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A Simple Act of Justice

The Rise of Risk and the Emergence of Actuarial Justice as a Paradigm of Equity

Introduction

In a recent article, Charles Mills and Katrin Flikschuh ask us to consider what we mean when we speak of racial justice. "'Racial justice'", they point out, "is a term widely used in everyday discourse, but little explored in philosophy".[1] In this chapter, I will ask what we mean when we speak of racial justice in the context of financial institutions and financial markets. Rather than exploring the meaning of racial justice by establishing how contemporary political philosophy can be brought to bear on it, I will show how a particular understanding of racial justice emerged *historically* in the interstices of emerging financial practices and racial ideology.[2] In order to do so, I turn to one of the earliest U.S. American struggles over racial practices by financial institutions in the post-Emancipation era. This struggle contested the discrimination of African Americans by life insurance companies. The efforts of Julius Chappelle, Jere Brown, T. Thomas Fortune, McCants Stewart and others resulted in the passage of anti-discrimination legislation in Massachusetts, Connecticut, Ohio, Rhode Island, New York, New Jersey, Michigan and Minnesota between 1884 and 1895. This example, I argue, allows us to trace the emergence of an articulation of racial justice as 'equal treatment given equal risk profiles' that can best be understood as a version of actuarial justice.

Actuarial justice holds that financial institutions are fair when they allocate financial responsibility in accordance with individuals' risk profile, as determined by the average risk of the group to which persons belong by virtue of characteristics such as race, gender, age or occupation. In this chapter, I trace

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[1] Charles Mills and Katrin Flikschuh, Racial Justice, The Aristotelian Society, Aristotelian Society Supplementary Volume XCII, 2018.

[2] It is easy to think of all things economic as rational, sober affairs, driven by the desire to maximize profit and quite devoid of moral niceties. In fact, insurance can seem like a particularly apt example of this because it has all the trappings of the rational and objective: a sophisticated apparatus for the quantification of social life, fine-tuned classificatory systems and complex algorithms to determine, assess and predict risks. Surely, it seems, this crowds out all mushy moral notions; it is the realm of the cool-headed businessman who follows the money rather than morality. But even a superficial glance at the public debate that articulated the complex and often confounding questions that the commodification of "life risks" raised during the 19th century, quickly reveals that risk commodification practices not only relied on conceptions of equity, but was continuously involved in shaping a novel conception of equity.

the emergence of actuarial justice as a normative standard in order to elucidate the implications that this had for emerging conceptions of racial justice. I argue that actuarial justice as a normative framework for a just distribution of financial responsibility for risk also came to define what the "abolition of the color line" could mean. This conception of racial justice—namely, equal treatment given equal risk characteristics—not only sidelined but obscured issues of corrective justice.

The following essay is divided into three parts: firstly, I will historicize actuarial justice by defamiliarizing its way of seeing risk and the financial responsibility for risk; secondly, I will show how actuarial justice came to inform the debate about the "color line" in life insurance; and finally, I will explore the ways in which civil rights activists sought to challenge the use of race as a marker of risk.

The Rise of Risk

Today, the principle that each and every one is financially responsible for their own risk may seem common sensical (at least to a U.S. audience). After all, we are constantly asked to submit to risk assessments and are required to take responsibility for the risks that we represent as individuals. Consider, for example, applying for a loan, job, apartment or car insurance—in the United States, all of these mundane activities now commonly require risk assessments. However, actuarial justice as an evaluative standard of equity in risk commodification is a relatively recent invention that only gained widespread acceptance in the U.S. during the 19th century. While the commodification of risk was always closely intertwined with conceptions of equity, these conceptions of equity were initially far removed from a system in which statistical individuality corresponds to financial responsibility.[3] Consider, for example, the earliest examples of risk commodification in marine insurance, in the late 13th and early 14th century[4]:

[3] I borrow the term "statistical individuality" from Daniel Bouk. Cf. *How Our Days Became Numbered: Risk and the Rise of the Statistical Individual*. Chicago: University of Chicago Press, 2015.
[4] Piccinno, Luisa. "Genoa, 1340-1620: Early Development of Marine Insurance.", In *Marine Insurance: Origins and Institutions, 1300-1850*, edited by A.B. Leonary, 24-45. London: Palgrave Macmillan UK, 2016, p. 28

risk was little more than a reasonable expectation about the likely danger that a commercial ship would face.[5] Risk was commonly referred to as "periculum" or danger, a far cry from a probabilistic understanding of risk as predictable social regularity. Reasonable men, it was presumed, would have roughly equal expectations about the likely success or failure of the undertaking, and thus roughly equal chances of losing or winning.[6]

The emergence of a probabilistic and statistical understanding of risk, however, raised new questions about the morality of risk practices. After all, it introduced a vision of social processes as predictable and regular and had the power to transform individuals themselves into objects—rather than subjects—of risk assessments. For many 19th century Americans, practical applications of such probabilistic understandings of risk—for example, in life insurance contracts—provoked anxieties: Was it morally permissible to predict the future? To put a price on a man's life? To insure one's own children?[7] Even when advocates for the insurance industry managed to quell such fears, many worried about the way in which insurance companies distinguished between different kinds of risk populations. Opponents resisted distinctions based on age or occupation, and decried such distinctions as unjust discrimination.

[5] Daston, Lorraine, Classical Probability in the Enlightenment, Princeton, N.J. Princeton University Press, 1988.

[6] As Lorraine Daston has argued, the first aleatory contracts (contracts involving chance) were only thought to be equitable (and therefore legally permissible) if all participants in the contract had equal expectations of losing and winning. This reflected the broader assumption that contracts were made for mutual advantage. Today, equiprobability would imply that two participants had the same statistical expectation of winning or losing a given game. An example of this would be a game of dice, in which all participants are randomly assigned a number between 1 and 6, and win if their number turns (assuming the dice isn't weighted unevenly). But a probabilistic understanding of chance had not yet developed, and equiprobability was thought to be present if all participants of an insurance contract were in roughly symmetrical positions. Given that they had access to the same information, it was thought, they were likely to weigh the chances of any given enterprise similarly. In other words, it was assumed that rational individuals would arrive at the same conclusions regarding the chances of winning or losing, without any of the participants having the upper hand.

[7] Zelizer, Viviana A. Rotman. *Morals and Markets: The Development of Life Insurance in the United States*. New York: Columbia University Press, 2017.

In the late 19th century, when Massachusetts, Connecticut, Ohio, Rhode Island, New York, New Jersey, Michigan and Minnesota passed legislation that outlawed discrimination against persons of color by life insurance companies,[8] the life insurance industry was still in the process of grappling with these challenges to its own understanding of equity in risk markets. Life insurance was a relatively recent arrival on American shores and had only begun to make serious inroads into the market and the American social and political imaginary since the 1830s.[9] As the life insurance industry boomed, the terms that were to govern the commodification of life risks were being actively contested, and life insurance became the site of competing moral economies of risk—conflicting ideas about what constituted fairness in the making and distribution of risk.

