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## Policing Corporate Conduct Toward Minority Communities: An Insurance Law Perspective on the Use of Race in Calculating Tort Damages

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**POLICING CORPORATE CONDUCT TOWARD MINORITY COMMUNITIES:  
AN INSURANCE LAW PERSPECTIVE ON THE USE OF RACE  
IN CALCULATING TORT DAMAGES**

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Dhruvi J. Patel\*

ABSTRACT

*Courts commonly use U.S. Department of Labor actuarial tables, which explicitly take into account the race of the tort victim, to determine average national wage, work-life expectancy, and life expectancy. This practice has led to wide discrepancies between average damage awards for minority plaintiffs compared to white plaintiffs even if both plaintiffs are similarly situated. While recent legal scholarship criticizes the use of race-based tables and addresses the Equal Protection and incentive concerns such tables present, few courts have deviated from the explicit use of race in determining tort damages.*

*Though the use of demographic features, such as race, to predict future lost earnings is viewed as a way to calculate more accurate damage awards, a closer look at the effects of race-based tables shows the practice does more harm than good. Specifically, this Note considers the intersection of corporate liability insurance and tort law and how race-based tables affect the deterrence and oversight objectives of the relationship. The first Part of this Note provides an overview of how insurance and tort law work together, as well as the recognized issues with the use of race-based tables. The second Part focuses on how race-based damage awards inhibit deterrence of corporate tortious misconduct by not allowing insurance providers to accurately price premiums. Further, race-based damage awards also prevent insurance providers from adequately policing corporations and mandating certain precautions, which leads to an increased likelihood of tortious harm. The final Part proposes that state legislatures rectify the negative consequences race-based tables create by outlawing the use of race-based tables and establishing a minimum damage award using blended actuarial tables.*

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## INTRODUCTION

Imagine two fifteen-year-old boys who live in two different apartment complexes in New York City. Both boys go to high school, play sports after school, and have similar prospects of going to college. The only notable difference between these two teenagers is that one is black and lives in an apartment complex that is predominantly black, and the other is white and lives in an apartment complex that is predominantly white. Despite their similar situations, if asbestos is found in each apartment building and a negligence suit is brought, it is likely the black teenager would receive less in damages than the white teenager solely due to his race. Further, it is more likely the corporate landlords of the building with a predominantly black population will have fewer safety precautions in place to detect and remove the asbestos. This is due to the courts' continued reliance on race-based actuarial tables to determine future wages and work-life expectancy. These tables, which the U.S. Department of Labor publishes and expert witnesses rely upon, stratify statistics by race and gender to particularize damage awards to a plaintiff's demographic characteristics. On average, minority plaintiffs are awarded a lower damage amount than white plaintiffs due to the discrepancies in these tables.

Legal scholars have recently addressed the issues the use of race-based actuarial tables presents. These issues include concerns about Equal Protection, perpetuation of past wrongs, and the potential distortion of deterrence incentives. This Note builds off these concerns by analyzing the use of race-based tables from the perspective of insurance law. As insurance providers are the ultimate cost bearers for most tortious conduct, it is important to understand the effects race-based actuarial tables have on insurance providers and whether these effects align with the main objectives of insurance law. This Note argues that when looking at the use of race-based tables in tort damages through an insurance law lens, there is further evidence that these tables should be outlawed and replaced with blended tables that do not stratify by race.

Part I provides an overview of the legal scholarship surrounding the overlap of tort liability and liability insurance, as well as reform proposals addressing the effects of race in tort law, insurance law, and insurance mechanisms. Part II explains how the use of race-based actuarial tables affects insurance pricing and policing mechanisms and how these effects are detrimental to the policy objectives of insurance law. To address the deterrence and policing problems presented by the use of race-based actuarial tables, Part III calls for state legislatures to prohibit the use of race-based actu-

arial tables in calculating tort damages and mandate the use of blended tables.

## I. THE INTERSECTION OF INSURANCE AND TORT LAW AND THE INEQUALITIES PERPETUATED BY THE USE OF RACE-BASED ACTUARIAL TABLES TO CALCULATE DAMAGES

Legal scholarship has recognized the intersection of liability insurance and tort law and the importance of liability insurance in analyzing the deterrence effect of tort damages.<sup>1</sup> This Part first looks at the role liability insurance plays in tort law in general and then specifically how it affects misconduct. As a result of the widespread use of liability insurance, insurers are the ultimate cost bearers of tortious misconduct. Following an overview of how corporate liability insurance works within the framework of tort liability, this Part summarizes calls for reform and legislation that address the use of race in both insurance and tort law. Legal scholars have examined how insurance pricing mechanisms that are based on group characteristics, such as gender and race, result in individual unfairness, namely higher premiums for individuals within those groups.<sup>2</sup> Many state legislatures have passed laws preventing the consideration of race when determining individual premiums in response to fairness arguments.<sup>3</sup> Similarly, legal scholars have called for ending the use of race-based actuarial tables as a determinant of tort damages.<sup>4</sup>

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1. See generally KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* (2008) (describing tort law and insurance as “separate bodies that form a common gravitational field”); Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990); Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993).

2. See Mary L. Heen, *Nondiscrimination in Insurance: The Next Chapter*, 49 GA. L. REV. 1, 7 (2014). See also Mary L. Heen, *Ending Jim Crow Life Insurance Rates*, 4 NW. J. L. & SOC. POL’Y 360, 362–63 (2009).

3. Many states prohibit “unfair discrimination” in insurance underwriting, though this prohibition does not explicitly or necessarily include racial discrimination in insurance underwriting. See Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Towards a Universal Framework for Insurance Anti-Discrimination Laws*, 21 CONN. INS. L.J. 1, 4 (2014) (finding that thirteen states have general statutes prohibiting “unfair discrimination” in all lines of insurance, and forty-five states have statutes prohibiting “unfair discrimination” in life insurance specifically). States have varying restrictions on the use of race in determining insurance rates in different lines of insurance. For example, twenty-three states prohibit the use of race in determining automobile insurance rates, but only nine states completely prohibit the use of race in setting rates for all lines of insurance. Ronen Avraham, Kyle D. Logue & Daniel Benjamin Schwarcz, *Understanding Insurance Anti-Discrimination Laws*, 87 S. CAL. L. REV. 195, 206–10 (2014) [hereinafter Avraham, Logue & Schwarcz, *Understanding Insurance*].

4. See, e.g., Anne M. Anderson, *How Much Are You Worth? A Statutory Alternative to the Unconstitutionality of Experts’ Use of Minority-Based Statistics*, 73 WASH. & LEE L. REV. 206 (2016); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017);

A. *Insurance Law Can Hinder Tort Law Objectives if Pricing Mechanisms Are Inaccurate*

Tort law is defined by three main objectives: compensatory justice, deterrence, and corrective justice. Insurance has the potential to both enhance and hinder these objectives depending on the mechanisms used to calculate premiums and pass costs to insurance consumers. The insurance regime began to develop and grow in the early Twentieth century.<sup>5</sup> Since that time, liability insurance has influenced the way tort law is enforced and has allowed the tort regime to continue to compensate victims. The original purpose of liability insurance was to protect the insured against liabilities owed to third parties. But, insurance law soon came to recognize the need for private compensation between two parties when cars became a common mode of transportation.<sup>6</sup> The fear that individuals would not be able to adequately compensate those whom they harmed became a public concern, and legislatures developed statutory reforms to address the problem.<sup>7</sup> Statutory provisions required insurers to compensate tort victims even if the tortfeasors were insolvent.<sup>8</sup>

Some advocates of the insurance system argue that insurance allows tort law to achieve compensatory justice, a recognized goal of tort law.<sup>9</sup> Gary Schwartz states that insurance law is essential to tort law because it helps guarantee compensation to the tort victim when the insured is at fault.<sup>10</sup> He argues that compensatory justice as a policy objective only makes sense if tort law aims to shift the burden of the tortious conduct to a “suitable loss-bearer.”<sup>11</sup> Without insurance, and assuming the defendant cannot afford to pay tort damages, tort law merely shifts the “devastating loss” from a tort victim to an insolvent defendant, resulting in neither compen-

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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); Kaitlyn Filzer, *Devaluing Child Plaintiffs Due to Their Race, Gender, and Socioeconomic Status: Why Courts Have Been Calculating Lost Future Earning Damages Wrong and How They Can Get It Right*, 48 *U. TOL. L. REV.* 561 (2011).

5. David A. Fischer & Robert H. Jerry, II, *Teaching Torts: Teaching Torts Without Insurance: A Second-Best Solution*, 45 *ST. LOUIS L.J.* 857, 861 (2001).

6. *Id.* at 863.

7. *Id.* at 864.

8. *Id.* at 861.

9. See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* § 10 at 17 (2000); KENNETH S. ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 14 (3d ed., 2007); Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 466–67 (1990); Benjamin Shmueli, *Pluralism in Tort Law Theory: Balancing Instrumental Theories and Corrective Justice*, 84 *U. MICH. J. L. REFORM* 745, 752 (2015); Glanville Williams, *The Aims of the Law of Tort*, 4 *CURRENT LEGIS. PROBS.* 137, 165–68 (1951).

10. Schwartz, *supra* note 1, at 359.

11. *Id.*

sation for the plaintiff nor any overall social benefit.<sup>12</sup> But, at a maximum, insurance will likely only compensate a plaintiff the amount a court awards in damages. Therefore, true compensatory justice can only be achieved if damages are calculated in an accurate way. If not, insurance providers will pay an amount different than what compensatory justice would require.

