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HOW TO INCLUDE ISSUES OF RACE AND RACISM IN THE 1-L TORTS COURSE: A CALL FOR REFORM

BY: JENNIFER WRIGGINS¹

ABSTRACT

Race and racism have always played a significant role in the U.S. tort system as research has long shown and as hundreds of published decisions demonstrate. Do torts casebooks reflect the importance of race and racism in torts? The article first surveys 23 torts casebooks published from 2016 to 2021 to see whether and to what extent they discuss race and racism. Most avoid discussions of race and racism in torts; and although they always discuss tort history, they omit the racial history of torts. Although publishers frequently issue new editions of torts casebooks, newer editions generally have not expanded their focus to include race and racism. Two notable exceptions are the new open source casebook, *TORTS: A TWENTIETH CENTURY APPROACH*, by Prof. Zahr Said, and *TORT LAW AND PRACTICE* by Prof. Dominick Vetri and co-

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authors.

Following this casebook survey, the article turns to this question: How can professors incorporate issues of race and racism in their torts courses? I recommend that law teachers incorporate issues of race and racism in first year torts courses in two major ways. First, law professors should teach a number of pedagogically interesting cases that deal with race and racism and that also illuminate significant doctrinal issues. This article suggests specific cases keyed to most of the important doctrinal areas in torts. These cases are less known than cases that are commonly taught, but they are also important and can convey the relevant doctrinal points equally well. Second, law professors in teaching damages should include material on the devaluation of injuries to African-Americans in torts. Important background also includes information about the unequal distribution of liability insurance – a key part of the torts system – by race. Since torts is a required first year course, and race and racism have had a significant role in the U.S. torts system, law students should gain at least a general understanding of race and racism's role in torts. Including race and racism in torts courses strengthens the first year curriculum. While this may seem daunting for some instructors, ample materials now on offer make it very feasible. The time is certainly ripe for this very important and positive change.

INTRODUCTION

Many first-year law courses and casebooks persist in teaching torts as if it was unconnected to race and racism. Yet race is not extrinsic or irrelevant to torts. Whiteness has been the legal default for torts from the end of slavery to the mid-twentieth century: courts consistently mentioned the race of litigants only if they were seen as not white and decisionmakers in the torts system had to be white during that same period.² This curricular silence is not due to a lack of awareness or it should not be. Race and racism have played a significant role in the tort system for a long time as research has long shown³ and as many published cases demonstrate.⁴ My own scholarly efforts in this area began over sixteen years ago and were followed by important interventions in the field.⁵ Nor is there a lack of awareness

² Courts routinely identified the race of the parties and witnesses whenever they were seen African-American from the end of slavery until the mid-twentieth century. *see* BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, & THE RAILROAD REVOLUTION, 1865-1920*, 379-389 (2001) (discussing hundreds of reported court cases from the late nineteenth and early twentieth century identifying the perceived race of Black plaintiffs); *See also* Jennifer Wriggins, Note 22, *Torts, Race, and the Value of Injury, 1900-1949*, 49 *HOW. L. J.* 99 (2005) (hereinafter Wriggins, *Value of Injury*) (describing racist exclusionary practices in civil justice system). Based on my reading of hundreds of tort cases, it seems that courts have not routinely identified litigants by ethnicity nor have courts routinely identified litigants by race other than those perceived as African-American. This could be an important area for further study.

³ *See e.g.* Welke, *supra* note 2; *See also* Frank McClelland, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 *RUTGERS L. REV.* 761-798 (1996); *See also* AUDREY CHIN & MARK A. PETERSON, *DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* (1985); *See also* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORD. L. REV.* 73 (1994).

⁴ For four striking examples among many, *see* *Griffin v. Brady*, 117 N.Y.S. 1136 (N.Y. App. Div. 1909) (mem.), *aff'd per curiam* 118 N.Y.S. 240 (1909) (denying motion for reargument), *aff'd* 126 N.Y.S. 1130 (App. Div. 1910) (mem.), *The Saginaw and The Hamilton*, 139 F.906 (S.D.N.Y. 1905), *aff'd sub nom* *The Hamilton*, 146 F. 724 (2d Cir. 1906), *aff'd sub nom* *Old Dominion SS Co. v. Gilmore*, 207 U.S. 398 (1907); *Wilson v. Singer Sewing Machine*, 184 N.C. 40 (1922), and *Bullock v. Tamiami Trails Tours*, 266 F.2d 326 (5th Cir. 1959), reversing 162 F.Supp. 203, 204 (N.D. Fla. 1958).

⁵ *See generally* Wriggins, *supra* note 1; Jennifer Wriggins, *Wriggins: Race and Torts*, L.

of the role race can play in the legal curriculum generally; increasing numbers of professors are asking how to include issues of race and racism in other courses while also covering necessary doctrinal issues. Yet torts has remained an outlier to a large degree.

The focus of this article is on how professors can incorporate issues of race and racism in first year torts courses. It begins with a survey of the existing teaching materials, finding that most avoid discussions of race and racism, and although they always discuss tort history, they omit the racial history of torts. It argues that the substance of tort law offers excellent opportunities to discuss these

PROFESSOR BLOGS (Aug. 30, 2006) https://lawprofessors.typepad.com/tortspof/2006/08/wriggins_race_a.html (blog post in a series about what to teach in torts); Jennifer Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865-2007*, 27 REV. OF LIT. 37 (2007) [hereinafter *Race and Remedies*]; Jennifer B. Wriggins, *Whiteness, Equal Treatment, and the Valuation of Injury in Torts, 1900-1949*, in FAULT LINES: TORT LAW AS CULTURAL PRACTICE (David M. Engel & Michael Mccann eds., Stan. Univ. Press 2009) [hereinafter *Whiteness & Equal Treatment*]; MARTHA CHAMALLAS AND JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (NYU Press 2010); Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263 (2010) [hereinafter *Constitutional Law and Tort Law*]; Jennifer Wriggins, *Toward a Feminist Revision of Torts*, 14 AM. UNIV. J. GENDER SOC. POL'Y & L. 139 (2010); Vinay Harpalani, *Teaching Torts with a Focus on Race and Racism – by Professor Jennifer Wriggins, Sumner T. Bernstein Professor of Law, University of Maine School of Law*, L. PROFESSOR BLOGS, (FEB. 13, 2020) <https://lawprofessors.typepad.com/racelawprof/2020/02/teaching-torts-with-a-focus-on-race-and-racism-by-professor-jennifer-wriggins-sumner-t-bernstein-pro.html>; MELISSA MILEWSKI, *LITIGATING ACROSS THE COLOR LINE: CIVIL CASES BETWEEN BLACK & WHITE SOUTHERNERS FROM THE END OF SLAVERY TO CIVIL RIGHTS* (Oxford Univ. Press 2018); Melissa Milewski, *Reframing Black Southerners' Experiences in the Courts, 1865-1950*, 44 L. & SOC. INQUIRY 113, (2019); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L. J. 661 (2017) [hereinafter *Discrimination*]; Ronen Avraham & Kimberly A. Yuracko, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CAL. L. REV. 325 (2018); Jonathan Cardi et al., *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CAL. L. REV. 507, (2020) [hereinafter *Do Black Injuries Matter?*]; Donald Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557 (2016); Alberto Bernabe, *Do Black Lives Matter? Race as a Measure of Injury in Tort Law*, 18 SCHOLAR, ST. MARY'S L. REV. ON RACE AND SOC. JUST. (2015).

critically important matters. It urges professors to confront, rather than avoiding discussions of race and racism and it offers suggestions and resources.

In particular, I recommend that law teachers incorporate issues of race and racism into the first year torts course in two major ways: First law professors should teach a number of pedagogically interesting cases that deal with race and racism in various ways that also illuminate significant doctrinal issues. These cases are less known than cases that are commonly taught, but they are also important and can convey the relevant doctrinal points equally well. Second, law professors should include more background on the torts system as it relates to race and racism. While this may seem daunting for some instructors, ample materials now on offer make it feasible for professors.

Law professors should include coverage of race and racism in torts courses and this article provides justifications in support of this view as well as concrete suggestions for cases, issues and teaching materials to include in torts courses. Having reviewed 23 recent casebooks, I suggest a brand new casebook and an existing casebook for professors who wish to incorporate a substantial focus on race and racism in their torts courses.

I am not advocating a wholesale change of curriculum or pedagogy, but rather an approach that recognizes the importance of race and racism in the torts system rather than ignoring it as past torts courses and casebooks have done. Moreover, the approach I advocate underscores the importance of skills that lawyers must have in any event, such as reading closely and rigorously analyzing specific facts and law. Adding a focus on the racial and racist context of tort law will not detract from but only add to the skills students can develop. In making these points, I do not label my approach at all. The subject matter of tort law, in other words, transcends any methodological or ideological focus; those may be particularized by individual instructor. Yet all torts courses should cover material on race and racism as a matter of routine. It is widely acknowledged that it is harmful and irresponsible to behave as though we “do not see race” and this should apply to the legal curriculum as well.

The first Part surveys the current landscape of 23 torts casebooks from 2016 to 2021 to see whether and to what extent they cover race and racism. Almost all pay scant if any attention to racism.

Although publishers regularly put out new editions of casebooks, casebooks generally have not expanded their focus to include race or racism. However, one casebook (only one) has long had a rich focus on race, ethnicity, and inequality.⁶ A brand new open source casebook, *Torts: A Twenty-First Century Approach*, published by CALI, pays extensive attention to race and racism as well as gender, socioeconomic status, disability and sexual orientation.⁷ Part Two contains specific suggestions for including race and racism as part of torts courses. I suggest basic background information and cases in major doctrinal areas that also relate to race and torts. Also using the basic observation that liability insurance is essential to tort litigation in that tort lawsuits generally are not brought unless the defendant is insured, I explain how to link the racially unequal distribution of liability insurance to a famous torts case, *Garrett v. Dailey*.⁸ Last, I focus on ways to approach damages in torts generally and as related to race and racism, highlighting the historical devaluation of injuries to African-Americans. Recognition of the ad hoc, arbitrary nature of torts damages and its frequent injustice leads to consideration of possible reforms.

I. THE CURRENT LANDSCAPE OF TORTS CASEBOOKS

My research assistant and I reviewed 23 introductory torts casebooks published between 2016 and 2021 to discern what their treatment of race and racism was,⁹ to see whether they included two

⁶ DOMINICK VETRI ET AL., *TORT LAW AND PRACTICE*. (Carolina Acad. Press 6th ed. 2020).

⁷ ZAHRA K. SAID, *TORT LAW: A 21ST-CENTURY APPROACH* (CALI 2021).

⁸ *Garrett v. Dailey*, 279 P.2d 1091 (Wash 1955).