Life insurance companies had to confront two threats to what we may call "actuarial power"—namely, the private power to make risks, to assess, classify and price risks was being contested. Firstly, fraternal and cooperative life insurance schemes increasingly challenged the private, for-profit model of life insurance companies. Fraternal life insurance first emerged in the 1860s, but quickly became a major player in the industry.[10] Between 1880 and 1910, cooperative insurance schemes had captured between 40 and 50 percent of the insurance market,[11] which made them "direct competitors of the stock and mutual companies".[12] Fraternal associations explicitly distanced themselves from for-profit insurance companies. Many went so far as to reject the commodification of risk entirely—the exchange of money for an

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[8] Heen, Mary L. "Ending Jim Crow Life Insurance Rates." Northwestern Journal of Law and Social Policy 4, October 01, 2009, p. 360.

[9] Stalson, Owen, *Marketing Life Insurance: Its History in America*, Cambridge: Harvard University press, 1942. *See also* Zelizer, Viviana A. Rotman. *Morals and Markets: The Development of Life Insurance in the United States*. New York: Columbia University Press, 2017.

[10] Witt, John Fabian. *The Accidental Republic*. Cambridge, Mass: Harvard University Press, 2004. *eBook Academic Collection (EBSCOhost)*, EBSCO*host* (accessed August 1, 2018), p. 71.

[11] Stalson, Owen, J. *Marketing Life Insurance: Its History in America*, Cambridge: Harvard University Press, 1942 p. 532-533.

[12] Murphy, Sharon Ann. *Investing in Life: Insurance in Antebellum America*. Baltimore, Md.: Johns Hopkins University Press, 2010 p. 295.

individual risk, they argued, went against the fraternal spirit of life insurance. For many, this meant that fraternal, mutualist and cooperative insurance companies were actively contesting the actuarial model of life insurance, where classification and proportional distribution of the cost of risk governed the relationship between members of the same life insurance industry.[13] Fraternal life insurance offered a sense of solidarity in an age of social alienation and explicitly rejected the individualistic premises of life insurance companies.[14] According to this logic, fraternal or mutual societies were considered clear alternatives to for-profit insurance companies.[15]

One way in which life insurance industries sought to combat the growing influence of fraternal alternatives was the introduction of industrial life insurance. Industrial life insurance provided life insurance for the "laboring classes". Payouts were small, but so were the premiums, which enabled many working-class families to insure their lives for the first time. In 1875, Prudential first pioneered industrial life insurance in the U.S., based on the British model of their sister company.[16] In 1879, John Hancock and Metropolitan followed suit. They became known as the "Big Three" in industrial life insurance. Industrial insurance was supposed to prove that there were ways in which for-profit insurance companies could take care of the most vulnerable members of society and stave off claims for the construction of a welfare state. It was an attempt, in other words, to secure and defend a capitalist model of risk commodification against potential threats. Advocates for the life insurance industry explicitly referred to industrial insurance as proof that workers could be integrated into a model of profitable self-provision. In

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[13] Cf. Stalson, Owen, J. *Marketing Life Insurance.*

[14] Stalson, Owen, J. *Marketing Life Insurance*, p. 451.

[15] In order to qualify as fraternal insurance, the proportional connection between contribution and benefit had to be severed. In 1901, B.H. Meyer, for example, argued that assessment societies were not to be considered insurance companies: insurance, he argued, only covered the promise of a definite sum of money "at the end of a fixed period of time in return for specified contributions". Meyer, B. H. "Fraternal Beneficiary Societies in the United States." *American Journal of Sociology* 6, no. 5 (1901): 646-61. http://www.jstor.org/stable/2762005 p.650 B.H. Meyer was a professor in political economy at the University of Wisconsin. Railway Age Gazette, April 7, 1916, p. 786 Vol. 60: *Railway Age Gazette Incorporated*. Google books, accessed Aug. 1 2018.

[16] Witt, *Accidental Republic*, 74.

1885, *The Chronicle*, a weekly insurance journal, for example, portrayed industrial life insurance thus: "[Industrial insurance has] brought within the means of the most humble citizen a protection as sound as that afforded by the policy of any life insurance company in the world, at a price so low that none are too poor to avail themselves to it."[17]

Ironically, it was precisely the introduction of industrial insurance that brought about a new challenge to the life insurance industry—namely, attempts to intervene directly in the ways in which insurance companies made their risks.[18] Black legislator and political activists began to contest the use of race as a marker of risk in the insurance industry and introduced legislation to establish greater regulatory control over the making and pricing of risks. In distinction to fraternal life insurance, they did not contest the fundamental precepts of actuarial justice but instead challenged the private power of life insurance companies to assess and classify risks without public supervision. They argued that the public had a legitimate role in supervising and ratifying the classification of groups, rather than leaving classification and pricing entirely up to life insurance companies.

Proper Distinctions

Initially, the most prominent industrial life insurance companies did not discriminate on the basis of race.[19] Prudential, the leading innovator in the field of industrial insurance, considered both applicants of color and white applicants on the same terms from November 1875 until April 1881.[20] As Wiggins points out, this was due to a lack of experience with insuring African American lives rather than an explicit

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[17] "The Week", *The Chronicle: A Weekly Insurance Journal*, 11 June 1885, Vol 35, No 24, p. 298.

[18] Cf. Levy, Jonathan. *Freaks of Fortune: The Emerging World of Capitalism and Risk in America*. Cambridge, Mass.: Harvard University Press, 2012.

[19] Wiggins, Benjamin Alan. "Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881–1948." University of Minnesota, 2013. https://search-proquest-com.proxy.uchicago.edu/docview/1461420213?accountid=14657, p. 50

[20] Hoffman, Frederick L. *Race Traits and Tendencies of the American Negro*. Clark, N.J.: Lawbook Exchange, 2004 (1896)

commitment to racial equality. Prior to the introduction of industrial insurance, the question of African American mortality rates had not come up: very few African Americans had been able to afford so-called "normal" life insurance. With the introduction of industrial life insurance, however, higher African American mortality rates became a problem for life insurance companies for the first time.[21] Life insurance companies began to analyze their own experiences with insuring African American lives and found the differential they were looking for.[22] In December 1880, Metropolitan decided to decline African American insurance applications.[23] While Prudential did not follow Metropolitan's lead outright, they adopted a differential pricing system based on race in 1881.[24] Metropolitan followed suit and introduced reduced benefits for the same premiums in November 1881.

