Fordham Law Review

Volume 63 | Issue 1 Article 6

1994

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QUESTIONING THE USE OF RACE-SPECIFIC AND GENDER-SPECIFIC ECONOMIC DATA IN TORT LITIGATION: A CONSTITUTIONAL ARGUMENT

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INTRODUCTION

TORT law, like virtually every other legal subject, has increasingly come under scrutiny by scholars seeking to uncover hidden biases based on race, gender and other important dimensions of personal identity.[1] In law reviews and in final reports of gender and race bias task forces, questions have been raised about the basic equity of legal standards employed in torts suits, particularly how rules created within a predominately white, male-dominated system often fail to take into account the differing experiences of more marginalized social groups in society. Some scholarship has moved beyond criticism of explicit legal rules to show how the law in action—the behavior of judges, lawyers, expert witnesses and jurors—influences the value placed on injuries suffered by particular classes of tort victims.[2]

The growing body of literature suggests that no dimension of tort law has escaped the influence of gender or race, the two aspects of personal identity examined in this Article. The four elements of the negligence claim—duty, breach, causation and damages—derive their meaning within specific cultural contexts in which understandings about gender and race play a prominent role. Concepts of duty and

* Professor of Law, University of Pittsburgh. I am grateful to Pat Bauer, Mike Green, David Jung and Joe Knight for their comments on an earlier draft and to Nancy Hauserman, Dick Stevenson and Gerry Suchanek for their insights about the role of expert witnesses. I also benefitted greatly from a faculty workshop on this piece with my new colleagues at Pittsburgh. Many thanks as well to Andrea Kurtz, Liza Diaz and Lisa Fisher for their research assistance.

1. For an excellent review of some of the feminist writings in the area, see Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575 (1993). *See also* Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 Stan. L. Rev. 1 (1988) (examining interlocking systems of race, gender and class bias); Taunya L. Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 Mo. L. Rev. 443 (1992) (critiquing doctrine of consent); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 Wash. & Lee L. Rev. 123 (1990) (discussing cases of sexual, racial, ethnic, religious and sexual orientation harassment); Ann C. Shalleck, *Feminist Legal Theory and the Reading of* O'Brien v. Cunard, 57 Mo. L. Rev. 371 (1992) (critiquing doctrine of consent).

2. *See, e.g.*, Barbara Y. Welke, *Unreasonable Women: Gender and the Law of Accidental Injury, 1870-1920*, 19 L. & Soc. Inquiry 369 (1994) (assessing role of gender in shaping the law of accidental injury); Barbara Y. Welke, *The Social Foundations for Non-Workplace Injuries in Negligence 1850-1920* (unpublished manuscript, on file with author) (same).

breach, even when formulated in gender and race neutral terms, often implicitly depend on a vision of the typical or standard person, who turns out to be white, male and middle class. For example, the "reasonable person" standard, a staple of tort law, is now recognized as a problematic construct that needs to be unpacked to expose its non-neutrality and propensity to reproduce the status quo.[3]

This new critique of tort law also has built upon the legal realists' understanding of causation as a value-laden inquiry that cannot be separated from considerations of social policy.[4] Feminists and other critical scholars claim that assessments of causation are influenced by the identity of the injured parties and that causal attribution is a dynamic process, the product of cultural as well as intellectual developments.[5] Gender ideology may affect which injuries are regarded as "remote" and which are classified as "proximate."[6] The core notion of "injury" also is being mined for its cultural and ideological dimensions.[7] The "discovery" of sexual harassment[8] and the reconfiguring of hate speech[9] and pornography[10] as harms disproportionately inflicted upon women and racial minorities have the potential to gener-

3. For critiques of the reasonable person standard in both tort litigation and Title VII harassment cases, see Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3 (1988); Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 Tex. J. Women & L. 95 (1992); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177 (1990); Lucinda Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 Yale J.L. & Feminism 41 (1989).

4. *See, e.g.*, Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 Stan. L. Rev. 60 (1956) (discussing how policy considerations affect the determination of causation-in-fact in tort actions).

5. *See, e.g.*, Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common-Sense Causality* (Oct. 7, 1993) (unpublished manuscript, on file with author) (relating attributions of cause to changes in technology, political economy and culture).

