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4-2021

## Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL into Tort Damages

Catherine M. Sharkey

*Segal Family Professor of Regulatory Law and Policy, New York University School of Law*

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### Recommended Citation

96 Notre Dame L. Rev. 1479 (2021)

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VALUING BLACK AND FEMALE LIVES:  
A PROPOSAL FOR INCORPORATING AGENCY  
VSL INTO TORT DAMAGES

Catherine M. Sharkey\*

*Federal agencies adopt a uniform VSL (value of statistical life)—one that does not vary according to demographic characteristics—in conducting cost-benefit analyses in connection with regulatory policy decisions. In sharp juxtaposition, the use of race- and gender-based statistics on wages and work-life expectancy in calculating tort wrongful death damage awards is an entrenched practice among forensic economists who serve as expert witnesses in tort litigation. The conventional use of race- and gender-specific economic data concerning wages and work-life expectancy in calculating tort damages leads to unjustifiable disparities in awards for blacks and women. Young female and minority tort victims bear the particular brunt of the effects of discriminatory and inaccurate data, given that their expected wages cannot be extrapolated from past earning history but instead must be based on the gender- and race-based tables.*

*Law and economics scholars have noted that wrongful death damages in tort—based primarily on earnings losses to survivors—grossly underdeter. A damage award based on employment statistics (even those for white men) will not produce adequate deterrence against accidents causing death. In order to effectuate the deterrence goal of tort law, scholars have argued that courts should change the existing method of pricing wrongful death in tort and instead incorporate the VSL methodology used by federal agencies.*

*In this Essay, I provide an additional argument for switching to the VSL methodology used by agencies: incorporating a uniform VSL would ameliorate the hitherto unaddressed and unjustified race and gender bias in tort awards. The substitution of a uniform VSL for race- and gender-based statistics addresses the racialized and gendered deterrence gap that has led to skewed incentives for actors to take precautions against harms to blacks and women. Moreover, with regard to the inevitable underdeterrence/overinsurance tradeoff that arises in formulating wrongful death damages, the “cost” of the overinsurance/overcompensation can be viewed as the “price” paid in order to provide equitable treatment across demographic groups, to ensure that defendants respect the same uniform duty of care for all plaintiffs, and to eradicate the perverse incentives for adverse risk allocation.*

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\* Segal Family Professor of Regulatory Law and Policy, New York University School of Law. Max Nettler (NYU 2022) provided excellent research assistance.

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I. FEDERAL AGENCIES’ UNIFORM “VALUE OF A STATISTICAL LIFE”

Professor Kip Viscusi pioneered the use of the value of a statistical life (“VSL”) as the gold standard for agency use in cost-benefit regulatory analysis. Although there is some variation among federal agencies in terms of the VSL, over time the range has narrowed to \$6–\$9 million. Agencies, moreover, deploy a uniform VSL. While there have been some calls to vary VSL on the basis of income or demographic characteristics such as age, there is near unanimous agreement that VSL should not vary by race or gender, thus valuing equally black, female, and white male lives.

A. *Agency Use of Average VSL*

1. Methodology

The VSL is calculated by measuring the amount of money an individual would be willing to pay to eliminate a small risk of death and then dividing that amount by the probability of that risk. For example, if the average American is willing to pay \$900 to eliminate a 1/10,000 risk of death, then the average VSL would be \$9 million.<sup>1</sup> The best VSL estimates are gleaned

1 See generally CASS R. SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014); W. KIP VISCUSI, PRICING LIVES: GUIDEPOSTS FOR A SAFER SOCIETY (2018).

from data reflecting choices made by people facing risks in the work setting—in other words, the wage premium they accept to face small risks of death. Thus, VSL is not an abstract concept conceived by agencies, but instead tracks people’s preferences and incorporates their judgments regarding willingness to accept risks.<sup>2</sup>

In conducting cost-benefit analyses for regulatory policy decisions, federal agencies use VSL as a benefits measure (in the form of lives saved) by a regulation under consideration. So, continuing with the simplistic example above, if the agency uses a VSL of \$9 million and a particular regulation is projected to save 10 lives on average, then the estimated benefits are \$90 million. Cost-benefit analysis would thus favor such a regulatory policy if the expected costs are less than \$90 million and correspondingly reject the policy if the expected costs exceed this amount.<sup>3</sup>

## 2. Heterogeneity

Agencies independently choose how to calculate VSLs and there is some variation across agencies.<sup>4</sup> In 2012, the Institute for Policy Integrity submitted comments to the Office of Information and Regulatory Affairs’ (“OIRA”) then-Administrator Cass Sunstein, urging that unifying the VSL across agencies should be a priority.<sup>5</sup> Sunstein has argued that VSL should *not* be standardized across agencies because the population is willing to pay more to avoid certain types of risks—for example, cancer deaths—and, consequently, risks that are particularly unpalatable should not be considered the same as others.<sup>6</sup>

In practice today, agencies’ VSL figures coalesce around a value between \$6 and \$9 million.<sup>7</sup> A 2017 White House report noted that “[i]n practice, agencies have tended to use a value above the mid-point of” the range of VSL provided by Circular A-4, issued by the Office of Management and Budget.<sup>8</sup>

Historically, agency VSLs have varied quite significantly. In 2011, for example, the Environmental Protection Agency (EPA) set the VSL at \$9.1 million (while considering placing a 50% premium on cancer deaths), the

2 See SUNSTEIN, *supra* note 1, at 86.

3 See SUNSTEIN, *supra* note 1, at 51–53.

4 Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423, 1436–39 (2014) (charting expanding federal agency use of VSL but noting the “somewhat different approaches to calculating VSL” between agencies).