⁹ The following books were reviewed: SAMANTHA BATES & JOHNATHAN ZITTRAIN, *ZITTRAIN TORTS PLAYLIST SPRING 2018* (Open Access H20); ARTHUR BEST ET AL., *BASIC TORT LAW: CASES, STATUTES, & PROBLEMS* (Wolters Kluwer 5th ed. 2018); GEORGE C. CHRISTIE, ET AL., *CASES AND MATERIALS ON THE LAW OF TORTS* (Foundation Press 6th ed. 2019); JOHN L. DIAMOND, *CASES AND MATERIALS ON TORTS* (3d. ed. 2016); DAN B. DOBBS ET AL., *TORTS AND COMPENSATION, PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY* (West Acad. Publ'n 8th ed. 2017); DOUGLAS LEE DONOHO, *THE MODERN LAW OF TORTS: A CONTEMPORARY APPROACH* (2020); MEREDITH J. DUNCAN ET AL., *TORTS: A CONTEMPORARY APPROACH* (West Acad. Publ'n 3d. ed. 2018); RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES AND MATERIALS ON TORTS* (Aspen Publishers

specific cases that are discussed in this article,¹⁰ and to see if they covered common carrier duties and liability insurance, as those are relevant to issues discussed here. We found that overall there was very little attention to race or racism.¹¹ Some casebooks did not mention race or racism at all. The most commonly included case involving an African-American plaintiff is the 1967 case of *Fisher v. Carousel Motor Hotel*. It was excerpted in twelve casebooks.¹² Turning to damages, ten casebooks mentioned race-based statistical tables with widely varying amounts of detail.¹³ Eleven casebooks alluded to or discussed other issues relating to race, racism and torts.¹⁴ More generally, all mentioned tort history and included old cases; often

12th ed. 2020); WARD FARNSWORTH & MARK F. GRADY, *TORTS: CASES AND QUESTIONS* (Wolters Kluwer 3d. ed. 2019); MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES: CASES AND MATERIALS* (Foundation Press 11th ed. 2021); JOHN C.P. GOLDBERG ET AL., *TORTS: RESPONSIBILITIES AND REDRESS* (Wolters Kluwer 5th ed. 2021); ERIC E. JOHNSON, *TORTS: CASES AND CONTEXT* (Vol. 2, 2016); VINCENT R. JOHNSON & CHENGLIN LIU, *STUDIES IN AMERICAN TORT LAW* (Carolina Acad. Press 6th ed. 2018); JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* (Wolters Kluwer 9th ed. 2017); ALEX B. LONG & TERI DOBBINS BAXTER, *TORTS: A MODERN APPROACH* (Carolina Acad. Press 2020); GEOFFREY RAPP, *TORT LAW IN FOCUS* (Wolters Kluwer 2020); DAVID W. ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* (W. Acad. Publ'g 5th ed. 2017); VICTOR E. SCHWARTZ ET AL., *PROSSER, WADE, AND SCHWARTZ'S TORTS: CASES AND MATERIALS* (Found. Press 14th ed 2020); AARON TWERSKI ET AL., *TORTS: CASES AND MATERIALS* (Wolters Kluwer 5th ed. 2021); JAMES UNDERWOOD, *TORT LAW: PRINCIPLES IN PRACTICE* (2d ed. 2018); DOMINICK VETRI ET AL., *TORT LAW AND PRACTICE* (Carolina Acad. Press 6th Ed. 2020), JOHN FABIAN WITT & KAREN M. TANI, *TORTS: CASES, PRINCIPLES, AND INSTITUTIONS* (CALI 5th ed. 2020); JOHN FABIAN WITT, *TORTS AND REGULATION: CASES, PRINCIPLES, AND INSTITUTIONS* (CALI 2d ed. 2020). Note that the recent casebook, *Tort Law: A Twenty-first Century Approach*, by Prof. Zahr Said (CALI 2021) is not included in this survey because it was not available until after the review was completed.

¹⁰ *Garratt*, 279 P.2d 1091; *Fisher v. Carousel Motor Hotel*, 424 S.W.2d 627 (Tx. 1967).

¹¹ Spreadsheet dated June 11, 2021, on file with the author.

¹² *Fisher*, 424 S.W.2d 627Tx. . In addition to the twelve casebooks that excerpted it, five more casebooks cited it. Only four casebooks addressed the plaintiff's race after the excerpt.

¹³ Spreadsheet, *supra* note 11.; Avraham & Yuracko, Note, *Torts and Discrimination*, 78 Ohio State L. J. 661, 683-685 (also surveyed six torts casebooks and discussed their treatment of race-based statistical tables for damages calculations in more detail).

¹⁴ Spreadsheet, *supra* note 11.

cases from the Jim Crow era, without discussion or explanation of context, the racial and racist exclusion of the torts system, or devaluation of African-Americans' claims.

Turning to coverage of issues highlighted later in this article, we found that eighteen of the casebooks mentioned or discussed liability insurance, although none mentioned the unequal distribution of it by race.¹⁵ Almost three-quarters of casebooks included *Garratt v. Dailey*,¹⁶ the famous chair-pulling case, discussed below in the context of liability insurance. Nineteen covered the duty of common carriers¹⁷ which is relevant to two cases connected with race discussed below.¹⁸

Summarizing the treatment of race and racism, casebooks continue to do very little besides sometimes including *Fisher v. Carousel Motor Hotel*, although some have made significant additions in recent years¹⁹ and two exceptions showcased below stand out for their sustained and nuanced focus on race and racism. And the issue of race and damages is covered by less than half of casebooks, with widely variable levels of detail.²⁰ The sparse to nonexistent coverage of race and racism in even very new editions is striking, unfortunate, and unnecessary.

Two casebooks feature sustained focus on race, racism, and related issues. The long-standing casebook with the most focused attention to race, ethnicity, and inclusion is 'Tort Law and Practice,' published by Carolina Academic Press and authored by Prof. Dominick Vetri, at University of Oregon, and several co-authors.²¹ It has specific suggestions for incorporating diversity and inclusion in torts classes, diversity and inclusion materials throughout the volume, and an index of such materials.²² It offers many opportunities to consider tort law in light of issues such as race, age, class, ethnicity,

¹⁵ *Id.*

¹⁶ *Garratt*, 279 P.2d 1091.

¹⁷ Spreadsheet, *supra* note 11.

¹⁸ *Gulf v. Luther*, 90 S.W. 44 (Tex. Ct. Civ. App. 1905); *Bullock v. Tamiami Trail Tours, Inc.*, 266 F.2d 326 (5th Cir. 1959), *reversing* 162 F. Supp. 203, 204 (N.D. Fl. 1958).

¹⁹ See, JOHN FABIAN WITT, TORTS & REGULATION: CASES, PRINCIPLES, AND INSTITUTIONS (2d ed. 2020); JOHN C.P. GOLDBERG ET AL., TORTS: RESPONSIBILITIES AND REDRESS (5th ed. 2021).

²⁰ Spreadsheet, *supra* note 11.

²¹ DOMINICK VETRI ET AL., TORT LAW AND PRACTICE (6th ed. 2020).

²² *Id.* at xlix-lvii.

gender, gender identity, and disability.

Second, a brand new, open source casebook, ‘Tort Law: A 21st Century Approach’ i centers issues of race and racism from the start, alongside canonical tort law cases. The casebook is published by CALI so it is free to students. The author is Prof. Zahr Said at University of Washington School of Law.²³ It also focuses on issues of gender, socioeconomic status, disability, and sexual orientation. The casebook, developed during the pandemic, was designed from the start to be compatible with asynchronous instruction. The book is organized into modules that can added into a class so a professor can easily use only a part of the book. The book, which includes cases that deal with race and other issues throughout, encourages thoughtful engagement with a wide range of issues in torts and is focused on testing understanding with useful questions in various formats after each section. This new casebook is rigorous and clear. It is truly a new beginning that is overdue. Despite these important exceptions, the overall picture from reviewing torts casebooks is that there seems to be a reluctance on the part of casebook authors and publishers to depart from existing materials to strike out in new directions.

II. INCLUDING RACE AND RACISM IN TORTS COURSES: CASES AND CONTEXT

Torts is an excellent course in which to include a focus on race and racism for several reasons. First, since it is a common law course focused largely on appellate opinions, there is more flexibility in material that can be used than in some code courses. Second, the material on race and racism now is readily available. A number of published appellate cases useful to understanding various doctrinal issues that also deal with race and racism that make great vehicles for analysis and class discussion have been ‘discovered’ and are showcased here. After all, thousands of African-Americans participated in the torts system as plaintiffs starting at the end of slavery; there are hundreds of reported torts cases with African-American plaintiffs from which to choose. Further, relatively recent

²³ Zahr Said, *TORTS: A TWENTY-FIRST CENTURY APPROACH* (CALI 2021).

published work on damages, race and racism in torts provides useful background that can be included in that section of torts courses. Third, torts courses always deal with some aspects of history, whether it is the origins of assault law, the shift from horse-drawn buggies to automobiles, the gradual development of strict products liability, or myriad other topics. Including a focus on race and racism as part of that history is a natural and organic addition to the course. Fourth, the private enforcement mechanism of torts (contingency fee agreements), with its individualized adjudication of injury, provided access to the legal system for thousands of African-American plaintiffs from the end of slavery onward; these aspects of torts shed light on access to the civil litigation system in general.

General background on torts, race, and racism

Exclusion and Failure

It is important to acknowledge that tort law has in many ways been a failure for African-Americans during much of its history in the U.S. Racist exclusion has been a key part of torts. Only people perceived to be white (and male) were allowed to be jurors, lawyers and judges during the periods often talked about in torts, the late nineteenth century to the mid-twentieth century.²⁴ Whiteness served as the default in judicial opinions; race was not mentioned unless someone involved in the litigation such as a witness or litigant was seen as other than white.²⁵ On the ground, there was American apartheid and a caste system.²⁶ This is part of the fabric of the legal system in torts. The bill of rights' equality principle was ignored for

²⁴ See Wriggins, *Value of Injury*, *supra* note 2 at footnote 22 (describing requirement that decision-makers in the civil justice system must be white). The jury instruction that appears in one of the cases I recommend considering for teaching explains and endorses this racist exclusion. See *Wilson v. Singer Sewing Machine*, 184 N.C. 40, 113 S.E.2d 503 (1922), *see infra* at Part II.B. 2

²⁵ See generally WELKE, *supra* note 2,2 at 379-89; Wriggins, *Value of Injury*, *supra* note 2,2 at 100, 110-35.

²⁶ See, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 111-47, 280-348 (2002) (stating that the "American system of apartheid was firmly in place in the first half of the [twentieth] century" and describing the racial caste system.)

decades. And torts still does not focus much on equality.

The focus of the field was in an industrial direction and centered on accidents.²⁷ Oliver Wendell Holmes wrote in 1897, ‘the torts with which our courts are kept busy today are mainly incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like.’²⁸ He and other influential thinkers such as Roscoe Pound implied that intentional torts had been pretty much solved, figured out, and dealt with.²⁹ But meanwhile, African-Americans from the end of slavery to at least the 1950s were suffering intentional injuries related to their race that torts did nothing about.

Torts is famously a field without a unitary governing principle.³⁰ But most scholars and teachers agree that two of its major purposes are to deter injury and to compensate for it.³¹ More broadly, tort liability is supposed to help protect physical safety³² and even the interest in being free “from apprehension of a harmful or offensive physical contact.”³³ But it was a huge failure in many ways where African-Americans are concerned. For example, at least 4,743 people were lynched between 1882 and 1968—the large majority were African-American, but civil lawsuits seeking compensation for lynching were

²⁷ See generally Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225, 1225-81 (2001) (highlighting accident-centered focus of twentieth century tort law).

²⁸ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897).

