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Alberto Bernabe

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TEACHING AT THE INTERSECTION OF TORTS, RACE, AND GENDER

Alberto Bernabe[*]

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[*] Professor of Law, University of Illinois Chicago School of Law. The author would like to thank Dean Julie Spanbauer for her support and Professors Kimberly Norwood, Margo Schlanger, and Rebecca Crootof for their helpful comments and suggestions on earlier drafts of the article. The reference to an "intersection" in the title of this article, as if it were an actual location at the corner of two streets, is a reference to the term "intersectionality," which is often used to refer to the discussion of different social categorizations such as race, class, and gender in order to examine how they overlap and relate to systems of discrimination. Michael B. Hyman, J., *Intersectionality: A Framework for Understanding Bias and Ourselves*, CBA RECORD 32 (July/Aug. 2021), https://user-35215390377.cld.bz/cba-julaug-2021/32/ ("'Intersectionality' is an approach to the study of the law that attempts to make 'feminism, anti-racist activism, and anti-discrimination law . . . highlight the multiple avenues through which racial and gender oppression are experienced so that the problems are easier to discuss and understand.") (internal quotation marks omitted).

INTRODUCTION

In 2016, I published an article that began with the sentence, "Discussions of race-related issues are a constant in American society[]."[1] I then noted that high-profile events of that year, including protests in response to a number of incidents in which police officers caused the deaths of unarmed black men, "continue to fuel a growing discussion about race and identity."[2] During the summer of 2020, mass demonstrations that made the phrase "Black Lives Matter" the signature message of a protest movement[3] against racism in the American justice system also made it clear that things have not changed much.

Yet, the massive Black Lives Matter protests in 2020 inspired changes in law school education. Many scholars and professors are speaking out more about the realities of systemic racism, and some law schools committed to making curricular changes to address issues related to race.[4] In certain law schools, these changes involved creating specific courses; in others, professors were encouraged to incorporate relevant

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[1] Alberto Bernabe, *Do Black Lives Matter?: Race as a Measure of Injury in Tort Law,* 18 THE SCHOLAR: ST. MARY'S L. REV. ON RACE AND SOCIAL JUSTICE 41 (2016) [hereinafter Bernabe, *Do Black Lives Matter?*].

[2] *Id.* at 41–43.

[3] Etienne C. Toussaint*, Blackness as Fighting Words*, 106 VA. L. REV., 124, 126 (2020) ("The resurgence of worldwide protests by racial justice activists has ushered in a global reckoning with the meaning of this generation's rallying cry – "Black Lives Matter."); Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES, 2–4 (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html. For more information about the Black Lives Matter organization, see BLACK LIVES MATTER, http://blacklivesmatter.com (last visited Oct. 22, 2022).

[4] *See, e.g.*, *From Words to Action: Behind the Implementation of Dickinson Law's Race and the Equal Protection of the Laws Course,* RACE AND THE EQUAL PROTECTION OF THE LAWS, PENN STATE UNIV. (2020), https://dickinsonlaw.psu.edu/race-and-the-equal-protection-of-the-laws (citing Faculty Resolution (June 2, 2020) [hereinafter *From Words to Action*]. During the summer of 2020, Penn State Dickinson Law faculty unanimously approved a resolution condemning violence against people of color and worked quickly to institute a new required course for first-year students: Race and the Equal Protection of the Laws. *Id.* The inspiration for the course and its goals are described on the Law School's website, which cites three articles forthcoming in the Rutgers Race and the Law Review. *Id. See also*, Staci Zaretsky, *Top Law School Will Make Race-Related Coursework Mandatory For Graduation*, ABOVE THE LAW, (Apr. 9, 2021), https://abovethelaw.com/2021/04/top-law-school-will-make-race-related-coursework-mandatory-for-graduation/; Michelle Weyenberg, *UCI Law adopts new race course requirement*, THE NAT'L JURIST, (Apr. 13, 2021), https://www.nationaljurist.com/prelaw/uci-law-adopts-new-race-course-requirement (both the University of Southern California and the University of California-Irvine School of Law announcing the adoption of a curriculum requirement for graduation that requires all students to complete a graded course which includes substantial content relating to racism and the law).

materials into existing courses.[5] Of course, these two approaches are not mutually exclusive, and many law schools will likely adopt both.

More importantly, in response to requests made in 2021 by 150 law school deans, the American Bar Association's (ABA) Section of Legal Education and Admissions to the Bar set forth a proposal to require all law schools to provide training and education on bias and cross-cultural competency.[6] The ABA's House of Delegates formally adopted the proposal in February 2022, and, as a result, "law schools must demonstrate that all law students are required to participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession."[7]

Because the standards do not require law schools to add a required course to the curriculum, many law schools will likely continue to encourage all professors to address issues of race and racial justice in their courses. Yet, as can be expected, some courses may be better suited than

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[5] For examples of law schools taking action by creating new courses, see *From Words to Action*, *supra* note 4 (Dickinson Law creating a new course covering race); Zaretsky, *supra* note 4 (Penn State Law adding a new required course for first-year students); *see also* Weyenberg, *supra* note 4 (UCI Law adopting a new race course requirement).

[6] *See* Karen Sloan, *ABA Mulls Racism, Bias Training Accreditation Requirement for Law Schools*, LAW.COM (May 5, 2021), law.com/2021/05/05/aba-mulls-racism-bias-training-accreditation-requirement-for-law-schools (proposing changes to the ABA's law school accreditation standards as part of a larger push to incorporate professional identity formation into the curriculum requirements). In May 2021, the Council of the Section approved for notice and comment proposed revisions to Standard 303 of the ABA Standards and Rules of Procedure for Approval of Law Schools on law school curriculum to require law schools to provide training and education to law students on bias and cross-cultural competency. *Id.*

[7] AMERICAN BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS FEBRUARY 2022 (Feb. 14, 2022), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/300-midyear-2022.pdf. The full text requires law schools to provide education "on bias, cross-cultural competency, and racism at the start of the program of legal education, and at least once again before graduation." *Id.* Explaining the need for the new standard, the Section wrote that "[p]rofessional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. . . ." and that "the importance of cross-cultural competency to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced." *Id.* The proposal, however, was not universally supported. *See* Christine Charnosky, *A 'Must-Have' or 'Forced Wokeness'?: Mixed Reaction to ABA's Newly Adopted Diversity Training Mandate for Law Students*, LAW.COM (Feb. 16, 2022), https://www.law.com/2022/02/16/a-must-have-or-forced-wokeness-mixed-reaction-to-abas-newly-adopted-diversity-training-mandate-for-law-students/?slreturn=20220310221131 ("The ABA's new accreditation standard forces law schools to push a political agenda on students. That is not only wrong, but it will likely result in violations of students' constitutional rights.").

others for purposes of exploring issues of race and, for that reason, whether incorporating new materials to already existing courses is effective depends on the courses' subject matter.

At first glance, torts might not seem to be a particularly apt course for this purpose. After all, the doctrines taught in this class seem to be "neutral" in their application, and the purpose of this area of the law is to provide avenues of relief equally for anyone who suffers an injury caused by another's wrongful conduct.[8] A more careful look at the subject matter of the course reveals multiple topics in which race and gender play critical roles in the development and application of the doctrines. In fact, torts is an excellent course to incorporate a rich discussion about issues of race and gender.[9] For this reason, and to contribute to the ongoing conversation on curricular reform, in this article, I will discuss how to incorporate issues related to the intersection of race and gender[10] into the curriculum of a first-year torts class.[11]

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[8] *See* Newman, *infra* note 13.

[9] A recent article by Professor Geoffrey Christopher Rapp addresses how tort law is an area of the law that tends to be limited by its reliance on dominant social structures but that, at the same time, provides great flexibility to evolve with, and adapt to, social changes. *See* Geoffrey Christopher Rapp, *LGBTQ+ Rights, Anti-Homophobia and Tort Law Five Years After Obergefell*, 2022 U. ILL. REV. 1103, 1104–05 (2022).

[10] The notion of "intersectionality" refers to the discussion of different social categorizations such as race, class, and gender to examine how they overlap and relate to experiences of discrimination or privilege. For a discussion on the notion of intersectionality, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244, 1265 (1991) (different dimensions of identity may "intersect" to produce particular experiences of vulnerability) [hereinafter *Mapping the Margins*]; Michael B. Hyman, *Intersectionality: A Framework for Understanding Bias and Ourselves*, CBA RECORD 32 (July/Aug. 2021); Anne Sisson Runyan, *What Is Intersectionality and Why Is It Important?*, AM. ASS'N OF U. PROFESSORS (2018), https://www.aaup.org/article/what-intersectionality-and-why-it-important; David Miguel Gray, *Critical race theory: What it is and what it isn't,* THE CONVERSATION, (June 30, 2021), https://theconversation.com/critical-race-theory-what-it-is-and-what-it-isnt-162752 ("multiple elements, such as race and gender, can lead to kinds of compounded discrimination that lack the civil rights protections given to individual, protected categories").

[11] What a first-year tort law class is differs among law schools. In some, torts is a two-semester class worth six credits. In others, it is only a one-semester, four-credit class. This is a big difference. The course I teach is a one-semester, four-credit class, and I barely have enough time to cover the basics of the three theories of liability: intentional conduct, negligence, and strict liability. I dedicate six two-hour classes to intentional torts and two classes to strict liability. I spend the rest of the semester on negligence. Because of these limitations, I do not get to cover the so-called "Constitutional Torts," including causes of action for violations of civil rights under 42 U.S.C. § 1983, which would be a key topic in a course dedicated to covering issues related to race. *See* 42 U.S.C. § 1983 (2012) (civil action for deprivation of rights). There is just not enough time in a one-semester course to add that material, and a full discussion on possible materials to use to discuss race and gender issues within the section of the course on

I. PLANNING, GOALS, AND APPROACH

As with any other course, one of the most important steps with respect to designing new course materials is to identify and choose the goals for the discussion of those materials. Professors should have specific goals for their students and for what they hope the students can learn by participating in the discussions. Then, with such goals in mind, professors should determine what approach to take to achieve them.

First, it is important to understand why it is a good idea to devote time to discuss issues related to the intersection of race, gender, and tort law. This understanding, in turn, forms the basis for the overall goal for this part of the course, which is to learn how the social and personal identities of the parties and cultural views on race and gender can affect contemporary tort law—from the types of claims recognized, to the application of basic torts concepts, to judgments about causation and valuation of injuries.[12]

Although most tort law classes phrase doctrines and concepts in "neutral" terms, the application or effect of the law is often affected by issues related to race and gender.[13] Sometimes the relation between race and gender is obvious, while other times, it is more subtle. For years, some legal scholars have analyzed areas of the law, seeking to expose "hidden biases based on race, gender and other important dimensions of personal identity."[14] Recent events, however, have prompted new debates about

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"Constitutional Torts" could be the source of an article of its own. For those reasons, in this article, I will only review materials I would add to a basic, single-semester torts class.