5 Letter from Michael A. Livermore, Alex Kondo, Brian Levy & Jennifer S. Rosenberg, members, Inst. for Pol’y Integrity to Cass Sunstein, Adm’r, Off. of Info. & Regul. Affs. (May 10, 2012), [https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2012\\_cb/comments/ipi-interagency-coordination-final-comments.pdf](https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/2012_cb/comments/ipi-interagency-coordination-final-comments.pdf).

6 SUNSTEIN, *supra* note 1, at 87.

7 *Id.* at 94.

8 OFF. OF MGMT. & BUDGET., 2017 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 12 (2019).

Food and Drug Administration (“FDA”) used a VSL of \$7.9 million (increasing its 2008 estimate by more than half), and the Department of Transportation used a value of \$6 million.<sup>9</sup>

VSL is subject not only to wide interagency variation, but also intertemporal variation. In 2016 dollars, the Department of Agriculture’s VSL was \$3.6 million in 1994, but \$8.9 million by 2016; similar increases have taken place at the FDA and EPA.<sup>10</sup> There are some outlier examples of agencies whose figures have not kept pace even with inflation. Consider, for example, that in 1995, the Nuclear Regulatory Commission (NRC) set its VSL at approximately \$3 million and this value had not been updated as of 2017, rendering NRC’s VSL a third of typical federal agency estimates.<sup>11</sup> Discrepancies of this magnitude seem unlikely to be justified by small variations in agency expectations about willingness-to-pay to avoid certain risks.

### B. Variations Based on Demographics?

Some scholars have argued that, in the agency policymaking context, VSL should vary according to the demographic group that is the target of the policy in question in order to avoid forcing members of groups with lower VSLs to pay more for a risk reduction than the dollar amount at which they value that risk reduced.<sup>12</sup> Given that taxpayers will eventually be responsible for the costs of the policy decisions made using VSL, adopting a uniform VSL could result in the implementation of policies that cost more than the amount at which they are valued by their ultimate beneficiaries.<sup>13</sup> For example, there was a period wherein the EPA applied a “senior discount” to the VSL for the elderly.<sup>14</sup> This practice has since fallen out of favor. In a draft report to Congress, however, OIRA noted that a major source of uncertainty for environmental regulations was that VSLs may be lower for the older populations who disproportionately benefit from environmental protections.<sup>15</sup>

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9 Binyamin Appelbaum, *As U.S. Agencies Put More Value on a Life, Businesses Fret*, N.Y. TIMES (Feb. 16, 2011), <https://www.nytimes.com/2011/02/17/business/economy/17regulation.html>.

10 Dave Merrill, *No One Values Your Life More Than the Federal Government*, BLOOMBERG (Oct. 19, 2017), <https://www.bloomberg.com/graphics/2017-value-of-life/>.

11 Richard L. Revesz, *Cost-Benefit Analysis of Financial Regulation: An Institutional Perspective*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORKS OF JERRY L. MASHAW 212, 215–218 (Nicholas R. Parrillo ed., 2017).

12 See SUNSTEIN, *supra* note 1, at 86–87.

13 See *id.*, at 89–90; VISCUSI, *supra* note 1, at 120–21.

14 See, e.g., W. Kip Viscusi & Joseph E. Aldy, *Labor Market Estimates of the Senior Discount for the Value of Statistical Life*, 53 J. ENV’T ECON. & MGMT. 377, 377–78 (2007).

15 OFF. OF INFO. & REG. AFFS., OFF. OF MGMT. & BUDGET., 2018, 2019 AND 2020 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 27 (2020), [https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5899-REV\\_DOC-Draft2018\\_2019\\_2020Cost\\_BenefitReport11\\_20\\_2019.pdf](https://www.whitehouse.gov/wp-content/uploads/2019/12/2019-CATS-5899-REV_DOC-Draft2018_2019_2020Cost_BenefitReport11_20_2019.pdf) (“Some studies indicate that willingness to pay for reductions in risk may change with age. If VSLs do change with age, it would have an