²⁹ Roscoe Pound made a similar point in 1922 about how assaults and “intentional aggressions” had been successfully dealt with by law and society and law had progressed to more subtle and difficult problems. See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 169-70 (1922); see also Jennifer Wriggins, *Domestic Violence Torts*, 75 S. CAL. L. REV. 121, 179 (2001) (discussing Pound’s assertion about the progress beyond intentional torts).

³⁰ See, e.g., DAN B. DOBBS, THE LAW OF TORTS 10-11, 17-19 (2000) [hereinafter DOBBS HORNBOOK].

³¹ See *id.* at 17, 19; RESTATEMENT (SECOND) OF TORTS § 901 (1965) (noting that one of the purposes of torts was “to give compensation, indemnity or restitution for harms”).

³² Dan Dobbs writes, “[i]n medieval England, the law of torts, like the law of crimes, had modest aims, principally to discourage violence and revenge. Today’s tort law has much grander aims.” DOBBS HORNBOOK, *supra* note 30, at 12. This also seems to assume that problems of violence have been somehow dealt with and are beyond the concern of tort law.

³³ PROSSER AND KEETON ON TORTS 43 (W. Page Keeton et al., eds., 5th ed. 1984).

extremely rare.³⁴ Torts did not deter or compensate for endless assaults on African-Americans or other harms –physical, mental, dignitary – even though when you look at the elements of the intentional torts—so many actions associated with lynching and other racial violence were – obviously - tortious. In these important ways and others, it has been a failure.³⁵ And it has been a failure in that even when African-Americans won tort claims, the damages awarded were generally less than awarded to whites for similar injuries.³⁶

Access and success

However, the history is complex and includes access and successes, and I think it is important to say that too. While appellate cases have treated whiteness of litigants as the unstated default, tort litigants have not all been white. African-Americans sued for torts from the end of slavery and won hundreds of tort cases.³⁷ This is not a matter of going back into history and adding figures or facts that weren't there; it is not a matter of imagining a different past like we see on TV sometimes. It is a matter of acknowledging what really did happen. When we teachers fail to do this it is an erasure of sorts and even if unintended, implies that these cases do not matter. When we do, it enriches the course and students' experiences.

If we fail to mention the lawsuits brought by African-Americans, or we just have one token decision with no context, as most casebooks still do,³⁸ we risk creating possible misimpressions. One misimpression is that African-Americans were not allowed to, or did not bring tort claims at all until perhaps the 1960s. This would

³⁴ See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 47-49 (1997); see e.g., JAMES HARMON CHADBOURN, *LYNCHING AND THE LAW* 78-80, 119 (1933).

³⁵ Further, governments at all levels have been at best complicit and at worse actively involved in violence and abuse directed at African-Americans. See, e.g., SHERRILYN IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* (2007); Friedman, *supra* note 25.

³⁶ See *infra* at Part II.B.6.a.

³⁷ See e.g. WELKE, *supra* note 2, Wriggins, *Value of Injury*, *supra* note 2, CHAMALLAS & WRIGGINS, *supra* note 2, at 48-62, Milewski, *supra* note 5.

³⁸ See Part I *supra* at note 12 (noting that *Fisher v. Carrousel Motor Hotel* was included in 12 casebooks out of 23 and that it was the most commonly included case involving an African-American plaintiff).

not be an unreasonable assumption given the general racism of the legal system up to that time. A second, contradictory misimpression is that the torts system must have treated African-Americans' claims the same as whites' claims, so the matter of race or racism is not worth discussing. Neither of these impressions is true however. As noted above, the only persons allowed to make decisions in the civil justice system until at least the 1950s were white and male.³⁹ Nonetheless, African-Americans brought and won hundreds of tort claims against big defendants like railroads; yet their injuries were often devalued by various mechanisms of the torts system.⁴⁰ Students should finish the torts course with a general sense of these realities.

Cases

Now I will discuss cases that are good vehicles for discussing, race, racism and torts, going through most of the major doctrinal areas and also briefly turning to liability insurance which is central to torts.⁴¹

*Battery, Agency, Fisher v. Carrousel Motor Hotel.*⁴²

If a casebook has any decision that relates to race, it is almost certainly going to be *Fisher v. Carrousel Motor Hotel*, a 1967 battery case. It highlights the traditional principle of battery that grabbing an object from someone's hand can be a battery,⁴³ where a restaurant manager grabbed a plate from the hand of an African-American man in a lunch buffet line at an event to which the man had been invited, shouting that he could not be served because of his race. This case deals with tort doctrine in a setting related to race and racism and demonstrates

³⁹ See Wiggins, *Value of Injury*, *supra* note 2 at footnote 22.

⁴⁰ See *infra* Part II.B.6.

⁴¹ I have a few slides pertinent to these cases and am happy to share them with anyone.

⁴² 424 S.W.2d 627 (Tex. 1967).

⁴³ Dan Dobbs writes "Extended personality. The plaintiff is also touched if the defendant touches some intimate extension of the plaintiff's person as when the defendant jerks a plate from the plaintiff's hand," citing *Fisher*. DOBBS HORNBOOK, *supra* note 30 at SEC. 31, 61-62. See Restatement (2d) of Torts sec. 18 cmt. c. (1965); *S.H. Kress v. Brashier*, 50 S.W.2d 922 (Tex. Civ. App. 1932).

tort law providing a remedy for racist actions. Different casebooks excerpt the case in different ways and typically include no context about it. The full decision states that that it was “undisputed” that the manager “was attempting to enforce the [restaurant] rules by depriving Fisher of services” because of his race.⁴⁴ Yet casebook authors sometimes excerpt it in a way that makes it seem as if the manager, although an agent of the motel under applicable law,⁴⁵ was acting on his own as an individual racist, rather than trying to enforce the restaurant’s institutional exclusionary policy.⁴⁶ This is misleading, in my view. It is very important that students know that the manager was acting to enforce the restaurant’s policy rather than acting on his own. These events probably took place around 1965, although neither opinion states the date; the Civil Rights Act of 1964 banned racial discrimination in public accommodations including restaurants.⁴⁷ Thus, depending on when the events occurred, it seems that the restaurant’s policy violated civil rights law. These aspects are certainly worthy of mention in casebooks and torts classes. In any event, there is no reason why this should be the only case in the entire course that relates to race and racism, particularly since there are so many fascinating, additional cases to include, some of which are discussed below.

Assault, Battery, Trespass, Agency, ‘White man’s government’ & Lawyer’s role, Wilson v Singer Sewing Machine Co.

Wilson v. Singer Sewing Machine⁴⁸ is a 1922 North Carolina Supreme Court case in which Singer Sewing Machine company was held responsible for the damages of Rosa Wilson, a Black woman, caused by a man hired by Singer to collect on an installment contract for a sewing machine.⁴⁹ Her claim was for assault upon her person

⁴⁴ 424 S.W.2d at 631.

⁴⁵ 424 S.W.2d at 630.

⁴⁶ See, e.g. HENDERSON et al, *supra* note 9 at p. 33.

⁴⁷ 42 U.S.C. 2000a (1964).

⁴⁸ Wilson v. Singer Sewing Mach. Co., 113 S.E. 508 (1922).

⁴⁹ Home sewing machines were extremely common in the late nineteenth and early twentieth century. See Marguerite Connolly, *The Disappearance of the Domestic Sewing*

and trespass upon her property; she alleged that the man, Garris, trespassed in her house, threw her Bible on the floor, swore, and grabbed the machine from her hands.⁵⁰ She won a verdict; the appellate decision does not specify the amount. Her damages were essentially mental distress damages. Specifically, she testified that “under the violent threats and conduct of said Garris she became faint, and she had an attack like heart trouble; and she had to have a doctor that night and all the next week, and was confined for a time to her bed.”⁵¹ The precise facts that led to the verdict as well as the cause of action are a bit vague as discussed below. ⁵² Singer appealed.

Class discussion can take three main directions. First, agency; second the facts and elements of the torts; and third the jury instruction about “white man’s government.” Singer on appeal first argued that the collector was not within the scope of his employment. The court, citing authority describing the scope of employment,⁵³ readily affirmed the jury’s determination of agency given the facts. Basic agency is a topic in every first-year torts course. The facts of grabbing the machine and trespassing can be used to initiate a discussion of agency and scope of employment for intentional torts (and crimes), an important torts question to this day, and covered in many casebooks.⁵⁴ A second direction is the precise torts that were committed. The court initially refers to assault but at the end of the

Machine, 1890-1925, 34 WINTERHUR PORTFOLIO, 1, 31, 35-37 (Spring 1999). Although ready-made clothes became widely available around 1920, clothes made with home sewing machines were much less expensive. *Id.* at 45. The opinion does not specify whether the collector was a Singer employee; it mentions that Mrs. Wilson had seen him at the office. 184 N.C. at 508.

⁵⁰ *Wilson*, 113 S.E. at 508.

⁵¹ *Id.*

⁵² *Id.*

⁵³ For example, the court noted that “I”n 2 O.J. 848, Sec. 533, it is said: “The liability of the principal for torts committed by him is not limited to torts which he has expressly authorized or directed. He is liable for all the torts which his agent commits in the course of employment; and if he commits a tort in the course of his employment the principal is liable therefor, even though he was ignorant thereof, and the agent in committing it exceeded his actual authority, or disobeyed the express instruction of his principal.” 113 S.E. at 508.

⁵⁴ See, e.g., *Lisa M. v. Henry Mayo Newhall Me. Hosp.*, 48 CAL. RPT. 2d 510 (Cal. 1995), *John R. v. Oakland Unified School District*, 769 P.2d 948 (Cal. 1989); see also JOHNSON & LIU, *supra* note 99, at 9 663-668.

decision refers to battery and assault.⁵⁵ It is not clear whether the tug of war between Garris and Mrs. Wilson over the sewing machine constituted a battery. A basic principle as noted above is that grabbing an object closely associated with one's body can be considered a battery.⁵⁶ Is the sewing machine such an object? And what exactly are the facts that constitute the assault? Trespass is clearer; it seems he came into her house without permission.⁵⁷

Third, the jury instruction merits discussion. The defendant claimed as a ground for appeal that the lengthy jury instruction prejudiced the jury against it.⁵⁸ The instruction endorses white supremacy and also bids the jury to make a decision only based on the facts and the law. The instruction states in part:

Now, it appears that the plaintiff is a colored woman. Her rights are being passed upon by a jury with 12 white men on it, and a white man on the bench. Notwithstanding this fact, it is a matter of serious responsibility to us, because I firmly believe in the fact that this is a white man's government, that he alone ought to hold its offices, run its courts, sit in its Legislatures, and make the laws, and enforce the laws for the benefit of all the people. Notwithstanding that fact, it is a matter of serious responsibility to us that, when the rights of property and personal liberty of colored people are being passed on in the courthouse, with no representative of their race and color on the jury, or on the bench, it is a matter of most serious responsibility, that we should be absolutely fair to them in passing on their rights and forget for the time being that the color of their faces is different from yours and mine. Anything else than that would make a farce of the so-called administration of justice. The courthouse is no place for race prejudice in passing on their rights.⁵⁹

The court held the instruction to be acceptable and not unfairly prejudicial to Singer. The court found it important that the

⁵⁵ *Wilson*, 113 S.E. at 510.