[12] I have adopted this goal from the framework developed by Martha Chamallas. *See* Martha Chamallas, *Race and Tort Law*, *in* THE OXFORD HANDBOOK ON RACE AND LAW IN THE UNITED STATES (Devon Carbado et al. eds, 2022) (manuscript at 1), https://ssrn.com/abstract=3661537 (on file with the *Ohio State Law Journal*) [hereinafter Chamallas, *Race and Tort Law*].

[13] Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 529–30 (2007) (citing ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 103 (2006), for the proposition that "the illusion of neutrality in the law has presented special obstacles to women and other historically disempowered groups.").

[14] Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM LAW REV. 73 (1994) [hereinafter Chamallas, *Questioning the Use of Economic Data*]. The body of work of scholars who began to study the relationship between the law and racial inequality is part of what is currently usually referred to as "critical race theory," which began with the work of Professors Derrick Bell, Kimberlé W. Crenshaw, and Richard Delgado, among others. *See* KHIARA M. BRIDGES, CRITICAL RACE THEORY, A PRIMER 7 (1st. ed. 2019). *See also* Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUCATION WEEK, (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05; Hyman, *supra* note 12, at 1 (citing work published in Kimberlé W.

race and identity.[15]

Much of the current debate revolves around police brutality and injustice committed by law-enforcement officers.[16] Still, there are many tort law issues for which race and gender are key components of the discussion. Helping students, particularly first-semester students, learn and understand the complicated relationship between the legal doctrines they are reading about and the realities of their application can only enhance the value of their education. Thus, the core goals of a course that addresses the relationship between tort law, race, and gender is to provide students with a better understanding of the social impact of the area of the law they are studying and to help the students develop the skills needed to address the issues.

But what should the students learn about this relationship? There are many possible answers to this question, including the fact that, sometimes, the law operates in ways that have a disparate impact on women and people of color, while, at other times, it operates to offer protection from discrimination to women and people of color.[17] The materials I suggest in this article provide meaningful examples of these different types of results.

For example, in discussing the topic of damages, I present materials that show how race and gender are often used to determine the value or worth of a person's life in a way that results in lower compensation for women and minorities. I also discuss a case and a statute that attempt to confront social inequities by banning the use of statistical data based on

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Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine*, *Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) [hereinafter *Intersection of Race and Sex*]) ("Law professor and civil rights advocate Kimberlé Crenshaw coined "intersectionality" to explain the many dimensions of discrimination faced by Black women. She argued that the experiences of Black women must be assessed by accounting for the cumulative effect of being both Black and female, not by viewing race and gender as mutually exclusive. According to Crenshaw, 'Intersectionality, then, was my attempt to make feminism, anti-racist activism, and anti-discrimination law do what I thought they should—highlight the multiple avenues through which racial and gender oppression were experienced so that the problems would be easier to discuss and understand.'").

[15] *See* Toussaint, *supra* note 3, at 126. *See also, e.g.*, U.N. Off. of the High Comm'r for Hum. Rts, Agenda towards transformative change for racial justice and equality, https://www.ohchr.org/en/racism/agenda-towards-transformative-change-racial-justice-and-equality (last visited Oct. 22, 2022) ("The murder of George Floyd on 25 May 2020 and the ensuing mass protests worldwide marked a watershed in the fight against racism.").

[16] Touissant, *supra* note 3; Buchanana et al., *supra* note 3.

[17] *See, e.g.*, CAL. CIV. CODE § 3361 (West 2022) (prohibiting reduction of damages based on race, ethnicity, or gender).

race and gender for purposes of determining the value of a claim.[18]

Likewise, when discussing whether there ought to be a duty to help, I suggest assigning a case in which the court imposed a duty to help protect others from racially motivated violence when racial violence was foreseeable under the circumstances.[19] I also mention materials that require students to question whether the desire to impose consequences for injuries caused by racially motivated conduct and the importance of respecting a woman's autonomy over her body are more important than other competing values.

The cases and materials I discuss in this article lead to important and interesting questions that usually result in rich and rewarding conversations in the classroom.[20] However, they can also take up a lot of class time, and for this reason, one of the most difficult decisions related to the course's design is determining how much time to allow for those discussions. There are two possible approaches to this. The first is to designate one or more class periods to discuss these topics, making all the materials on race and gender the subject of one or more dedicated class days. This approach has the advantage that it frames the discussion in a specific context and also allows for better control of the time spent on the materials.

On the other hand, this approach has several disadvantages. One is that these classes must be at the end of the semester since it would not make sense to assign cases and materials on subjects that have not yet been covered in the course. This has the potential to make the course seem repetitive and disjointed because the discussion of the material at the end of the course will likely require the class to cover some of the material twice. Also, it creates the risk that, if the class falls behind in covering material throughout the semester, the professor may have to rush over the material at the end of the year, making the discussion less meaningful. Having promised an intersectional approach to the subject, rushing through the intersection at the end of the semester, or skipping it altogether, will feel unfulfilling to both the students and the professor. Finally, and most importantly, addressing the issues separately from the rest of the course may give the impression that they can be divided into elements that are distinct from the rest of the doctrine and practice of law,

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[18] *See infra* Part II (providing examples of cases and sources supporting the statement that race and gender are often used to determine the value or worth of a person's life, which has a disparate effect on minorities and women). *See also* CAL. CIV. CODE § 3361 (West 2022).

[19] For an example discussing the duty to help, see Bullock v. Tamiami Trails Tours, 266 F.2d 326 (5th Cir. 1959), *infra* Part VII.

[20] *See, e.g.*, *infra* Part V., note 109 (discussing Stallman v. Youngquist, 531 N.E.2d 355 (1988), and the typical classroom discussion that often follows).

thus weakening the message that the issues are really interwoven with the fabric of the legal doctrines.

Accordingly, I prefer the second approach: to integrate the materials related to race and gender into the discussion of the doctrinal aspects of the course. For example, a discussion on whether to recognize a cause of action for injuries that resulted from racist conduct can be integrated into a lesson covering battery and intentional infliction of emotional distress.[21] Likewise, by asking whether it would be a good idea to adopt a "reasonable woman" standard when discussing the elements of a cause of action for negligence, the class can address the notion of implicit bias.[22]

Finally, given the attention the concept has been getting recently, when considering what approach to take to the materials on race and gender, it is worth discussing whether studying the intersection of tort law and race and gender is based on the notion of "critical race theory" (sometimes referred to as "CRT").[23] The answer is that it can be but does not have to be.

First, it is important to understand that critical race theory is not a "theory" if that word is defined as an idea that can be proven right or wrong through experimentation.[24] Rather, it is a "framework." Critical race theory is an analytical framework that can be used to evaluate and

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[21] *See* discussion *infra* Part III.

[22] *See infra* note 93 and accompanying text.

[23] *See* Daniel Payne, *Critical race theory turning school boards into GOP proving grounds*, POLITICO (Sept. 8, 2021), https://www.politico.com/news/2021/09/08/critical-race-theory-school-boards-510381. As Payne explains in his article about the debate over teaching the history of racism in schools, "[c]ritical race theory is a framework for analysis developed by legal scholars in the 1980s that examines how race and racism have been ingrained in American law and institutions since slavery and Jim Crow. The study is essentially nonexistent in K-12 schools, but this year, the term has been used to describe diversity trainings and a cadre of classroom lessons on slavery, sexism and other acts of discrimination." *Id.* Critical race theory has become a hotly debated topic in the public arena this year because numerous state legislatures are debating bills seeking to ban its use in school classes (even though it is not something that is typically taught anywhere other than in some college level courses and law schools). *See, e.g.*, Associated Press, *Bill to curb racial teachings advances in North Carolina*, COURTHOUSE NEWS SERVICE (Aug. 24, 2021), https://www.courthousenews.com/bill-to-curb-racial-teachings-advances-in-north-carolina/); Sarah Schwartz, *Four States Have Placed Legal Limits on How Teachers Can Discuss Race. More May Follow*, EDUCATION WEEK (May 17, 2021), https://www.edweek.org/policy-politics/four-states-have-placed-legal-limits-on-how-teachers-can-discuss-race-more-may-follow/2021/05 ("[As of June 2021][,] lawmakers in at least fifteen states have introduced bills that seek to restrict how teachers can discuss racism, sexism, and other social issues."); Jerusha Osberg Conner, *Critical race theory sparks activism in students*, THE CONVERSATION (June 21, 2021), https://theconversation.com/critical-race-theory-sparks-activism-in-students-162649 ("Critical race theory – an academic framework that holds that racism is embedded in society – has become the subject of an intense debate about how issues of race should or shouldn't be taught in schools.").

[24] BRIDGES, *supra* note 14, at 7; Gray, *supra* note 10.

explain facts or events.[25] More specifically, it is a framework used to study and to try to understand how subtle racial power structures work, "how they often pose as 'neutral' institutions in law and society, and how to undo the injustices" they have caused.[26] Critical race theorists reject colorblindness because "[i]t can lull decision-makers, wrongly, to assume that once they no longer explicitly discriminate along racial lines," "racial power," or disparate racial effects, "no longer play[] a part in social life."[27]

Also, it should be noted that although critical race theory scholars share some basic principles, critical race theory is not based on a unified or internally consistent view.[28] As one such scholar describes this distinction, "[s]cholars who have reflected on the framework acknowledge that there are [a] host of different approaches, ideas, and trajectories within the [critical race theory] body of work."[29]

For these reasons, whether a professor's approach to race and gender issues within the area of tort law is based on, or related to, critical race theory is mostly irrelevant. In my own case, because many of the topics and issues I like to discuss involve a combination of issues related to both race and gender, labeling the approach only on the basis of race would be inaccurate.[30] If I had to put a label on it, I would be more comfortable

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[25] BRIDGES, *supra* note 14, at 8; Conner, *supra* note 23; *Bill to curb racial teachings advances in North Carolina*, *supra* note 23 ("Critical race theory is a framework legal scholars developed in the 1970s and 1980s centering on the idea that racism is systemic in the nation's institutions and serves to maintain the dominance of whites in society.").