Using different VSLs for different groups of people could result in policies that allocate benefits to the rich being implemented more frequently than policies that assist the poor, since the rich have a higher VSL.<sup>16</sup> Moreover, there is some evidence that the tax system may not respond to the distributive impacts created by agency policymaking, such that higher taxes are not imposed on the rich when they enjoy the bulk of the benefits of a new policy and likewise the poor are not taxed more heavily when policies allocate benefits in their direction.<sup>17</sup> If it is true that the direct beneficiaries of a policy are not made primarily responsible for paying for it, in that the tax system does not balance each new policy benefit with a higher tax rate, then concerns about forcing an individual to pay more for a policy than the dollar amount at which she values that policy are less warranted since costs are spread rather than assigned primarily to the group receiving benefits. Indeed, using a lower VSL for certain demographic groups would merely send more benefits to groups with higher VSLs even though the costs of these benefits may be shared by groups with both high and low VSLs. Use of a nonuniform VSL in agency decisionmaking could therefore exacerbate inequality rather than respect individual preferences.<sup>18</sup>

With respect to evaluating heterogeneity in VSL estimates based on demographics, most economic studies address age and income level. But a few tackle race and gender. Notably, Professor Kip Viscusi has documented that VSL is highest for white males and lowest for black males.<sup>19</sup> Specifically,

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important impact on the size of the benefits associated with premature mortality because EPA's analysis shows that the median age of individuals experiencing reduced mortality is around 75 years old. However it is also worth noting that slightly more than half of the lost life years occur in populations age <65 due to the fact that the younger populations would lose more life years per death than older populations.” (footnotes omitted)).

16 See Zachary Liscow, *Is Efficiency Biased?*, 85 UNIV. CHI. L. REV. 1649, 1656, 1681 (2018).

17 See Zachary Liscow, *Are Court Orders Sticky? Evidence on Distributional Impacts from School Finance Litigation*, 15 J. EMPIRICAL LEGAL STUD. 4, 37 (2018).

18 Indeed, this effect could “snowball.” As described by Liscow and Paez, where certain groups are assigned higher VSLs than others, the disproportionate allocation of resources toward high-VSL groups in time period 1 would increase the relative wealth of those groups, and—since VSL is linked to wealth—could further widen the disparity in VSLs, leading to an allocation of resources in time period 2 that is even more disproportionate, and so on. See generally Zachary Liscow & Daniel Giraldo Paez, *Inequality Snowballing* (Aug. 29, 2019) (unpublished manuscript) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3327460](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3327460)).

19 W. Kip Viscusi, *Racial Differences in Labor Market Values of a Statistical Life*, 27 J. RISK & UNCERTAINTY 239, 251–53 (2003). Leeth and Ruser also explore gender and race differentials using workplace data from 1996–1998. See John D. Leeth & John Ruser, *Compensating Wage Differentials for Fatal and Nonfatal Injury Risk by Gender and Race*, 27 J. RISK & UNCERTAINTY 257 (2003). According to their study, women's VSL ranges from \$8.1 million to \$10.2 million; whereas men's VSL ranges from \$2.6 million to \$4.7 million. *Id.* at 266. They explain this differential as follows: “[M]en but not women earn [ ] higher pay for bearing greater fatal injury risk, all else equal. However, the concentration of women in white-collar occupations explains much of the difference in the fatal injury rate results between the genders.” *Id.* at 258. Moreover, “[w]hen the sample is separated by occupa-

the overall white VSL is \$15 million, more than double the overall black VSL at \$7.2 million. And, a similar gender gap emerges: the \$18.8 million VSL figure for white males is likewise double that of the overall figure for white females at \$9.4 million.<sup>20</sup>

Racial and gender differences might arise from two very different sources. First, preferences with respect to risk might vary (as with age and income level) by race.<sup>21</sup> Second—and of particular significance in evaluating the soundness of disaggregating VSL estimates by race and/or gender—there are fundamental differences in labor market opportunities between blacks and whites and men and women. The relevance of this second factor can hardly be gainsaid, in light of “[t]he substantial literature on market discrimination [that] has documented that there is a persistent difference in the earnings of whites and blacks even after controlling for a broad set of individual characteristics and job characteristics.”<sup>22</sup> Indeed, as Professor Kip Viscusi has explained, “Although differences in preferences could be influential, such differences cannot reconcile the various empirical findings. Rather, there must also be fundamental differences in labor market opportunities for blacks and whites as well as in the structure of their offers for risky jobs.”<sup>23</sup>

What is key for my purposes here is that, in conducting cost-benefit analyses for regulatory policy decisions, federal agencies adopt a uniform VSL in the sense that it does not vary according to race and gender.<sup>24</sup> In addition to the likely political infeasibility of varying VSL estimates by race and gender, such a practice would not be normatively desirable in light of the sources of market failure, such as labor market discrimination.<sup>25</sup>

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tional category, neither gender earns a wage premium for fatal injury risk in white-collar jobs, but both earn a wage premium in blue-collar jobs.” *Id.* at 258–59. They also report the striking result that black males receive no compensation for fatal workplace risks, producing a VSL of 0. *Id.* at 275.