⁵⁶ See DOBBS HORNBOOK, *supra* note 29 at sec. 31, 61-62 (2000). Here the plaintiff had been making payments for four years and she had probably spent many hours using it. See also *S.H. Kress Co. v. Brashier*, 50 S.W.2d 922 (Tex. Civ. App. 1932).

⁵⁷ Civil courts do not always precisely distinguish between assault and battery perhaps because of their origins in criminal law. JOHNSON & LIU, *supra* note 9, at 67-68.

⁵⁸ *Wilson*, 113 S.E. at 509.

⁵⁹ *Id.*

judge stated “nothing is further from my thoughts than meaning to say that a colored person has more right to recover than a white person and the verdict should be found according to the facts as those are found to be.”⁶⁰

The instruction obviously is offensive and objectionable in many ways. At the same time, there can be value to teaching this case. It vividly illustrates the indisputable racist exclusion of the entire legal system including the torts system at the time. How could “race prejudice” be kept out of the courthouse as the end of the instruction said when American apartheid ruled the day and the judge himself endorsed rule by white men? Obviously, it could not. It took decades of struggle for the “white man’s government” mentioned in the instruction to change, and the struggle against racism in the legal system continues to this day. At the same time that the instruction endorses racism and racist exclusion from decision making rules, it calls for an individualized assessment of the facts of the case rather than a decision based on racist generalizations. It allows consideration of the plaintiff’s narrative, and the possibility of a plaintiff’s victory in the case, as indeed was achieved.

The deterrent effect of the decision is worth considering and asking about. The jury verdict and the appellate court’s endorsement of it send a clear message to Singer and other companies. What is that message? To hire people to collect on installment contracts who do not trespass, swear, throw items of customers on the ground or take other similar extreme steps to collect on the contracts, regardless of the customer’s race.

The case also can get students thinking about the role of clients, lawyers, private enforcement and contingency fee agreements in torts—then and now. Rosa Wilson was wronged and injured by Garris’ behavior; she went to see a lawyer to do something about it.⁶¹ Rosa Wilson’s lawyer was almost certainly white and male and paid by

⁶⁰ *Id.*

⁶¹ This was a bold step to take. For example, the National Association for the Advancement of Colored People in its magazine *THE CRISIS*, summarized some personal injury cases won by Black plaintiffs. *See*, WRIGGINS, *VALUE OF INJURY*, *supra* note 2, at footnote 33; MILEWSKI, *supra* note 5. *See generally*, ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (2017) (arguing that asserting claims in litigation is an important part of a functioning democracy).

contingency fee agreement.⁶² That plaintiffs' lawyer assessed the case as worth bringing, took it to a jury trial and persuaded an all-white, all-male jury to award what were basically mental distress damages to a Black woman plaintiff. That was quite a feat, especially given the stereotypes of the day that the "ladies" who were delicate and would suffer emotional injuries all were white.⁶³ The torts system allowed Rosa Wilson's individual narrative to be heard by the jury resulting in this surprising win. Of course, there is much unknown about the case such as the amount of damages and whether they were was in line with other similar cases if there were any.⁶⁴ This is not to say, of course, that the torts system of the day was not racist. Obviously it was. And here is an example of how lawyers can make a difference for individuals in the face of systemic racism and sometimes win in a David-Goliath battle.

***Common carriers, early precursor of Intentional
Infliction of Emotional Distress, White Privilege and Racialized
Fear, Gulf v. Luther.***

Gulf v. Luther⁶⁵ is a 1905 Texas case where the relevant events took place in the "ladies" waiting room of a train station.⁶⁶ Students may be surprised to learn, as I was, that train stations in large

⁶² PETER KARSTEN, ENABLING THE POOR TO HAVE THEIR DAY IN COURT: THE SANCTIONING OF CONTINGENCY FEE CONTRACTS, A HISTORY TO 1940, 47 DEPAUL L. REV. 231, 243-247 (1998) (describing increasingly widespread acceptance of contingency fee agreements since the mid nineteenth century).

⁶³ CHAMAILAS & WRIGGINS, *supra* note 5 at 37-48, WELKE, *supra* note 2 at 289-294. For an example see *Gulf v. Luther*, *infra* at PART II.B.3.

⁶⁴ *Wilson v. Singer Sewing Machine* would be an interesting case for historians, law students and faculty to do further research on, including finding out the actual amount of damages.

⁶⁵ *Gulf, C & S. F. R. Co. v. Luther*, 90 S.W. 44, 45 (Tex. Civ. App. 1905).

⁶⁶ This case is included in Prof. Said's TORTS: A TWENTY-FIRST CENTURY APPROACH (CALI, 2021). This is the only casebook featuring this case. Prof. Said encourages students to think hard about how authority is used in common law adjudication in the following way: She includes a case cited in *Gulf v. Luther* and *Int'l & G.N.R. Co. v. Henderson*, 82 S.W. 1065 (Ct. Civ. App. Tex. 1904) after *Gulf* itself. The actual facts of the *Henderson* case contrast with *Gulf* court's characterization in its parenthetical of the case in vivid and disturbing ways. For further discussion of *Gulf v. Luther*, see WRIGGINS, TOWARD A FEMINIST REVISION OF TORTS, *supra* note 5.

cities in the segregated South often had 3 waiting rooms - one for white women, their children, and their white male escorts (usually husbands). A second was for all other whites, used mostly by white men. Black women and men were limited to “colored” waiting rooms.⁶⁷ The station has been restored and at least prior to the pandemic was a venue available to rent for events.⁶⁸ The African-American woman attendant (who is unnamed throughout the opinion) in the ladies waiting room and a white mother whose child spilled water on the floor got into a verbal fight.⁶⁹ The white woman, Mrs. Luther, said the child didn’t know there was water in the cup; the attendant said the child was lying.⁷⁰ Mrs. Luther claimed the attendant was frightening as she “turned on me with an angry look.”⁷¹ Mrs. Luther testified she told the attendant she was not “accustomed to be[ing] treated this way by colored people” and the attendant replied, “I am used to your kind. I meet up with them every day.”⁷² In the verbal exchange, the Black woman apparently shook her finger at the white woman, stood “right over her,” and looked “vicious and angry,” according to Mrs. Luther.⁷³ Mrs. Luther’s husband later sued for her injuries described as “great fright, humiliation, worry, distress, nervous prostration, physical pain, and mental anguish.”⁷⁴ The jury ruled against the railroad and awarded \$2500.00.⁷⁵ This is \$77,928.98 in today’s dollars.⁷⁶ The judgment was upheld on appeal.⁷⁷

⁶⁷ WELKE, *supra* note 1 at 96-201, 276-277.

⁶⁸ *A Visit to the Restored Santa Fe Depot, Fort Worth, TX, I RIDE THE HARLEM LINE* (Oct. 30, 2014), <https://www.iridethelarlemline.com/2015/10/30/a-visit-to-the-restored-santa-fe-depot-fort-worth-texas/>.

⁶⁹ *See Gulf*, 90 S.W. at 46 (accepting Mrs. Luther’s testimony and ignoring testimony of the African-American attendant).

⁷⁰ *See id.* at 45.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 46. The plaintiff was Mr. Luther, not Mrs. Luther. Although, under Texas law, it seems she could have sued in her own name, unlike in jurisdictions that adopted the common law since Texas law in this regard derived from Spanish civil law. *See* WRIGGINS, TOWARD A FEMINIST REVISION OF TORTS, *supra* note 5, at 146, *supra* note 35.

⁷⁵ *See id.* at 45. The unnamed attendant was not a defendant in the case, unsurprisingly, as she probably lacked the assets to satisfy a judgment.

⁷⁶ \$2,500 in 1905 is worth \$78,576.429928. today. Ian Webster, CPI INFLATION

In this case there is no real question of whether the attendant was an agent of the railroad because of the duty owed by the railroad as a common carrier. As noted above about 80% of casebooks cover the common carrier duty doctrine in some way.⁷⁸ The setting of common carrier liability is doctrinally important; during this time the law was already developing in the direction of common carriers having broad liability for insults to passengers by their employees even in the absence of physical contact or injury.⁷⁹ The employee's behavior had to be insulting or outrageous for the common carrier to be liable and here it was, according to the jury. The case also invites interesting discussion of the facts of the case and the question of what exactly is the tort which I have found to be a useful exercise for students because it is practicing applying the law to the facts. Could it have been a battery? Could it have been an assault?⁸⁰ The assault question is worth spending a few minutes on – did the attendant shaking her finger in the white woman's face create an apprehension of immediate physical contact? And does the apprehension have to be reasonable or just genuine?⁸¹ An assault or battery were generally prerequisites for mental distress damages. Here there was a verbal exchange and a finger shake. And this was a time before the free-standing tort of intentional or reckless infliction of emotional distress had been developed.⁸² The law applied to common carriers is the answer, but the discussion of the facts and law is an important

CALCULATOR, <https://www.in2013dollars.com/us/inflation/1905?amount=2500> (last visited Nov. 8, 2021).

⁷⁷ See *Gulf*, 90 S.W. at 49.

⁷⁸ See Spreadsheet, *supra* note 11.

⁷⁹ See CHAMALLAS & WRIGGINS, *supra* note 5, at 48-52.

⁸⁰ See *id.*

⁸¹ Professor Vincent Johnson writes “[t]here is some dispute as to whether the plaintiff's apprehension of contact must be reasonable or merely genuine. According to the Restatement, if the defendant succeeds in intentionally placing the plaintiff in apprehension of imminent contact[**]** it is irrelevant that that defendant's acts would not have placed a person of ordinary courage in such apprehension. (citing Restatement (Second) of Torts § 27 (Am. L. Inst. 1965). However, some cases appear to reach a different conclusion” (citing *Bouton v. Allstate Ins. Co.*, 491 So. 2d 56 (La. Ct. App. 1986)); JOHNSON & LIU, *supra* note 9, at 79.

⁸² The American Law Institute first recognized emotional distress as a free-standing claim in 1948, and then reframed the tort in the Second Restatement. Restatement (Second) of Torts § 46 (Am. L. Inst. 1965).

exercise for law students. The case presents a noteworthy example of a precursor to the intentional and reckless infliction of emotional distress tort, where there is no physical contact yet there is recovery for mental distress damages.

Race, gender, and status are all inseparable from the injury, and the language of the opinion as it refers to the facts of the case is a powerful example of how racism and sexism were part of tort law in action. Careful reading in class, as always, is illuminating. In my view, white privilege benefited Mrs. Luther.⁸³ The attendant's behavior arguably could be seen as "outrageous" only if it is assumed that Mrs. Luther had a right to be treated with special deference as due a white woman.⁸⁴ Mrs. Luther is treated as delicate and fragile while the attendant is "masculinized" and made to seem actually violent.⁸⁵

Also in discussing torts cases, it is useful to consider the deterrent effects of opinions. Here the court is incentivizing railroads to hire extremely deferential attendants and encouraging white women to be both entitled and fragile. Not all tort cases are written with this kind of rhetoric but it is important for students to see and think about this history in the course of their study of doctrine.⁸⁶

Negligence, foreseeability, duty, Bullock v. Tamiami Trails Tours

*Bullock v. Tamiami Trails Tours*⁸⁷ is a Fifth Circuit case from 1959 deriving from a violent attack on a couple sitting in the front of a bus that deserves to be widely taught in the negligence section of torts courses.⁸⁸ It is a civil rights case as well as a torts case,

⁸³ See CHAMALLAS & WRIGGINS, *supra* note 5, at 50.