While insurance aids tort law in achieving compensatory justice, insurance can also hinder tort law by encouraging tortious conduct. One effect of the rise of insurance law is the risk of “moral hazard.” Moral hazard results primarily from the lack of accurate information available to insurance companies when they calculate premiums based on an individual’s level of care and the risk of harm resulting from the various activities in which the individual engages in.<sup>13</sup> Moral hazard refers to a phenomenon whereby an insured does not act using the appropriate level of risk due to the level of protection offered by insurance.<sup>14</sup> Insurance causes an individual to act in a riskier manner because the individual does not directly and completely bear the costs of the harm he or she causes.<sup>15</sup> Therefore, if an individual is insured, either due to a statutory mandate or through his or her own choice, tort liability no longer serves to deter the individual from participating in risky and harmful conduct as the individual does not pay the full cost of the tort judgment.<sup>16</sup> Race-based actuarial tables are a prime example of moral hazard as they discount the cost of harm for corporate tortfeasors depending on their victim’s race.<sup>17</sup> The discount has two potential effects: First, the discount makes it more difficult for insurance providers to accurately predict costs and pass those on to corporations via higher premiums. Second, corporations themselves are more likely to engage in riskier behavior in communities

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12. *Id.*

13. *See*, Fischer & Jerry, *supra* note 5, at 864–66.

14. *See, e.g.*, Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91, 93 (1996) (“Simply put, moral hazard is the proclivity of parties that have purchased insurance to behave in a riskier fashion than they did before.”); Fischer & Jerry, *supra* note 5, at 865.

15. Legal scholars continue to debate whether tort law, absent any liability insurance regime, truly acts to deter tortious conduct. Scholars who hold a “law and economics” view of tort law adhere to the argument that tort law is essential for deterrence. *See, e.g.*, GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970); Richard Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). In contrast, others have critiqued the efficiency of tort law in achieving its deterrence objectives. *See* Stephen D. Sugarman, *Alternative Compensation Schemes and Tort Theory: Doing Away with Tort Law*, 73 CALIF. L. REV. 558 (1985). A more moderate argument suggests that tort law deters tortious conduct to some extent, but not to the extent the “law and economics” view of tort law purports it does. *See* Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter*, 42 UCLA L. REV. 377, 378–79 (1994).

16. *See* Fischer & Jerry, *supra* note 5, at 865. *See also* Schwartz, *supra* note 1.

17. *See* Avraham & Yuracko, *supra* note 4, at 697–98 (finding that tort damage awards for minority plaintiffs, on average, are less than awards for white plaintiffs).

of color because the costs of doing so are lower and therefore more appealing to insurance providers, which could reduce premium rates.<sup>18</sup> Premiums that accurately reflect the cost of the harm corporate tortfeasors will potentially cause, however, will result in the optimal level of deterrence, as individuals would pay the full amount of their tort liability over successive payments.<sup>19</sup>

In addition to the warped deterrence outcomes insurance causes, insurance can also undermine another goal of tort law: corrective justice. In principle, corrective justice seems fundamentally at odds with insurance. Corrective justice emphasizes that tortfeasors, including corporations, should be personally responsible for the harm they cause.<sup>20</sup> Though a court can still find individuals liable, corrective justice emphasizes the “duty of wrongdoers . . . to repair the wrongful losses for which they are responsible.”<sup>21</sup> To a large extent, personal liability no longer exists because insurance providers usually cover costs of harmful activity as long as the behavior is not purposeful.<sup>22</sup> The tension between insurance and corrective justice disappears, however, if insurance is accurately priced.<sup>23</sup> If insurance providers price premiums based on the actual level of risk and cost of an individual’s behavior, the individual is the ultimate cost bearer of his own liability.<sup>24</sup> Race-based tables, though, enforce the assumption that injury to a minority plaintiff causes less harm than the same injury to a white plaintiff. Assuming the actual cost of harm is the same because the injury is the same regardless of race, the current way of pricing premiums is inaccurate because the cost of harm calculation, which is represented by the amount of damages, is inaccurate. Also, removing factors like race from damages calculations could reduce the amount of speculation involved in

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18. Moral hazard shows how insurance can cause insured entities to engage in riskier behavior because insurance protects them. See Chandler, *supra* note 14. Race-based tables amplify the already-existing moral hazard problem because not only are tortfeasors insured, but they are insured for a lower cost if they primarily interact with minority communities because they are liable for a lower amount of damages. See *id.*

19. Fischer & Jerry, *supra* note 5, at 865.

20. See, e.g., *id.* at 866 (“At first glance, liability insurance might seem to be completely inconsistent with the corrective justice perspective.”); Alexander B. Lemann, *Coercive Insurance and the Soul of Tort Law*, 105 GEO. L.J. 55, 87 (2016) (“Corrective justice theory is built on the idea that when one person wrongfully injures another, he is required to correct this injury by making the victim whole.”); Schwartz, *supra* note 1, at 332 (“[C]orrective justice—in this respect somewhat resembling retributive justice—emphasizes that the tort defendant, having created risks in a certain way, should serve as the actual source of the compensation payment.”).

21. Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 610 (2006) (quoting Jules Coleman, RISKS AND WRONGS 324 (1992)).

22. See, e.g., *id.* at 606.

23. Fischer & Jerry, *supra* note 5, at 867–68. See also Lemann, *supra* note 20, at 90 (“Corrective justice still conceives of the duty to correct as being satisfied by ‘repairing the wrongful losses’ a tortfeasor causes, that is, paying money from one party to another.”).

24. Fischer & Jerry, *supra* note 5, at 867–68.



insurance risk-assessment. Similar to the deterrence effects discussed above, because insurance providers face barriers that prevent them from accurately assessing and pricing individual risk,<sup>25</sup> corporate insurance liability regimes prevent tort law from fully achieving its corrective justice objective.

On the other hand, scholars have argued that insurance law's use of technology to more accurately predict feature and experience ratings for insured persons has made the pricing of insurance premiums more accurate, which facilitates the goal of corrective justice.<sup>26</sup> Feature rating is when insurance providers adjust premiums based on an insured's risk characteristics.<sup>27</sup> Experience rating refers to when insurance providers adjust premiums based on the loss the insured entity incurred during a certain period of time.<sup>28</sup> Further, in cases where a minor negligent act results in massive injuries, and therefore massive damage judgments, insurance law may align more closely with the common perception of the duty to correct.<sup>29</sup> Insurance law spreads the costs of liability among many potential tortfeasors, which allows an individual who committed a minor infraction to correct to a less-burdensome extent. Scholars have recognized, however, that insurance is not able to incorporate all the extrinsic considerations that influence insurance premiums, including the wealth and environment of the insured.<sup>30</sup> These external considerations again highlight whether corrective justice is fully realized under any insurance regime.

B. *Corporate Liability Insurance Benefits Tort Victims by Facilitating Compensatory Justice and Monitoring Corporate Behavior*

Insurance law can counteract the disincentives limited liability causes by allowing tort victims to fully recover from corporations and passing on costs of liability to corporations. Limited liability

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25. *Id.* at 865.

26. *See* Lemann, *supra* note 20, at 90, 96 ("As technological innovations give the insurance industry more and more powerful tools to track and assign costs to individuals' behavior in real time, insurance is beginning to look more and more like a liability rule in the sense that the term is used to describe tort law.")

27. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 206 (2012).

28. *Id.*

29. *See* Lemann, *supra* note 20, at 90, 96.

30. *Id.* *See, e.g.*, James M. Anderson, Paul Heaton, & Stephen J. Carroll, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE, 52-53 (2010) (arguing that while insurance can correct some moral issues with tort judgments, such as paying massive damages for a slight error, it cannot solve all moral issues, such as how poor people are likely to pay more in insurance due because their rates of loss are higher due to crime).

for corporate shareholders reduces how effectively tort liability can regulate corporate conduct. Limited liability distorts shareholder incentives to act with the optimal level of care because shareholders will not bear the full cost of the corporation's harm. The only cost they face is the loss of their initial investment.<sup>31</sup> Although limited liability is a component of corporate structure, and thus distinct from third party-provided liability insurance, limited liability already presents barriers to limiting corporate tortious activity. Beyond the loss of a shareholder's equity investment, tort liability is "not part of any actor's calculation," which allows the corporation to undertake socially undesirable decisions.<sup>32</sup> Since individual actors within corporations do not bear the full cost of a potential tort judgment, risky business decisions create negative externalities for tort creditors. An individual shareholder may not support the adoption of costly prophylactic measures, for example, because the costs of these measures outweigh any loss the individual would face. Further, though limited liability is not absolute, as there is still the option of piercing the corporate veil, courts are reluctant to do so in widely-held firms.<sup>33</sup>

When limited liability of corporate shareholders is paired with liability insurance, compensatory justice may be achieved. Despite the protection of limited liability, corporate shareholders often influence corporations to purchase general liability insurance.<sup>34</sup> In addition, though corporations are considered risk-neutral, the demand for corporate insurance is high due to the "value-enhancing" effect of purchasing insurance and creditors requiring the corporation to have insurance for certain liabilities.<sup>35</sup> While individuals are only able to purchase liability insurance for limited situations, corporations are able to purchase liability insurance for most types of businesses and injuries.<sup>36</sup> Corporate liability insurance also serves to alleviate the inability of tort creditors to recover tort judgments under limited liability when a corporation has insufficient assets, as the insurance policy pays the judgment instead.<sup>37</sup> In this sense, corporate insurance, like personal insurance

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31. See David Millon, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1373 (2007). See also David W. Leebron, *Limited Liability, Tort Victims, and Creditors*, 91 COLUM. L. REV. 1565, 1584–85 (1991).

32. Leebron, *supra* note 31, at 1584–85.

33. *Id.* at 1567.