20 Viscusi, *supra* note 19, at 252.

21 As Viscusi explains, these race-based differences could be correlated with wealth or represent independent differences in taste. *Id.* at 240 (“To the extent that black workers have lower lifetime levels of wealth than do white workers, they should be more willing to bear risk. There also may be racial differences in tastes that are not correlated with wealth, though the theoretical direction of these differences is unclear.”).

22 *Id.*

23 *Id.* at 254–55; *see also id.* at 255 (“[B]ecause of the differences in market opportunities, it is inappropriate to attribute the observed differences to a greater willingness by black workers to bear risk.”).

24 *See* SUNSTEIN, *supra* note 1, at 85.

25 *See* W. Kip Viscusi, *The Heterogeneity of the Value of Statistical Life: Introduction and Overview*, 40 J. RISK & UNCERTAINTY 1, 12 (2010) (“If the observed differences are attributable to a market failure, such as labor market discrimination, then incorporating these VSL differences in policy evaluations is unwarranted.”).

## II. DEVALUATION OF BLACK AND FEMALE LIVES IN TORT CASES

### A. *Current Disparities in Tort Damage Awards*

Tort doctrine is explicit that damages are individuated—namely based on the particular losses suffered by the plaintiff. The economic component of damages, comprised of lost wages and medical expenses, varies significantly by a particular individual’s income level and socioeconomic status. And noneconomic pain-and-suffering awards likewise vary by individuals’ unique characteristics. Tort doctrine is less upfront with regard to the fact that damages vary based on the plaintiff’s race and gender. When it comes time for the calculation of awards, courts have embraced the use of work-life expectancy and wage tables constructed separately for men and women and for whites and blacks. Notwithstanding the racial and gender disparities that result—including “discounting” awards in particular cases on account of a plaintiff’s race or gender—and the fact that the use of such tables reifies existing structural inequalities and historical patterns of participation in the workforce, this practice has gone largely unchallenged.

#### 1. Conventional Use of Race- and Gender-Specific Economic Data in Damages Calculations

A key component of tort damages are economic damages based upon past, present, and future lost earning capacity. Women and members of minority racial and ethnic groups have both lower expected wage estimates<sup>26</sup> and lower work-life expectancy estimates<sup>27</sup> than do white men. Forensic economists rely upon the annual wage tables published by the Bureau of Labor Statistics (“BLS”) for expected wages estimates<sup>28</sup> and upon either BLS tables or tables developed by economists Skoog, Ciecka, and Krueger for work-life expectancy estimates.<sup>29</sup> The BLS wage tables provide separate statistics for men and women.<sup>30</sup> The BLS work-life tables segregate workers into racial groups and then differentiate by gender within each racial group, and

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26 See DARIELY RODRIGUEZ & HOPE KWIATKOWSKI, LAWS. COMM. FOR C.R. UNDER L., HOW RACE, ETHNICITY, AND GENDER IMPACT YOUR LIFE’S WORTH: DISCRIMINATION IN CIVIL DAMAGES AWARDS 6 (2018); Michael I. Meyerson & William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPP. L. REV. 771, 807–08 (2010).

27 See RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 5; Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 81–82 (1994) [hereinafter Chamallas, *A Constitutional Argument*]; Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 481 (1998).

28 See 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, 331 (2018).

29 See *id.*

30 See *id.*



the tables by Skoog, Ciecka, and Krueger outline work-life expectancies by gender at various levels of educational attainment.<sup>31</sup>

Myriad cases illustrate the conventional use of gender- and race-based tables.<sup>32</sup> Even when using the tables that do not distinguish by race, it is nevertheless common practice for forensic economists to modify estimates so that they reflect the racial group to which the plaintiff belongs.<sup>33</sup>

The use of such gender- and race-based tables reifies and perpetuates structural inequities. To the extent that the lower wage estimates for women and members of minority racial/ethnic groups reflect, at least to some degree, structural inequities and historical injustices, these are incorporated into tort damage estimates.<sup>34</sup> Similarly, to the extent that minority patients receive inferior healthcare treatment,<sup>35</sup> this affects not only expected medical expenses, but also life expectancy, that likewise will be incorporated into depressed tort damages estimates.

Moreover, such gender- and race-based tables are inaccurate predictors of the future. The table figures are static, meaning they reflect a snapshot of the time period from which the data were collected without accounting for trends that were evolving over that time period. The use of static figures rests on the assumption that whatever discrepancies exist between demographic groups will not only persist but also remain constant into the future.<sup>36</sup> Specifically, such figures do not capture the emerging legal,<sup>37</sup> professional,<sup>38</sup> and social norms<sup>39</sup> that favor workplace equality and increase the likelihood that discrepancies in employment data between demographic groups will diminish in the future. Young female and minority tort victims bear the particular brunt of the effects of discriminatory and inaccurate data, given that

31 See Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 674 (2017).

32 See, e.g., *Dershowitz v. United States*, No. 12-CV-08634, 2015 WL 1573321, at \*21 (S.D.N.Y. April 8, 2015); *Athridge v. Iglesias*, 950 F. Supp. 1187, 1192–93 (D.D.C. 1996); *Caron v. United States*, 410 F. Supp. 378, 397–98 (D.R.I. 1976); *Frankel v. United States*, 321 F. Supp. 1331, 1337 (E.D. Pa. 1970); *Allen v. State*, 535 So. 2d 903, 913 (La. Ct. App. 1988); *Powell v. Parker*, 303 S.E.2d 225, 228 (N.C. Ct. App. 1983); *Johnson v. Misericordia Cmty. Hosp.*, 294 N.W.2d 501, 527 (Wis. Ct. App. 1980); see also Avraham & Yuracko, *supra* note 31; Chamallas, *A Constitutional Argument*, *supra* note 27; Yuracko & Avraham, *supra* note 28.