6. *See, e.g.*, Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814, 824-34 (1990) (discussing miscarriages and stillbirths caused by fright that were classified as "remote" and "unforeseeable").

7. *See, e.g.*, Adrian Howe, *The Problem of Privatized Injuries: Feminist Strategies for Litigation* (developing the notion of "social injury" to describe systematic harms suffered by women), *in* At the Boundaries of Law: Feminism and Legal Theory 148, 148-49 (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).

8. Two early influential texts on sexual harassment are Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979) and Lin Farley, Sexual Shakedown: The Sexual Harassment of Women on the Job (1978). For an overview of the legal literature on sexual harassment, see Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 U.C.L.A. Women's L.J. 37 (1993).

9. *See* Mari J. Matsuda et al., Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment (1993).

10. *See* Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 127-214 (1987); Catharine A. MacKinnon, Only Words 3-41 (1993); Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. Rev. 793 (1991).

ate a broader critical discussion about the inadequacy of traditionally recognized categories of legal injuries.

In this Article, I examine gender and race bias in the calculation of damages, specifically the assessment of loss of future earning capacity. This element of damages is significant because it is frequently a sizable component of a damage award.[11] I contend that the courts, expert witnesses and lawyers have uncritically relied on statistical data, premised explicitly on race and sex, to calculate loss of earning capacity. This explicit use of race-based and sex-based economic data dramatically reduces some damage awards for women and for African-American and Hispanic men.[12] The effect for white male plaintiffs, in contrast, is to set their recoveries at an unjustifiably high amount, which perpetuates and recreates gender and race disparities in the distribution of personal income.[13]

Reliance on race-based and gender-based economic data to determine lost earning capacity is bad social policy. The use of race-based and gender-based tables assumes that the current gender and racial pay gap will continue in the future, despite ongoing legal and institutional efforts to make the workplace more diverse and less discriminatory. The use of these data allows discrimination in one area—the setting of pay rates—to influence valuations in another area—the calculation of personal injury awards. This bootstrapping magnifies the impact of employment discrimination to the extent that current disparities in earnings are traceable to discriminatory acts of employers. It further impoverishes members of low income groups who find themselves disabled from severe accidents.

Most importantly, the use of explicit race-based and gender-based economic data is unconstitutional.[14] I maintain that under current doctrine, reliance on either race-based or gender-based tables in the course of a judicial proceeding is state action sufficient to trigger constitutional guarantees. On the merits, moreover, the possible justifications for using race-based and gender-based data fail to satisfy the requisite constitutional standards. It is well settled law that racial classifications are suspect and cannot be used to disadvantage minorities, absent a showing that the classification is necessary to further a compelling governmental interest.[15] Under the prevailing intermediate scrutiny standard for explicitly gender-based classifications, individual women are protected from damaging generalizations about their sex,

11. *See, e.g.*, Floyd v. Fruit Indus., Inc., 144 Conn. 659, 669-70 (1957) (noting that destruction of earning capacity may be the "principal element of recovery" in wrongful death of employed person); *accord* Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1281 (D. Conn. 1974).

12. *See infra* notes 71-98 and accompanying text.

13. *See infra* notes 71-98 and accompanying text.

14. *See infra* notes 218-311 and accompanying text.

15. *See infra* notes 257-67. The leading case is Korematsu v. United States, 323 U.S. 214, 223 (1944).

unless the state proves that the classification is substantially related to the achievement of an important governmental objective.[16] I contend that there is no persuasive justification—certainly not one that qualifies as a compelling or important justification—for relying on race-based or gender-based economic data in tort litigation. Equitable determination of loss of future earning capacity can be made by individualized determinations which look at the particulars of a plaintiff's situation. When such individualized determinations are not possible, courts and experts should rely on inclusive, race-neutral and gender-neutral statistical data.

My argument against the use of race-based and gender-based tables to determine loss of earning capacity, surprisingly, is a novel one in the United States legal commentary. American commentators have not probed as deeply as our Canadian counterparts to test for the fairness and distributional consequences of standard measures used in computing loss of future earning capacity.[17] The race and gender bias in the computation of damages that I discuss in this Article has been hidden, despite the fact that this practice relies on data explicitly premised on race and gender categories.