[26] Gary Peller, *I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point For Us*, POLITICO MAGAZINE (June 30, 2021), https://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046. Critical race theorists generally employ a broad definition of racial bias that encompasses not only intentional discrimination but various forms of implicit bias, including unintentional disparate treatment, devaluation, negative racial imagery, and stereotypes. *See* Chamallas, *Race and Tort Law*, supra note 12, at 3 ("Their analyses often sought to uncover the racial implications of neutral rules and practices in order to ascertain the racial origins, racialized meanings and race-linked effects of purportedly 'colorblind' doctrines."). *See also* Jon Wiener, *The Predictable Backlash to Critical Race Theory: A Q&A With Kimberlé Crenshaw*, THE NATION (July 5, 2021), https://www.thenation.com/article/politics/critical-race-kimberle-crenshaw/ (interview with Kimberlé Crenshaw, one of the original critical race theory scholars) ("The whole point of critical race theory was to repudiate the idea that we can talk about racism only as a quality of individuals rather than as a structured reality that's embedded in institutions.").

[27] Peller, *supra* note 26.

[28] *Id.* (opinion by Professor Gary Peller) ("We embrace no simple or orthodox set of principles. . . .[W]e have a number of different approaches and beliefs. . . .").

[29] BRIDGES, *supra* note 14, at 8–9.

[30] In fact, it is quite possible to address issues of race and gender in a torts class using an approach that is not quite consistent with all the basic tenets of critical race theory. As explained by Khiara Bridges, "simply expressing dissatisfaction with the existing racial order is not enough to make a piece of scholarship a part of the CRT ouvre." *Id.* at 9. Instead, in order

referring to my approach as "Critical Legal Theory," which suggests that the "critique" originates in the intersection of multiple factors rather than solely on race. But labels are not necessary. In this article, instead of placing a label on the approach I propose, I concentrate on the content I suggest and the goals I would pursue in assigning that content.

II. DETERMINING THE VALUE OF THE INJURY IN TORTS CASES

One primary reason to discuss materials related to race and gender in a torts course is that it is important for students to understand that even though the doctrines they are learning appear to be "neutral," in that they apply equally to everyone, the application of the legal principles covered in the course may have a disparate impact on people of color and women.[31] An efficient way to illustrate this point is to include materials covering the way the value of certain types of injuries is often calculated.[32]

There are two ways in which issues related to race and gender intersect with the topic of damages. One is the debate about the use of actuarial tables that take into account race and gender in order to estimate the value of an injury.[33] The other is the practice of "race norming."[34] Discussing both topics serves two important goals. First, both topics are

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for something to be considered to be part of the critical race theory approach, it must be consistent with a few basic ideas that are common to all CRT works. The most important of these are: (1) that race is a social construct, (2) that racism is endemic to American society, (3) that institutions, like the law, have worked to perpetuate racial inequality, (4) and that the goal of critical race theory is to eventually dismantle systems that subordinate people of color. *Id.* at 9–13. It is possible to agree with some of these points but not with all. For example, the materials on valuation of torts claims show that an analysis based on socioeconomic conditions is more helpful than one based on race to explain the disparate impact of the methodology used to determine compensation. *See infra* note 36 (discussing sources of information to prepare for a discussion on the intersection of race, gender, and the valuation of damages). Race may be an improper factor by which to analyze the impact of society's institutions since the disparate effect of those institutions affect people differently across races but more similarly within socioeconomic groups. Also, a course that seeks to focus on the intersectionality of both race and gender should, by definition, not focus only on critical race viewpoints.

[31] In a different context, for example, see Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 536 (2015) ("Recognition of disparate-impact liability . . . plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment . . . . In this way disparate-impact liability may prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.").

[32] *See infra* note 36 and accompanying text.

[33] *See* Chamallas, *Race and Tort Law*, *supra* note 12, at 10–12.

[34] Dave Zirin, *So What the Hell is Race Norming*?, THE NATION (Mar. 12, 2021), https://www.thenation.com/article/society/race-norming-nfl-concussions/ (describing "race norming").

current, which helps eliminate the idea that issues of race are limited to old, "historical" cases. Second, and more importantly, the discussion of the valuation of damages illustrates issues related to stereotyping and implicit bias. When addressing damages, it is important to discuss how "[r]acial devaluation often fails to see and to value the pain and suffering of people of color in a manner comparable to the way similar injuries suffered by dominant groups are seen and valued."[35]

There are many valuable sources of information available to prepare for a discussion on the intersection of race, gender, and the valuation of damages.[36] Which ones professors should assign for the students to read, however, depends on the factors they consider when selecting materials to assign, which likely includes the number of pages to be assigned relative to the amount of time that can be spent on the discussion of the material. At the very least, I suggest assigning an edited version of *McMillan v. City of New York*, the first published judicial opinion in which a court refused to allow defendants to use actuarial tables that rely on race and gender-based economic data to determine both the number of years that plaintiffs would likely have worked had they not been injured and the likely annual income they would have earned.[37]

I also recommend California Senate Bill No. 41, the first legislative enactment that bans the use of actuarial tables based on race and gender.[38] Other possible alternatives include the short article *The Problem with*

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[35] Chamallas, *Race and Tort Law*, *supra* note 12, at 10.

[36] For sources with a wealth of information on this topic, see Soffen, *In one corner of the law, minorities and women are often valued less*, WASHINGTON POST (Oct. 25, 2016), https://www.washingtonpost.com/graphics/business/wonk/settlements/; *see* Chamallas, *Questioning the Use of Economic Data*, *supra* note 14 (examining gender and race bias in damages calculations); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435 (2005) (discussing race and sex-based damages calculations and the need for reform) [hereinafter *Civil Rights in Ordinary Tort Cases*]; MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY, RACE, GENDER AND TORT LAW, 73 (N.Y. Press 2010) (arguing that tort law is not gender and race neutral); Jesse Schwab, *The Problem with Defining Tort Damages in Terms of Race and Gender*, HARV. CIV. RTS.-CIV. LIBERTIES L. REV. (Nov. 25, 2019); Catherine M. Sharkey, *Valuing Black and Female Lives: A Proposal for Incorporating Agency VSL Into Tort Damages*, 96 NOTRE DAME L. REV. 1479 (2021).

[37] McMillan v. City of New York, 253 F.R.D. 247, 256 (E.D.N.Y. 2008). Seven years after deciding *McMillan*, the same judge reached similar conclusions in a case involving the calculation of future medical expenses and life expectancy of a young Latino boy who suffered cognitive disorders after exposure to lead paint in his Brooklyn apartment. *See* G.M.M. v. Kimpson, 116 F.Supp.3d 126, 140–41 (E.D.N.Y. 2015) (rejecting the use of race-based data in computing reduced damages in torts cases).

[38] *See, e.g.*, S.B. 41, 2019–2020 Reg. Sess. (Cal. 2019) (enacted at CAL. CIV. CODE § 3361 (West 2022)).

Defining Tort Damages in Terms of Race and Gender, by Jesse Schwab[39] and the longer article *In one corner of the law, minorities and women are often valued less*, by Kim Soffen.[40] These articles provide empirical evidence of the disparate effect that using actuarial tables based on race and gender has on the recovery of damages by women and people of color,[41] but it is *McMillan* that provides a legal analysis to address the issue.[42]

In *McMillan*, an African American man sued for medical expenses and pain and suffering after he "was rendered a quadriplegic in the crash of a ferryboat operated negligently by the City of New York."[43] To determine the plaintiff's estimated life expectancy and, therefore, the value of the claim, the defendant introduced statistical evidence suggesting that an African American man with a spinal cord injury was likely to survive for fewer years than members of other races.[44] The court concluded, however, that it would be improper to base the value of the claim on racially based statistics.[45]

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[39] Schwab, *supra* note 36.

[40] Soffen, *supra* note 36.

[41] *Id.* ("[W]hite and male victims often receive larger awards than people of color and women in similar cases . . . . These differences largely derive from projections of how much more money individuals would have earned over their lifetimes had they not been injured – projections that take into account average earnings and employment levels by race and gender."). *See also* Chamallas, *Civil Rights in Ordinary Tort Cases*, *supra* note 36, at 11 ("In some contexts, the use of race-based economic data can result in systematic undervaluation of recurring types of injuries that disproportionally affect minorities. Lead paint litigation . . . is a good example. When lost earning capacity is calculated for minority child plaintiffs using race-based tables, the awards are considerably lower than for comparably injured white children. Landlords and government housing authorities – the typical defendants in such cases – thus have fewer incentives to take measures to clean up toxic hazards in the neighborhoods most affected by lead paint.").

[42] *See* McMillan v. City of New York, 253 F.R.D. 247, 248 (E.D.N.Y. 2008). *McMillan* is an excellent teaching tool, but it was not the first, nor the only, high profile instance in which the use of race- and gender-based data was rejected as a means to determine the value of injuries. The first instance occurred in 2002, when Kenneth Feinberg, the special master of the September 11 Litigation Compensation Fund, exercised his discretion and refused to use gender-race tables in setting awards for the families of victims of the terrorist attacks of September 11, 2001. Soffen, *supra* note 36.

[43] *McMillan*, 253 F.R.D. at 248.

[44] *Id.*

[45] *Id.* ("Racially based life expectancy and related data may not be utilized to find a reduced life expectancy for a claimant in computing damages based on predictions of life expectancy"). The court also concluded that "[t]he findings of the studies reinforce the conclusion that despite a documented gap in life expectancy between 'Black' and 'White' Americans, the simple characterization of individuals as 'Black' or 'White' is not only misleading, it risks masking the complex interactions between a host of genetic and socio-economic factors." *Id.* at 253.

The court based its conclusion on "the unreliability of 'race' as a predictor of life expectancy" and on the constitutional requirements of "equal treatment" and due process.[46] Whether the reasoning in the opinion is convincing should form the basis of a lively classroom discussion. The opinion also provides a good opportunity to discuss the notion of critical race theory. While the opinion follows one of its basic tenets—the fact that the very notion of "race" is merely a social construct[47]—another aspect of its reasoning contradicts another basic tenet: the idea that systemic racism is the best way to explain the disparate impact of supposedly neutral laws.[48]

Also, the opinion's discussion of the "unconstitutionality of 'race' as a criterion for assessing damages"[49] is debatable. First, the court concludes that allowing the use of race- and gender-based statistics constitutes discrimination in violation of the principle of equal protection because the law should not subject claimants to a disadvantageous life expectancy estimate based solely on racial classification.[50] Then, without much explanation, the opinion concludes that allowing the use of race-related statistics to determine the value of a claim would constitute a violation of due process.[51] The premises upon which those conclusions are based should lead to interesting classroom discussions.

Finally, the discussion of the issue should include a review of a

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[46] *McMillan*, 253 F.R.D. at 248-49.