34. Nina A. Mendelson, *Control-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1285–88 (2002).

35. Victor P. Goldberg, *The Devil Made Me Do It: The Corporate Purchase of Insurance*, 5 REV. L. & ECON. 541, 543, 546 (2009).

36. See, e.g., Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1888 (1991); Mendelson, *supra* note 34, at 1225.

37. See Millon, *supra* note 31, at 1356 (describing how a corporation acts reasonably when purchasing liability insurance that adequately covers foreseeable tort judgments com-

for individual tortfeasors, makes it more likely that a tort judgment will result in compensatory justice for the victim. But, this is limited to the extent to which insurance will cover the full amount of the tort judgment when the corporation is unable to pay the remaining amount from its own assets.

Due to the prevalence of corporate insurance, commentators argue that insurance providers function as corporate monitors and regulators through insurance premiums and provisions that limit insurance coverage to certain corporate conduct.<sup>38</sup> Scholars have studied the role insurance companies play in regulating corporate director and officer behavior through director and officer liability insurance, and many of the same considerations apply to corporate tort liability insurance.<sup>39</sup> As the ultimate cost-bearers for the majority of corporate misconduct, insurance providers have the financial incentive to adopt policies that control moral hazard and reduce the risk a particular insured poses.<sup>40</sup> Insurance providers may also be the most effective entity to regulate insureds due to both their “motivation to reduce misconduct” along with the “know-how” to reduce loss.<sup>41</sup> The three main methods insurance providers use to manage an insured’s risk are loss prevention policies, underwriting, and rating.<sup>42</sup>

Insurance providers specialize in loss prevention policies, such as monitoring services,<sup>43</sup> which reduce agency costs between owners and managers, and claims management, which reduces post-accident loss.<sup>44</sup> In the context of products liability insurance, for example, insurance companies are the most cost-efficient regula-

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pared to opportunistic corporate behavior where the corporation underinsures or self-insures with the knowledge that the corporation will be unable to pay tort judgments and individual officers and directors are not liable under limited liability doctrine).

38. See, e.g., ABRAHAM, *supra* note 1, at 228–29; EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK* 100 (1982); Ben-Shahar & Logue, *supra* note 27; Mendelson, *supra* note 34; John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543–44 (2017).

39. See Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors’ and Officers’ Liability Insurer*, 95 GEO. L.J. 1795, 1823 (2007); *id.* at 1797 (arguing that director and officer liability insurers can achieve deterrence objectives of corporate law by pricing insurance based on risk, monitoring corporations they insure, and managing the settlement of corporate lawsuits). See also Ben-Shahar & Logue, *supra* note 27, at 218 (describing the various techniques insurance providers use to regulate their insureds, including differentiated premiums, deductibles, copayments, refusal to insure, advising on safer conduct, research and development of safer methods, and influencing government regulation).

40. See Rappaport, *supra* note 38, at 1543.

41. *Id.* at 1595–96 (“[B]undling loss prevention with insurance coverage is more effective because an insurer giving loss-prevention advice has ‘skin in the game,’ and is also more efficient because of synergies with underwriting and claims management.”).

42. *Id.* at 1554–55.

43. Goldberg, *supra* note 35, at 543.

44. See David Mayers & Clifford W. Smith, Jr., *On the Corporate Demand for Insurance*, 55 J. BUS. 281, 285 (1982).

tors of corporate behavior due to the specific research insurance providers conduct when determining premiums.<sup>45</sup> Products liability, which can result in mass tort litigation, is insured at a company-specific level.<sup>46</sup> Insurance companies collect information regarding the manufacturing, design, and inspection of the product and use this information to price premiums and to train employees on reducing liability.<sup>47</sup> Insurance providers also act as regulators when assessing environmental risk of a firm.<sup>48</sup> Insurance liability premiums act as an ex-ante Pigouvian tax,<sup>49</sup> which compels corporations to internalize liability costs that limited liability partially externalizes.<sup>50</sup> As discussed earlier, however, the power of corporate insurance providers to regulate firm behavior depends on the accuracy of the insurance premium.<sup>51</sup>

Underwriting and experience and feature rating also control moral hazard by incentivizing corporations to engage in less risky behavior.<sup>52</sup> Underwriting consists of insurance providers using information about the insured to determine risk, set premium rates, and form conditions for insurance coverage.<sup>53</sup> The insurance rate and contractual conditions incentivize corporations to take more precautions and reduce the probability of liability.<sup>54</sup> For example, an insurer can condition coverage on whether a corporation adopts loss-prevention measures, which incentivizes corporations to implement policies that reduce risk.<sup>55</sup> Through the rating system, an insurer can differentiate the risk the insured presents based on certain features, such as the industry the corporation operates in, or the loss history of the insured; the insurer can then charge a higher premium to riskier corporations.<sup>56</sup> Risk differentiation influences corporations to reduce their risk profiles to obtain a lower premium.<sup>57</sup>

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45. See Ben-Shahar & Logue, *supra* note 27, at 218.

46. *Id.*

47. *Id.*

48. *Id.* at 225–26.

49. A Pigouvian tax is a tax levied upon a corporation that is equal to the costs of the harm the corporation externalizes. It is a governmental mechanism to force corporations to internalize external costs. See generally ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

50. *Id.* at 232.

51. *Id.* at 233 (“Since most regulated parties do not have the information necessary to accurately convert expected ex post liability awards and fines into an exactly equivalent Pigouvian tax, and since the government does not provide such estimates to help people plan, insurers fill this void.”).

52. Rappaport, *supra* note 38, at 1554.

53. *Id.*

54. *Id.* at 1555.

55. See *id.*

56. See *id.*

57. See *id.*

C. *Considering Race in Insurance Pricing and  
Tort Law Is Inefficient*

1. Efficiency and Fairness Justifications for State Law Restrictions  
on Racial Discrimination in Insurance Pricing

Although the accuracy of insurance pricing plays a pivotal role in determining whether liability insurance achieves the objectives of tort law, considerations of fairness limit the extent to which insurance providers should be allowed to discriminate in valuing premiums.<sup>58</sup> Race is an unfair and inefficient basis for discrimination when calculating individual insurance premiums.

Fairness arguments in defense of prohibiting the consideration of race in insurance underwriting view insurance as a risk-spreading mechanism.<sup>59</sup> Discrimination in insurance underwriting divides the general community of insureds into smaller risk pools, which limits the degree of risk-spreading possible.<sup>60</sup> Further, characteristics that influence risk assessments often depend on and emphasize “preexisting social inequities” that reflect socially-constructed biases and norms.<sup>61</sup> For example, residents of racial and ethnic urban neighborhoods are denied property insurance through the process of “redlining.” Redlining is when insurance providers determine certain areas are economically unstable due to the demographic characteristics of their residents, and therefore, ineligible for insurance coverage due to the high risk they impose.<sup>62</sup> A similar structure is seen in automobile insurance rates, which are also set based on where the insured lives.<sup>63</sup> Under this risk calculation, insurance providers deem inner cities as high-risk which leads young, minority males to be charged high insurance rates.<sup>64</sup> If liability insurance providers consider race in calculating premiums because race factors into the damages to be paid, the

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58. Avraham, Logue & Schwarcz, *Understanding Insurance*, supra note 3.

59. *Id.*

60. *Id.*

61. See, e.g., François Ewald, *Insurance and Risk*, in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY*, 197, 206–10 (Graham Burchell, Colin Gordon, & Peter Miller, eds., 1991); Regina Austin, *The Insurance Classification Controversy*, 131 U. PA. L. REV. 517, 534–36 (1983) (“However much the [insurance] companies plead happenstance, insurance ‘risk’ classifications correlate with a fairly simplistic and static notion of social stratification that is familiar to everyone.”).

62. Steven Plitt & Daniel Maldonado, *Prohibiting De Facto Redlining: Will Hurricane Katrina Draw a Discriminatory Redline in the Gulf Coast Sands Prohibiting Access to Home Ownership?*, 14 WASH. & LEE J. CIVIL RTS. AND SOC. JUST. 199 (2008); see also Austin, supra note 61, at 524.

63. Kenneth S. Abraham, *Efficiency and Fairness in Insurance Risk Classification*, 71 VA. L. REV. 403, 420 (1985).

64. *Id.*

fundamental mechanisms of insurance, like risk spreading, could become ineffective. Further, the practice could perpetuate the effects of past discrimination and inequality.

Efficiency arguments also provide justifications for why legislatures should outlaw racial classifications in insurance underwriting. For example, one common argument in defense of risk classification is the potential for moral hazard.<sup>65</sup> In contrast, moral hazard is not an issue in the context of race because individuals cannot change their race in response to insurance coverage.<sup>66</sup> For example, health insurance may cause an individual to behave in a riskier way, such as by exercising less or participating in more dangerous activities because the individual does not bear the full costs of such activities. Insurance providers often consider this information when calculating health insurance rates.<sup>67</sup> Insurance providers can either encourage an individual to take more preventative health measures to lower his or her rates, or the individual can compensate the insurance provider for the excess risk the individual poses after being insured.<sup>68</sup> This does not work in the context of race, as any increase in an individual's insurance premium due to race will not influence the individual to engage in less risky behavior. Since the insured is not in control of his or her race and cannot change that characteristic, he or she will engage in the same behavior, regardless of risk level, insured or not.