I suspect that this subject has not been debated because the subject of damages generally tends to be neglected in the literature. The determination of damages frequently is omitted from first year torts classes. Legal academics, like myself, may shy away from discussing damages because we lack the detailed knowledge of practicing attorneys and may not see the theoretical importance of the topic. In addition, issues in damage law are difficult to research. Relevant discussion is typically buried in trial court opinions, consisting of a small facet of one of several issues in a case, rarely highlighted as a significant legal issue.

Aside from these practical obstacles, objections to the use of race-based and gender-based economic data may not have surfaced because of ideological barriers. The economists who testify as expert witnesses and the lawyers who try personal injury cases are unlikely to be primed to identify race and gender inequities in a context totally removed from a civil rights case. My research, ironically, reveals that it is often the attorney for the female plaintiff who introduces gender-specific data.[18] Experts are unlikely to question the fairness of using gender-based tables, particularly since such use is standard practice outside the litigation context. I sense that lawyers and experts are more hesitant to rely on race-based data, if only because, as a societal norm, color blindness now is more widely accepted than gender blindness. However, it is clear that race-based data have been used and

16. *See infra* notes 287-98. The leading case is Craig v. Boren, 429 U.S. 190, 197 (1976).

17. *See infra* notes 190-217.

18. *See infra* notes 141-45.

there is no clear prohibition against the practice in the reported cases. Significantly, there are no constitutional challenges to the use of race-based or sex-based data in the reported American cases: the few discussions in the cases treat the issue as a common law, evidentiary question.[19]

What economists regard as an accurate measure of loss of future earning capacity has dominated the legal determination. When the inquiry is so pared down, there is little room for discussion of the equity of the process and little awareness that predictions about the future involve social as well as economic judgments. The calculation of loss of future earning capacity has not yet been significantly affected by anti-discrimination principles, whether couched in constitutional or general policy terms.

Despite the narrowness of the issue, the calculation of the loss of future earning capacity has important theoretical and symbolic implications because it concerns the value placed on human potential. When race-specific and gender-specific data are used, it signals that white men are worth more, and reinforces beliefs that they will achieve more than white women or minority men and women. In the criminal context, a similar devaluing of the lives of racial minorities has resulted in harsher sentences for defendants who kill or injure white people.[20] In the employment context, devaluing of women's contributions has led to a rejection of comparable worth in the courts[21] and the perpetuation of a huge gender gap in wages.[22] The cumulative effect of these valuations is to project current disparities into the next generation. When the reproduction process is invisible, the disparities seem inevitable.

Part I of this Article reviews some standard formulations relating to the calculation of loss of future earning capacity to determine the role of gender-based and race-based data in these calculations.[23] Reliance

19. *See infra* notes 165-83.

20. A comprehensive study of racial disparity in sentencing directed by Professor David Baldus showed that defendants charged with killing white victims were 4.3 times as likely to receive the death sentence as defendants charged with killing blacks, even after controlling for 39 nonracial variables. David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990). In McCleskey v. Kemp, 481 U.S. 279, 297 (1987), the Supreme Court accepted the statistical soundness of the Baldus study but refused to regard it as sufficient proof of intentional discrimination in the individual case. For a discussion on the devaluation of the lives of black victims, see Stephen L. Carter, *When Victims Happen to Be Black*, 97 Yale L.J. 420 (1988) and Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988).

21. *See, e.g.*, Spaulding v. University of Wash., 740 F.2d 686, 709 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984); American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401, 1404 (9th Cir. 1985); Christensen v. Iowa, 563 F.2d 353, 356-57 (8th Cir. 1977).

22. *See infra* notes 66-68. *See generally* Claudia Goldin, Understanding the Gender Gap: An Economic History of American Women (1990).

23. *See* discussion *infra* notes 32-68 and accompanying text.

on explicit gender-based and race-based economic data is most likely to occur in cases in which the plaintiff has not established an individualized record of earnings, generally when the plaintiff is a minor child. In these cases, experts do not have enough information to select more refined statistics, such as the level of earnings within a particular occupation and the average rate of pay increases in such occupation.