T. McCants Stewart, a black lawyer and civil rights activist, recounted his personal experience with discriminatory insurance rates in an article in the *New York Age*: "[O]ne of the officers of the Equitable Life Insurance Company of New York City, not knowing my color, wrote offering to insure my life. I invited information. He called at my office, and was surprised to find me a colored man. After a pleasant conversation which took a definite business shape, he, with much embarrassment, told me that he could not give me the same rates as a white man. That settled it. I stopped right there."[25] Stewart was not alone in his outrage about the discrimination he suffered at the hands of life insurance companies. In 1884, Julius Chapelle, the sole black representative in the Massachusetts State House, introduced a bill

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[21] "Insurance. The Negro as a Life Risk." *The Independent: Devoted to the Consideration of Politics, Social and Economic Tendencies*], February, 10, 1898, p. 23

[22] Wiggins, Benjamin Alan. "Managing Risk, Managing Race: Racialized Actuarial Science in the United States, 1881–1948." University of Minnesota, 2013. https://search-proquest-com.proxy.uchicago.edu/docview/1461420213?accountid=14657, p. 5 Bouk, *How Our Days Became Numbered*, p. 34

[23] Ibid.

[24] Prudential dropped benefits by one-third for African Americans adults and increase premiums for African-American infants from three cents per week to five. Wiggins, *Managing Risk*, p. 5.

[25] McCants Stewart, "Counsel to the State League", *New York Age*, 6.14.1890 p. 2

"against the discrimination of persons of color by life insurance companies".[26] Eventually, a number of states followed Massachusetts' lead. Connecticut passed a copy of the Massachusetts bill in 1887, Rhode Island and Ohio passed anti-discrimination bills in 1888[27] and 1889, New York in 1891, Michigan in 1893, New Jersey in 1894 and Minnesota in 1895.[28]

However, where Stewart and others had seen discriminatory treatment, life insurance companies and their supporters insisted that they were merely making a "proper distinction".[29] In 1887, for example, the insurance commissioner of Massachusetts, John K. Tarbox, argued that the 1884 Massachusetts law "against discrimination of persons of color in life insurance" missed its intended target. "Were the effects of the statute what its title imports," Tarbox maintained, "it would be unexceptionable. But the title is a misnomer. Under the guise of an attempt to prevent an odious discrimination, the law forbids a proper distinction. It compels insurance to companies to insure the lives 'of colored persons wholly or partially of African descent' upon the same terms it insures the lives 'of white persons'. This would be right if the average longevity of the races were the same. But […] the fact seems well established that the average longevity of the colored population is considerably less than that of the white population in the United States. The science and safety of life insurance rest upon a safe estimate of the probable average duration of the lives of the insured […]".[30] Most insurance journals agreed with Insurance Commissioner Tarbox and argued that the law could not be regarded as "discrimination in the obnoxious sense" because it was

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[26] Heen, Mary L. "Ending Jim Crow Life Insurance Rates." Northwestern Journal of Law and Social Policy 4, October 01, 2009, p. 360.

[27] Rhode Island repealed the law in 1906. Ibid, n126.

[28] Wiggins, Benjamin Alan. "Managing Risk, Managing Race: Racialized Actuarial Science in the United States: 1881-1948, ProQuest Dissertation Publishing: University of Minnesota, 2013, n1 p. 140.

[29] Massachusetts. General Court. House of Representatives. 1887 House Bill 0020. Report of the Insurance Commissioner On the Resolve To Revise And Codify the Insurance Laws of the Commonwealth (Chap. 83, Resolves of 1886). http://archives.lib.state.ma.us/handle/2452/754472 Date Accessed: 01/22/2018

[30] Massachusetts. General Court. House of Representatives, 1887 House Bill 0020. Report Of The Insurance Commissioner On The Resolve To Revise And Codify The Insurance Laws Of The Commonwealth (Chap. 83, Resolves Of 1886) p. xiv. For a similar commentary by Tarbox in an earlier insurance report, see "The Color Line in Insurance", *The Weekly Underwriter: An Insurance Newspaper*, July 19 1884, Vol. 31, No 3 p. 31.

not "against color" and therefore "not […] in any real sense a discrimination".[31] Instead, differential pricing on the basis of race merely reflected the "logic of the facts of experience"[32] and the "indisputable fact that the death rate among the colored people was greater than among the whites".[33]

'Discrimination against color' was construed very narrowly as unequal treatment given identical characteristics. As one writer put it: "If any discrimination has been made or is likely to be made, we may be sure it is because the companies discern a difference in the nature of the risk *due to the color*. Assuredly they would never say to the black, 'We count you an equal risk with the white but because of your color we charge you extra.' "[34] Consequently, discrimination came to mean unequal treatment that is *solely* attributable to a dislike or devaluation of color and that creates a new distinction rather than recognizing an existing distinction. Recognizing and acting according to existing inequalities that are distributed along lines of race, on the other hand, did not constitute discrimination, but had to be understood as a 'proper distinction'. Many of its supporters sought to portray this as the realization of 'equality of opportunity'. 'Equality of opportunity', however, here required nothing more than that corporations and state institutions did introduce distinctions where equality of conditions prevailed. However, it did not require—in fact it forbade—addressing existing racial inequalities.

Private actors could not be held responsible for existing inequalities, opponents of anti-discrimination legislation argued, and the state could not, legitimately, force them to assume a role in the amelioration of such inequalities. Three arguments were commonly advanced to argue that holding private actors co-responsible for the amelioration of inequality was morally impermissible. Firstly, commentators

[31] "The Negro as an Industrial Risk." *The Independent…Devoted to the Consideration of Politics, Social and Economic Tendencies*, October 2, 1902, p. 2381
[32] The Independent… Devoted to the Consideration of Politics, Social and Economic Tendencies p. 1223, 17/05/1900.
[33] *Boston Daily Advertiser*, April 25, 1884; p. 2.
[34] "An Objectionable Law", *The Independent…Devoted to the Consideration of Politics, Social and Economic Tendencies*, Jul 2 1891; p. 24

often argued that holding private actors responsible for existing inequalities and forcing them to participate in the amelioration of such inequalities was impermissible because it violated property rights. Property rights, so the argument went, were sacrosanct, and nobody could be forced to use their property in a way they did not choose. Insurance capital, it was argued, was private property and the obligation to insure any particular class of policy holders would constitute such a violation. Secondly, opponents of anti-discrimination legislation argued that state interference in this matter was impermissible because it undermined the provision or maximization of a good. Insurance companies, it was argued, produced a crucial good—they provided each individual with the ability to protect themselves against life's inherent risks. Any attempt to meddle with or intervene in the making of risks would inevitably lead to a decline in the profitability of the insurance industry, and hence to a decline in general welfare.[35] Finally, opponents argued that intervening in the making of risks was impermissible because it contravened natural laws. The state, they argued, set and enforced conditions that allowed natural regularities to be reflected and worked out via the market. Racial differences, it was implied, constituted such regularities and the state therefore had to respect them rather than interfering. Hence, the market had to *reflect* existing inequalities; it could not be used to remedy them.