⁸⁴ See *id.*

⁸⁵ The opinion speaks of Mrs. Luther's nightmares after the event and the attendant's actions as "murdering sleep." *Gulf*, 90 S.W. at 48; see also WELKE, *supra* note 2, at 125-136 (describing the stereotype of an acutely sensitive and fragile white woman).

⁸⁶ WELKE, *supra* note 2, at 289. ("In the wake of the [Civil W]ar, white womanhood became a critical bulwark of white supremacy.")

⁸⁷ See *Bullock v. Tamiami Trails Tours*, 266 F.2d 326 (5th Cir. 1959), reversing 162 F.Supp. 203 (N.D.Fla. 1958). The Fifth Circuit opinion will be referred to as *Bullock II*; the District Court opinion will be referred to as *Bullock I*.

⁸⁸ This case is included in Professor Said's TORTS: A TWENTY-FIRST CENTURY

raises significant doctrinal issues, and has other fascinating aspects.

The events in the case took place on an interstate bus in Florida during the time of the Montgomery bus boycott.⁸⁹ A married couple from Jamaica came to Florida as tourists in late summer 1956, intending to travel by bus to New York City.⁹⁰ Seven months before, the Interstate Commerce Commission (I.C.C.) had ordered interstate buses to be integrated.⁹¹ The husband, Reverend Bullock, was as the court said ‘dark or black,’ while the wife, as the court put it, ‘although a Negress’ appeared to be white.⁹² They boarded the bus in Miami and sat together in the front.⁹³ A white passenger soon complained to the driver, who asked Rev. Bullock to move to the back, but he declined.⁹⁴ When the bus stopped in the middle of the night at a northern Florida restaurant that was used as a bus stop, the driver told some people in the restaurant about the Bullocks’ presence, how they would not move back, and how there was nothing he could do about it.⁹⁵ A white farmer, Milton Poppell, who lived nearby heard this, bought a ticket on the bus, got on the bus, told them to move back, and when they refused, slapped and struck them.⁹⁶ They sued the bus company for their injuries in federal court when they got to New York City.⁹⁷

APPROACH. This is the only casebook featuring this case.

⁸⁹ The dates of the Montgomery Bus Boycott were December 5, 1955, to December 20, 1956. HISTORY, <https://www.history.com/topics/black-history/montgomery-bus-boycott> (last visited May 30, 2021).

⁹⁰ See *Bullock II*, 266 F.2d at 328.

⁹¹ See CATHERINE A. BARNES, JOURNEY FROM JIM CROW: THE DESEGREGATION OF SOUTHERN TRANSIT 99 (1983) (noting that after years of ruling that segregation in interstate public transportation was legal, the Interstate Commerce Commission in 1955 ordered rejection of Jim Crow rules in interstate bus transportation by January 10, 1956). The Fifth Circuit mentions a January 23, 1956 memo to drivers; this was doubtless in response to the I.C.C.’s ruling. See *Bullock II*, 266 F.2d at 332, n.5.

⁹² *Bullock II* 266 F.2d at 328. Although the Fifth Circuit was clear that Mrs. Bullock was a “Negress,” the trial court described her as simply white. See *Bullock I*, 162 F. Supp. at 204 (stating that the “husband is colored and the wife is white.”).

⁹³ See *id.* at 328.

⁹⁴ See *id.* at 331.

⁹⁵ See *Bullock I*, 162 F. Supp. at 204. The restaurant was Pouncy’s restaurant which was open until recently. Pictures of it can still be found online.

⁹⁶ See *id.* at 205.

⁹⁷ See *id.* at 204. The trial court stated that the bus driver called the police after the

The case raises a classic torts question - Should the bus company (a common carrier) be liable for the actions of a passenger?⁹⁸ The assaulting farmer was not an employee of the company (unlike the attendant in *Gulf v. Luther*⁹⁹ who shook her finger at the white train customer). And he was not an agent of the company acting on its behalf (unlike the person who collected installment payments for sewing machines in *Wilson v. Singer*).¹⁰⁰ Like much in negligence cases a lot in this case turns on duty and foreseeability.¹⁰¹ After a bench trial, the district court said the attack was unforeseeable, segregation in public transportation was voluntary, this was the only example of unprovoked assault in the four year history of desegregating public transit in the south,¹⁰² and concluded the bus company had no duty here and was not liable.¹⁰³

The Fifth Circuit reversed, finding the attack foreseeable

assault and the police came and arrested both Milton Poppell and Rev. Bullock, demanded a \$25 bond from each of them, and directed the Bullocks to take a seat in the rear of the bus which they did.

⁹⁸ This question of the extent of the carrier's liability when a passenger attacks another passenger continues to this day. *See, e.g.,* *Maison v. New Jersey Transit Corp.*, 24A.2d 536 (N.J. 2021).

⁹⁹ *See Gulf v. Luther*, 90 S.W.44 (Tex. Civ. App. 1905).

¹⁰⁰ *See Wilson*, 184 N.C.; regarding whether Garris was an employee *see supra* note 51.

¹⁰¹ *See, e.g.,* Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(A) (2010) (“(a) An actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm. (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.”); W. PAGE KEETON, ET AL., EDS., *THE LAW OF TORTS*, 356 (5th ed. 1984) (explaining the intersection of duty, obligation, and risk in negligence cases); *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y.1929) (“The risk reasonably to be perceived defines the duty to be obeyed.”).

¹⁰² This was incorrect. Actually, there was violence involving people who were injured, and African Americans were killed for sitting in the front of buses prior to the violence that led to this lawsuit. *See BARNES, supra* note 90, at ix, 11, 40, 62, 104 (describing how segregated public transportation was one of the most hated forms of racial segregation for Southern African Americans and was resisted well before and throughout the Jim Crow period as well as afterwards, with many instances of violence against African Americans who would not move to the back of the bus).

¹⁰³ *See Bullock I*, 162 F. Supp. at 205.

largely because of the social conditions of the day and the place. The appellate court wrote that “the folkways prevalent in Taylor County Florida. . . would cause a reasonable man, familiar with local customs, to anticipate that violence might result if a Negro man and a seemingly white woman should ride into the county seated together toward the front of an interurban bus.”¹⁰⁴ Context mattered, “mischief was hovering about,” the company did not do enough to prevent the attack, and was liable.¹⁰⁵ The case was remanded for determination of damages.¹⁰⁶

Bullock can be used to discuss several important negligence questions. These include duty, the court’s use of the “reasonable man” standard in the case, and the deterrence potential of tort cases. It’s useful to compare the reasoning of the two opinions to rigorously contrast them. For example, what are the key differences in reasoning between the District Court opinion and the Fifth Circuit opinion? Duty is key. The Fifth Circuit and the District Court drew conflicting conclusions about duty ostensibly because of drawing opposing empirical, factual conclusions about the attack’s foreseeability. The Fifth Circuit found that “mischief was hovering about” so harm was foreseeable and the bus company had a duty to prevent it.¹⁰⁷ The District court found the opposite. Therefore the precedents stating that bus companies were not liable to passengers for harm caused by unprovoked assaults by other passengers were on point to the District Judge.¹⁰⁸ Also fascinating is the Fifth’s Circuit’s invocation of the “reasonable man” standard, tying it to the very specific facts of the case and to custom—an African-American man, a seemingly white woman, sitting in the front of the bus, in Taylor County Florida—was a risk-creating circumstance that the bus company had to take account of.¹⁰⁹ It is not clear what evidence the Bullocks presented at trial

¹⁰⁴ See *Bullock II*, 266 F.2d at 331.

¹⁰⁵ See *id.* at 331-32 (ruling that the danger to the Bullocks should have been reasonably foreseen by the company, giving them time to act to avoid passenger injury).

¹⁰⁶ See *id.* at 332.

¹⁰⁷ *Id.* at 331.

¹⁰⁸ See *Bullock I*, 162 F. Supp. at 205; see also *Hall v. Seaboard, So. 151, 154* (Fla. 1921) (finding the railroad was not liable for unforeseeable injury to plaintiff by a fellow passenger).

¹⁰⁹ See *Bullock II*, 266 F.2d at 332. Taylor County, Florida is a coastal county

about other attacks but thinking about that question gets students thinking about the kind of evidence they would try to present at trial in order to establish a duty such as evidence of similar attacks.¹¹⁰ Such evidence might have been necessary to persuade different judges.¹¹¹

The decision spreads the costs of injury by racists and creates an economic incentive for all interstate bus companies to prevent racist injury. The Fifth Circuit at this time consisted of Florida, Alabama, Mississippi, Georgia, Louisiana and Texas, so the decision applied throughout the Deep South. One can ask students something like, “if you were general counsel to Greyhound, Trailways or some other interstate bus company at this time, what would your advice to your client be after reading this decision?” And one can ask, “if you were a plaintiff’s lawyer at that time, and an African-American passenger who had been attacked by a white passenger while sitting in the front of an interstate bus consulted you after this decision, what would you do?” The court in effect “sided” with persons who were defying the segregated customs of the day. By reshaping the duty to protect, it afforded a broad prospective civil rights remedy in tort for private racial violence. In that sense it is a challenge to racism.

But the Fifth’s Circuit’s list of “precautions” the company should have taken to prevent the harm presents a more limited challenge to racist exclusion.¹¹² For example, the court said the company should have told the driver to inform visiting foreign blacks (like the Bullocks) of the South’s segregation traditions, and “should have explained his reasons for wanting them to move.”¹¹³ This raises questions such as: if bus driver had given reasons for wanting them to move, they still had refused to move, and had been attacked, would the bus company be liable? The court left these questions

southeast of Tallahassee. The major city, Perry, is fifty-one miles from Tallahassee. The trial court was located in Tallahassee.

¹¹⁰ See Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351 (2010).

¹¹¹ The decision was written by Judge Rives, who also decided the Montgomery Bus Boycott case, *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956), *aff’d* 352 U.S. 903 (1956).

¹¹² *Bullock II*, 266 F.2d at 332.

¹¹³ See *id.*; see e.g., *Hall v. Seaboard*, A.L.R. 93, So. 151, 154 (Fl. 1922) (railroad not liable for unforeseeable injury by fellow passenger).

unanswered, but close reading of the opinion suggests they would not have excused the bus company even if the driver had explained the reasons he wanted them to move.¹¹⁴

Notably, tort law did not supply the principle of equal access so that the Bullocks were allowed to sit in the front of the bus. It was the regulatory agency, the I.C.C., that established the rule requiring bus companies to desegregate buses.¹¹⁵ Once the I.C.C. had provided that equal access principle, tort law could serve an important regulatory, private enforcement function through lawsuits brought by private lawyers using contingency fee agreements to fund the litigation.¹¹⁶

Liability insurance and its unequal distribution by race; the whiteness of litigants as unstated default; Garratt v. Dailey.

Access to liability insurance equals access to the tort system.¹¹⁷ When plaintiffs in the tort system receive money for damages, the money generally comes out of a defendant's liability insurance policy, rather than out of the defendant's pocket. ¹¹⁸

¹¹⁴ For further discussion see Wriggins, *Toward a Feminist Revision of Torts*, *supra* note 5, at 151-152.