[47] *Id.* at 250. The debate about the notion of race itself is beyond the scope of this article. It should be noted, however, that, even within that debate, scholars accept that the concept of race clearly has a real impact on American society. Regardless of whether it is scientifically justified, the concept of race is generally understood to identify and distinguish among different categories of people. It is within that general understanding that I use the term in this article. Interestingly, the notion that there is no clear definition of what constitutes race for particular individuals is reflected in the state of the law. *See* Emilie Le Beau Lucchesi, *Do Varying Legal Definitions of Race Leave Room for Abuse?*, ABA JOURNAL (June 1, 2021, 3:15 AM), https://www.abajournal.com/magazine/article/do-varying-legal-definitions-of-race-leave-room-for-abuse ("The federal government does not have precise legal definitions of what it means to be a member of a particular race. And with no centralized federal guidance, federal and state agencies have pieced together definitions, applying them in disparate settings"). The University of Pennsylvania Law School has produced a video for its program "Case in Point" in which panelists discuss whether race is a social invention. Dorothy E. Roberts & Jonathan Marks, *Is Race a Social Invention?* UNIV. PA. CAREY L. SCH. (June 9, 2015), https://scholarship.law.upenn.edu/podcasts/23/. *See also* Allyson Hobbs, *Rachel Dolezal's Unintended Gift to America*, N.Y. TIMES (June 17, 2015), https://www.nytimes.com/2015/06/17/opinion/rachel-dolezals-unintended-gift-to-america.html (race is a fiction).

[48] *McMillan*, 253 F.R.D. at 255–56.

[49] *Id.*

[50] *Id.* at 255.

[51] *Id.* at 255–56.

recently adopted statute in California that bans the use of race- and gender-based statistical data as a means to calculate the value of torts claims.[52] Here are some of the questions to explore when discussing this material: (1) If the court in *McMillan* is correct in asserting that the concept of race is a social construct inappropriate for assessing damages in a negligence case, why do so many jurisdictions still accept the use of race- and gender-based data when calculating the value of claims? (2) Could the creation of more detailed life expectancy tables that take into account distinctions such as education, place of residence, geographic wealth distribution, employment, and socioeconomic status eliminate the concerns expressed by the opinion and by the California legislature? (3) How convincing is the conclusion that the use of race- and gender-based data is unconstitutional?[53]

Depending on the amount of time dedicated to this material, an additional (or alternative) topic that can be added to the discussion about damages in a torts course is the notion of race norming. The phrase "race norming" refers to the practice of adjusting test scores to account for the race or ethnicity of the test-taker.[54] Although the practice of race norming was originally designed as a method to counter racial bias in aptitude tests, it has a negative effect on minority claimants when used to evaluate levels of injury.[55]

To frame the discussion, professors can assign recent accounts of the National Football League's use of race norming as part of the evaluations of former players' cognitive disabilities.[56] These materials explain that medical professionals use the practice of race norming, in theory, to help make proper diagnoses by using race to fully evaluate patients' injuries

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[52] CAL. CIV. CODE § 3361 (2020).

[53] *McMillan*, 253 F.R.D. at 249; *see also, e.g.*, CAL. CIV. CODE § 3361 (West 2022); *McMillan*, 253 F.R.D. at 255 ("Equal protection in this context demands that the claimant not be subjected to disadvantageous life expectancy estimate solely on the basis of a 'racial' classification.").

[54] Zirin, *supra* note 34.

[55] *Id.*

[56] *Id. NFL Considered Race in Paying Head Injury Claims: Lawsuit*, ABC NEWS (Feb. 3, 2021), https://youtu.be/ZWPdey09hG8; Alberto Bernabe, *Federal Judge Orders NFL and Players to Mediation to Address Concern Over Racist Methodology When Calculating Compensation for Players*, TORTS BLOG (Mar. 13, 2021), https://bernabetorts.blogspot.com/2021/03/federal-judge-orders-nfl-and-players-to.html; Maryclaire Dale & Michelle R. Smith, *Retired Black players say NFL brain-injury payouts show bias*, AP NEWS (May 14, 2021, 5:15 PM), https://apnews.com/article/health-nfl-race-and-ethnicity-sports-066d9fd6bd85f5b5023207467701fde4; Pete Madden, et al., *Clinicians Fear NFL's concussion settlement program protocols discriminate against Black players*, ABC NEWS (Feb. 3, 2021, 6:06 AM), https://abcnews.go.com/Sports/clinicians-fear-nfls-concussion-settlement-program-protocols-discriminate/story?id=75646704.

but that, in practice, its effect can be seen as discriminatory.[57] The NFL has used the practice to establish the level of damage done to former players' brains during their careers and has tried to justify it by stating that race norming was developed to correct, rather than to perpetrate, racial bias in neurological tests.[58] The practical effect of race norming, however, is the use of a different standard to evaluate the claims of African American players, which results in lower compensation for their injuries.

III. BATTERY AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Another reason to discuss issues of race and gender in a torts class is to help the students understand that addressing those types of issues often requires a balancing of competing values. This will, in turn, require the students to question the validity and relative importance of those values. The direction of this discussion often takes unexpected turns. Students who are passionate about recognizing certain types of claims might pause when they realize that the consequences of doing so might require giving up some degree of the right to freedom of expression or require allowing the state to exercise more control over a woman's right to autonomy, for example.

The discussion of this material can be organized around the doctrines related to battery and intentional infliction of emotional distress, as well as the doctrines related to prenatal torts. The first of these two approaches might rely on the well-known case *Fisher v. Carrousel Motor Hotel, Inc*., which many editors include in torts casebooks.[59] *Fisher* took place in the early 1960s, during the height of the civil rights movement in the United States.[60] The plaintiff was an African American mathematician employed by NASA who attended a luncheon during a professional conference.[61] As a waiter was about to serve him, one of the defendant's employees snatched a plate from the plaintiff's hand, shouting that he would not be served because of his race.[62]

Casebooks use the case to help illustrate the distinction between assault and battery and to explain that a plaintiff can support a claim for battery even if there is no direct contact with the plaintiff's body and no

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57 Zirin, *supra* note 34.
58 Madden et al., *supra* note 57.
59 Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627 (Tex. 1967).
60 *Id.*
61 *Id.* at 628.
62 *Id.* at 628–29.

physical harm.[63] Yet, the offensive conduct in *Fisher*, which was clearly based on racial animus toward the plaintiff,[64] also supports a discussion about whether such conduct should give rise to a cause of action for injuries caused by racist conduct. This discussion often leads to an analysis of the tort of intentional infliction of emotional distress, which in turn leads to questions about whether the conduct is "outrageous" enough to support such a claim and whether the emotional distress claimed as an injury is "severe."[65] This case, therefore, can be a perfect springboard to discuss another intersection between torts and issues of race. Is racist conduct a type of "extreme and outrageous conduct" that justifies the recognition of a cause of action for the emotional harm it causes?

In my experience, most students quickly agree that the law should consider racist conduct to be "extreme and outrageous" because they feel it fits the description of conduct courts typically recognize as such—that is, conduct that goes "beyond the bounds of human decency" or that is

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[63] *See generally Fisher*, 424 S.W.2d at 628–30 (holding that the intentional snatching of an object from one's hand constitutes a battery) ("To constitute . . . battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when, done in an offensive manner, is sufficient.") (quoting Morgan v. Loyacomo, 1 So. 2d 510 (Miss. 1941)).

[64] *Id.* at 628.

[65] *Fisher*, 424 S.W.2d at 628–29. It is worth noting that the type of conduct that can give rise to a claim for intentional infliction of emotional distress varies among states and that proving that certain conduct is "extreme and outrageous" is a high standard to meet. *See, e.g.*, Walker v. Thompson, 214 F.3d 615, 628 (5th Cir. 2000) (holding that conduct that would have been sufficient to support a claim of harassment for employment law purposes did not support a claim for intentional infliction of emotional distress). In *Walker*, the appellants sued their employers because the employers frequently subjected them to racist remarks while at work. *See id.* at 626 ("The offensive remarks began in 1994, shortly after [they were] hired and had not ceased the week prior to the appellants' resignations in May of 1997. While working for [their employers], the appellants at various times were subjected to: comparisons to slaves and monkeys, derisive remarks regarding their African heritage, patently offensive remarks regarding the hair of African–Americans, and conversations in which a co-worker and supervisor used the '[N-word].' The office manager also informed them that the vice-president did not want the African–American women to talk to each other."). Nevertheless, the court found that the conduct "does not rise to the level of extreme and outrageous conduct under Texas law." *Id.* at 628. For an example of the burden of proof needed to show that the emotional distress caused by racist conduct is "severe," see Turner v. Wong, 832 A.2d 340, 348 (N.J. Super. App. Div. 2003). In *Turner*, the court held that "the invocation of racial slurs may conceivably be sufficient to cause severe emotional distress to the average African American," but "[m]ere allegations of 'aggravation, embarrassment, an unspecified number of headaches, and loss of sleep,' are insufficient as a matter of law to support a finding of severe mental distress that no reasonable person could be expected to endure." *Id.* For a discussion about how the high standard of proof required in emotional distress cases has a disparate effect on people of color, see Hafsa S. Monsoor, *Modern Racism But Old-Fashioned IIED: How Incongruous Injury Standards Deny "Thick Skin" Plaintiffs Redress for Racism and Ethnoviolence*, 50 SETON HALL L. REV. 881 (2020).

"intolerable in civil society."[66] A more detailed discussion of the issue often leads to an interesting debate, however, after which many students agree that, even if the conduct is extreme and outrageous, it might not be a good idea to recognize a cause of action, at least in cases in which the conduct is limited to expressive conduct or speech.[67]

There are many useful sources of information that professors could assign to prepare for this discussion, but my suggestion is to assign only *Fisher* and to try to lead the discussion to consider the pros and cons of recognizing a cause of action for the emotional injuries caused by racist conduct.[68] Professors, however, should prepare for the discussion by reading a few important law review articles. The first one to consider is

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[66] *See, e.g.*, THE RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (AM. L. INST. 1965) ("The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress . . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."). *See also infra* note 68 and accompanying text.

[67] The First Amendment generally protects expressive conduct and speech. *See* U.S. CONST. amend. I.