With regards to risk, this meant that the art of making proper distinctions was the art of approximating categories that reflected *natural*, *pre-given* regularities. We can call this a 'naturalist' conception of risk that sees categories and practices through which we 'capture' risk as *functional approximations* of underlying regularities.[36] Any tampering with such categories (i.e. categories that had

[35] These arguments were not mutually exclusive, and were, in fact, often employed in tandem. For a similar discussion of the way in which older conceptions of natural law and the inalienable rights of man (that could not be violated because it was morally impermissible) and modern conceptions of natural laws (that denote immutable regularities that should be violated because it is futile to do so) see Nancy Cohen, *The Reconstruction of American Liberalism*, 2002, Chapel Hill: The University of North Carolina Press, p. 39ff.

[36] I would distinguish a naturalist understanding of risk from constructivist conceptions of risk. Constructivist conceptions of risk differ from naturalist understandings of risk in two ways: Firstly, it sees the social practices that establish the underlying

been established as functional approximations) commentators asserted, would threaten to enforce equality where it did not belong.

This view was embedded in a broader conception of the role of the market in facilitating and revealing naturally given social hierarchies. The market, in other words, was understood as a mechanism that could reveal the inherent, naturally given social order.[37] It was to be a site of veridiction that could itself reveal the ontology of race—i.e. it would reveal whether African Americans were truly equal.[38] This conception of the market meant that opponents of anti-discrimination legislation did not necessarily have to subscribe to the biological racism that we so readily associate with the late 19th century. Of course, there were many opponents of anti-discrimination legislation who subscribed to biological racism and regarded racial difference—including differences in mortality rates—as biological and immutable. Frederick L. Hoffman, one of Prudential's actuaries, for example, asserted that racial differences in mortality rates were attributable to an "inherent racial degenerative trait", which would eventually lead to the "extinction of the race".[39] Similarly, an anonymous insurance journalist in *The Independent* argued

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regularities that allow us to measure risk as contingent and fluctuating. They therefore need to be "conceptually visible"—i.e. one needs an analysis of the practices that constitute underlying regularities in order to understand the appropriateness of the construction and circulation of financial risk measures (such as, for example, credit scores or assessments made by bond rating agencies). Secondly, the relation between underlying social regularities and risk measures is not simply one of reflection. Instead, the way in which is objectified through epistemic and institutional practices is *productive*. Here, I would distinguish between a moderate constructivist conception of risk according to which we have a number of different epistemic tools at our disposal that help us (or fail to do so) to assess risks, i.e. contingent regularities of social action. According to this conception, a divergence between the contingent regularities of social action and the objectification of risk can lead to the generation of systemic instability. Risk practices or risk epistemes can thus be productive insofar as they are inadequate reflections of contingent underlying regularities. A radical constructivist conception of risk, by contrast, argues that the ways in which we conceive of risk and the practices through which we "objectify" it are themselves constitutive of the underlying regularities (although this constitutive logic need not be one of self-realization—i.e. it is not simply the case that "ideal" conceptions of risk produce their "material" mirror images.) One could also call this a performative theory of risk.

[37] Cf. Peart, Sandra, and David M. Levy. *The "Vanity of the Philosopher": From Equality to Hierarchy in Postclassical Economics*. Ann Arbor: University of Michigan Press, 2005.

[38] *Cf.* Foucault, Michel, Michel Senellart. *The Birth of Biopolitics: Lectures at the Collège De France, 1978-1979*. New York: Picador, 2010, p. 27ff.

[39] Hoffman, Frederick L. (Frederick Ludwig). *Race Traits and Tendencies of the American Negro*. Clark, N.J.: Lawbook Exchange, 2004 (1896). In fact, a number of advocates of the life insurance industry subscribed to the emerging "race death" thesis, which portrayed emancipation as the beginning of the end for freedmen and maintained that African Americans were unfit to survive and thrive in a modern world. Enslaved Africans, so the argument went, had been "protected from the new

that mortality rates would either persist or worsen, given “low vitality and inherited weakness of constitution”.[40] But although we tend to associate this particularly virulent strand of racism with the 19th century, it was not, by any means, the only explanation of racial differences in mortality rates circulated in insurance circles. In fact, many commentators were aware that differences in mortality rates could also be explained by environmental factors. One writer in *The Independent*, for example, argued that the racial differences in mortality rates were “an unhappy condition, but not necessarily a hopeless or discouraging one.” The author maintained that racial differences in mortality rates would eventually disappear, because “the evolution of the long depressed and down-trodden race is slow and must be slow, but it is none the less sure.”[41]

In both cases, however, the idea was that questions about the origins and ontological status of differential racial mortality rates were going to be answered by and through market mechanisms themselves. The market would act as a facilitator, a mechanism that allowed for the competition not merely of individuals but of racial groups also. But this competition was not conceptualized as a race in which everybody had the same starting point. Instead, it was seen as a form of civilizational catch-up; the results of which would establish whether there was any inherent equality between racial groups or whether racial groups were to be hierarchically ordered. In other words, a history of injustice—of enslavement and brutal exploitation—was transmuted into the natural starting point for a civilizational contest that would take place in a putatively free market. There was a common rejection of responsibility for mortality differences even as a consensus on the origins of racial differences in mortality remained elusive. Irrespective of what

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environment” which had allowed them “to flourish”. After emancipation, advocates of the race death thesis suggested, African Americans were bound to “disappear”. Frederick Starr, “The Degeneracy of the American Negro”, *The Dial, a Semi-monthly Journal of Literary Criticism, Discussion and Information*, January 1, 1897.

[40] “Insurance: The Negro as a Life Risk”, *The Independent: Devoted to the Consideration of Politics, Social and Economic Tendencies*, February, 10 1898.

[41] “Insurance: The Negro as a Life Risk”, *The Independent. Devoted to the Consideration of Politics, Social and Economic Tendencies*, February, 10 1898.

commentators believed about the origins of racial differences in mortality rates, they shared the idea that African Americans were financially responsible for the cost of these higher mortality rates. The best African Americans could hope for, in other words, was to catch up—to overcome both the historical legacy of slavery, exploitation and exclusion—in order to prove, in overcoming this history, their own equality. Economic success was to be a sign of equality; the market a site of veridiction. Of course, this meant that the United States, as a political body, eschewed any responsibility for corrective justice—both for remedying the injustice of the past and for providing anything resembling an equal starting point. Henceforth, the responsibility for remedying an unjust past was to be a problem for people of color, and the cost of a history of enslavement, dehumanization and exploitation was to be borne by the victims of that injustice.