33 See Yuracko & Avraham, *supra* note 28, at 331.

34 See Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309, 311 (2004); Chamallas, *A Constitutional Argument*, *supra* note 27, at 75; Meyerson & Meyerson, *supra* note 26, at 806–07.

35 See Yuracko & Avraham, *supra* note 28, at 335–36; cf. Avraham & Yuracko, *supra* note 31, at 688–90.

36 See Avraham & Yuracko, *supra* note 31, at 700; Chamallas, *A Constitutional Argument*, *supra* note 27, at 75; Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1452–53 (2005).

37 See RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 7–8.

38 See *id.* at 8.

39 See Adjin-Tettey, *supra* note 34, at 328–29.

their expected wages cannot be extrapolated from past earning history but instead must be based on the gender- and race-based historical tables.

## 2. Largely Unchallenged Industry Practice

The use of gender- and race-based statistics to calculate tort damage awards has become an entrenched practice among forensic economists who serve as expert witnesses in personal injury litigation. As one economist who had “performed thousands of lost income analyses” testified, “no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases.”<sup>40</sup> In a survey by the National Association of Forensic Economists, 42.4% of respondents indicated that they would use gender-specific data in calculating a lost earning award, and an additional 44.8% said they would use both gender- and race-specific data.<sup>41</sup>

In the legislative sphere, a few states have enacted statutes that codify gender- and race-neutral tables or have jury instructions that favor the use of such tables.<sup>42</sup> At the federal level, the proposed Fair Calculations in Civil Damages Act of 2016 would prohibit federal courts from awarding civil damages “using a calculation for the projected future earning potential of [a] plaintiff that takes into account the race, ethnicity, gender, religion, or actual or perceived sexual orientation of the plaintiff,” but the bill died in committee in both the House and Senate.<sup>43</sup>

In the last quarter of the twentieth century, courts entertained a limited number of challenges to the use of race- and gender-based tables in the calculation of damages awards; but, even in the twenty-first century, these cases remain distinct outliers.<sup>44</sup> Judge Weinstein, a recently retired federal district

40 *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004).

41 RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 3.

42 See CAL. CIV. CODE § 3361 (West 2021) (“Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.”); OR. REV. STAT. § 31.770 (2019) (“A calculation of the projected future earning potential of the plaintiff that takes into account the race or ethnicity of the plaintiff is inadmissible in any civil action.”); Avraham & Yuracko, *supra* note 31, at 680–81. New Jersey is the only state with a pattern jury instruction that favors both gender- and race-neutral tables. Compare Avraham & Yuracko, *supra* note 31, at 681 n.101 (“Of the states that we examined, only New Jersey’s court rules identified tables that were gender-neutral”), with *id.* at 681 n.102 (“New Jersey . . . expressed a preference for race-neutral tables or statistics.”). Five states have pattern jury instructions that favor race-neutral statistics but nonetheless allow gendered tables. See ALASKA CIV. PATTERN JURY INSTRUCTIONS § 20.13 (1990); CAL. CIV. JURY INSTRUCTIONS § 3932 (2007); 4A MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES—CIVIL § 91.85 (2020), Westlaw CIVJIG; NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL, div. 2 app. A, Westlaw (database updated Dec. 2020); 6 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS CIVIL § 34.04 (2019), Westlaw WPI.

43 See RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 8–9 (quoting Fair Calculations in Civil Damages Act of 2016, S. 3489, 114th Cong. § 3(a) (2016)).

44 See, e.g., *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 368 (6th Cir. 1978); *Reilly v. United States*, 665 F. Supp. 976, 997 (D.R.I. 1987); *Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991); *Childs v. United States*, 923 F. Supp. 1570, 1585 (S.D. Ga.

court judge characterized by the *New York Times* as “the quintessential activist jurist [who used] his longtime perch on the federal bench in Brooklyn to champion causes,”<sup>45</sup> took up the gauntlet in opposition to the use of such tables, rejecting the practice (an issue the judge raised *sua sponte* in one case) in two published decisions on both public policy and constitutional grounds.<sup>46</sup> But, for the most part, other judges have not followed his lead.<sup>47</sup>

Given the attention drawn to the discriminatory impact of the use of such tables—by Judge Weinstein’s decisions, Special Master Kenneth Feinberg’s decision to use the male tables for both male and female victims of 9/11 in the Victims’ Compensation Fund,<sup>48</sup> academic critiques,<sup>49</sup> torts casebooks,<sup>50</sup> and outrage expressed in the press<sup>51</sup>—it remains a bit of a puzzle why attorneys mount (and thus courts entertain) relatively few challenges to the practice.<sup>52</sup> Prevailing partial explanations include: (i) personal-injury

1996); *Childers v. Sec’y of Health & Hum. Servs.*, No. 96–194V, 1999 WL 218893, at \*56 (Fed. Cl. Mar. 26, 1999); *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1319 (D. Utah 2004); see also Avraham & Yuracko, *supra* note 31; Chamallas, *A Constitutional Argument*, *supra* note 27; Yuracko & Avraham, *supra* note 28.