¹¹⁵ See BARNES, *supra* note 90, at 84 (citing the ICC rule). The lawyering in the case is impressive; the deposition of the farmer, Milton Poppell's deposition is quoted at length in the District Court opinion and the questioning is well done.

¹¹⁶ Tort law as a deterrent is debated. See, e.g., Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 UCLA L. REV. 377, 381, 390 (1994). With respect to desegregation of interstate buses, the effect of this decision is unclear and has not been studied to my knowledge. The Freedom Rides aimed at "ending the remaining segregation in bus travel" began in May 1961, years after this decision, suggesting its effect was limited. See BARNES, *supra* note 90, at 156. Catherine Barnes, in her history of desegregation of Southern transit, notes that by 1961 almost all forms of segregated transit had been outlawed and much desegregation had taken place. See *id.* at 155. Segregated transit persisted in various forms, and between 1955 and 1961 neither the Justice Department nor the I.C.C. did much to enforce desegregation requirements. See *id.*

¹¹⁷ See Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L. J. 1 (2006) (explaining that liability insurance is a de facto element of tort liability except for claims against the wealthiest organizations and individuals).

¹¹⁸ See Tom Baker, *Blood Money, New Money and the Moral Economy of Tort Law in Action*, 35 L. & SOC'Y REV. 275 (2001); KENNETH ABRAHAM, *THE LIABILITY*

Liability insurance also pays the bills for defense and plaintiff lawyers—either directly or indirectly.¹¹⁹ As noted earlier a large majority of casebooks now mention liability insurance.¹²⁰ Yet they all leave out how unequally liability insurance has been distributed.¹²¹ It has been unequally distributed by race – as a result at least in part of deliberate racism by institutions, individuals, and governments, through practices such as redlining, which both insurance companies and government engaged in.¹²²

The 1955 case of *Garratt v. Dailey*,¹²³ a true classic, included in more than three-quarters of casebooks reviewed,¹²⁴ is an ideal case in which to briefly elucidate this context. It is almost always one of the first cases in the casebook. Ruth Garratt, an older woman with arthritis, sued a five-year-old boy, Brian Dailey, for injuries she received when he pulled a folding chair out from under her as she was starting to sit down in her backyard, where Brian was visiting. Generations of law students ponder the intent Brian did or did not have, what kind of intent is required for battery liability, and why this was a battery. Leaving those questions aside, here I'll highlight a few other aspects of the case. Ruth won \$11,000 (about \$109,611 in

CENTURY: INSURANCE & TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, 171-197 (2008).

¹¹⁹ Standard liability policies include a “duty to defend,” meaning that the policy will cover the bills of a competent lawyer retained by the insurance company to represent the defendant. See ROBERT H. JERRY & DOUGLAS R. RICHMOND, UNDERSTANDING INSURANCE LAW 111, 691 (6th ed. 2018). Plaintiffs’ lawyers generally are paid by contingency, meaning the lawyer takes her fee out of the plaintiff’s recovery as well as reimbursing her own costs from the recovery. The money for the settlement or judgment as noted above comes from liability insurance.

¹²⁰ See *supra* note 15.

¹²¹ See *id.*

¹²² See, e.g., RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017), HUGHES ET AL, MEETING THE INSURANCE CRISIS OF OUR CITIES: A REPORT BY THE PRESIDENT’S NATIONAL ADVISORY PANEL ON INSURANCE IN RIOT-AFFECTED AREAS (1968) [hereinafter HUGHES REPORT]; Jennifer Wriggins, *The Color of Property and Auto Insurance: Time for Change*, FLA. ST. UNIV. L. REV. (forthcoming Fall 2021).

¹²³ *Garrett v. Dailey*, 46 Wash. 2d at 279. The opinion after the remand, quoted in some casebooks, is at 49 Wash. 2d 499 (Wash. 1956).

¹²⁴ See *supra* Part I.

today's dollars)¹²⁵ for a fractured hip and serious injuries.¹²⁶ The judgment was paid for by Brian's parents' homeowners insurance policy, one casebook tells us.¹²⁷ And the homeowners insurance company provided Brian with a lawyer who represented him in the case to its conclusion.¹²⁸ But Brian's parents owning a home and having homeowners insurance both were not foregone conclusions; they were grounded in context and history.

So, how to teach that aspect of the case? Besides the doctrinal material, here is what I do—and it doesn't take long. At some point in the class after the discussion of the doctrine, I ask a series of questions. Did five-year-old Brian have \$11,000? (No). Did his parents have 11,000? (Maybe). But wait a minute, are Brian's parents legally responsible for what Brian did? (Normally no). Unless there is a statute on point, or Brian is a serial chair puller, they would not be legally responsible.¹²⁹ So where did the money come from to pay the judgment? Someone may say Brian's parents' homeowners insurance. Question – how? This incident had nothing to do with Brian's home; it took place in Ruth Garratt's backyard. Someone may know that a person's homeowners insurance policy covers them everywhere in the world; the liability does not have to be connected to the home.¹³⁰

¹²⁵ CPI INFLATION CALCULATOR, <https://www.in2013dollars.com/us/inflation/1955?amount=11000#:~:text=Value%20of%20%2411%2C000%20from%201955,cumulative%20price%20increase%20of%20896.47%25>.

¹²⁶ See *Garratt*, 46 Wash. 2d at 199.

¹²⁷ VINCENT JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 28 (3rd ed. 2005) (citing Walter Probert, *A Case Study in Interpretation in Torts: Garratt v. Dailey*, 19 TOL. L. REV. 73, 85 n. 65 (1987) (noting the judgment against Brian Dailey was paid by his parents' homeowners insurance policy)). This fact is included in later editions of the casebook without the citation to the article by Walter Probert. See, e.g., VINCENT JOHNSON, *STUDIES IN AMERICAN TORT LAW* 30 (5th ed. 2013).

¹²⁸ See JERRY & RICHMOND, *supra* note 122 at 111, 691 (describing the duty to defend).

¹²⁹ See, e.g., JOHNSON & LIU, *supra* note 9, at 62-65 (noting that at common law, in the absence of a statute, parents are not legally responsible for their children's torts simply by being parents, but that vicarious liability can arise in some circumstances).

¹³⁰ See, e.g., Cara O'Neill, *Does My Homeowners' Insurance Cover Accidents That Occur Off My Property?*, NOLO, <https://www.nolo.com/legal-encyclopedia/does-my-homeowners-insurance-cover-accidents-that-occur-off-my-property.html> (last visited Oct. 6, 2020) (noting that standard homeowners policies cover liability from off-

This typically surprises a lot of people.

And then I show a map of a redlined city,¹³¹ mentioning that insurance companies used to refuse to insure all buildings in huge swaths of cities not just for property insurance but liability insurance too.—as liability insurance and property insurance have been always sold together since 1949.¹³² For example, in Boston in the 1950s, all insurers pronounced every single property in the neighborhood of Roxbury to be ‘blighted’ and refused to sell insurance to homeowners there until regulatory action was taken starting in the 1960s.¹³³ – And then I say – if Brian’s chair pulling had taken place in this spot (a red area) there would have been no lawsuit because there would have been no liability insurance. Without a lawsuit, Ruth would have had to pay her own medical bills and they might have bankrupted her. If she owned a house (as indeed it seems that she did), she might have lost it to creditors because of the medical bills. But if the chair pulling had taken place in this spot (pointing to an area outside the redlined zone), it would be much more likely that there would be a lawsuit – coverage of Ruth’s big medical bills and pain and suffering damages. Putting all this together, we don’t know for certain whether little Brian Dailey and Ruth Garratt were white, but they probably were. And the chair pulling incident took place in 1951 which was prime time for insurance redlining in the United States. ¹³⁴ We don’t know for certain that if a factually identical incident had taken place in another part of town predominantly inhabited by African-Americans, it would have resulted in no lawsuit - but we can be pretty sure of this given what is true about liability insurance, tort litigation, and redlining.¹³⁵ And if Brian’s parents were renting in the 1950s it is unlikely they would have had renters insurance (which also has a liability component); even now only 37% of renters have renters insurance and the number likely was far lower in the 1950s.¹³⁶ Faculty

property accidents).

¹³¹ GOOGLE IMAGES, <https://www.google.com/imghp?hl=EN> (type into search bar “redlined maps” [including the quotation marks], “and,” and a city name, for example, “‘redlined maps’ and Newark”).

¹³² ABRAHAM, *supra* note 121, at 177.

¹³³ HUGHES REPORT, *supra* note 125, at 57. *See also* Wriggins, *supra* note 125.

¹³⁴ *See generally* HUGHES REPORT, *supra* note 125.

¹³⁵ *See supra* notes 135-139.

¹³⁶ *See* Kara McGinley, *Renters Insurance Statistics 2021*, POLICYGENIUS.COM (Jan. 4,

using casebooks without Garratt can readily find a different case with which to make similar points about the unequal distribution of liability insurance.¹³⁷

These background facts do not change the doctrine of the case, but they do give powerful context, at an early point in the course, both about liability insurance, which is essential for understanding torts on the ground, and of the unequal distribution of liability insurance which is significant too.

III. DAMAGES

Although damages are very important, they have been given relatively little attention in the torts curriculum and scholarship until relatively recently.¹³⁸ Often casebooks just focus on different elements of damages with cases that discuss each type. The race-based devaluation of injuries to African-Americans is hugely significant and merits attention. Here I suggest including background information, considering assigning certain cases, and raising broader issues about damages including the use of race-based tables in economic loss calculations. More indepth and technical consideration of this topic can be done in seminars but failing to mention it in the first year course is a missed opportunity.

Background information – Race-based Devaluation, Treating Like Cases Alike, and the Structure of the Tort System

I suggest professors acknowledge that tort claims of African-Americans¹³⁹ and probably others who were seen as not white

2021), <https://www.policygenius.com/renters-insurance/renters-insurance-statistics/>.

¹³⁷ If a case has an individual defendant and does not involve a motor vehicle, the source of the insurance is likely to be homeowners' insurance. Access to auto insurance has been more complicated, and is the subject of a forthcoming article. Wriggins, *supra* note 125.

¹³⁸ CHAMALLAS & WRIGGINS, *supra* note 5, at 216.

¹³⁹ This devaluation is likely true for members of other groups who are seen as not white, but more research would need to be done to make definitive statements on that issue. In the case of race, as noted earlier courts consistently identified the perceived race of litigants for decades when they were seen as not white, *see* Welke,

generally were valued for less than comparable claims of whites between the end of slavery until at least the 1950s and likely still.¹⁴⁰ This is a violation of the basic principle of the rule of law that “like cases should be treated alike.”¹⁴¹ This devaluation is not surprising, given the racist exclusions of the civil justice system until at least the 1960s.¹⁴²

But part of teaching law, in my view, is urging students to look past their assumptions to the evidence. Given facets of the torts system such as its decentralization, the fact that most cases settle, the fact that there is no centralized reporting system for settlements or verdicts, and the fact that damages are calculated on an individual basis in each case, demonstrating this devaluation takes some effort.¹⁴³

In order to research how the torts system treated race and damages historically, I looked at published information about

supra note 2, but that does not seem to be the case in the case of ethnicity. More research on this might unearth more detailed and substantive information, however.