This did not simply take the form of a rejection of a claim of corrective justice. Instead, the notion that each individual had to take responsibility for 'their' risk was itself presented as a requirement of justice. The opponents of anti-discrimination legislation often portrayed themselves as hard-headed business men, willing to recognize the harsh realities of the world and eschewing simple-minded sentimentalities. In Massachusetts, for example, Representative Williams, the chairman of the insurance committee and one of the principal opponents of Representative Chapelle's anti-discrimination bill maintained that while the "insurance committee would do anything to prevent discrimination on grounds of color, this was a matter of business".[42] "If the bill would right the wrong to anyone, he would heartily support it", he argued, but argued that it was instead "framed to meet the wishes of those who were oversensitive and delicate upon the matter".[43] Senator Thomas concurred that "this was not a question of sentiment, but of business." He claimed that it was "an indisputable fact that the death rate among the

[42] "The Legislature", *Boston Daily Advertiser* (Boston, Massachusetts) April 1, 1884, p. 8.
[43] "On Beacon Hill", *Boston Daily Globe*, Apr 25, 1884.

colored people [is] greater than among the whites. Whatever the cause of this, it was not in the power of the legislature to change this fact, and no business ought to be endangered by sentiment."[44] For all their appeals to hard-headed 'business reason', however, the opponents of the anti-discrimination legislation insisted that "proper distinctions" were a requirement of justice. John Tarbox, the Massachusetts insurance commissioner, for example, claimed that "if […] a class of persons of inferior vitality are mutually insured on the same terms with, and upon a basis calculated from the probabilities of life of, a class of persons of superior vitality, injustice is done the latter class, who are made to bear a disproportionate part of the common burden of insurance […]."[45] Tarbox and other opponents of the law frequently invoked the idea that an equitable and fair distribution of the financial costs of risk had to reflect the distribution of risk in the population—each and every one had to bear financial responsibility for their *proper*, their *own* risk. According to opponents of the anti-discrimination legislation, it was the only way to ensure an equitable distribution of the financial responsibility for risk. As one commentator in *The Independent* put it, "[a]ll this is a way of saying that the insured must pay for *their own* [my emphasis] insurance".[46]

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[44] "The Legislature: No Discrimination against colored people", *Boston Daily Advertiser* (Boston, Massachusetts), April 25, 1884, p. 2

[45] Ibid.

[46] "Insurance: A Statutory Curiosity." *The Independent…Devoted to the Consideration of Politics, Social and Economic Tendencies*, July 24 1884.

Distinction and Discrimination

How did anti-discrimination activists make the case that differential premiums did not constitute a proper distinction, but were instead an example of illegitimate and unjust discrimination? Our contemporary familiarity makes the anti-discrimination case seem straightforward—a step in the right direction in history even as it is tragically thwarted. In the following, however, I will take a closer look at the way in which African American legislators and leading political thinkers conceptualized and contested discrimination. I argue that civil rights activists challenged the private power of insurance companies to define, make and price so-called life-risks. They insisted that the state had the right to oversee the rationality and appropriateness of actuarial categories in order to ensure racial equality. This, I maintain, constituted a partial politicization of the practices of risk-making. In fact, it set a precedent for the politicization of certain economic practices by articulating principles for the evaluation of state interventions into social and economic life according to criteria of racial justice. However, while civil rights activists did politicize risk-making, this politicization remained limited. Civil rights discourse challenged the private power of insurance companies to aggregate and segregate risks according to racial criteria at their discretion, but it did not challenge the principle of actuarial justice as an evaluative standard for the distribution of the financial burdens of risk. The idea that everyone had to pay for the risk they represented remained unquestioned and unchallenged. In a society that was deeply marked by the legacy of racial slavery, this could not successfully resolve the racialized distribution of the financial cost of risks that were the product of a history of injustice.

The fight against discriminatory practices in life insurance markets was embedded in broader civil rights struggles that raised complex questions about the boundary between the private and the public and the extent and nature of legitimate state intervention into the economy. While the tenuous gains of Reconstruction were rapidly being reversed in the South, black Americans in the North were fighting to preserve and expand civil rights gains.[47] The passage of the 1866 Civil Rights Act, the Reconstruction Amendments and the 1875 Civil Rights Act had secured civil rights and political rights for African Americans, including rights of property and security, the right to vote and stand for office, and the right to "equal enjoyment" of public places of enjoyment (such as theaters), means of transportation and inns.[48] In the wake of the 1883 Civil Rights Cases, in which the Supreme Court declared the 1875 civil rights act unconstitutional, African Americans in many Northern states pushed for legislation that would (re-) establish or strengthen rights to equal enjoyment of public accommodations in state law. New York, for example, had already passed a civil rights state law in 1873, establishing "equal enjoyment of accommodations or facilities provided by inn-keepers, common carriers, theaters or common schools and public educational institutions"[49] and enlarged the scope of the law in 1893 and 1895.[50]

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[47] Today, civil rights are commonly understood as the "rights that constitute free and equal citizenship in a liberal democracy" and include not only rights such as property rights, due process and religious freedom, but also political and welfare rights and/or rights of cultural membership. *See* Altman, Andrew, "Civil Rights", *The Stanford Encyclopedia of Philosophy* (Winter 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/win2017/entries/civil-rights/>. However, at the close of the 19th century, civil rights had a narrower meaning. The 1866 Civil Rights, for example, defined civil rights as follows: "civil rights" in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this: "Civil rights are those which have no relation to the establishment, support, or management of government." *Congressional Globe*, House of Representatives, 39th Congress, 1st Session, p. 1117 (March 1, 1866). The 1875 Civil Rights Act took a broader view of civil rights and included the right of equal enjoyment of places of public accommodation. Distinguishing civil from political and social rights, however, remained common throughout the late 19th century.

[48] Cf. Rutherglen, George (2012). *Civil Rights in the Shadow of Slavery: The Constitution, Common Law, and the Civil Rights Act of 1866,* Oxford University Press USA.

[49] New York Laws of 1873, Chapter 186, Section 1 as cited in McBride, David. "Fourteenth Amendment Idealism: The New York State Civil Rights Law, 1873–1918." *New York History* 71, no. 2 (1990): 207.

[50] Ibid., 219. The 1895 amendment extended the list of property the use of which had to be governed by Civil Rights law to "full and equal accommodations, advantages, facilities and privileges of inns, restaurants, hotels, eating houses, bath-houses, barber-shops, theatres, music halls, public conveyances on land and water, and all other places of public accommodation or

The debate about 'discrimination against persons of color by life insurance companies' took place in this context. Proponents of the 'bill to prevent discrimination of persons of color by life insurance companies' called the legislation a "civil rights bill" and defended it on analogous terms as legislation that aimed to secure equal and full enjoyment of public accommodations. McCants Stewart, a black lawyer and civil rights activist, for example, argued that:

> "We need an insurance law such as they have in the State of Ohio to prevent the unjust discrimination to which insurance companies subject their patrons on account of race and color. I am glad that the Afro-American League of Albany has already moved in the matter, and I hope that the next legislature will resist the influence of these corporations and pass a remedial law. Again, public places are licensed for the accommodation of the public. Afro-Americans are a part of the public. A refusal to serve them is in violation of the common law of the land and there should be passed a Civil Rights Act with punitive provisions for those who violate the common law. Social matters will regulate themselves. In the enjoyment of public rights there should be no discrimination on account of color; and the law should be that separation, whether in public schools, or inns, or conveyances, or elsewhere, is discrimination."[51]

Insurance, this argument implied, like theaters, inns or means of transportation had a public or quasi-public character, and therefore ought to accommodate African Americans on the same terms as whites.