45 Alan Feuer, *A Legal Lion Lays Down His Gavel with a Ruling of “Love, Not Hate,”* N.Y. TIMES (Feb. 17, 2020), <https://www.nytimes.com/2020/02/17/nyregion/judge-jack-weinstein-retirement.html>.

46 See *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 148–49, 152–54 (E.D.N.Y. 2015); *McMillan v. City of New York*, 253 F.R.D. 247, 255–56 (E.D.N.Y. 2008).

47 Judge Weinstein’s two decisions have been cited for rejection of the use of such tables in two other cases, both of which were brought in Judge Weinstein’s own district. See *Cedeno v. Broan-Nutone, LLC*, No. 16-CV-796, 2019 U.S. Dist. LEXIS 169027, at \*30 n.15 (E.D.N.Y. Sept. 30, 2019); *Hwang v. Grace Rd. Church*, No. 14-CV-7187, 2018 U.S. Dist. LEXIS 164450, at \*23 n.9 (E.D.N.Y. Aug. 10, 2018).

48 Chamallas, *supra* note 36, at 1444–45 (explaining that Feinberg decided to use male statistics for all victims, influenced by filings submitted by National Organization for Women).

49 See, e.g., MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 156 (2010); Chamallas, *supra* note 36; Yuracko & Avraham, *supra* note 28.

50 See, e.g., RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* 805–07 (12th ed. 2020) (discussing how “work-life expectancy calculations have come under increasing scrutiny” in academic literature and in practice in the United States and in Israel).

51 See, e.g., Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, WASH. POST (Oct. 25, 2016), <https://www.washingtonpost.com/graphics/business/work/settlements/>.

52 In *Banda v. Herc Rentals, Inc.*, No. 18-CV-05329-JCS, 2020 WL 353461 (N.D. Cal. Jan. 21, 2020), the plaintiff’s attorney raised an objection (citing *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008)) to the forensic expert’s consideration of race to reduce work-life expectancy. Notwithstanding the expert’s testimony that if consideration of race were removed and everything else stayed the same the statistical work-life expectancy would be higher, upon review it turned out that the “statistics for males generally with the same level of education as [plaintiff], as reflected in the publication upon which [defendant’s expert] relied, show a *shorter* worklife expectancy than for Hispanic males with that level of education.” The plaintiff’s attorney accordingly withdrew the objection. This rare example of a plaintiff attorney’s challenge sheds light on the complex interaction among

litigation is removed from the civil rights context;<sup>53</sup> (ii) expert witnesses may feel pressured to make calculations with official statistics, which delineate by gender and race;<sup>54</sup> (iii) the tort system is a necessarily individualized sphere of law, treating each case as unique and with comparison between damage awards taking place only rarely;<sup>55</sup> and (iv) legal academics have neglected the topic, which is seen as the purview of legal practice, not the domain for theoretical exploration.<sup>56</sup>

### B. A Racialized and Gendered Deterrence Gap

#### 1. Theoretical “Misalignment” in Tort

Ariel Porat has most prominently identified the “misalignment” in tort between the notion of a duty of care owed by a defendant to all persons (regardless of individual characteristics, including demographics) juxtaposed against the reality that defendants will take care only to the point at which the marginal expected cost of precautions ( $B$ ) equals the marginal expected damages ( $P*L$ ).<sup>57</sup> Thus, for example, if the duty of care were set at a level of precautions that cost \$100, but the expected damages for injuring a female or minority plaintiff amounted only to \$50, then the defendant would not take care in excess of \$50 when engaging in activities that threatened injury to women and minorities, whereas, the defendant would be willing to take precautions up to \$100 when white male plaintiffs would be susceptible.<sup>58</sup>

The use of gender- and race-based tables in the calculation of damages thereby creates incentives for defendants to direct risky and harmful conduct toward minority communities.<sup>59</sup> Given the lower expected damages, female and black plaintiffs are also less desirable as clients in our contingency-fee driven system. Such knowledge on behalf of defendants can further skew their incentives to act with less care when interacting with these minority individuals or groups. Caps on noneconomic damages, moreover, exacerbate this effect, as they limit the extent to which pain and suffering and other

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demographic characteristics—in this case, taking into account educational attainment within a minority ethnic/racial group—that might also explain how a challenge to the use of race- or gender-based tables might not always serve the interests of particular plaintiffs.