[68] Although there are a few cases in which courts have recognized a cause of action for intentional infliction of emotional distress caused by racist conduct and expressions, assigning them for class discussion may not be as productive. *See, e.g.*, Alcorn v. Anbro Engineering Inc., 468 P.2d 216 (Cal. 1970); Taylor v. Metzger, 706 A.2d 685 (N.J. 1998); Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977). These cases are more on point than *Fisher*, but assigning them for class discussion may be problematic because the courts' opinions explicitly quote the defendants racist expressions, including the "N-word" and other offensive expressions. Deciding whether to assign these cases will place the professor in the position of having to decide whether to assign a case "as written" respecting the integrity of the document, to censor the text to avoid its original language, to mention or quote (and whether to allow students to use or quote) the offending words during the discussion in class, and then to be ready to explain those decisions if questioned by students. There is a robust debate as to whether it is acceptable for professors to use, and allow others to use, the "N-word" in class and whether it is a good idea to assign materials that contain it. As an example, see Eugene Volokh & Randall Kennedy, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAPITAL UNIV. L. REV. 1 (2021), https://www2.law.ucla.edu/volokh/epithets.pdf; *see also*, Eugene Volokh, *The Controversy Over Quoting Racial Epithets, Now at UC Irvine School of Law*, THE VOLOKH CONSPIRACY (Aug. 21, 2020), https://reason.com/volokh/2020/08/29/the-controversy-over-quoting-racial-epithets-now-at-uc-irvine-school-of-law/. This debate and recent events that have resulted in discipline for academics suggest that even though cases such as *Alcorn, Taylor,* and *Contreras* directly address the issue of whether a court should recognize a cause of action for injuries caused by racist speech or conduct, assigning any one of them might be counterproductive. It may result in protests from students and a debate as to the decision to assign the cases rather than to a healthy discussion of the content for which the professor assigned the cases. Thus, it might be better to avoid the distraction and the risks involved in assigning what will likely be controversial cases that will offend someone and instead to use a hypothetical case based on the facts in *Fisher*.

Professor Richard Delgado's article, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-calling,* which is one of the first examples of critical race theory scholarship.[69] Delgado argues that there ought to be a tort for vindicating the emotional harm caused by racist insults.[70] The arguments in the article sound compelling, and many students will likely agree with them.[71] However, professors should also discuss a second article, which is a reply to Delgado and which makes a strong argument in favor of rejecting a cause of action based on traditional principles of freedom of expression reflected in the First Amendment.[72]

Depending on how much time there is to devote to this discussion, professors may want to assign edited versions of all the articles or simply use the facts of *Fisher* as the background for a discussion of the issue,[73] while steering the discussion to cover both sides of the debate and to introduce the content of the articles. Ultimately, the discussion should address this essential question: Should a court recognize a cause of action for the emotional injury caused by racist conduct or speech absent support for a cause of action for battery or assault?

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[69] *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter *Words That Wound*]. Other articles to similarly pioneer this subject matter are Marjorie Heins, Commentary, *Banning Words: A Comment on "Words That Wound"*, 18 HARV. C.R.-C.L. L. REV. 585 (1983); Richard Delgado, Response, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593 (1983); *see* Chamallas, *Race and Tort Law*, *supra* note 12, at 1, 3 (considering Delgado's article as the "first critique of tort law from a critical race lens," which "marked the beginning of a vibrant, if still not voluminous, body of critical race torts scholarship"). More recently, Delgado's proposal was revived by Tasnim Motala's article, *Words Still Wound: IIED & Evolving Attitudes Toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115 (2021), *reviewed in* Cristina Tilley, *Torts That Heal Words That Wound*, JOTWELL (Sept. 27, 2021), https://torts.jotwell.com/torts-that-heal-words-that-wound/. *See also* MARI J. MATSUDA, CHARLES R. LAWRENCE, RICHARD DELGADO, & KIMBERLÉ CRENSHAW, WORDS THAT WOUND, CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 2 (Westview Press 1993) (presenting a dissenting view grounded in the authors' experiences as people of color).

[70] *See* Richard Delgado, *Words That Wound*, *supra* note 69, at 167 ("This Article will argue that an independent tort action for racial insults is both permissible and necessary . . . . [It] will first examine the harms caused by racism and racial insults to the victims, to the perpetrators, and to society as a whole . . . . The Article will next consider objections to an independent tort that are based on the difficulty of apportioning damages and on first amendment concerns.").

[71] As expressed by Professor David Kairys, "[r]ace harassment, like sex harassment, intentional infliction of emotional distress, and assault, should not be constitutionally protected or socially legitimized." DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT 81 (N.Y. Press 1st ed. 1993).

[72] *See* Heins, *supra* note 69, at 591–92.

[73] Fisher v. Carrousel, 424 S.W.2d. 627 (Tex. 1967); *see also supra* note 68 and accompanying text.

Regardless of the approach to the discussion, the important thing is for the students to understand the arguments and counterarguments, as well as the possible unintended consequences of the positions they decide to advance. Moreover, it is important for students to recognize that choosing between alternative positions requires a careful evaluation of the different sides of the issue and the balancing of competing positive values. On the one hand, we want to discourage racist conduct and speech, but on the other, we want to protect the right to freedom of expression. Can we find a way to balance both?

Discussing the different issue of whether the state can criminalize racist speech, Professor David Kairys has explained that "[t]here is no easy answer to the racist-speech or bias-motivated crime question unless one is prepared to abandon either free speech or equality."[74] If that is true, are we ready to give up some freedom of expression to try to discourage racist actors and to provide remedies to those who suffer injury as a result of racists' actions? Is the use of tort law principles an effective way to try to solve a social problem like racism? These are some of the questions that will emerge during the discussion of this material.

IV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A third reason to spend time discussing issues of race and gender in a torts class is to expose students to the disturbing history of bias in the American legal system. Professors interested in this approach will have many cases to choose from that illustrate a history of discrimination in the law, as well as cases that illustrate steps courts have taken to try to correct that history.

For example, as part of the coverage of negligent infliction of emotional distress, professors may want to assign *Gulf v. Luther*. Decided in 1905, in *Luther*, the court recognized a cause of action on behalf of a white plaintiff against the employer of an African American woman.[75] The case is interesting because, at a time when courts were reluctant to

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[74] On the other hand, Professor Kairys disagrees with Supreme Court rulings that he feels have protected racist speech in a way that is inconsistent with other existing limitations. *See* KAIRYS, *supra* note 71. *See also id.* at 80. ("Anyone who values free speech *and* equality should feel some ambivalence about racist speech, particularly because, regardless of the rhetoric, speech is regularly regulated based on content and much less offensive and socially disruptive messages are censored. . . . . Done with accomplished vagueness and ambiguity, the conservative critique of regulation of racist speech simultaneously ties into familiar conservative themes about affirmative action, taps white fears and prejudices, and mocks liberals as obsessed with 'political correctness.'").

[75] Gulf, C. & S.F. Ry. Co. v. Luther, 90 S.W. 44, 48 (Tex. Civ. App. 1905).

recognize claims for emotional distress, the court recognized a cause of action because of the race of the parties.[76] Leaving little doubt as to the bias involved in the decision, in a disturbing passage, the court justifies its holding, stating that "[w]hat could be more humiliating to a frail, delicate, sensitive woman . . . than to be pounced upon, vilified, and traduced by a negro servant in a railway depot, where [the plaintiff was entitled] to be treated with respect and kindness?"[77]

Although disturbing, this language can form the basis of an interesting class discussion. For example, the overt double standard the court used to describe the relationship between the plaintiff and the defendant's employee provides a good picture of the prevalent bias at the time.[78] The court calls the plaintiff by name and characterizes her as "delicate," "sensitive," and someone who should be respected, while it refers to the African American woman by her race and as a "servant" whose conduct was disrespectful.[79] In fact, the opinion does not even mention the African American woman's name.

Class discussion should also explore the consequences of the holding of the case. Was the employee's conduct the type of conduct for which a court should recognize a cause of action? What was it about the conduct that justified recognition of a cause of action? The plaintiff alleged that the defendant's employee looked at his wife "with an angry look" and said that his wife was a liar while shaking a finger in her face.[80] The opinion acknowledges that the African American woman testified to different facts but does not say what her testimony was, so readers only get one side of the story.[81] Evidently, the court based its decision on a value judgment about the expected behavior of an African American person toward a white person. This is disturbing and makes for an uncomfortable class discussion about whether courts' decisions can operate to, as one author has called it, "reinforce white privilege and to provide a remedy for wounded feelings of white racial pride."[82]

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76 *Id.* at 48.

77 *Id.*

78 *Id.*

79 *Luther*, 90 S.W. at 48.

80 *Id.* at 46.

81 *Id.*

82 *See* Chamallas, *Race and Tort Law*, *supra* note 12, at 6 (discussing how, prior to the civil rights era, tort law operated to reinforce white privilege and to provide a remedy for wounded feelings of white racial pride but did not compensate for the emotional and psychic harms of racial subordination).

V. SHOULD THE STANDARD OF CARE IN NEGLIGENCE CASES TAKE INTO ACCOUNT GENDER OR RACE?

As part of the discussion of the elements of the cause of action for negligence, torts casebooks and courses cover the notion of the standard of care.[83] Presumably, most professors also address whether this standard should change to account for certain individual traits.[84] For example, a common issue is whether courts should apply a different standard when the defendant suffers from a physical disability, is a minor, or is mentally ill.[85] Casebooks tend to pay much less attention to whether the standard should consider the race and gender of either the defendant or the plaintiff.[86]

One reason for this is that if the standard of evaluation were based on some of the defendant's personal traits, there would be no rational way to determine which traits to use and which to ignore. The use of too many individual traits would result in the application of a standard that is too subjective. As all torts professors know, traditional tort law doctrine applies an objective standard in most cases to avoid that approach.[87]

Another explanation for why casebooks might not include materials that address whether to adjust the standard based on gender and race is, perhaps, that there may not be enough recent opinions discussing the standard of care in those terms. However, that does not mean that the issue is not worth exploring. After all, the prevailing use of the expression "reasonable man" has always implied bias by suggesting that the proper

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[83] *See* Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769, 776–77 (2001) [hereinafter Schlanger, *Gender Matters*]; Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 21–22 (1988).

[84] *See* Schlanger, *Gender Matters*, *supra* note 83, at 770–71; Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1358–61 (2010) [hereinafter *Third-Party Criminal Attack Cases*].

[85] *See* Chamallas, *Third-Party Criminal Attack Cases*, *supra* note 84, at 1358.

[86] *See* Schlanger, *Gender Matters*, *supra* note 83, at 769 ("[O]ddly, no casebook of which I am aware deals with the trait that nearly invariably figures in our description of people: sex.").