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amusement, subject only to the conditions established by law and applicable alike to all citizens." New York Laws of 1895, chap. 1042, sees. 1 and 2.

[51] Stewart, New York Age, New York, Saturday, June 14, 1890; Issue 38. *See also*, "The Civil Rights Measure," *The New York Age*, 26 April 1890 p. 4 (most likely written by T. Thomas Fortune). The opponents of the legislation likewise took up the argument that insurance, like theaters or inns, should be subject to the requirement of equal enjoyment regardless of color, race or previous conditions of servitude. An anonymous author in the *Weekly Underwriter*, for example, wrote: "The affairs of ordinary commerce might safely and better be left to the regulation of the natural influences and laws of trade, in the absence of clear demonstrations of substantial wrong done. An insurance company can scarcely be deemed to sustain relations to the people equivalent to those of inn-holders and common carriers, and properly amenable to like control by public law." "The Color Line in Insurance", *The Weekly Underwriter*, Vol 31, No. 3, 9 July 1884.

Contrary to the claims of life insurance companies, Stewart argued that risk making was *not* a purely private undertaking. Instead of delegating the power to classify and price risks exclusively to the actuaries and managers of life insurance companies, Stewart and others argued that life insurance was a public good that the state could legitimately regulate. This had three implications: firstly, a public debate about actuarial categories contested actuarial power. It challenged the rationality of risk-making and risk-pricing, disputed the private power of insurance companies to make and assess risks without state oversight and demanded that public power be granted a role in assessing and ratifying the making and pricing of risks.[52]

Secondly, challenging actuarial distinctions and asserting the legitimacy of the state to oversee the formation of actuarial categories also made distinctions visible in public discourse and subject to demands for justification. When challenged, companies had to defend and explain their classificatory systems and often did so by making their assumptions about racial hierarchies and differences explicit. This allowed for a contestation of racial ideologies that informed the formation of actuarial categories. In Massachusetts, for example, the debate about the passage of anti-discrimination legislation effectively challenged a particularly virulent racist narrative that sought to naturalize the legacy of slavery and the immediate aftermath of Emancipation by maintaining that comparatively higher mortality rates amongst African American reflected inherent biological inferiority.[53] Representative Chappelle rejected predictions that differences in mortality rates would persist. He offered a more hopeful narrative—one that saw Emancipation as the promise of future equality of conditions rather than as the beginning of permanent inequality or terminal decline. The debate about the pricing and assessing of risk, therefore, revealed the

[52] Other regulatory initiatives with regards to the life insurance industry had likewise extended state oversight. However, they had focused on shoring up policyholders' rights, and overseeing the financial stability of insurance companies. Regulation had not, by contrast, concerned itself with the legitimacy or appropriateness of actuarial distinctions or categories.

[53] Bouk, Daniel B. *How Our Days Became Numbered.*

commodification of risk as a site of race-making and sought to actively contest what visions of race and racial futures would be incorporated into the commodification of risk.

Finally, the public debate about the appropriateness of certain actuarial categories politicized economic practices invested with public interest, and established a criterion of racial justice as an evaluative standard for governing such economic practices. The great strength of this approach was that it politicized those political practices that the public had a legitimate interest in. In other words, it established a precedent in which the public interest in the provision of certain economic goods could function as the basis for intervening in their distribution and laid claim to articulating the criteria for legitimate forms of access to certain private goods invested with a special public interest, such as public inns, railroads, theaters—and, potentially, insurance. Outlawing the admissibility of certain criteria of distinction, differential treatment and exclusion, such as race, became constitutive of what I call a liberal politics of taboo—the idea that certain protected criteria were inadmissible in governing access to public accommodations, even if those were privately owned.

This strategy—mobilizing the power of the state to regulate interactions in civil society—unsettled existing boundaries between private and public and contested more restrictive understandings of civil rights. Many opponents of civil rights legislation sought to draw a clear line between the use of racial distinctions in law and the use of racial distinctions in the private (read: the social and economic) realm. They argued that anti-discrimination legislation constituted a form of illegitimate interference into the private and social realm. This argument was made both with regards to the legislation concerning life insurance, as well as more broadly with regards to civil rights legislation. Opponents of anti-discrimination legislation in the life insurance industry, for example, argued that it constituted an "impolitic interference with business”[54], as well as that “the person who takes a risk [i.e. the insurance company] should have something to say about it.”[55] Similarly, during the landmark case before the New York Court of Appeals, People v. King (1888), an ice rink owner sought to contest the state’s civil rights law as an unconstitutional infringement on his property rights.[56] He argued "[a] law that prescribes that the owners of private property […] shall devote it to the use of colored people, is unconstitutional and void”.[57]

Advocates of the insurance anti-discrimination bills criticized and contested such restrictive understandings of civil rights. Thomas Fortune, for example argued that “civil rights are those rights that *all public benefits* [my emphasis] sought to be obtained by or insured to individuals by the organization of mankind into government for mutual advantage and protection in which no member possesses any legal prerogative to enjoy any larger share of such public benefits or to enjoy any benefits not common to each and every one of his fellow citizens”.[58] This was an ambitious political vision, and one that could lay claim to making a radical contribution: it established racial justice as an evaluative standard in the distribution of private property invested with a public purpose.

The Limits of the Civil Rights Vision

For all its strengths, this politicization of economic practices was also limited in its efficacy and conceptual reach. It did not argue for a redistribution of the cost of an unequal distribution of risks, but instead construed the wrong of racial discrimination as unequal treatment given the same conditions and characteristics—or equal treatment under equal conditions. This focused the debate on the question

[54] “The Legislature”, *Springfield Republican*, 12 April 1884, p. 8
[55] *The Weekly Underwriter*, Vol 30, No 13. 29 March 1884, p.211*ff*
[56] McBride, David. "Fourteenth Amendment Idealism: The New York State Civil Rights Law, 1873–1918." *New York History* 71, no. 2 (1990): 215.
[57] Ibid.
[58] *See* T. Thomas Fortune “Civil Rights and Social Privileges” (1886) in Fortune, T.T. and Shawn, Alexander (ed) *T. Thomas Fortune the Afro-American Agitator: A Collection of Writings, 1880-1928*. University of Florida Press, 2008.

whether racial differences in mortality rates existed and obscured the question whether the financial cost of existing differences in mortality rates should be redistributed. Consequently, black legislators and political activists such as Julius Chappelle, W.W. Ferguson, W.H. Johnson, Jere Brown, Thomas Fortune and McCants Stewart, concentrated on rejecting the claim that racially differentiated rates were necessary in order to account for the higher mortality risk of African Americans. They argued that any distinction based on race was arbitrary and prejudicial. During the debate in the Massachusetts legislature, for example, Julius Chappelle explicitly argued that "decision[s] against negroes should not be made on the arbitrary reason of color"[59] because the claim that black mortality rates were higher than white mortality rates was misleading.[60] "No statistics", Chappelle asserted, "had yet proved that the colored people of Massachusetts do not live as long as the whites"—an opinion that was consistently echoed by advocates of the anti-discrimination bill.[61] When Representative Williams of Foxboro cited statistics[62] that

[59] *Weekly Underwriter*, Vol 30, No 14, 4/5/1884 p. 231

[60] *Boston Daily Advertiser* (Boston, Massachusetts), Tuesday, April 01, 1884; pg. 8; Issue 79.