Similarly, some could worry that tort damage awards that do not consider race "overcompensate" tort victims.<sup>69</sup> Essentially, the tort damage award functions as a form of insurance coverage, and if it overcompensates tort victims, they would take on more risk because they will be awarded more later. But, because an individual's race is not a behavior he or she can change in response to tort or insurance compensation, "overcompensation" in the racial context cannot lead to a moral hazard problem. The current regime, however, could create a moral hazard problem. Corporations are not forced to consider the true costs of their tortious behavior because they pay disproportionately low premiums when operating in minority communities, which do not capture the magnitude of harm to society.

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65. See *supra* note 14–17 and accompanying text.

66. Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 208.

67. See Ronen Avraham, *The Economics of Insurance Law*, 19 CONN. INS. L.J. 29, 84–85 (2013).

68. See Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 206–07.

69. The current system of tort damages relies upon the idea that the cost of harm to an individual is in part determined by the amount of income they will lose as a result of the injury. Since minority populations tend to have lower incomes and reduced work-life and life-expectancy on average, proponents of the traditional system might worry that by ignoring these discrepancies, tort law is overcompensating minority plaintiffs.

Twelve states completely prohibit the use of race in life, health, disability, automobile, and property/casualty insurance.<sup>70</sup> No federal statute completely bans insurance providers from considering race when determining individual premiums,<sup>71</sup> but language in the Fair Housing Act<sup>72</sup> and 42 U.S.C. § 1981<sup>73</sup> suggests that insurers could be prohibited from using race in calculating individual insurance premiums. Further, reputational concerns and social norms may prevent insurance providers from inquiring and classifying risk based on race.<sup>74</sup> State legislatures may have relied upon the pressure of these social norms instead of enacting laws that would completely prohibit racial classification in all lines of insurance.<sup>75</sup> Legislatures may assume that the insurance industry has eradicated the practice due to stigmas around inquiring or outwardly discriminating based on race,<sup>76</sup> though there is no evidence that the industry has self-regulated in this way.

## 2. Scholarly Arguments for Prohibiting Racial Considerations in Tort Law

Racial considerations are also used in tort law at the damages stage to determine future wages and life expectancy of the victim.<sup>77</sup> Race-based actuarial tables<sup>78</sup> become especially relevant with child

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70. Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 240.

71. *Id.* at 199.

72. *See id.* (explaining how new HUD regulations interpret language in the Fair Housing Act to prohibit racial discrimination in homeowners' insurance); 42 U.S.C. § 3604 (2000).

73. 42 U.S.C. § 1981 prohibits racial discrimination in the formation of contracts, but no court has applied this standard to insurance premiums. 42 U.S.C. § 1981 (2000); *see also* Guidry v. Pellerin Life Ins. Co., 364 F. Supp. 2d 592, 594 (2005) (noting that 42 U.S.C. § 1981 requires proof of intentional discrimination, and differences in premiums between individuals of different races reflects differences in risk, not intentional discrimination).

74. *See* Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 243 (referring to the taboo nature of inquiring or discussing an individual's race in business transactions).

75. *Id.* (explaining that state legislatures may assume that insurance providers have stopped using race because if it were known that a certain provider discriminates based on race, the providers would suffer reputational harm).

76. *Id.*

77. Avraham & Yuracko, *supra* note 4, at 662, 670–78 (explaining how courts use race and gender-based actuarial tables in their damages calculations, including a quote from a forensic economist, who stated “if the injured child were born to a mixed couple but looks black, like Barack Obama, I would use black tables [in the calculation of damages I present to the jury]. However, if he is educated, and his life style is similar to the average typical white, then I would be inclined to use white tables. It is all a matter of common sense.”).

78. U.S. courts routinely use actuarial tables delineated on race and gender lines, often presented by expert witnesses, to determine tort damages. *Id.* at 670. The three most common tables used are life expectancy tables, work-life expectancy tables, and average national wage. *Id.* U.S. federal government life expectancy tables present statistics for white, black, Hispanic, non-Hispanic white, and non-Hispanic black categories. *Id.* at 671. U.S. Depart-

plaintiffs who have few other ways to prove those two factors other than predictive tables.<sup>79</sup> Race and gender stratifications in these tables create notable differences in damage awards for plaintiffs suffering similar injuries.<sup>80</sup> Only three jurisdictions—North Carolina, South Carolina, and Virginia—have codified the use of race-neutral life expectancy tables,<sup>81</sup> and few courts have prohibited parties from introducing evidence from race-based actuarial tables.<sup>82</sup> In response to this phenomenon, legal commentators have argued for the prohibition of race-based actuarial tables in damages calculations on Equal Protection, economic efficiency, and distributive justice grounds.<sup>83</sup>

The constitutional argument against using race-based actuarial tables in damage awards invokes the Equal Protection clause and the strict scrutiny analysis that often accompanies state-sanctioned racial discrimination.<sup>84</sup> The main concern of this line of scholarship is whether judicial reliance on race-based actuarial tables is considered state action under the Equal Protection Clause, as private parties introduce race-based actuarial tables via expert testimony.<sup>85</sup> Once courts establish that the use of race-based actuarial tables is subject to strict scrutiny, they would likely find no compelling reason to uphold the use of race-based tables and find that blended tables are a better alternative.<sup>86</sup> Blended tables are actuarial tables that do not delineate on racial lines. The statistics are cal-

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ment of Labor work-life expectancy tables provide statistics for white, black, and other racial categories. *Id.* at 674. Courts integrate work-life expectancy with a plaintiff's "established earnings record" to determine future lost wages, but in cases of child plaintiffs who do not have an "established earnings record," courts use national average wage tables provided by the Department of Labor. *Id.* at 675. These tables provide data by gender, educational level, and occupation, and can be adjusted based on predictions for individual plaintiffs, which include personal characteristics and family background. *Id.* at 676.

79. *See id.* at 688; *see also* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1440–41 (2005).

80. Avraham & Yuracko, *supra* note 4, at 675 ("According to the most recent [Bureau of Labor Statistics] statistics, a white boy and a black girl with the same projected educational levels who were injured identically at age sixteen would receive monumentally different damage awards. Assuming each earned an average annual income of \$25,000, the white male would receive \$302,500 more in future loss of earning capacity than the black woman.") (footnote omitted).

81. *Id.* at 680.

82. Kimberly A. 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); *see, e.g.*, *McMillan v. City of New York*, 253 F.R.D. 247, 255–56 (E.D.N.Y. 2008) (holding that the use of race-based actuarial tables violated Equal Protection and Due Process and "blended" tables should be used instead).

83. *See generally* sources cited *supra* note 4.

84. *See generally* Yuracko & Avraham, *supra* note 82 (analyzing the Equal Protection implications of race-based actuarial tables in tort law).

85. *Compare id.* at 348–59 with Anderson, *supra* note 4, at 251.

86. *See* Yuracko & Avraham, *supra* note 82, at 359–70 for a detailed analysis of how race-based tables would fare under a strict scrutiny analysis.



culated using the whole population size, not a particular racial group within the population as a whole.

Legal commentators have also examined the justifications for race-based actuarial tables and determined these tables create distorted incentives for tortfeasors. Race-based actuarial tables lead to lower damages for minority plaintiffs than non-minority plaintiffs because of minority plaintiffs' reduced expected future wages and work life expectancy, which makes it less expensive to commit a tort against a minority plaintiff than a non-minority plaintiff.<sup>87</sup> This distinction in tort damages creates an incentive to target certain individuals and communities based on race.<sup>88</sup> Beyond theoretical arguments, research shows numerous examples of corporations targeting minority individuals and communities, which aligns with the incentives created by tort law.<sup>89</sup>

One example of such targeting is the case of lead-based paint. Lead poisoning from lead-based paints is extremely harmful to young children and can result in developmental issues.<sup>90</sup> In *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, the court found the defendant landlord had "perverse incentives" that discouraged the removal of lead-based paint due to the race of the tort victims, who were predominantly black and Latino.<sup>91</sup> Essentially, the landlord was not motivated to remove the lead-based paint since the damages the landlord would have to pay were cheaper because of the race of his tenants. The court here also rejected the use of race-based statistics because of their "unreliability," citing the analysis used in *McMillan v. City of New York*.<sup>92</sup>

The targeting behavior exemplified by the case above is one of the most problematic consequences of courts calculating damages using race-based tables. Recent scholarship has fought back against the traditional notion that targeting is efficient.<sup>93</sup> Instead, it has become clearer that from a law and economics viewpoint, blended

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87. Avraham & Yuracko, *supra* note 4, at 697–98.

88. *Id.*

89. *Id.* at 686–92 (citing examples of targeting of minority communities due to lower damage awards, including a leaked 1991 World Bank memo which states, "Just between me and you, shouldn't the World Bank be encouraging MORE migration of the dirty industries to the [less developed countries]?").

90. *Id.* at 687–88; see also Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 390–91 (1997).

91. *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 143 (E.D.N.Y. 2015) ("[B]ecause it is cheaper to injure poor minority children, there is less incentive for defendants to take measures to clean up toxic hazards in the neighborhoods most affected by lead paint.") (quoting Chamallas, *supra* note 79, at 1441).

92. *Id.* at 136–49.

93. See Avraham & Yuracko, *supra* note 4.

tables are more accurate and, therefore, economically efficient.<sup>94</sup> These efficiency arguments are important when considering the functions of insurance providers and developing policy that makes it easier for insurance providers to fulfill their compensatory objectives.