[87] *Id. See also* Chamallas, *Third-Party Criminal Attack Cases*, *supra* note 84, at 1356 ("One of the basic tort concepts first encountered in a first-year torts course is that of the reasonable person. Students soon learn that the RPS is an "objective" and "universal" standard that seeks to evaluate conduct from a neutral position and does not turn on the personal characteristics or traits of the party.").

standard by which one should evaluate proper conduct is that of an adult male.[88]

It is not difficult to find old torts cases that contain expressions of bias toward women as a matter of both substance and of procedure. For example, in *Daniels v. Clegg*, the court found that, in deciding whether a twenty-year-old woman had exercised ordinary care, the jury should apply a standard of care akin to the one used to evaluate the conduct of children.[89] It held that "the jury should consider the age of the daughter, and the fact that she was a woman" and concluded, "that she would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use."[90] Likewise, with respect to procedural bias, one example is *Western Union Telegraph Co. v. Hill*, in which the plaintiff was a man even though the injured victim was his wife.[91] Yet, there are few modern cases that discuss whether courts should consider a tortfeasor's gender to evaluate her conduct as part of a claim.

The work of Professor Margo Schlanger is an excellent source of information on this topic.[92] Professor Schlanger discusses the different approaches courts have adopted in cases that involve the conduct of women, and she uses those cases to explore whether the law of torts should consider the notion of a "reasonable woman."[93] In looking at those cases, it becomes obvious that references to a person's gender in defining the standard of care are necessarily based on a presumption that typical conduct varies according to gender.[94] Some courts have held that it would be proper to evaluate the conduct of a woman by taking her gender into

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[88] *See, e.g.*, Schlanger, *Gender Matters*, *supra* note 83, at 769–70 ("If the casebooks are silent [on gender and race] . . . the cases and commentary are not. Judicial opinions frequently used to refer to the 'reasonable man' rather than the reasonable person."). Evidently, because the use of the word "man" in the expression "reasonable man" suggests bias, over time courts began to change the wording to the more common current version, the "reasonable person." Yet, it is difficult to know whether the change was only in the use of a word, and not necessarily in the underlying analysis or whether the change in the wording has had a more significant effect on the way jurors think of the standard and how to apply it. A detailed review of jury instructions throughout the states, which is beyond the scope of this article, would be helpful to determine whether courts are providing more detailed explanations on how to apply the standard in gender-neutral terms. *See* Bender, *supra* note 83, at 20–22 (discussing courts' gradual evolution from the once-considered-gender-neutral term "reasonable man" to the more recent "reasonable person").

[89] 28 Mich. 32, 40 (1873).

[90] *Id.*

[91] *See, e.g.*, Western Union Telegraph Co. v. Hill, 150 So. 709–710 (Ala. App. 1933).

[92] *See generally* Schlanger, *Gender Matters*, *supra* note 83 (discussing and providing examples of modern cases considering these issues).

[93] *Id.*; Margo Schlanger, *Injured Women Before Common Law Courts, 1860–1930*, 21 HARV. WOMEN'S L.J. 79, 80–81 (1998) [hereinafter Schlanger, *Injured Women*].

[94] Schlanger, *Gender Matters*, *supra* note 83, at 773–775.

account, but other courts have held the opposite.[95] Discussion of these decisions adds value to a torts course. Exploring this issue reinforces the value of paying close attention to judicial language, and, more importantly, it "gives students a chance to explore the interaction of law and social norms in a doctrinal context" and "reveals that doctrinal implementation of an ideal of equality between the sexes is more complicated than most [students] would have thought."[96]

Professors who are interested in approaching this question in a more recent case can also assign *Ellison v. Brady*, in which the Court of Appeals for the Ninth Circuit adopted a "reasonable woman" standard to help define what constitutes actionable conduct in support of a claim of sexual harassment.[97] In *Ellison*, the court reversed the lower court's ruling that the plaintiff had not stated a prima facie case of hostile environment sexual harassment, holding that "in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim."[98] The court concluded that, if courts do not consider the plaintiff's gender when applying the standard of care,[99] they "run the risk of reinforcing the prevailing level of discrimination."[100] The court declared that "a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[101]

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[95] *Id.* Interestingly, Schlanger discusses some of the cases in which courts took gender into account when the plaintiffs were women were based on preexisting gender stereotypes such as the notion that women were weak and needed to be protected. *See id.* For example, *compare* Daniels v. Clegg, 28 Mich. 32 (1873), *with* Tucker v. Henniker, 41 N.H. 317 (1860), *and* Hassenyer v. Michigan Central Railroad, 48 Mich. 205 (1882). On the other hand, Professor Schlanger has also argued that in some cases courts have ruled in favor of women not because of biased images but, rather, because of the courts' recognition of objective circumstances that distinguished women from men and that some defendants (namely common carriers) created risks that affected women more than men. Schlanger, *Injured Women*, *supra* note 93, at 114–18.

[96] Schlanger, *Gender Matters*, *supra* note 83, at 777–778.

[97] *See* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) ("[W]e hold that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."). In addition, the court concluded that because conduct considered harmless today may be considered discriminatory in the future the reasonableness standard should not be static. *Id.* As the views of what is a "reasonable woman" change, so too will the standard of acceptable behavior. Most other circuit courts, including those for the Fifth, Sixth, Eighth, and Eleventh Circuits, have rejected a similar standard, and the Supreme Court has not clarified the split among the courts. *See* Newman, *supra* note 13, at 532–33.

[98] *Ellison*, 924 F.2d at 878.

[99] *Id.* (referring to this approach as "analyzing harassment from the victim's perspective," which requires an analysis of the different perspectives of men and women).

[100] *Id.*

[101] *Id.* at 879.

Can the same be said in torts cases? Should the conduct of men and women be evaluated differently when one potentially creates an unreasonable risk of harm to others?[102] Again, there are a number of law review articles professors can assign to students or use to prepare for discussion.[103]

In addition, professors can use the dissenting opinion in *Ellison* to support the argument against adopting a reasonable woman standard in torts cases. In it, Judge Stephens argued that the reasonable person standard assumes that it is applicable to all persons, regardless of gender, precisely because it is better to use a legal term that can apply to all

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[102] Notably, there is some empirical evidence that men and women behave differently in some circumstances that may create risks to others. *See, e.g.*, Gary T. Schwartz, *Feminist Approaches to Tort Law*, 2 THEORETICAL INQUIRIES L. 175, 187–88 (2001) (noting that there is emerging literature on whether there are gender differences in behavior and illustrating it with statistics that suggest that young women drivers are involved in a dramatically lower number of severe crashes than young men).

[103] In addition to the articles by Margo Schlanger already mentioned, there are scholarly articles that seem to recommend the use of a "reasonable woman" standard in sexual harassment cases. *See* Schwartz, *supra* note 102, at 189 (citing Lucinda M. Findley, *A Break in the Silence: Including Women's Issues in a Torts Course*, YALE J.L. & FEMINISM 41, 57–58 (1989)); Caroline Forell, *Essentialism, Empathy, and the Reasonable Woman*, 1994 U. III. L. REV. 769, 776 (1994). Yet, according to Schwartz, none of these articles really endorses a different standard for purposes of evaluating the negligence of a party's conduct in personal injury litigation. *See id*. For an article exploring the possibility of adopting a "reasonable Black person standard in the context of criminal law and procedure," see Kerry L. Shipman, *The Reasonable Black Person Standard in Criminal Law: Impartiality, Justice and The Social Sciences*, 13 S. J. POL'Y & JUST. 75, 75–6 (2019) (arguing that a way to confront the fact that African Americans regularly face more discriminatory practices is to adopt a "reasonable [B]lack person" standard to account for the idea that a "reasonable white person" would likely respond differently to any situation involving law enforcement) [hereinafter *The Reasonable Black Person Standard*]. Shipman's article concludes that, to attempt to minimize discrimination in the criminal justice system, it is necessary to apply a reasonable Black person standard to cases involving Black suspects, in order to consider their experiences with both the law and society in general. *Id*. *See also* Mia Carpiniello, *Striking a Sincere Balance: A Reasonable Black Person Standard for "Location Plus Evasion" Terry Stops*, 6 MICH. J. RACE L. 355, 355 (2001). Carpiniello argues that African Americans are subject to a disproportionate number of police stops "because the current standard fails to take account of the unique experience of Blacks in the criminal justice system;" thus, "reasonable behavior" is defined as white behavior. *See id.* at 358 ("By painting the reasonable White person standard as a race-neutral reasonableness standard, courts undermine the significance of race. Race does matter when it comes to a person's decision to flee from police, a police officer's decision to stop a person, and a court's decision whether to accept a police officer's judgment. As such, a criminal justice system predicated on equality under the law should aim to cure this discriminatory reality. The current reasonable police officer standard for *Terry* stops fails to recognize the unique Black perspective on police encounters. As such, it perpetuates racial discrimination by re-enforcing existing racial hierarchies while maintaining a façade of race-neutrality."). *See also* Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U.L. REV. 1513, 1513–14 (2018).

persons and because of "the impossibility of a more individually tailored standard."[104] Traditional tort law cases like *Vaughan v. Menlove* and cases discussing the consideration of gender when evaluating a person's conduct support this view, but, as the *Ellison* court states, the law is not static.[105]

On the other hand, one should also note that not everyone agrees that the reasonable man (now reasonable person) standard necessarily resulted in the disparate treatment of women in older tort law cases. In an article published in 2001, Professor Gary Schwartz addressed the article written by Professor Schlanger mentioned above in support of this conclusion.[106] He argues that several studies of torts cases between 1870 and 1920 found that, when evaluating the conduct of women in order to determine if they were contributorily negligent and, therefore, would lose the right to recover entirely, courts sometimes tended to hold men and women to different standards of care.[107] This is based on the notion that negligence was "an explicitly relative term indissolubly tied to the gender of the actors involved"[108] and that the opinions produced results that were "frequently, though not uniformly, friendly to women and their needs."[109]

There is much more material on this topic than there will be time to allocate in a typical first-semester torts class, so professors will have to make some tough decisions regarding how much material to assign and how much time to spend on the discussion. For a typical single-semester torts course, I recommend assigning *Daniels v. Clegg* to compare its result to the modern approach to evaluating the conduct of children, and, if time allows, maybe *Ellison v. Brady,* also in order to consider whether the adoption of a reasonable woman standard would be a good policy choice in tort law.[110]

Although *Ellison* is not a torts case, its discussion is relevant to tort law and can form the basis of yet another rich discussion on issues of race and gender. Should the conduct of a woman in a torts case be evaluated by using a "reasonable woman under the circumstances" standard? Should the standard also take race into account?[111] If so, how should the judge in

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104 *See* Ellison v. Brady, 924 F.2d 872, 884 (9th Cir. 1991).

105 *Id.* at 872; Vaughan v. Menlove, 132 Eng.Rep. 490, 493 (1837).

106 Schwartz, *supra* note 102, at 180.

107 *Id.*

108 *Id.*

109 *Id.* at 181.