[61] *Boston Daily Advertiser* (Boston, Massachusetts), Saturday, April 12, 1884; pg. 8; Issue 89. *See also*, "Discrimination", New York Freeman, 30 April 1887, p. 2

[62] Representative Williams used statistics from the *Sanitary Engineer*, March 22, 1884 which provided the following mortality statistics: District of Columbia: 18.80 (white) vs. 55.90 (black); Richmond, Virginia 15.60 (white) vs. 41.60 (black); Baltimore, Maryland: 1881 14.87 (white) vs. 38.12 (black); 1882 19.70 (white) vs. 34.70 (black) 1883 20.4 (white) vs. 27.5 (black). *See* "The Legislature: Report Against a Constitutional Convention (No Discrimination Against Colored Persons)", *Boston Daily Advertiser* (Boston, Massachusetts), Saturday, April 12, 1884; pg. 8; Issue 89. The source merely records that this is "for a given time per thousand". I could not locate the copy of the *Sanitary Engineer* to which Williams refers, but I was able to track down a later issue of the *Sanitary Engineer* from June 12, 1884. The *Sanitary Engineer* reported weekly mortality statistics, which it also used to project annual death rates per 1000 residents. It is therefore possible that Williams is here referring to a projected annual death rate that is based on weekly mortality data. However, given that he has annual data for 1881, 1882 and 1883 in the case of Baltimore means that it is also possible that the *Sanitary Engineer* published a more expansive mortality table in the issue he is referring to. *See* "Report of Mortality in Cities of the United States for the Week ending in May 31", *The Sanitary Engineer*, Vol. 10, No. 2, June 12, 1884, p. 35. I did not have access to the archives of the three main providers of industrial insurance at the time and so do not know exactly what data they relied on. However, in 1898, *The Independent*, an insurance journal, reported the mortality experiences of the companies as follows: "The John Hancock reported the mortality about one-half higher among Negroes than among whites, so that insuring the two races on the same terms is impracticable. The Prudential replied to the Indicator's inquiry at considerable length. Having for five years made no discrimination between the races, the company found, in 1881, that the number of claims paid on colored risks was out of proportion to the number of such risks; and an investigation so plainly showed a higher mortality that new tables were constructed, giving one-third less insurance for the money in case of adults (12 to 70) and 40 percent less on infants (1 to 12) than to whites. Thereafter mortality was separated and tabulated by color; and special search and study among health reports and census reports was made. From 1884 to 1893 inclusive, the company's experience showed an average loss per $ 1,000 at risk of $16.96 among whites, and

documented differential mortality rates in Richmond, Baltimore and the District of Columbia, Julius Chappelle challenged the validity of using Southern mortality statistics to predict the future mortality rate of African Americans and argued that such statistics had little predictive power.[63] The use of black mortality rates in the South in a post-Emancipation world was illegitimate, Chappelle argued, because it overestimated black mortality rates by naturalizing the legacy of slavery and the Civil War: "Colored people have been working for themselves in the South only 20 years. The whites [are] well cared for and did not do anything but cut sticks and whistle. Statistics from such data [can] not be cited against the colored people".[64] Senator Cronin echoed this argument in the Senate debate and expressed the hope that this bill in favor of equal rights would not be defeated in consideration of tables of mortality compiled in antebellum days.[65]

However, while opponents and proponents of anti-discrimination disagreed when it came to the existence of differences in mortality rates, they converged when it came to the validity of actuarial justice—in other words, both sides agreed that *if* differences in mortality rates existed, they constituted legitimate grounds for differential treatment. At best, this eschewed the question of who was responsible for the financial cost of a history of disadvantage. In other words, supporters of the anti-discrimination bills did not call into question the actuarial conception of justice in the distribution of the financial costs of risks. What they contested, instead, was, firstly, the assertion that race correlated with risk (and the

$21.63 among blacks. *See* "Insurance: The Negro as a Life Risk", *The Independent: Devoted to the Consideration of Politics, Social and Economic Tendencies*, 10 February 1898.

63 For an excellent account of the debate in the Massachusetts legislature, see Bouk, Daniel B. *How Our Days Became Numbered.* He characterizes the anti-discrimination legislation as a rejection of fatalizing (i.e. a rejection of the idea that the past can predict the future given the changes introduced by Emancipation).

64 The Legislature: Report Against a Constitutional Convention (No Discrimination Against Colored Persons), *Boston Daily Advertiser (*Boston, Massachusetts), Saturday, April 12, 1884; pg. 8; Issue 89.

65 "Color Discrimination in Insurance", *Boston Journal*, 25 April 1884, p.3

devaluation of black life that often went hand in hand with this assertion) and secondly, the incomplete and arbitrary application of the principles of actuarial justice.

At a first glance, the struggle of discrimination against the insurance industry may seem to confirm a broader narrative about the limits of civil rights discourse. After all, the approach did not address the underlying de facto inequality that led to higher mortality rates amongst African Americans. One could therefore assume that the civil rights discourse simply did not offer the conceptual resources for a more radical approach to the distribution of the costs of risk. This critique—that civil rights struggles are legalistic in nature and aim 'merely' at de jure equality without effecting de facto equality—is a common one. As Susan Carle has recently put it, this "critique argues that civil rights lawyers and other activists too greatly emphasized court-focused strategies aimed at achieving what would turn out to be Pyrrhic "civil" rights victories-i.e., gains solely in "formal" equality through requirements enshrined in law as to how the state must treat its citizens, to be concerned, first and foremost, with the establishment of formal, de jure equality without being capable of establishing de facto equality."[66]

I do not think that this critique fits here, and I am not arguing that a civil rights approach to the question of access to insurance simply *ignored* the economic aspects of this issue. Rather the contrary: I find the conceptual omission of addressing the underlying inequality in the case of life insurance puzzling, precisely because at least some advocates of anti-discrimination legislation, particularly T. Thomas Fortune and McCants Stewarts, clearly recognized the limits of an understanding of civil rights that focused primarily on the abolition of racial distinctions in law. Fortune and Stewart, two of the most ardent advocates of anti-discrimination legislation in New York, were well aware that meaningful equality of opportunity required radical changes to the economic order, including extensive redistribution. Fortune