¹⁴⁰ See e.g., AVRAHAM & YURACKO, *Discrimination*, *supra* note 5, at 665; CARDI ET AL., *supra* note 5, at 508-509; CHAMALLAS & WRIGGINS, *supra* note 5, at 52-62; McClelland, *supra* note 3, at 761; Wriggins, *Value of Injury*, *supra* note 2 at 99; Wriggins, *Race and Remedies*, *supra* note 5, at 115-170; see also, GIFFORD & JONES, *supra* note 5, at 559.

¹⁴¹ The idea that “like cases should be treated alike” dates to Aristotle. ARISTOTLE, *THE NICOMACHEAN ETHICS* 112-116 (J.L. Ackrill & J.O. Urmsion eds., David Ross trans., 1980) (1973). This idea has often been seen as a basic principle of the United States legal system. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147 (William N. Eskridge & Philip P. Frickey eds., 1994) (stating that the concept that “[l]ike cases should be treated alike” is an “underlying and pervasive principle of law”). For further discussion, see Wriggins, *Value of Injury*, *supra* note 2, at 101 n.10.

¹⁴² Wriggins, *Value of Injury*, *supra* note 2, at 104 n.22.

¹⁴³ The classic article by Michael J. Saks explains these elements well. See generally Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System-And Why Not?* 140 UNIV. PA. L. REV. 1147 (1992); see also McClelland, *supra* note 3, at 775; Wriggins, *Value of Injury*, *supra* note 2, at 101-03, 103 n.18. As Douglas Laycock wrote in a symposium introduction that included a piece by this author on race, torts and damages, “[i]t is not all that surprising that white plaintiffs get more money than black plaintiffs. But to suspect such disparities is one thing; to document them is another. With careful research in both reported opinions and old press accounts, Professor Wriggins has retrieved evidence of disparities, both flagrant and subtle, in the century after the Civil War.” Symposium, *Remedies: Justice and the Bottom Line: Introduction*, 27 REV. LIT. 1, 3 (2007), referring to Wriggins, *Race and Remedies*, *supra* note 5.

settlement; the limited information available suggested that African-Americans' tort claims were devalued relative to whites' claims.¹⁴⁴ In moving from settlement to cases, Westlaw searches revealed hundreds of appellate decisions with plaintiffs identified as African-American from the end of slavery until the 1950s. Some, including from courts in New York, explicitly devalued African-Americans' tort claims. For example, in one New York case from the early twentieth century, the judge required the successful African-American plaintiff in a false imprisonment case to remit most of the damages awarded him by the jury solely because of his race, stating that "a colored man. . .has not the same amount of injury under all the circumstances that a white man would have."¹⁴⁵ Appellate courts upheld this decision despite strong and sometimes biting criticism from newspapers across the country.¹⁴⁶ Another example is a 1905 admiralty case from New York about multiple deaths from a boat crash on a foggy night in which some of the decedents were white and some were African-American.¹⁴⁷ The district court decision included a discussion of mortality tables that showed how judgments about the value of a person's life were influenced by racism and affected the methodology courts used for valuing lives.¹⁴⁸ Besides notable examples like those just discussed, most were just different cases, finding or not finding liability, and compensating or not compensating for disparate injuries in distinct circumstances. It was thus hard to discern the effect of

¹⁴⁴ See e.g., Welke, *supra* note 2, at 110-11 (discussing an influential settlement manual for railway claims agents that explicitly called for valuing claims for injured African Americans for less than whites' claims); Wriggins, *Value of Injury*, *supra* note 2, at 108-09; Wriggins, *Race and Remedies*, *supra* note 5, at 48-49.

¹⁴⁵ *Negro Not Equal to White: Suffers Less Humiliation in False Arrest, Court Holds*, N.Y. TIMES, May 22, 1909, at 16.

¹⁴⁶ See, e.g., Griffin v. Brady, 117 N.Y.S. 1136 (App. Div. 1909) (mem.), *aff'd per curiam*, 118 N.Y.S. 240 (App. Div. 1909). Griffin is discussed in CHAMALLAS & WRIGGINS, *supra* note 5, at 52-56; Wriggins, *Race and Remedies*, *supra* note 5, at 49-51; Wriggins, *Value of Injury*, *supra* note 2, at 130-35.

¹⁴⁷ See, e.g., *The Saginaw & The Hamilton*, 139 F. 906 (S.D.N.Y. 1905), *aff'd sub nom. The Hamilton*, 146 F. 724 (2d Cir.1906), *aff'd*, 207 U.S. 398 (1907). The liability section of the analysis is contained in *In re Clyde S.S. Co.* 134 F. 95 (S.D.N.Y. 1904).

¹⁴⁸ *The Hamilton*, *supra* note 150, at 907. For discussion, see AVRAHAM & YURACKO, *Discrimination*, *supra* note 5; CHAMALLAS & WRIGGINS, *supra* note 5, at 161-62; Wriggins, *Race and Remedies*, *supra* note 5, at 53-56; Wriggins, *Whiteness & Equal Treatment*, *supra* note 5, at 164-67.

racism in the torts system besides the racist exclusions of people of color from decisionmaking roles mentioned above. To hone in on damages, I looked for cases that dealt with similar injuries to African-American and white plaintiffs and compared the damages awarded. It is always difficult in torts to determine what injuries are ‘similar,’ because torts treats each injury as different with little to no requirement of consistency.¹⁴⁹ Turning to wrongful death cases as cases with an arguably similar injury (i.e. death), I analyzed all the published wrongful death cases in Louisiana where the amount of damages was discussed from 1900-1950, a total of 152 cases.¹⁵⁰ Out of the 152 cases, the average and median awards to African-American survivors were less than half those to others—whites.¹⁵¹ In this collection of cases, I also compared damages awarded in cases that were factually similar where the decedents were of different races and found that injuries to African-Americans and losses to their families were valued for less than whites in specific cases.¹⁵² Racist generalizations and differences in tone in discussions of suffering by African-Americans and whites surfaced in some opinions, suggesting ‘racially selective empathy’ where judges value injuries to white

¹⁴⁹ Wriggins, *Value of Injury*, *supra* note 2, at 110-30; Wriggins, *Race and Remedies*, *supra* note 5, at 57-58 (extending review of cases back to 1865).

¹⁵⁰ Since Louisiana is a civil code state rather than a common law state, judges on appeal can review facts closely, make their own determinations of facts, and decide damage amounts. This makes the appellate opinions of Louisiana particularly rich in detail. See CHAMALLAS & WRIGGINS, *supra* note 5, at 57-58; Wriggins, *Value of Injury*, *supra* note 2, at 110-30 (outlining specifics of appellate review in Louisiana). It was not possible to draw conclusions from these cases as to the frequency that defendants were held liable by race of the plaintiff. See Wriggins, *Value of Injury*, *supra* note 2, 138 n.53.

¹⁵¹ The median award for Black family members per case was \$3,200, while the median award for white family members per case was \$7,021. The average award for Black family members per case was \$3,559, while the average award for white family members per case was \$8,245. Wriggins, *Value of Injury*, *supra* note 2, at 117-18. The awards were complex; specifics of many of the cases and awards are discussed in much more detail in *Value of Injury*, *supra* note 2, at 113-29. The pertinent Louisiana law permitted surviving family members in wrongful death cases to recover for the decedent’s pain and suffering and lost wages, as well as the surviving family members’ pecuniary loss, grief, and loss of consortium. See LA. CIV. CODE ANN. art. 2315 (2005).

¹⁵² See Wriggins, *Value of Injury*, *supra* note 2, at 122-24 (discussing case comparisons).

decedents more than to African-American decedents.¹⁵³ Further, precedents some courts used as guideposts for determining damages actually placed place deaths of African-Americans in different categories from deaths of whites, using segregated precedents to decide damage awards.¹⁵⁴ Cases from other states and historical analysis published since¹⁵⁵ have confirmed and underscored that the torts system applied a race-based discount to African-Americans' injuries. When damages are unequal by race, when African-Americans are compensated for less than whites for comparable injuries, that is race discrimination and a violation of the basic principle that like cases should be treated alike. It has ripple effects to the future, disadvantaging people of color and advantaging whites.

Current issues & Ideas for reform

The next question is of course, what about more recent years and specifically, what about now? It is more difficult to draw clear conclusions about damages awarded for similar injuries in recent years because judges do not mention the race of the litigants or witnesses or juries, most cases settle, jury composition is not reported, there still is no centralized database of information about resolved cases, and tort cases are always decided on an individualized basis.¹⁵⁶ It was not until 1991 that the Supreme Court held that peremptory challenges in tort cases could not be based on race but that alone tells us nothing certain about outcomes by race.¹⁵⁷ Social science research about race, racism and torts has been very limited, especially as compared to criminal law.¹⁵⁸ Studies of race and damage awards in recent decades have not reached definitive, consistent conclusions.¹⁵⁹ A 2016 study

¹⁵³ See *id.* at 122-24; see also Randall Kennedy, *McCleskey v. Kemp, Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1420 (1988).

¹⁵⁴ See Wriggins, *Race and Remedies*, *supra* note 5, at 52-53; Wriggins, *Value of Injury*, *supra* note 2, at 124-26.

¹⁵⁵ See generally Welke, *supra* note 2; Milewski, *supra* note 5.

¹⁵⁶ See generally Saks, *supra* note 146.

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

¹⁵⁸ See CARDI ET AL., *supra* note 5; W. Jonathan Cardi, *The Search for Racial Justice in Tort Law*, in CRITICAL RACE REALISM 115, 124 (Gregory S. Parks et al, eds., 2008).

¹⁵⁹ CARDI ET AL., *supra* note 5, at 507, 510-16 (summarizing studies); Wriggins, *Race and Remedies*, *supra* note 5, at 58-60.

of tort reform in different states, *Keeping Cases from Black Juries: An Empirical Study of How Race, Income Inequality, and Regional History Affect Tort Law*,¹⁶⁰ found a strong correlation between tort reforms making it more difficult for plaintiffs to reach a jury and a state's having a large African-American population and/or being part of the South.¹⁶¹ Of course correlation is not causation, but the analysis is thoughtful and persuasive and points toward the significant and continuing impact of race and racism on tort law.

A very recent experimental study tested the role of the litigant's race and impact of implicit racial bias in tort case decisionmaking; researchers found that dollar awards for injuries suffered by black plaintiffs were lower than awards for the same injuries experienced by white plaintiffs by study participants given the same scenarios varied by race.¹⁶² Also, study participants took the Implicit Association Test ("IAT") for black and white races; those who had high IAT scores recommended higher awards for plaintiffs who sued black defendants and assigned more legal responsibility to black defendants than to white defendants.¹⁶³ The study authors note that the results were "complex and nuanced," reflecting the need for more research on the influence of implicit bias on decisionmaking in torts and for possible reforms.¹⁶⁴

One issue that continues to affect damages is race-based and gender-based tables. Plaintiffs in successful bodily injury cases can generally receive economic damages which are past and future losses stemming from medical costs and lost income.¹⁶⁵ Calculating future damages necessarily involves prediction and estimation. Three types of tables are used to make these predictions and estimates. First, worklife expectancy tables are used to estimate the number of years the victim would have remained in the workforce if not for the tort.¹⁶⁶ Next, life expectancy tables are used to estimate statistical life

¹⁶⁰ See Gifford & Jones, *supra* note 5.