There is no way to determine how often parties resort to gender-specific and race-specific information or the precise impact this practice has on damage awards. Part II of this Article, however, reviews empirical studies on the size of damage awards for male and female plaintiffs and examines the commentary from the many task force reports on gender or race bias in the courts in order to provide a general idea of the consequences of this practice.[24] These data suggest that the sizable wage gap between men and women, and between white men and minorities is replicated in damage awards. We know that loss of future earning capacity is an important factor in producing these disparities, even if resort to explicit gender-based and race-based data is relatively infrequent. I make the modest claim that the practice of using such gender-based and race-based data should stop, even if it is unlikely to have a great impact in reducing the size of the disparity in damage awards between white men and less favored groups.

Part III reviews cases that refer to race or sex in discussing calculation of lost earning capacity.[25] Although the discussions are sparse, I conclude that only in the last five years have the courts questioned the use of race-specific or gender-specific information. Two recent cases from the United States—from the First Circuit[26] and from the federal district court in the District of Columbia[27]—are notable for refusing to rely on gender-specific or race-specific data.[28] The one important Canadian decision,[29] by a trial court in Vancouver, rejected the use of women's average earnings to calculate loss of future earning capacity of a female plaintiff, relying instead on the average earnings of male workers as an appropriate measure of the loss of earning capacity. Part III also discusses the progressive Canadian scholarship on this issue,[30] the only commentary to identify gender and race bias as a problem associated with the current methods of calculating lost earning capacity.

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24. *See* discussion *infra* notes 69-98 and accompanying text.

25. *See* discussion *infra* notes 99-217 and accompanying text.

26. Reilly v. United States, 665 F. Supp. 976 (D.R.I. 1987), *aff'd*, 863 F.2d 149 (1st Cir. 1988).

27. Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427 (D.D.C. 1991).

28. *See infra* notes 165-84.

29. Tucker v. Asleson, Vancouver Reg. B871616 (B.C.S.C. Apr. 25, 1991) (unreported).

30. *See* discussion *infra* notes 99-217 and accompanying text.

Finally, Part IV contains the constitutional argument against the use of race-specific or gender-specific economic data.[31] This Article concludes that if state action can be proven in this context, the constitutional challenge is very strong on the merits.

I. STANDARD FORMULATIONS AND PRACTICES: LOSS OF FUTURE EARNING CAPACITY

In both personal injury and wrongful death cases, juries are asked to estimate loss of future earning capacity as part of the damage award. As its name suggests, loss of future earning capacity compensates for the loss of ability to earn money, for the fact that the accident impaired plaintiff's (or decedent's)[32] earning power. This element of damages is likely to be of significance in cases of severe injury, especially where permanent injury prevents a plaintiff from engaging in the type or range of employment possible before the injury.

The basic strategy in calculating loss of future earning capacity is to compare the amount the plaintiff was capable of earning before the injury to the amount plaintiff is capable of earning after the injury. The authorities are generally in agreement that this element of damages is aimed at compensating for loss of potential. Earning capacity may be destroyed by a serious accident, even if plaintiff might never have decided to work or might not have chosen the highest paying job he or she was capable of attaining.[33] By focusing on what plaintiff *could* have earned rather than what plaintiff *would* have earned, the courts have provided a theoretical basis for authorizing awards for persons who do unpaid labor in the home or whose work is not otherwise compensated through the market. One commentator has described this kind of award as "an award for the value of the time of the injured person, measured by a more or less objective measure."[34]

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31. *See* discussion *infra* notes 218-314 and accompanying text.

32. Throughout this Article, I will use "plaintiff" to refer to the accident victim. My argument against the use of explicit gender and race-based data is also applicable to wrongful death actions. There are added complexities, however, when parents seek to recover for the wrongful death of a child. Typically parents will have a statutory right to recover for their "pecuniary injury" as a result of a child's death, including loss of the child's services and future contributions. The courts have struggled with valuing services of a child in the contemporary context where most children are a financial liability rather than an asset to their parents. *See* Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution § 8.3(4), at 433-36 (2d ed. 1993); Wex S. Malone, Torts in a Nutshell: Injuries to Family, Social and Trade Relations §§ 2-5 to 2-6, at 37-40 (1979). Proof of the decedent's future earning capacity is relevant to determine the amount the child might have contributed to support aging parents. Many states now allow the jury to consider the value of the child's companionship as an element of pecuniary loss. Dobbs, *supra* at 441.