110 Daniels v. Clegg, 28 Mich. 32 (1873); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

111 *See* Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2065

a torts case explain to a male juror how to apply the reasonable woman standard? In cases in which the plaintiff is seeking compensation for an emotional injury, should jurors be told to consider the gender or race of the plaintiff in determining the validity or extent of that injury? How should we all, members of society, learn to understand how others' gender and race influence how they react to our actions? Finally, it is always interesting to ask students to put themselves in the position of a juror and to explain to their classmates how they would evaluate an allegedly negligent actor's conduct.

VI. PRENATAL TORTS

Several cases related to prenatal torts provide opportunities to address interesting issues at the intersection of torts, gender, and race, the analysis of which requires students to balance competing values. One is *Stallman v. Youngquist,*[112] in which the court refused to recognize a cause of action against a mother for injuries caused to her child while the child was *in utero,* even though it would have recognized the same claim if the defendant had been someone else.[113]

Stallman is an example of a case involving a prenatal injury—a type of claim commonly recognized by courts as occurring against "third parties."[114] The issue in *Stallman*, however, is distinguishable from other prenatal injury cases. In this instance, the question was whether to recognize a cause of action against a mother when her child is born with an injury that can be traced back to the mother's negligence during the pregnancy.[115] Addressing this question forces students to ask whether and to what extent the state should be able to regulate the conduct of a woman simply because she happens to be pregnant.

An injured child is usually able to support a claim for injuries suffered while *in utero* as long as, after birth, the child-plaintiff can establish the elements of the cause of action, including making a causal connection between the injury and the conduct of the defendant who interacted with the child's pregnant mother.[116] The relevant policies change, however, when the defendant is the child's mother and the child

(2017) (resorting to common law tort theory may be equally unavailing for Black women who are subject to aggressive encounters).

112 Stallman v. Youngquist, 125 III. 2d 267, 278 (Ill. 1988).

113 *Id.* at 280.

114 *Id.*

115 *Id.* at 271.

116 *Stallman*, 125 III. 2d at 272.

is alleging that the mother was negligent while pregnant.[117] A pregnant woman can claim that, although she may have a moral duty to take care of herself while she is pregnant in order to avoid placing the fetus at risk of injury, courts should not recognize an enforceable legal duty to do so because that would infringe on her right to autonomy. This was precisely the basis for the decision of the court in *Stallman*.[118] The court concluded that the law should not force a woman to subordinate her right to control her life when she becomes pregnant and that the recognition of the plaintiff's cause of action would have serious ramifications for all women, as well as for how society views women and their reproductive abilities.[119] In other words, the court felt that women should have the right to decide how to live their lives while they are pregnant without government interference.

The *Stallman* court explained that potentially subjecting a woman to liability if she negligently caused an injury to a fetus would be an unprecedented intrusion into her personal privacy and autonomy because nearly every aspect of a woman's life—including, for example, whether the woman smokes, drinks alcohol, gets enough sleep, exercises too much or too little, as well as her diet, her living environment, and whether she has access to quality medical care—could impact the fetus's health.[120] The court also pointed out that imposing a duty in this context could have a disparate effect on women of varying socioeconomic circumstances.[121]

The classroom discussion of this case almost always results in a very lively and rewarding exchange of ideas and opinions. Many students feel passionate about the rights of the unborn, and many others feel equally passionately about a woman's right to choose and control her own body. Other questions also arise. For instance, men's lives are presumably not subject to scrutiny while they are "expecting," so why should women be held to a different standard of care simply because they are women? Is it acceptable for tort law to operate in a way that has a disparate impact on women? Is that discriminatory? *Stallman* provides a constructive basis for the discussion of all these topics.

In addition, the discussion of a case that briefly garnered national media attention in 2014 provides an opportunity for an even more interesting discussion in the area of prenatal torts.[122] In the complaint, in

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117 *Id.*

118 *Id.* at 279–80.

119 *Id.* at 275–76.

120 *Stallman*, 125 III. 2d at 278.

121 *Id.* at 279.

122 For a discussion of *Cramblett* and its implications, see Bernabe, *Do Black Lives Matter?*, *supra* note 1.

that case, Jennifer Cramblett sued a sperm bank, alleging that the defendant negligently provided sperm from an African American donor, even though Ms. Cramblett had specifically requested the sperm of a white donor with blond hair and blue eyes.[123] Ms. Cramblett found out about the mistake after having been inseminated with the sperm, and, though upset by the mistake, she carried the pregnancy to term and gave birth to a healthy mixed-race child.[124] Although expressed differently, Ms. Cramblett's claim would have essentially forced the court to decide whether to consider a child's birth to be an injury to the child's parents because of the child's race. Ultimately, the court dismissed the complaint, but the issue raised by the plaintiff's claim is interesting and worth discussing.[125]

In *Cramblett*, the plaintiff argued that the sperm bank should compensate her for the hardships she had to endure as the result of becoming the parent of a mixed-race child and for the hardships that the child would have to endure throughout her life.[126] The child born to Ms. Cramblett did not suffer from any medical condition that required extraordinary expenses.[127] The child was born healthy, without any physical or mental disabilities; rather, what the plaintiff claimed was "wrong" was the child's mixed-race heritage.[128] To justify compensation as a "wrongful birth" claim based on that allegation, the court would have had to find that the child's race was, itself, a disability, and that, for the mother, having a mixed-race child was an injury.[129] Class discussion can revolve around whether courts should recognize such a claim and the unintended consequences that would follow from such a ruling. What message would it send to recognize a claim based on the notion that a child has, or *is*, a disability because of his or her race? What would recognizing the claim say regarding the value of life as an African American person in American society?

Presumably, the court could have avoided a wrongful birth claim by categorizing it as a claim for emotional distress arising from the birth of a child with unexpected characteristics. Doing this, however, would not have avoided the fact that the "unexpected characteristic" of the child was

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123 *Id.* ¶ 3.
124 *Id.* ¶ 5.
125 *Cramblett*, 2017 IL App. 2d ¶ 6.
126 *Id.* ¶ 7.
127 *Id.*
128 *Id.* ¶ 6.
129 *See Cramblett*, 2017 IL App. 2d ¶ 6.

her race, which brings the discussion back to the same starting point.[130] Would it be good legal and social policy to recognize a cause of action on behalf of white parents who argue that they would rather not have had a mixed-race child or that having a mixed-race child constitutes an injury?[131] In her complaint, Ms. Cramblett also argued that she was not well-equipped to be the mother of her child because of her ignorance regarding race relations in this country. Is tort law a good vehicle to provide a remedy for not being well-informed about the realities of race relations in American society?[132]

There are a few readings available that will help prepare for a discussion of the *Cramblett* case,[133] but again, in the interest of keeping the assignments short and to the point, it may be best to just assign the video of an interview of the plaintiff originally broadcast by NBC.[134] In the broadcast, the plaintiff explained why she felt she should be compensated for her injuries, which included the fact that the child's race caused unexpected expenses, difficulties related to the family's need to move to a different neighborhood, and the need to go to an African

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[130] *Compare* Harnicher v. Univ. of Utah Medical Center, 962 P.2d 67 (Utah 1998) (court rejecting a claim for emotional distress based on an unexpected characteristic of a child), *with* Andrews v. Kelz, 838 N.Y.S.2d 363 (N.Y. Sup. Ct. 2007) (court not giving much importance to the racial mix-up aspect of the claim). In *Harnicher*, the court hinted that the question may be different if the allegation had been based on a "racial mismatch" between the children and their parents. *Harnicher*, 962 P.2d 67. In *Andrews*, New York courts had already decided that the birth of a healthy child does not constitute a harm for which the law should recognize a remedy. *Andrews*, 838 N.Y.S.2d at 367 ("As a matter of public policy we are unable to hold that the birth of an unwanted but otherwise healthy and normal child constitutes an injury to the child's parents and is, therefore, compensable in a medical malpractice action."). The court stated that recognizing a cause of action on behalf of parents who argue that the birth of a healthy child (even if the parents are distressed due to a racial mix up), "would be incompatible with contemporary views concerning one of life's most precious gifts – the birth of a normal and healthy child. We are loath to adopt a rule, the primary effect of which is to encourage, indeed reward, the parents' disparagement or outright denial of the value of their child's life." *Id.*

[131] For a possible answer to this question, see CHAMALLAS & WRIGGINS, *supra* note 36, at 112 ("To award a couple damages for emotional distress . . . might well reinforce racial prejudice or racial antipathy and might be understood as making a statement that it is reasonable for a person to reject a child for the sole reason that his skin color or physical attributes are different from the plaintiff's."). *See also* Bernabe, *Do Black Lives Matter?*, *supra* note 1, at 65 (arguing that the court was correct in rejecting the claim in *Cramblett* because, otherwise, the court would have sent a negative message about the value of parenting which could have a negatively affected the plaintiff's daughter).

[132] *See, e.g.*, Procanik v. Cillo, 478 A.2d 755 (N.J. 1984) (court rejecting a claim that parents should be compensated for emotional distress because they were not well-equipped to be parents of a child with a disability).

[133] Bernabe, *Do Black Lives Matter?*, *supra* note 1, at 56.

[134] *Today*, "A black & white case?" (NBC television broadcast), YOUTUBE (Oct. 14, 2014), https://youtube.com/watch?v=CE0XZM2vJPE.

American neighborhood to obtain some services for the child.[135]

The plaintiff also said that the lawsuit "[was] not about race," which is, at best, naive.[136] Discussing the plaintiff's arguments and contradictory statements is a good way to address many questions, including whether it is accurate to say that the case was not "about race," whether the claim should be for "wrongful life," "wrongful birth," or "wrongful conception;" whether the plaintiff's alleged injuries are injuries at all; and the implications of finding that a child's race is an expression of an injury to their parents. More importantly, the discussion of all these questions will help professors study issues related to tort law in a broader social context.

VII. DUTY TO HELP

One final reason to consider addressing issues of race as part of a first-semester torts class is to discuss the history of segregation and its effect on the shaping of legal doctrines. One case to add to the course for this purpose is *Bullock v. Tamiami Trails Tours,*[137] which professors can use to explain proximate cause and to address whether courts should adopt, or impose, a limited duty to help under certain circumstances.