[66] Susan Carle, Debunking the Myth of Civil Rights Liberalism: Visions of Racial Justice in the Thought of T. Thomas Fortune, 1880-1890, 77 Fordham L. Rev. 1479 (2009).

and Stewart conceptualized civil rights politics and legislation as part of a broader political program that did not exhaust itself in reactive or proactive civil rights legislation and litigation.[67]

Fortune and Stewart both entertained radical political ideas in the 1880s and 1890s. While there were differences in their political visions and allegiances, they also shared key commitments: both argued that racial justice required 'equality of opportunity', and that equality of opportunity necessitated a fundamental restructuring of economic relations. Both maintained a three-pronged approach to the problem of economic exploitation, exclusion and marginalization of black Americans. They argued for broad civil rights legislation, reparations for slavery, redistribution of land, black cooperative business ventures and extended state control over the economy. Stewart also contemplated limiting the earnings of invested capital, establishing state control over key industries, and legislating shared earnings for employers and their employees.[68] For both Stewart and Fortune, it was clear that broad state interventions were necessary in order to make even the semblance of an opportunity of equality possible. At a minimum, both Fortune and Stewart maintained that three kinds of intervention were necessary: firstly, African Americans' political and civil rights—including property rights—had to be safeguarded in a meaningful way. Stewart, for example, saw a direct connection between the violation of votes and economic

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[67] Fortune's purported ideological and political inconsistency has often been noted. It is certainly true that Fortune was affiliated with a number of very different political organizations and figures throughout his lifetime. Early in his career, he advocated "agitation, contentions, ceaseless unrest, constant aspiring" (Fortune, Timothy Thomas, The Virtue of Agitation, New York Globe, August 18, 1883 *reprinted in* Fortune, Timothy Thomas, and Shawn Leigh Alexander. T. Thomas Fortune, the Afro-American Agitator: A Collection of Writings, 1880-1928. Gainesville: University Press of Florida, 2008. p. 126), and did not shy away from calling for revolution. In *Black and White: Land, Labor and Politics in the South*, published in 1884, for example, he called for fundamental economic transformations, including the confiscation and redistribution of all landholdings, as well as the unification of the black and white laboring classes. In later years, he became one of Booker T. Washington's closest allies and publicly supported far more conservative approaches to black emancipation. In his final years, he worked for Garvey's organization. Affiliations with these different political associations have led to the impression that Fortune's political thought was somewhat superficial and fickle. I have my misgivings about this assessment of Fortune's thought, but I cannot explicate them here fully. In either case, I here focus on Fortune's earlier career because it is most pertinent to explaining his view of anti-discrimination legislation in the 1880s and 1890s. Thornbrough, Emma Lou. *T. Thomas Fortune: Militant Journalist*. Chicago: University of Chicago Press, 1972.

[68] Fortune, Fortune, Timothy Thomas. *Black and White: Land, Labor, and Politics in the South*. New York: Arno Press, 1968. T. McCants Stewart, "An Industrial Servitude?", *The New York Age,* March 17, 1888, p.1

dispossession and exploitation, and argued that any kind of racial self-help or uplift depended on secure property rights: “So you see, these fellows, who suppress votes will suppress cash if they think they can safely do so.”[69] Secondly, explicit and legally sanctioned unequal treatment on the basis of race—such as the use of race as a marker of risk—had to be abolished. Finally, they maintained, the state had to actively intervene in order to ensure fairer entry to the market. This meant anti-trust legislation, redistribution of land and legal limitations on corporate earnings that would counteract the progressive concentration of capital. Against this background, it becomes clear that Fortune and Stewart had a broad view of the requirements of racial economic justice: civil rights legislation was conceptualized as a necessary but not sufficient for the establishment of equitable economic participation.

It is painfully evident, however, that the hopes for the realization of this broader political program were slim at best. While Chappelle, Fortune and Stewart were struggling to get civil rights legislation on the books, political interest in the predicament and fate of the freedmen was rapidly declining.[70] Fortune, in particular, reflected on the narrow possibilities for political action. He argued that “we must adjust ourselves to the order of things”[71] and maintained that black survival called for pragmatic strategies, even if they were contrary to true principles of justice.

With regards to insurance, therefore, advocates of anti-discrimination legislation in the life insurance industry, including Fortune and Stewart, did not develop a conceptual or political language that successfully challenged the principles of actuarial justice. Consequently, they did not find a way to talk about the social nature of risks—the disproportionate risks to which African Americans were exposed due

[69] Stewart, “South Carolina Politics”, *The New York Age*, August 30, 1890, p. 1
[70] An anonymous journalist in the Plaindealer remarked on this strange juxtaposition in “The New Insurance Deal”, *Plaindealer* (Detroit, Michigan), 21 April 1893.
[71] Thomas Fortune, “Who will own the soil of the south in the future” (1883) *in Fortune, T. T., & Alexander, S. L. (2008). T. Thomas Fortune, The Afro-American Agitator: A Collection of Writings, 1880-1928. Gainesville: University Press of Florida, p. 5.*

to past and present injustice and the ways in which the costs of these risks should therefore be redistributed or borne collectively. However, these conceptual resources were and are available elsewhere in their thought. The fact that they did not articulate the social nature of risk with regards to life insurance may have been due to pragmatic political concerns, the availability of civil rights discourse as the only legitimate form of claim-making for racial justice (and one that was already being marginalized at this point in time) or the conceptualization of risk as a consumer good rather than as a key site of the production and reproduction of economic racial inequality. Whatever the explanation for the conceptual limitations of their vision of equity in insurance markets, however, it is important to recognize that they nonetheless made an important—if limited—contribution to the politicization of risk according to criteria of racial justice.

Conclusion

In this chapter, I have shown that the rise of risk in the form of life insurance as a mass commodity raised new questions about the moral economy of risk. These questions included the issue of morally permissible distinctions between different risk populations, particularly the question whether race could be used as a proxy for risk. As I have shown, African American legislators and political activists challenged the use of racial distinctions as a proxy for risk. They contested the actuarial power of insurance companies and subjected actuarial distinctions to public scrutiny. In many ways, this constituted an important, if partial, politicization of risk practices. However, it did not contest actuarial justice as an evaluative standard for a racially just distribution of the costs of risk. The failure to challenge the precepts of actuarial justice, I have argued, resulted in a narrow vision of what racial justice required. It obscured the question of who was to be responsible for accumulated historical and present disadvantage and injustice, and did not advance a case for redistributing the burden of this unjust history.

Today, it is important to re-examine such strategies of contestation in order to raise the question of who is to bear the cost of historically accumulated injustice anew. If we do not raise this question explicitly it is all too easy to fall back on the assumption that each of us is responsible for the risk that we represent and to forget that this risk is not of our own making.

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