¹⁶¹ *Id.* at 560.

¹⁶² Cardi et al., *supra* note 5, at 507-08.

¹⁶³ *Id.* at 507.

¹⁶⁴ *Id.* at 508.

¹⁶⁵ Restatement (Second) of Torts § 910 (Am. L. Inst. 1979); Avraham & Yuracko, *Discrimination*, *supra* note 5, at 665 n. 13.

¹⁶⁶ CHAMALLAS & WRIGGINS, *supra* note 5, at 159; Avraham & Yuracko, *Discrimination*, *supra* note 5, at 665-666.

expectancy which is used to determine future medical costs and other damages by serving as a multiplier.¹⁶⁷ Third, courts also use average wage tables to estimate lost earnings especially when plaintiffs do not have an earnings history such as children.¹⁶⁸ These three types of tables are often divided by race.¹⁶⁹ Tables separated by race and sex are often seen as “technical and objective tools to manifest foundational tort law concepts,” such as making the victim whole.¹⁷⁰ Yet there are strong arguments to be made that use of these tables is unfair, inaccurate, unconstitutional, and creates perverse incentives.¹⁷¹ As Martha Chamallas and I argued, the use of race-based tables “use[s] the depressed social and economic status of a racial group as the benchmark for an award to an individual plaintiff.”¹⁷²

Martha Chamallas was the first to argue, back in 1994, that use of race-based and gender-based tables in court is unconstitutional.¹⁷³ Since then others have joined the discussion and there is a substantial literature on the topic.¹⁷⁴

¹⁶⁷ Avraham & Yuracko, *Discrimination*, *supra* note 5, at 665-666; CHAMALLAS & WRIGGINS, *supra* note 5, at 159. For historical discussion, see Mary Heen, *Ending Jim Crow Life Insurance Rates*, 4 N.W. J. L. & SOC. POL. 360 (2009), Wriggins, *Whiteness and Equal Treatment*, *supra* note 5, at 164-167.

¹⁶⁸ CHAMALLAS & WRIGGINS, *supra* note 5, at 159; Avraham & Yuracko, *Discrimination*, *supra* note 5, at 665-66. See also JEROME H. NATES ET AL., FUNDAMENTALS OF DAMAGES IN TORT ACTIONS Sec. 10.02[2][B] (2012) (For example, a guide for lawyers to damages in tort actions states “In many cases, the plaintiff will not have a sufficient work history to permit the use of historical earnings in the establishment of a pre-accident earnings level...The economist may consult data of the U.S. Dept. of Commerce to establish average educational levels by the sex and race of the plaintiff...[i]f the plaintiff were a white male, the economist would likely establish a base annual earning capacity of...”).

¹⁶⁹ CHAMALLAS & WRIGGINS, *supra* note 5, at 159; Avraham & Yuracko, *Discrimination*, *supra* note 5, at 665-66.

¹⁷⁰ See e.g., Avraham & Yuracko, *Discrimination*, *supra* note 5, at 666; CHAMALLAS & WRIGGINS, *supra* note 5, at 159.

¹⁷¹ Avraham & Yuracko, *Discrimination*, *supra* note 5, at 665-66; CHAMALLAS & WRIGGINS, *supra* note 5, at 155-82.

¹⁷² CHAMALLAS & WRIGGINS, *supra* note 5, at 162.

¹⁷³ Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORD. L. REV. 73 (1994).

¹⁷⁴ See, e.g., Ronen Avraham, Kimberly A. Yuracko, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-based Tables in Calculating Tort Damages*, 106 CAL. L. REV. 325 (2018); CHAMALLAS & WRIGGINS, *supra* note 5 at 155-170; Gregory

After explaining in general how tables can work, students who have covered equal protection and due process in constitutional law can be asked to try to articulate arguments that use of these tables is unconstitutional under the fourteenth amendment and often will come up with strong answers. The discussion also is a good way to surface general discussions of equal protection, due process and the state action requirement of the fourteenth amendment.¹⁷⁵ Cases such as *G.M.M. v. Kimpson*,¹⁷⁶ or *MacMillan v. New York City*,¹⁷⁷ which hold that use of the raced-based or ethnicity-based tables to determine damages is unconstitutional can be assigned to explore these issues further depending on time available.

With the many problematic aspects of tort damages,¹⁷⁸

Keating, *Torts and the Paradox of Conservative Justice: A Response to Avraham & Yuracko*, 78 OHIO ST. L. J. FURTHERMORE 29 (2017); Wriggins, *Constitutional Law and Tort Law*, *supra* note 5.

¹⁷⁵ CHAMALLAS & WRIGGINS, *supra* note 5 at 164-170. Regarding state action, see Wriggins, *Constitutional Law and Tort Law*, *supra* note 5, at n.148.

¹⁷⁶ *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 159 (E.D.N.Y. 2015) (holding that statistics based on ethnicity of a child cannot be used to determine damages for lost earning capacity in lead poisoning case involving Hispanic child). The specific constitutional analysis in *G.M.M. v. Kimpson* and *McMillan v. NYC* is brief. See CHAMALLAS & WRIGGINS, *supra* note 4, at 165 (referring to *McMillan*; *Kimpson* was decided after the book's publication). As part of the Feminist Judgments series published by Cambridge University Press, Sara Cressey and I have rewritten *GMM v. Kimpson* to be more explicit and specific in terms of constitutional arguments as well as more intersectional. FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS 361 (Martha Chamallas & Lucinda Finley eds. 2020).

¹⁷⁷ *McMillan v. NYC*, 253 F.R.D. 250 (2008) (raced-based life expectancy table for African-American males who are quadriplegic cannot be used to estimate life expectancy and related medical expenses for an African-American man rendered a quadriplegic in a Staten Island Ferry accident). *McMillan* is also an interesting case to consider assigning because in the liability decision on the case, the court explicitly discusses the famous BPL formula in the liability phase of the trial, as few cases do. See generally *In Re City of New York* 475 F. Supp. 2d 235 (E.D.N.Y. 2007), *aff'd*, *Agni v. Wenshall (In Re City of New York)* 522 F.3d 279 (2d. Cir. 2008).

¹⁷⁸ An additional set of problematic aspects of tort damages are well discussed by Ellen Pryor. She points out that some plaintiffs may have 'Cadillac' damage awards or settlements if the defendant is fully insured, while others with similar injuries may have limited recoveries from limited liability policies that are reduced to almost nothing by liens and fees. Further, while it might be very positive for victims to have interim payments for rehabilitation expenses early on, resolution of cases often takes years and there is no way in torts for interim awards that might help injured plaintiffs

discussing ideas for reform may be useful. First, if we think that bias and subjectivity always affects tort damages, maybe we should think of something else as a way to determine tort damages. Maybe even something like workers compensation? Washington State's workers compensation brochure states that injuries like loss of a leg are "easily quantifiable;" workers compensation statutes do not provide for pain and suffering damages.¹⁷⁹ When I suggest a workers compensation system with a set schedule of damage amounts, often class members express a renewed commitment to the individualized adjudication process of tort litigation, even with all its shortcomings. Second, the whole idea of tort damages being financial in nature can be thought-provoking to discuss. A recent excellent article explored this in provocative ways, arguing that in some settings, plaintiffs may want other kinds of redress and that a new type of insurance modeled on a type of insurance common in Germany should be available.¹⁸⁰ Third, turning to race-based and gender-based tables, students may be encouraged to research the law in their states concerning race-based and gender-based tables; the outstanding article, *Torts and Discrimination*, provides indispensable research on state damages laws.¹⁸¹ For example, three states, Colorado, Georgia and Rhode Island, have laws that promise admissibility of particular life expectancy and worklife expectancy tables; these tables are separated by gender and race.¹⁸² Based on analysis of the law in one's state, this could be a significant law reform project for interested students.¹⁸³

recover more fully long term. Ellen Pryor, *Part of the Whole: Tort Law's Compensatory Failures Through a Wider Lens*, 27 REV. LITIG. 307 (2008).

¹⁷⁹ WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, WORKERS COMPENSATION BENEFITS: A GUIDE FOR INJURED WORKERS 15 (Publication F242-104-000) (Apr. (2020)), <https://lni.wa.gov/forms-publications/F242-104-000.pdf>.

¹⁸⁰ Merle H. Weiner, *Civil Recourse Insurance: Increasing Access to the Torts System for Survivors of Domestic And Sexual Violence*, 62 ARIZ. L. REV. 957 (2020).

¹⁸¹ Avraham & Yuracko, *Discrimination*, *supra* note 5, at 689, nn.94-98 & 101.

¹⁸² *Id.*

¹⁸³ While the initial first thought for law students is likely to be constitutional litigation, a number of factors including the way in which a lawsuit would be likely to arise make it difficult to bring such a case. Concretely, in *GMM v. Kimpson* and *McMillan v. New York City*, the issue of admission of race-based tables appears to have been raised by the judge, not the plaintiff. *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015), *McMillan v. NYC*, 253 F.R.D. 250 (2008). Students can explore the reasons for this, and upon reflection it is not surprising that this would be

California for example has changed its law.¹⁸⁴ Also a federal bill was introduced in 2016 on the same subject; perhaps this could be revived.¹⁸⁵ Fourth, steps could be considered, based on the recent experimental study on implicit bias and decisionmaking to “screen out biased jurors, reduce bias in jurors, and reduce the effects of bias in tort decisionmakers.”¹⁸⁶ Fifth, students may want to explore ideas for increasing transparency in the torts system. Legislative changes such as requiring disclosure of racial composition of juries, of amounts of settlements, of verdicts, and other data might be worthy of consideration.

CONCLUSION

The first year torts course is an ideal place to include more focus on race and racism. As professors now know, these issues matter in torts, not just in criminal law, constitutional law, and race-and-the-law courses. The course is enriched and deepened by including cases and materials that relate to these issues. The subject generally has been presented as carved off from race and racism, as if racial issues were extrinsic to it and relevant only to other courses. Yet race and racism are entwined with and very relevant to torts in many ways, including in ways that shed light on the way the field works as a whole. This article has shown that cases and materials can be included that change and expand the focus of the course while still

the case.

¹⁸⁴ Cal. Ch. 36 Sen. Bill No. 41 § 3361 (2019), added to Civil Code, to read: “3361. Estimations, Measures or calculations of past, present or future damages for lost earnings or impaired earning capacity or wrongful death shall not be reduced based on race, ethnicity, or gender.”

¹⁸⁵ Fair Calculations in Civil Damages Act, S. 3489, 114th Cong. § 2 (2016). To prohibit a court from awarding damages based on race, ethnicity, gender, religion, or actual or perceived sexual orientation, and for other purposes. Sec. 2. Definitions. In this Act (1) the term ‘future earnings table’ includes any table or compilation of economic data used to determine (A) how many years an individual would have worked in the future; or (B) the average wage an individual would have earned in the future. Sec. 3 (a) In general-Notwithstanding any other provision of law, no court of the U.S. may award damages to a plaintiff in a civil action using a calculation for the projected future earning potential of that plaintiff that considers the race, ethnicity, gender, religion, or actual or perceived sexual orientation of the plaintiff.

¹⁸⁶ Cardi et al., *Do Black Injuries Matter?*, *supra* note 5, at 555.

illuminating doctrinal issues. The time for these changes is now.