In *Bullock*, the plaintiffs were a Jamaica-born married couple who were touring the United States for the first time in 1956 and who were unfamiliar with racial segregation as practiced in southern states at the time.[138] In the opinion, the court described the husband as "dark or black" and the wife as having a lighter complexion and appearing to be white.[139] During one of the legs of their trip, the couple took one of the defendant's buses to a town in Florida and sat together in the forward part of the bus.[140] Several witnesses testified that it was the first time they had ever seen a black man and someone they thought was a white woman seated together on a bus.[141] At their destination, a man with no connection to the defendant entered the bus, violently assaulted the husband, and slapped the wife.[142] The plaintiffs sued, arguing that the defendant "had breached the duties owed to them as passengers by omitting to warn them of a foreseeable danger, by failing to protect them from that danger, and by willfully, or at

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135 *Id.*.
136 *Id.*
137 Bullock v. Tamiami Trails Tours, 266 F.2d 326 (5th Cir. 1959).
138 *Id.* at 328.
139 *Id.*
140 *Id.*
141 *Bullock*, 266 F.2d at 332.
142 *Id.* at 328.

least negligently, aggravating the danger."[143]

Even though tort law doctrine traditionally imposes a limited duty to help on common carriers, the lower court held that the defendant was not liable to a passenger for the illegal conduct of a third party.[144] On appeal, however, the Fifth Circuit reversed, holding that a carrier does have a duty if the intervening conduct was foreseeable.[145] This short summary of the case provides a "textbook explanation" of the correct analysis. Although the generally accepted doctrine in the United States has always been that there is no duty to help someone at risk of injury, it has been generally accepted that common carriers do have a limited duty to help their customers.[146] However, that duty is "limited," and what "limits" it is the notion of foreseeability. Therefore, as the court correctly explained in *Bullock*, a common carrier only has a duty if the common carrier knew or should have known of the risk involved.[147]

It is not the mere fact that the plaintiff suffered an injury that imposes liability on the common carrier but the fact that the carrier did not exercise due care under circumstances[148] in which it was reasonably foreseeable that the defendant should have acted to protect the customer.[149] Thus, as the court explained, "[i]t is the failure of the carrier through its agents to afford the required protection, after they had reasonable grounds for believing that violence or the insult was imminent, upon which the liability of the carrier rests."[150]

Interestingly, the discussion does not end there. Once it is decided that there is a duty to act, courts must determine what could have been done to comply with the duty. In *Bullock*, the court admitted that the

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143 *Id.* at 329.

144 *Id.* at 330.

145 *Bullock*, 266 F.2d at 330–31.

146 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2010/2012). *See also* DAN B. DOBBS, THE LAW OF TORTS 857 (2000) (the Restatement recognizes five kinds of formal relationships that require the defendant to use reasonable care for the plaintiff's safety, including the relationship between a common carrier and a passenger).

147 As the court explained in *Bullock*, "If the injury could have been reasonably anticipated in time to have prevented its occurrence, the carrier [has a duty] to its passenger either to protect him from or to warn him of the danger." *Bullock*, 266 F.2d at 331.

148 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40, cmt. d (AM. L. INST. 2010/2012) ("[T]he duty imposed requires only reasonable care under the circumstances.").

149 *Bullock*, 266 F.2d at 330–31 ("It is not the fact of injury to the passenger that fixes the carrier's liability. The injury must have been of such character and inflicted under such circumstances as that it might have been reasonably anticipated or naturally expected to occur.").

150 *Id.* at 330.

defendant could not have protected the plaintiffs from the attack by the third party but found that, because the risk to the plaintiffs was foreseeable, the defendant could have warned them of the risk beforehand.[151] In this way, the case illustrates basic principles of tort law, and it can be used when discussing the notion of whether intentional conduct constitutes a superseding cause and the type of circumstances that may give rise to a duty to help. But, of course, the fact that the court's analysis of both the conduct of the actor and the possible liability of the defendant depends on the state of racial relations in the United States in the 1950s opens the door to a different type of discussion.

This discussion can start by pointing out that the court finds that "[w]e can visualize no stronger case than this to show a situation where two bus drivers and the bus company officials should have reasonably anticipated that mischief was hovering about and that the Bullocks were in some danger."[152] Why is that? Students should be able to recognize how the court justifies its conclusion that a violent attack on the plaintiffs by a complete stranger was foreseeable and should be able to articulate the consequences of that conclusion.

From there, the discussion can turn to whether the case offers insights into how current tort law doctrine should address similar issues. Under what circumstances is violence based on racial animus foreseeable in today's society? Should courts recognize, and impose, a duty to protect others from racial violence on everyone? Would it be fair, or practical, to impose a duty to protect strangers from racial violence by other strangers? If the duty is to be imposed on only a limited group of people, who should be included in that group?

As an alternative to the discussion based on *Bullock*, or in addition to it, the class could discuss a proposal to impose a duty to help on police officers who witness fellow officers engaging in discriminatory conduct. This discussion can be based on a short article published in the Washington Post by Frank Rudy Cooper, Suzette Malveaux, and Catherine E. Smith called *How allowing civil lawsuits against bystander*

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[151] *Id.* at 331. Unfortunately, one disturbing aspect of this suggestion is that the court implies that one of the things the driver of the bus could have done to comply with the duty was to ask the plaintiffs to move to the back of the bus, even though it apparently was not a requirement at the time. *Id.* Obviously, it is disturbing to suggest that, to comply with the duty to protect the plaintiffs, the defendant should have acted in a way that would have been discriminatory and insulting toward the plaintiffs because of their race.

[152] *Bullock*, 266 F.2d at 331. In fact, the court concluded that, "a reasonable man, familiar with local customs, [would] 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." *Id.* at 332.

cops could change police culture.[153] In it, the authors argue that, to prevent police misconduct, states should impose an affirmative duty on bystander police officers to intervene when they witness other officers engaging in excessive force or other civil rights violations and should empower individuals to bring civil lawsuits against bystander-officers who fail to intervene.[154]

According to the article, this idea is the underlying principle of Section 1986 of the Civil Rights Act of 1871, which complainants rarely invoke today but which requires police and other state officials to intervene to counter conspiracies against civil rights whenever possible.[155] The authors explained:

> Requiring officers to intervene makes sense for several reasons. When violence is perpetrated by law enforcement, bystander police officers are often the only people who can safely intervene. Civilians cannot be expected to stop an officer from assaulting a victim: they would risk arrest for obstructing justice and possibly face bodily harm themselves.
>
> Police officers' unwillingness to report misconduct by other officers and their tendency to retaliate against those who do are common dynamics of police culture. If officers were required to intercede and were supported in doing so, pressure would be reduced on those who currently hesitate to act.[156]

Class discussion should explore whether these arguments are convincing. Should courts recognize a duty to help to prevent police misconduct? Some arguments against this position may include that taxpayers will ultimately pay for the police officers' increased exposure to liability, that any changes would also have to include changes to the doctrine of qualified immunity, that it is not clear what effect the recognition of a duty to help would have on the availability and affordability of insurance coverage, and that increasing police officers' exposure to liability will create an incentive for police departments to actually police less, which will affect communities that need more policing the most.

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153 Cooper et al., Editorial, *How allowing civil lawsuits against bystander cops could change police culture*, WASHINGTON POST (June 17, 2020, 11:47 AM), https://www.washingtonpost.com/opinions/2020/06/17/we-must-tear-down-blue-wall-silence-heres-how-civil-lawsuits-could-help/.

154 *Id.*

155 *Id. See also* 42 U.S.C. § 1986.

156 Cooper et al., *supra* note 153.

VIII. REMEDIES: IS THERE AN ALTERNATIVE TO TORTS?

Most torts casebooks start by defining the concept of a tort, and the typical definition is something along the lines of "wrongful civil conduct, other than a breach of contract, for which the law recognizes a remedy."[157] From there, professors can begin to explore the notion of a remedy as it relates to torts claims and explain that a remedy is the compensation that may result from the litigation of a claim filed by an injured plaintiff.[158]

Professors can enhance discussion of this topic, however, by adding a discussion of possible alternative remedies, including the creation of what Professor Monica C. Bell has called "Racism Response Funds."[159] In her article *The Case For Racism Response Funds*, Bell argues that criminal and civil legal remedies fall short for those who suffer the consequences of racist acts.[160] Civil suits offer the possibility of some redress for victims of racism, but lawsuits are tedious and expensive and fail to create ongoing, community-level accountability.[161] For these reasons, she proposes Racism Response Funds, which would provide a source of compensation to victims of racist acts.[162]

According to her argument, this mechanism can help communities accept accountability for the racism they allow to flourish, can bridge the disconnect between the daily realities of racism and currently available remedies for it, and can offer a path to a collective response.[163] These racism response funds "can also be a concrete way of expressing the community's recognition of its complicity in perpetuating racism, segregation, and their accompanying ills. In some places, community-based [racism response funds] might look more like mutual aid, and in predominantly white communities, the structure might reflect commitment to redistribution or reparation."[164]

This proposal is complex, and studying it in detail may require a significant amount of class time. But it is novel and interesting, and professors who have available class time should consider whether the discussion fits within the topics they cover in their torts course. As Professor Bell explains in her article, racism response funds can provide

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157 *Id.*

158 *Id.*

159 Monica Bell, *The Case for Racism Response Funds*, THE APPEAL (July 17, 2020), https://theappeal.org/the-case-for-racism-response-funds-a-collective-response-to-racist-acts/.

160 *Id.*

161 *Id.*

162 *Id.*

163 *See* Bell, *supra* note 159.

164 *Id.*

a way for those who are concerned about the prevalence of racism to create a source of compensation for victims of racial harms and can be part of an effort to raise awareness about the need for racial justice advocacy.[165]

CONCLUSION

As I discussed at the beginning of this article, the massive Black Lives Matter protests during 2020 inspired law school faculty members to address issues of race within the law school curriculum. In some schools, this has translated into creating new courses, while in others, it has involved incorporating relevant materials into already-existing courses. Because a course on torts provides multiple opportunities to discuss issues in which race and gender play a critical role in the development and application of legal doctrines, this article provides ideas and suggestions regarding how to incorporate materials related to race and gender into a torts class.

Discussing materials related to race and gender in a torts course is important for students to understand that, even though the doctrines they are learning seem to be "neutral," in that they apply equally to everyone, the application of the legal principles covered in the course may result in disparate impacts on people of color and women. Moreover, students should discuss issues of race and gender in a torts class to understand that addressing those types of issues often requires a balancing of competing values, which will, in turn, force the students to question the validity and relative importance of those values. Students should also spend time discussing issues of race and gender to gain exposure to the history of discrimination and bias in the American legal system, as illustrated by some of the disturbing content within certain cases. Finally, discussing issues of race as part of a first-semester torts class will help students understand the effect of segregation on the shaping of legal doctrines. Professors can achieve these goals by incorporating the materials suggested in this article, which provide alternative ways to address issues related to the valuation of injuries, battery, intentional infliction of emotional distress, the negligence standard of care, causation, limited duties of care, prenatal torts, and the creation of alternative sources of compensation.

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165 *See id.*