## II. INSURANCE CONSIDERATIONS PRESENT ADDITIONAL ARGUMENTS FOR OUTLAWING THE USE OF RACE-BASED ACTUARIAL TABLES IN DAMAGE AWARDS

The interaction of tort law and insurance provides a fresh perspective on the implications of using race-based actuarial tables to determine tort awards in the corporate context. Though legal scholarship recognizes the inherent inequity and inefficiency of using race in this context,<sup>95</sup> the fact that insurance companies are the ultimate cost bearers of tortious corporate conduct merits an analysis of why racial discrimination in tort damages is harmful when considering the third-party role of an insurance provider. As tort damages tend to be lower for minority plaintiffs *because* they belong to racial minorities, insurance providers likely adjust corporate liability insurance costs for the race of potential tort victims. This Part first shows it is inefficient and unfair for insurance providers to consider race when pricing corporate liability insurance just as it is when discriminating based on race in insurance underwriting for individual insureds. The focus then shifts to the role of insurance providers as corporate regulators and establishes how racial distortion of tort damages impairs the regulatory and deterrence effects of the insurance relationship and could lead to negligent and harmful behavior toward minority communities.

### A. *Effects of Tort Damages on Insurance Premiums*

Insurance liability premiums reflect both the risk and overall cost of the insured's potential liability, and therefore, adjust to legal rules that affect tort damage awards. Insurance premiums are calculated based on the expected losses of an insured, defined by the magnitude of the harm multiplied by the probability the harm

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94. For a full analysis of the incentive structure that race-based tables provide and how blended tables are economically more efficient than race-based tables, *see* Yuracko & Avraham, *supra* note 4.

95. *See, e.g.*, Avraham & Yuracko, *supra* note 4; Jennifer H. Arlen, *An Economic Analysis of Tort Damages for Wrongful Death*, 60 N.Y.U. L. REV. 1113 (1985) (arguing that future earnings projections as a basis for calculating damages is economically inefficient).

will occur.<sup>96</sup> Insurance premiums especially react to changes in tort law that establish more concrete rules for determining either liability or damages, as insurance providers are able to more accurately assess and incorporate their predictions into the underwriting process.<sup>97</sup> Advocates for a uniform price on pain and suffering damages, for example, argue that the uncertainty that unregulated pain and suffering damage awards cause can affect insurance premiums because insurance providers are unable to accurately underwrite the risk.<sup>98</sup> Uncertainty in risk, or “risk ambiguity,” results in additional costs associated with insurance coverage, which are added to the insured’s expected loss valuation.<sup>99</sup> Legal uncertainty ultimately correlates with higher liability insurance premiums or insurance providers refusing to participate in certain coverage markets.<sup>100</sup>

The products liability insurance market is illustrative. The Senate Committee on Commerce, Science, and Transportation recommended that the Products Liability Fairness Act be passed in part due to the problem of increasing costs for products liability litigation and insurance.<sup>101</sup> One problem with the products liability system was the inconsistency in legal standards.<sup>102</sup> At the time Congress was debating passing the Act, legal rules varied by jurisdic-

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96. Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1793–94 (1995).

97. See, e.g., Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CALIF. L. REV. 773, 787 (1995). It is important to recognize that there is a debate among legal and policy experts as to whether tort reform actually results in lower premiums because there is more certainty in legal outcomes. Tort reform measures, such as placing caps on damages, were initially justified by theoretical arguments that they would lead to lower insurance costs, and therefore, solve the insurance “crisis” that was occurring in the 1970s. See, e.g., Sam Batkins & Jacqueline Varas, *Tort Reform’s Impact on Health Care Costs*, American Action Forum (2016), <https://www.americanactionforum.org/research/tort-reforms-impact-health-care-costs/>. Since the adoption of such reforms, however, empirical evidence has been inconclusive in determining whether tort reform actually results in lower insurance costs. See, e.g., Ronen Avraham, Leemore Dafny & Max Schanzlenbach, *The Impact of Tort Reform on Employer-Sponsored Health Insurance Premiums*, 28 J. L., ECON., & ORG. 657, 680 (2012) (“We find evidence that the four most commonly implemented reforms (in recent years) are associated with decreases in self-insured premiums of 1-2 percentage points each . . . . By contrast, there is little evidence that tort reform affects fully insured premiums.”); Kathryn Zeiler & Lorian E. Hardcastle, *Do Damages Caps Reduce Medical Malpractice Insurance Premiums?: A Systematic Review of Estimates and the Methods Used to Produce Them*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS (Jennifer Arlen ed., 2012) (finding that “better data and more methodologically sound analysis” is needed to determine the impact of damages caps on insurance premiums). For the purposes of this article, it is not important whether tort reform reduces insurance premiums, only that tort law and damages awards are considered when determining insurance premiums.

98. Batkins & Varas, *supra* note 97.

99. *Id.*

100. *Id.*

101. See SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION: REPORT, 1, 3 (1995), <https://www.congress.gov/104/crpt/srpt69/CRPT-104srpt69.pdf>.

102. *Id.* at 5.

tion.<sup>103</sup> It was often difficult for products manufacturers and insurance providers to predict whether a jury would find that a specific fact pattern met the legal standard. The uncertainty in which legal standards would be used also affected settlements, as it was difficult to “negotiate sensibly” without accurate information regarding potential liability.<sup>104</sup>

Though the empirical research does not analyze corporate liability insurance specifically, it is likely that corporations that interact more with members of racial minorities face lower insurance premiums due to the reduced tort damages awarded to minority tort plaintiffs.<sup>105</sup> If tort law influences insurance premiums in the pain and suffering and products liability contexts, reduced tort damages for minority plaintiffs could have a similar effect. Because minority plaintiffs present reduced liability costs, the expected value of a corporation’s liability is also reduced, which directly affects its insurance premium.<sup>106</sup> Further, liability insurance providers often use experience rating in determining an insured’s risk.<sup>107</sup> If a corporation has historically operated in areas with a higher minority population, its prior tort liability costs are likely to be lower than they would be if the corporation operated in areas with a higher white population.<sup>108</sup> Therefore, without intentionally or consciously discriminating on the basis of race, insurance underwriting still may disadvantage minority populations. Insurance premiums become less expensive for corporations who harm minority plaintiffs because tort damages awards are calculated in a racially biased way.

#### B. *Race-Based Tables in Tort Damages Undermine the Social Redistribution Functions of Insurance*

Given the likelihood that corporations pay lower liability insurance premiums due to the race of their potential tort creditors, fairness arguments against racial discrimination in insurance underwriting for individual plaintiffs must be considered in the con-

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103. *Id.*

104. *Id.* at 5–6.

105. See *supra* note 69 and accompanying text.

106. See Croley & Hanson, *supra* note 96.

107. See *supra* notes 26–28 and accompanying text.

108. No empirical data on the interaction between racial demographics of the area and corporate insurance premiums has been generated, but a similar argument has been made for low-income communities and liability insurance. See George L. Priest, *Symposium: Issues in Tort Reform: Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 502 (1987) (“The high correlation of . . . damage elements with income, however, means that the premiums set equal to the average damage payout will undercharge high income consumers and overcharge low income consumers. The provision of liability insurance tied to the sale of products and services requires the low income to subsidize the high income.”).

text of tort damages.<sup>109</sup> Scholars who argue for the elimination of race as part of the underwriting process emphasize the risk-spreading function of insurance.<sup>110</sup> Risk spreading promotes “social solidarity” within a particular group of insureds and results in insured’s “cross-subsidiz[ing] each other’s risk.”<sup>111</sup> Social solidarity falls in line with the broader goals of insurance, such as reducing aggregate costs of injury and increasing access to certain services, such as healthcare, for more individuals.<sup>112</sup>

The desire to ensure fairness in damage awards underpins two arguments against using race-based tables. First, by eliminating race-based damage awards and providing a framework where insurance providers can adopt race-blind liability premiums, communities of color would bear less of the risk of corporate tortious conduct than they do now. In the same way individual insurance coverage can promote social solidarity, eliminating race-based discrepancies in corporate insurance premiums would help spread the costs of corporate tortious conduct among communities because corporations would no longer be encouraged to concentrate harmful activity in communities of color. Second, insurance providers are often the entities that fulfill the compensatory justice purpose of tort law when a corporation commits a tortious harm. Just as scholars argue that, when insuring individuals, race should not be a factor because it forces the insured to bear the cost of being a certain race, insurance companies should have to compensate minority tort victims at the same rate as white tort victims for the same injuries. Race-based actuarial tables create a system where insurance providers, as the cost bearers of corporate torts, force minority tort victims to carry the additional costs of being a certain race. Though not their direct insureds, in the context of corporate insurance, tort victims are the ones insurance providers compensate. The legal system should not create different standards as to whether insurance companies can employ racialized treatment when compensating direct insureds versus the tort victims of their corporate insureds.

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109. One could plausibly assume that the distortion of incentives that race-based actuarial tables cause could lead to a vicious cycle where corporations target minority communities because it is cheaper to harm those communities than it is to harm predominately white ones. This is difficult to argue, however, because of the numerous factors that go into corporate decision-making and the lack of empirical data in the area. Rather than attempt to argue that corporate behavior as a whole is determined by these distorted incentives, this Note focuses on how these incentives impact insurance providers and hinder their attempts to police corporations.

110. See Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 203. See also Wendy K. Mariner, *Social Solidarity and Personal Responsibility in Health Reform*, 14 CONN. INS. L.J. 199, 200–01 (2007).