53 See Chamallas, *supra* note 36, at 1437.

54 See *id.* at 1452.

55 Jennifer B. Wriggins, *Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263, 268 (2010); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1900-1949*, 49 HOW. L.J. 99, 102–03 (2005).

56 Chamallas, *A Constitutional Argument*, *supra* note 27, at 76.

57 Ariel Porat, *The Future of Law and Economics and the Calabresian External Moral Costs* 9 (Coase-Sandor Working Paper Series in L. & Econ., No. 787, 2016), [https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2481&context=law\\_and\\_economics](https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2481&context=law_and_economics).

58 See Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 98–99 (2011).

59 See Avraham & Yuracko, *supra* note 31, at 697–98; Yuracko & Avraham, *supra* note 28, at 327, 334–35.

categories apart from lost earning capacity might increase expected damages.<sup>60</sup>

## 2. Empirical Evidence

There is some limited empirical evidence to support the misalignment thesis and more specifically a racialized and gendered deterrence gap. A salient example arises in the context of lead paint abatement. Minority children have the highest rates of lead poisoning.<sup>61</sup> Given that the victims of lead poisoning are mostly young children, defendant manufacturers can expect with a high degree of confidence that courts will rely on gender- and race-based tables. Thus, when contemplating lead paint abatement activities, defendants are incentivized to begin (and perhaps end) abatement in majority white neighborhoods (where expected damages are the highest).<sup>62</sup> Indeed, Judge Weinstein discussed the risk-allocation issues caused by gender- and race-based tables in the context of *G.M.M v. Kimpson*, a case involving lead poisoning of a Hispanic infant.<sup>63</sup>

In a similar vein, there is some evidence that minority neighborhoods have higher rates of accidents involving chemical facilities.<sup>64</sup> Studies also reveal that areas with higher concentrations of racial and ethnic minorities are more likely to be chosen as the sites for hazardous-waste facilities or other locally undesirable land uses by private actors.<sup>65</sup>

Finally, there is evidence that blacks are underrepresented by attorneys relative to their proportion of the total American population, which correlates with the contention that race- and gender-based tables make it more difficult for blacks to find attorneys who are willing to take them on as clients.<sup>66</sup> Attorneys, moreover, have stated that, after caps on noneconomic damages were adopted, they began screening potential clients more thoroughly for personal characteristics such as work and criminal history (which are highly correlated with race and gender).<sup>67</sup>

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60 See CHAMALLAS & WRIGGINS, *supra* note 49, at 156; Avraham & Yuracko, *supra* note 31, at 690.

61 See RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 3–4; Avraham & Yuracko, *supra* note 31, at 687–88.

62 See Avraham & Yuracko, *supra* note 31, at 688.

63 See 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015).

64 See RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 4; Yuracko & Avraham, *supra* note 28, at 335.

65 See RODRIGUEZ & KWIATKOWSKI, *supra* note 26, at 4–5; Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, ENV'T RSCH. LETTERS, NOV 18, 2015, at 1, 14–16 (2015); Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENV'T L. & POL'Y REV. 485, 499–500, 502–03 (1997).

66 See Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIGATION 37, 59 (2007).

67 Blacks still have higher rates of unemployment, arrest, and conviction than do whites. See CHAMALLAS & WRIGGINS, *supra* note 49, at 178. Women may be similarly disad-

### III. REFORM PROPOSAL: INCORPORATING AGENCY VSL INTO TORT DAMAGES CALCULATIONS

Prominent academics have urged the incorporation of VSL methodology into the calculation of tort damages for wrongful death, as a measure of the dollar amount at which the deceased valued her life.<sup>68</sup> Critics have decried such proposals on the ground that the purpose of tort damages is to make the plaintiff whole—indeed, at common law, when the plaintiff died, no damages were given; the entire basis of wrongful-death damages is statutory, and most state statutes provide compensation based upon financial losses to survivors and reject the notion of hedonic (or loss of the value of life) damages.<sup>69</sup>

But if tort law is to fulfill a deterrence goal, then it cannot be gainsaid that wrongful death damages dramatically underdeter. If one were to graph average tort awards on an x-axis of severity, from minor injuries, to more serious, to grave injuries, then death, there would be an upward-sloping line from minor to grave injuries and then a plunge downwards for death.<sup>70</sup> Thus, separate and apart from the race- and gender-based “discounts,” even if courts utilize work-life statistics for white men, wrongful-death damages would not adequately deter.

To satisfy the deterrence goal, courts should pivot to using VSL measures.<sup>71</sup> Professor Kip Viscusi has advocated the use of VSL in wrongful-death cases in which punitive damages are warranted, so as to target situations in which the incentives for deterrence are paramount.<sup>72</sup> But tying damages to the VSL metric for wrongful deaths more generally ensures that the appropriate duty of care is set and therefore that the adequate level of deterrence is achieved, even in cases that do not warrant punitive damages. VSL not only provides the correct value for a saved life, but also frames safety decisions in prospective terms, which is the more relevant way to assess the defendant’s behavior when determining whether or not a defendant should be held liable.<sup>73</sup>

#### A. *Novel Deterrence Argument: Addressing the Racialized/Gendered Deterrence Gap*

Against the backdrop of the consistent, systematic use of race- and gender-based tables used in the calculation of tort damages (described in Part II), I propose a new angle on the debate regarding the incorporation of VSL

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vantaged in their ability to acquire legal representation by their lower employment rates relative to men.