111. See Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 203.

112. See Mariner, *supra* note 110.

C. *Race-Based Tables Create a Differential Inaccuracy Problem for Insurance Providers*

Discriminatory tort damage awards result in inaccurate risk calculations in insurance premiums because race-based tables rely on generalized inaccuracies. Scholars that argue against insurance discrimination refer to this issue as “differential inaccuracy.”<sup>113</sup> Differential inaccuracy occurs when the burden of inaccurate discrimination in insurance premiums disproportionately falls on certain groups.<sup>114</sup> One example of differential inaccuracy is when health insurance providers charge higher rates to women than men.<sup>115</sup> An insured’s sex is a less costly measure of certain behavior than actually studying the behavior of each insured person, so insurance providers use sex to estimate future risk no matter how accurately an insured’s sex actually measures future risk.<sup>116</sup> Scholars who argue for fairness in insurance pricing practices argue that the cost of inaccurate risk classification should fall on all insureds, not just those insureds inaccuracy directly impacts.<sup>117</sup>

The inaccuracies in race-based actuarial tables also create a differential inaccuracy problem as insurance providers use discriminatory awards to determine corporate liability insurance premiums. Ronen Avraham and Kimberly Yuracko have identified three main reasons why race-based actuarial tables are less accurate than blended tables.<sup>118</sup> One reason for the inaccuracy in race-based tables is these tables “capture only a snapshot in time” and fail to account for increased efforts in fighting racial discrimination and changing views on race in general.<sup>119</sup> Essentially, race-based tables assume historical trends within a certain racial group will continue in the future, which inaccurately reflects statistical trends. In fact, life expectancy, workforce participation, and academic achievement among racial groups has converged.<sup>120</sup> The second potential source of inaccuracy in race-based actuarial tables is the high standard errors associated with life expectancy, work-life expectancy, and wages.<sup>121</sup> High standard errors indicate high variation in the

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113. See Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 217–18; Avraham, *supra* note 63, at 431 (“[I]naccuracy is not objectionable if it works to everyone’s benefit. Differential burdening of individual insureds, however, may be objectionable.”).

114. See Avraham, *supra* note 63, at 431.

115. *Id.*

116. *See id.*

117. *See id.*

118. Avraham & Yuracko, *supra* note 4, at 700–06.

119. *Id.* at 701.

120. *Id.* at 701–03 (providing a detailed look at the evidence of the convergence of life expectancy, workforce participation, and academic achievement between racial groups).

121. *Id.* at 704–05

population, which demonstrates how using a particular statistic could be highly inaccurate for a particular individual.<sup>122</sup> Finally, Avraham and Yuracko discuss the skewness of each racial group's distribution, which demonstrates that the medians and modes for each group are similar, though their means are different.<sup>123</sup> The similarity in medians and modes presents a case for why each racial group should be treated the same when awarded damages.<sup>124</sup>

Race-based tables produce inaccurate calculations of tort damages, which disproportionately impact minority communities. Since differences in race do not correctly predict an individual's future earnings or expected work life,<sup>125</sup> among other statistics used in calculating awards, insurance providers inaccurately calculate the premiums that corporations should pay. For example, if a corporation's past tort liability primarily involved black plaintiffs, then the total cost of its tort liability would, on average, be less than if a corporation was liable to primarily white plaintiffs.<sup>126</sup> This creates a differential inaccuracy problem as minority communities bear the costs of this particular inaccuracy in the expected loss calculation due to lower insurance compensation<sup>127</sup> and potentially distorted incentives of insured tortfeasors<sup>128</sup> that insurance policies perpetuate.<sup>129</sup> Though there is no way to completely predict future risk, the particular flaw in calculating insurance premiums based on discriminatory tort damages disproportionately burdens minority communities.

Inaccuracy in this context does not refer to the actual monetary calculation of insurance premiums given the current state of law. Neither insurance providers nor insureds are losing profit as they are likely assessing the expected value of an insured's liability based on the actual discriminatory damages courts are awarding plaintiffs.<sup>130</sup> Rather, insurance premiums are inaccurate in the sense that the tort damage award calculations they rely upon do

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122. See *id.* The authors stipulate that, though they predict that variance would be reduced in blended tables due to the larger number of observations, "mathematically, however, this outcome is not guaranteed." *Id.* at 705. To be sure that blended tables would offer more accurate results, the standard deviations of blended tables should be calculated. *Id.*

123. See *id.* at 705.

124. *Id.* at 706.

125. See *supra* notes 118–24 and accompanying text.

126. See Avraham & Yuracko, *supra* note 4, at 675 (explaining the difference in damage awards a white boy and black girl with the same projected educational levels would receive under the current process by which courts calculate tort damages).

127. See *id.*

128. See *id.* at 686–92 (discussing lead-based paint, healthcare, and pollution as three real-life examples of discriminatory tort damage awards creating distorted incentives for tortfeasors to target minority communities or plaintiffs).

129. See *supra* notes 38–57 and accompanying text (discussing how insurance providers can monitor, influence, and control insured behavior).

130. See Avraham & Yuracko, *supra* note 4, at 670–77.

not value minority individuals in a fair or precise way,<sup>131</sup> and therefore serve to overburden minority plaintiffs with the costs of tortious conduct. Inaccurate premiums allow corporations to evade the true burden of the losses they cause. Further, minority plaintiffs are less likely to bring lawsuits due to factors such as excessive litigation costs and distrust of the legal system.<sup>132</sup> The reduced likelihood of facing liability also reduces the overall costs imposed on corporations for tortious conduct and contributes to differential inaccuracy.

#### D. *Inaccuracy in Premium Calculations Impedes Deterrence Functions of Insurance*

The potential inaccuracy and undervaluation of harm to minority actors distorts and underutilizes the deterrence mechanisms insurance providers can employ. The deterrence argument for prohibiting race-based actuarial tables in this context is stronger when considering the role of insurance providers.<sup>133</sup> Insurance providers often monitor and deter harmful conduct of their insureds due to their financial incentives in minimizing risk and the tools they have in place to enforce compliance with risk-reducing methods.<sup>134</sup> The deterrence aspect of the insurance relationship certainly depends in part on the ability of insurance providers to determine risk and accurately price premiums.<sup>135</sup> Accurate risk assessment and pricing are important for two reasons: deterrence through premiums and other risk-reducing methods.

The insurance premium is a direct and semi-responsive cost on the corporation, and fluctuations in this price is one factor that can influence whether insurance over-deters or under-deters cer-

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131. See *id.* at 700–06.

132. See David McElhattan, Laura Beth Nielsen, & Jill D. Weinberg, *Race and Determinations of Discrimination: Vigilance, Cynicism, Skepticism, and Attitudes About Legal Mobilization in Employment Civil Rights*, 51 *LAW & SOC. REV.* 669, 674–78 (2017) (discussing legal cynicism of minority individuals due to their “lived experiences,” including instances where legal authorities have treated them unfairly or have dismissed their concerns, which leads to reluctance to turn to legal remedies though they have suffered injustice).

133. Avraham and Yuracko address deterrence objectives when discussing the “perverse ex-ante incentives” created by race-based actuarial tables and how blended tables achieve “optimal deterrence model” of using tort law to induce companies to engage in behavior that minimizes the costs of precautions and the costs of harm from accidents not prevented.” See Avraham & Yuracko, *supra* note 4, at 686–92, 697. In general, the deterrence effect of tort law has been contested. See *supra* note 15 and accompanying text. In contrast, this Section shows that insurance providers have better mechanisms in place to deter tortious corporate conduct, which provides further reasons for courts to use blended tables.

134. See discussion *supra* Section I.B.

135. See Fischer & Jerry, *supra* note 5, at 864–66.



tain conduct.<sup>136</sup> In fact, insurance premiums likely serve as better deterrents for tortious conduct than damage awards because premiums are usually the product of a contractual relationship between two sophisticated parties, while tort litigation between corporate actors and regular citizens is not.<sup>137</sup> The current state of tort law does not provide the necessary financial incentives for insurance providers to price premiums in a way that forces corporations to internalize the true cost of tortious conduct against minority communities. As established in Section C, the current inaccuracy of insurance premiums is due to their lack of consideration for the externalities of tortious corporate conduct.

When considering the other methods insurance providers employ to reduce risk, such as requiring certain safety standards or inspections, accurate risk assessment is also necessary.<sup>138</sup> If an insurance provider does not detect or under-appreciates a risk, it will likely not implement the appropriate policies and deterrence mechanisms. This is especially true when the insured causes a harm that is externalized to non-insured actors, as neither the insured nor the insurance provider has the financial incentive to reduce the risk of harm.<sup>139</sup> If the law were to provide a more equalized measure of tort damages regardless of race, insurance providers would be more likely to require corporations to implement the same precautionary measures regardless of who past and potential tort victims are. For example, in the case of lead paint poisoning, an insurance provider may not enforce or monitor building inspections because “it is cheaper to harm minority children” and resources could be allocated to preventing more costly injuries.<sup>140</sup> The current legal regime produces incentives for this scenario to occur. On the other hand, if the law were to enforce more equal damages against corporate tortfeasors, insurance providers would be more likely to require building inspections and repairs because the associated risks would be similar despite the race of the tenants.

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136. See Schwartz, *supra* note 1, at 337 (“Given these standard explanations of liability-rule deterrence, it is easy to see that perfectly responsive insurance poses no problem. Covered by such insurance, a party who engages in a certain activity and who declines to adopt the safety precaution will encounter a high premium. Since he can reduce this premium by \$1000 by purchasing a \$700 safety precaution, he has a full incentive to make that purchase; tort law’s deterrence objectives are hence preserved.”).

137. Deterrence objectives are better achieved when a party is certain it will face penalties for its conduct. Insurance premiums that are enforced by contractual provisions are a more certain cost to a party than the possibility of being found liable for a tort violation and having to pay damages that could vary greatly.

138. See *supra* note 36 and accompanying text.

139. See Rappaport, *supra* note 38, at 1543, 1595–96.

140. See *G.M.M. ex rel. Hernandez-Adams*, 116 F. Supp. 3d at 143.

### III. STATE LEGISLATURES SHOULD OUTLAW THE USE OF RACE-BASED TABLES AND MANDATE BLENDED TABLES AS THE MINIMUM MEASURE OF TORT DAMAGES

In response to the issues race-based damage calculations cause regarding insurance pricing and policing, states should pass legislation that outlaws the use of race-based tables in calculating tort damages. As tort law aims to reduce overall harm with adequate deterrence,<sup>141</sup> and risk-spreading is an important function of insurance,<sup>142</sup> the law should facilitate awarding the appropriate level of damages to minority plaintiffs. To achieve this, state legislatures should mandate that the minimum amount of damages awarded be calculated using blended tables.<sup>143</sup> Courts would still be allowed to adjust upward based on special circumstances, such as education level of a particular plaintiff or previous earned wages, but the minimum amount should depend on blended tables that do not discriminate based on race.

This Part discusses the comparative merits of state legislative action as opposed to judicial solutions and, in particular, addresses a few perennial arguments scholars confront when arguing that race-based tables should be replaced with a non-discriminatory method of damages calculation. A reform that focuses on state legislative action is not subject to the whim of the courts and does not rely on constitutional doctrine and precedent for the reform to be enacted. Further, state legislatures have traditionally been the primary actors for insurance and damages regulation, so state action would present few federalism concerns and allow the party most equipped to enforce the reform to enact it. Also, the use of blended tables as a minimum for damage awards not only reduces targeting but would also introduce consistency in insurance underwriting. A reliable minimum for tort damages removes uncertainty from insurance underwriting, which improves differential inaccuracy and reduces underwriting costs for insurance providers. By changing current practices and prohibiting the use of race-based actuarial tables in damages calculations, insurance providers would impose a more accurate measure of the costs of corporate tortious conduct on their corporate insureds. Insurance providers could also use their more efficient and effective deterrence methods to

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141. See, e.g., Avraham & Yuracko, *supra* note 4, at 697.

142. Avraham, Logue & Schwarcz, *Understanding Insurance*, *supra* note 3, at 198.

143. Scholars have proposed other reforms as alternatives to race-based tables, such as using the national average wage for all plaintiffs whose wage and work-life computations would be speculative in some way. Those reforms, however, face greater challenges in justifying the distributive nature of that sort of damages scheme as opposed to accurately calculating the individual harm a tort victim suffers.

produce the optimal level of harm for all communities. Finally, this reform focuses on corporate tortfeasors, rather than individual human actors, which limits overdeterrence concerns and allows more effectual policing of corporate behavior.

A. *Statutory Regulation Avoids Issues Associated with Equal Protection Doctrine*

State legislative efforts to reform tort damages encounter fewer legal barriers compared to reforms based in constitutional litigation. In particular, there is an open debate as to whether the use of race-based tables constitutes state action under the Equal Protection Clause, which demonstrates the possibility that constitutional litigation would not result in reform. One approach scholars who argue against race-based tables use is analyzing the practice under Equal Protection doctrine.<sup>144</sup> One of the many requirements in bringing a successful Equal Protection challenge is that the claim must allege a state action,<sup>145</sup> which could present a challenge for plaintiffs in this context. The reason that the state action question is not clear here is because judges and juries are not awarding lower damages due to their *own* racial biases, but rather relying on *biased evidence*.<sup>146</sup> Based on constitutional precedent, if judges and juries were relying on their own racial biases, an award would likely be struck down as unconstitutional.<sup>147</sup> Race-based actuarial tables are different, however, because parties via expert witnesses, rather than judges and juries, introduce the racially-biased statistics used in calculating awards.<sup>148</sup> It is less clear that reliance on racially discriminatory evidence constitutes state action because judges and juries are not the source of the bias—the parties are.

Yuracko and Avraham present various ways that using race-based tables to calculate tort damages could constitute state action.<sup>149</sup> They rely heavily on the Supreme Court's analysis and holding in

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144. Yuracko & Avraham, *supra* note 82; Jennifer B. Wiggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263 (2010).

145. *See, e.g.*, U.S. v. Stanley, 109 U.S. 3, 11 (1883); Nat'l Collegiate Ath. Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988); Shelley v. Kraemer, 334 U.S. 1, 14 (1948)

146. *Cf.* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017) (finding that evidence that a juror relied on racial bias, animus, or stereotypes requires the "no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee."); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 614 (1991) (stating that a trial judge is state actor for 14th Amendment purposes).

147. *See id.*

148. Yuracko & Avraham, *supra* note 82, at 349.

149. *Id.* at 351–58.

*Shelley v. Kraemer*, which struck down state enforcement of racially restrictive private covenants.<sup>150</sup> One interpretation of the Court's holding in *Shelley* is that state enforcement of private discrimination that significantly burdens social and economic participation is unconstitutional under the Equal Protection clause.<sup>151</sup> Yuracko and Avraham use this interpretation of *Shelley* to support their argument that the use of race-based actuarial tables is state-enforced discrimination.<sup>152</sup> They also argue that using race-based tables in calculating tort damages is “symbolic encouragement” or “facilitation” of discriminatory behavior, which are theories that also find support in *Shelley*.<sup>153</sup>

Other scholars, however, have critiqued the constitutional analysis of race-based tables because private parties introduce the discriminatory statistics through expert witnesses. Although courts enforce damage awards, they are not bound by expert witness calculations of damages when deciding the amount.<sup>154</sup> Both judges and juries are allowed to give as much weight as they want to expert testimony regarding what the damage amount should be.<sup>155</sup> Aside from any statutory cap on damages, courts can award a wide range of damage amounts that differ from what the parties present and are given deference by appellate courts.<sup>156</sup> Therefore, no state actor is required to incorporate the biased statistics that experts introduce in the final damages award, though evidence still shows that damage awards tend to be biased against minority plaintiffs.

Further, under the state action test in *Edmonson*, race-based actuarial tables may not constitute state action. The Supreme Court found that to determine whether a particular deprivation is the result of state action, the court should consider “first, whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, and second, whether the private party charged with the deprivation could be described in all fairness as a state actor.”<sup>157</sup> The second prong of whether the private party could “in all fairness” be described as a

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150. *Shelley*, 334 U.S. at 14.

151. Yuracko & Avraham, *supra* note 82, at 352–53; *see also Shelley*, 334 U.S. at 10.

152. Yuracko & Avraham, *supra* note 82, at 352–55.

153. *Id.* at 355–58.

154. Anderson, *supra* note 4, at 237 (“Expert testimony, on the other hand, merely sets forth one piece of evidence from which the jury—the ‘quintessential governmental body’—may consider.”) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991)). *See* Fed. R. Evid. 702 Advisory Committee Notes (recognizing that an expert explains relevant scientific or other principles, which the trier of fact then applies to the facts of the case).

155. *See generally* Fed. R. Evid. 702.

156. Monetary damages awarded by a judge or a jury are reviewed under an abuse of discretion standard.

157. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991).

state actor calls for the evaluation of certain factors, such as whether the private actor relies on government assistance or benefits, performs a traditional government function, or causes an injury that “is aggravated in a unique way by the incidents of governmental authority.”<sup>158</sup>

Scholars disagree over the extent to which race-based actuarial tables meet the *Edmonson* factors. For example, Chamallas argues that the introduction of race-based actuarial tables as the basis for damage awards requires government assistance because the judge actively admits that testimony into evidence.<sup>159</sup> By admitting testimony with underlying bias, the judge is essentially sanctioning the use of race as “legally permissible criterion.”<sup>160</sup> Anderson, on the other hand, contends that Chamallas ignores the *Edmonson* court’s focus on a court’s procedural control over the jury selection process,<sup>161</sup> which was the state action in question in *Edmonson*.<sup>162</sup> Anderson distinguishes race-based tables from discriminatory preemptive strikes because the court does not have the same level of control over the extent and the basis of expert testimony as it does over the jury selection process.<sup>163</sup>

This Note does not purport to argue that the use of race-based tables in tort damage calculations is or is not state action under the Equal Protection clause. Rather, the debate about whether state action exists in this context highlights the issue with proposing a reform based in constitutional doctrine over statutory reform. In addition to concerns about state action, there are other factors to consider when using the court for reform. These include finding the “right” plaintiff, navigating the effects of *stare decisis*, and finding an appropriate enforcement mechanism for judicial decisions. These factors could all influence the court’s judgment and whether a court would hold race-based tables unconstitutional. Though state statutory reform would likely face certain political barriers, access to the political system via voting and lobbying seems at least as accessible as, if not more than, reform through constitutional litigation.

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158. *Id.* at 621.

159. *See* Chamallas, *supra* note 4, at 108–09.

160. *Id.* at 108.

161. *See* Anderson, *supra* note 4.

162. *See* *Edmonson*, 500 U.S. at 614.

163. *See* Anderson, *supra* note 4, at 236.

B. *States Have Historically Been the Primary Regulators of Tort and Insurance Law*

State legislatures are the primary actors in insurance law and damages regulation and are therefore in the best position to intervene. In response to a Supreme Court decision holding that insurance regulations fall under Commerce Clause powers,<sup>164</sup> Congress passed the McCarran-Ferguson Act, which ensures that insurance regulation will be left to the states.<sup>165</sup> Some goals of state insurance regulation include fair pricing and preventing unfair practices by insurance companies.<sup>166</sup> While the reform proposed here is not one that regulates insurance directly, states have already developed statutory precedent and institutional knowledge regarding insurance regulation. Therefore, when justifying tort damage reform with the improvements it can cause in insurance policing and pricing accuracy, state legislatures would have the motivation and expertise in insurance regulation to make the proposed changes.