68 See SUNSTEIN, *supra* note 1; VISCUSI, *supra* note 1.

69 See Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 441–42 (2005).

70 See *id.* at 469–71.

71 See VISCUSI, *supra* note 1, at 84–85.

72 See *id.* at 215–16.

73 See *id.* at 199–200.

into wrongful-death damages—namely that this would address the skewed incentives with respect to taking precautions to protect women and minorities.

The argument is simple, yet its implications profound. Relying upon a uniform VSL in assessing damages would solve the problem of women and members of minority racial and ethnic groups receiving depressed damages awards as a result of past (and ongoing) discrimination; moreover, it would be in line with trends toward convergence in wages and workforce-participation rates between demographic groups. The adoption of a uniform VSL as a measure of tort wrongful-death damages would eliminate the perverse incentives for defendants to channel their most risk-laden behavior toward minority communities.

### B. *Caveats*

Here I try to respond to one well-known caveat with respect to the incorporation of VSL into tort damages for deterrence-based reasons and also raise a more novel concern introduced by injecting agency practice into the tort realm.

#### 1. Overcompensation/Overinsurance Concerns

Economists have long pointed out that basing damages on VSL is likely to overcompensate victims for their injury, in that the amount exceeds the amount an individual would choose to insure against.<sup>74</sup> It is difficult to evaluate the extent of potential overcompensation/overinsurance, however, given well-known issues of underdetection and other issues leading to underdeterrence of tort defendants.<sup>75</sup> Even though some plaintiffs may receive excessive compensation for their injuries, others may not receive any compensation at all despite being equally entitled to recover. The issue of overcompensation/overinsurance may thus be mitigated at the group level.

Here I highlight an additional comparative point—namely, the balance that incorporation of VSL into tort damages strikes in favor of trading off overinsurance against underdeterrence is preferable to the racialized and gendered deterrence gap created by the conventional use of race- and gender-based tables in the calculation of tort damages. Seen in this light, the “cost” of overinsurance/overcompensation can be viewed as the “price” paid in order to provide equitable treatment across demographic groups, to ensure that defendants respect the same uniform duty of care for all plaintiffs, and to eradicate the perverse incentives for adverse risk allocation.

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<sup>74</sup> See *id.* at 198–99.

<sup>75</sup> For example, if the likelihood that a defendant who does not satisfy the duty of care will be held liable is only fifty percent, then it may be necessary to impose damages equal to,  $2 \times$  VSL, in order to produce sufficient deterrence. See *id.* at 85–86.

## 2. Race and Gender Bias in Agency Decisionmaking<sup>2</sup>

The argument for the incorporation of agency VSL methodology into the tort realm in order to mitigate a racialized and gendered deterrence gap raises a more novel concern—namely, the danger that agency methodology and practice might themselves be tainted by racial and/or gender bias.

It is difficult to get a handle on how to evaluate this concern. But there are some worrisome signs. First, there is evidence to suggest that the government settles environmental suits brought against it differently depending on whether the plaintiff is white or belongs to a minority group<sup>76</sup> and penalizes law-violating polluters differently based on whether the polluting was done in a white or minority community.<sup>77</sup> Some studies have also shown that areas with higher concentrations of racial and ethnic minorities are more likely to be chosen as the sites for hazardous-waste facilities or other locally undesirable land uses by the government.<sup>78</sup>

### CONCLUSION: HARNESSING EFFICIENCY ARGUMENTS IN THE SERVICE OF JUSTICE

In this Essay, I present a fresh take on an age-old problem—namely, how to set the optimal level of wrongful-death damages in light of the inevitable tradeoff between underdeterrence and overcompensation/overinsurance. Placing a thumb on the deterrence side of the scale and arguing for the incorporation of agency VSL into wrongful death damages is justified so as to provide equitable treatment across demographic groups, to ensure that defendants respect the same uniform duty of care for all plaintiffs, and to eradicate the perverse incentives for adverse risk allocation. Young female and minority children bear the brunt of the effects of discriminatory and inaccurate data, given that their expected wages cannot be extrapolated from past earning history but instead must be based on the gender- and race-based tables. The reform proposal thus harnesses efficiency arguments ultimately in the service of justice.

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<sup>76</sup> Avraham & Yuracko, *supra* note 31, at 691–92.

<sup>77</sup> See Northern, *supra* note 65, at 505–06.

<sup>78</sup> See *id.* at 502; Avraham & Yuracko, *supra* note 31, at 691; Yuracko & Avraham, *supra* note 28, at 335–36.