One issue with insurance regulation at the state level is the potential for a competitive regulatory scheme, where states are reluctant to enact reforms that affect insurance premiums because they want to encourage insurance coverage of businesses in their states. The worry is that by relying on individual state regulation, insurance regulation will become a race to the bottom. Scholars agree that a “race to the bottom” market in insurance regulation is not beneficial, especially to consumers.<sup>167</sup> Upon closer examination, it seems unlikely that this particular reform would catalyze such a reaction from the market. Though insurance regulation is left to the individual states, the National Association of Insurance Commissioners (NAIC) helps facilitate a national regulatory system.<sup>168</sup> The efforts of NAIC to standardize insurance regulation, as well as the nationalization of the insurance industry in response to the nationalization of many other industries, already serve as appropriate protections against inefficient deregulation.<sup>169</sup> There seems to be no reason that these mechanisms would stop functioning in light of states adopting the reform proposed by this Note. Because state legislatures already regulate to promote fairness in insurance availability and pricing,<sup>170</sup> this reform would not be so radical as to gen-

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164. U.S. v. South-Eastern Underwriters Ass’n, 322 U.S. 533 (1944).

165. See Susan Randall, *Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners*, 26 FLA. ST. U.L. REV. 625, 633–34 (1999).

166. *Id.* at 629.

167. See Daniel Schwarcz, *Regulating Insurance Sales or Selling Insurance Regulation? Against Regulatory Competition in Insurance*, 94 MINN. L. REV. 1707 (2010).

168. See Randall, *supra* note 165, at 635.

169. *Id.* at 634–40.

170. *Id.* at 629.

erate concerns that insurance providers would leave certain states upon enactment.

In addition to insurance regulation, states have also been the source of tort regulation. Though some scholars have noted that federal actors have become more active in interfering with state regulation of tort law,<sup>171</sup> tort law remains an area of “traditional state concern.”<sup>172</sup> States have enacted tort reform in a variety of ways, including placing caps on pain and suffering damages, placing caps on punitive damages, and exempting certain industries from liability for certain claims.<sup>173</sup> Many state statutory tort reforms have worked to limit defendant liability.<sup>174</sup> This trend is partially due to the efforts of American Tort Reform Association (ATRA), an interest group that seeks to quell abuses of the tort system.<sup>175</sup> Though the reform presented in this Note would not fit the trend of limiting tort liability, the benefits it would provide in promoting the fairness and deterrence goals of insurance and tort law may justify a reform which increases damages liability. Many state legislative changes to tort law were made in response to the liability insurance crisis in the 1980s.<sup>176</sup> A reform that could potentially stabilize insurance premiums and introduce more certainty into the underwriting process would protect states from enduring another insurance crisis. These benefits may outweigh the influence of corporate interest groups in state legislatures and allow a reform to be passed, though enactment can never be guaranteed.

### C. *Blended Tables Reduce Targeting and Introduce Certainty in Damage Awards*

Scholars recognize that blended tables are a better alternative to the racially discriminatory tables that courts currently use in calculating tort damages.<sup>177</sup> Specifically, blended tables would reduce the incentive to target minority communities because the damages owed to those communities are less than those owed to predominately white communities. By taking race out of premium calculations, corporations are less likely to take race into account when making decisions, such as where to locate manufacturing plants or

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171. See, e.g., Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1505 (2009).

172. *Id.* at 1504; *Bates v. Dow Agrosciences, LLC*, 554 U.S. 431, 449 (2005).

173. Klass, *supra* note 172, at 1513–18.

174. See *id.* at 1513.

175. See *id.* at 1516.

176. See *id.* at 1513.

177. See, e.g., Avraham & Yuracko, *supra* note 4.

where to extract resources. Just as important, as explained in Part II, insurance providers would also no longer take race into account when pricing corporate premiums and creating corporate compliance and policing measures. While there is no evidence that insurance providers actively consider the race of potential tort victims of an insured corporation, they may consider race indirectly because of the discrepancy in damage awards the corporation has had to or will have to pay. Blended tables remove race from consideration in damage awards because they do not categorize the relevant statistics based on race. This policy would eventually reduce the racial discrepancy in damage awards, which would in turn reduce the variation in insurance premiums. No matter the race of past or potential tort victims, corporations will be held liable to a less varying amount and insurance providers will create compliance practices that cater to these costs.

There is some precedent for state legislatures to amend the type of actuarial table a court should use in calculating damages. Three states, which include North Carolina, South Carolina, and Virginia, do not rely upon Department of Labor tables.<sup>178</sup> Instead, they have adopted their own tables which do not stratify by race.<sup>179</sup> Eleven states also have jury instructions that preference certain life expectancy tables,<sup>180</sup> and six of those states have race-neutral jury instruction provisions.<sup>181</sup> There have been no documented attempts to strike down race-based actuarial tables based on inefficiency or fairness concerns, though.

Courts should be able to upwardly adjust awards that are calculated from blended tables, however, to mitigate the harm blended tables can cause for “above average” plaintiffs. By incorporating the statistics of all classes of people, blended tables provide statistics that represent the mean population. For those who currently benefit from the more favorable statistics for certain demographics, such as white males, or through some other factor, such as educa-

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178. See N.C. GEN. STAT. ANN. § 8-46; S.C. CODE ANN. § 19-1-150; VA. CODE ANN. § 8.01-419.

179. *Id.*

180. These states include Alaska, California, Kansas, Kentucky, Michigan, Minnesota, New Jersey, New York, North Dakota, Tennessee, and Washington. Avraham & Yuracko, *supra* note 4, at 680. See also AL. CIVIL PATTERN JURY INST. 20.13; 3932: Life Expectancy, JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS 773 (2012); PATTERN INST. KAN. CIVIL 171.45; Life expectancy tables, KENTUCKY WRONGFUL DEATH ACTIONS § 13:3 (2012-13 ed.); MODEL CIVIL JURY INST.—MICHIGAN; 4A MINN. PRAC., JURY INST. GUIDES—CIVIL APPENDIX (5th ed.); N.J. CT. R. 1:13-5, APP. I; N.Y. PATTERN JURY INST.—CIVIL APPENDIX A (3d ed.); N.D. PATTERN JURY INST.—LIFE EXPECTANCY (PERSONAL INJURY); 8 TENN. PRAC. PATTERN JURY INST. T.P.I.—CIVIL APPENDIX C (2012 ed.); 6 WASH. PRAC., WASH. PATTERN JURY INST. CIV. WPI 34.04 (6th ed.).

181. Alaska, California, Minnesota, New Jersey, New York, and Washington expressed preference for race-neutral tables or statistics. *Id.*



tion, the blended damage calculation would undervalue the harm caused to them. Scholars have noted that blended tables would not only “depress awards for individual white victims,”<sup>182</sup> but also that black males may not necessarily benefit from a switch to blended tables.<sup>183</sup> While the inclusion of white male statistics in blended tables increases awards for black males, the inclusion of statistics relevant to female plaintiffs may depress the award more than the current race-based table for black men.<sup>184</sup> Courts should still not be able to adjust upward for race regardless, as that would defeat the entire purpose of the reform. By allowing some amount of upward adjustment, however, the judicial process can adequately compensate “above average” plaintiffs, while plaintiffs who the system currently harms would not automatically be given lower awards because of race.

Although the upward adjustment of tort awards would likely result in less certainty in insurance predictions of tort damages judgments, the net harm would still be less than the harm generated from race-conscious tables. Certainty of risk is important for insurance providers because it helps create more accurate insurance premiums and reduces underwriting costs.<sup>185</sup> The discrepancy in awards due to race introduces more uncertainty and additional costs into the underwriting process as insurance providers may have to determine the demographics of future tort victims and account for varying costs. By requiring that race be removed from damage calculations and that blended tables be the minimum for damage awards, insurance providers would know what costs to use in calculating an insured’s premium. Though this reform would allow for some uncertainty in damage awards due to upward adjustments, blended tables would establish the minimum award no matter the race of the tort victim. Therefore, insurance providers have certainty as to the minimal costs that must be incorporated in insurance premiums. Though not a complete mitigation of the costs that uncertainty imposes, establishing a more certain minimum will help insurance providers better account for tort damage costs in their premiums. Further, insurance providers would no longer have less incentive to encourage compliance with safety measures based on the racial compositions of the community with which an insured corporation interacts. All tort victims regardless of race will be valued at the same minimum award, so insurance providers would require safety measures up to that minimum

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182. Yuracko & Avraham, *supra* note 82, at 363.

183. *Id.* at 333 n.30.

184. *Id.* at 363.

185. *See supra* notes 23–25 and accompanying text.

award. The certainty blended tables create will establish a minimum standard of safety, which would eliminate the disproportionate burden placed on minority tort victims.

#### CONCLUSION

Courts continue to award damages for corporate tortious conduct based on the race of the plaintiff with little judicial oversight or deviation from the practice. The result of such damage calculations is the undervaluation of injuries for minority plaintiffs compared to white plaintiffs. The effects of racial disparities in tort damages on insurance providers properly policing corporate behavior and accurately pricing corporate premiums to deter such behavior add to the literature of why race-based damage awards should be outlawed. State legislatures must replace the outdated and inefficient practice of race-based tort damage calculations with the use of blended tables. Blended tables take race out of the tort damage calculation, which in turn takes race out of the calculations for assessing corporate insurance premiums and for determining the level of preventative measures an insurance company will require the company to invest to prevent tortious incidents. Both tort law and insurance law recognize the value in accurate damage calculations and how these calculations further deterrence and restitution objectives. But, to conflate the results of biased educational and employment structures with how much an individual is worth only results in an unjust, burdensome system for plaintiffs.