33. Marilyn Minzer et al., 2 Damages in Tort Actions §§ 10.30-10.34 (Matthew Bender 1994); Jamie Cassels, *Damages for Lost Earning Capacity: Women and Children Last*, 71 Can. B. Rev. 447, 448 (1992); Dobbs, *supra* note 32, § 8.1(2).

34. Dobbs, *supra* note 32, at 367.

As a practical matter, however, the most common starting point for calculating the lost earning capacity of adults is the plaintiff's established earnings record.[35] Current earnings are then used as the basis for projecting future earnings levels.[36] To arrive at this projection, it is necessary to estimate both how many years the plaintiff would have worked if he or she had not been injured (*i.e.*, worklife expectancy) and the amount plaintiff would have earned each year, adjusted for probable wage increases or other fluctuations in earnings.[37] Because plaintiffs receive lump sum payments, the award must then be reduced to present value. These calculations are complicated enough to justify expert testimony on the issue. Typically, prior to trial, an economist will prepare a formal report summarizing the calculations used to arrive at a figure or figures for lost earning capacity, including a statement of the assumptions employed and copies of relevant government source documents providing statistical information.[38]

When plaintiffs have an established work history, the process of calculating loss of future earning capacity may be individualized, at least to the extent that projections are based on the specific occupation in which plaintiff was employed.[39] Economists will look to plaintiff's own earnings record as well as the average earnings in that occupation to determine both the base annual income and the projected increases in earnings. In these instances, it is possible, of course, to resort to gender-based or race-based data specific to the occupation—for example, the average income of female law professors or the average rate of pay increases for black accountants. In my research, however, I have not come across cases in which economists have relied on race-based and gender-based earnings data in projecting future earning capacity for persons who have an established earnings track record.[40]

35. Minzer, *supra* note 33, § 10.22(3)(b); Evelyn E. Zabel, *A Plain English Approach to Loss of Future Earning Capacity*, 24 Washburn L.J. 253, 259 (1985).

36. Fringe benefits, such as pensions, social security, retirement and profit sharing are included within the future earnings projections. Zabel, *supra* note 35, at 259 & n.62.

37. Minzer, *supra* note 33, § 10.22(3).

38. Leo M. O'Connor & Robert E. Miller, *The Economist-Statistician: A Source of Expert Guidance in Determining Damages*, 48 Notre Dame Law. 354, 356-57 (1972).

39. Paul M. Deutsch & Frederick A. Raffa, 8 Damages in Tort Actions § 110.11(1) (Matthew Bender 1994).

40. This, of course, does not mean that gender or race has no bearing on the amount of recovery. Insofar as women are likely to be clustered in low-paying female occupations and minorities have a low representation rate in high-paying professional job classifications, reliance on occupation-specific data will have a negative impact on recoveries for women and minorities. Moreover, if individual plaintiffs have suffered job discrimination because of race or sex, their individual earnings profile will be lower than that of a white male counterpart; when the plaintiff's base salary is used to project future income, past discrimination will negatively affect the earning capacity calculation. In these last two cases, however, the impact of race or sex is indirect, in that it is not directly traceable to an expert's or other participant's reliance on explicit race or gender-based generalizations. Because my argument is premised on prevail-

In calculating the worklife expectancy of plaintiffs, even for plaintiffs with an established work history, economists often rely upon race-specific or gender-specific worklife tables, which predict that women and racial minorities will spend fewer years in the labor force.[41] Worklife expectancy is distinct from life expectancy. Worklife expectancy is derived from the working experience of all persons in the plaintiff's gender or racial group; it incorporates rates of unemployment, both voluntary and involuntary, as well as expected retirement age.[42] The worklife tables provide an average for the group, reflecting the historical pattern of actual years worked.[43] Thus, for example, even though women as a group live longer than men, the worklife expectancy of women of all races is typically shorter than that of men. Moreover, minority men have a shorter worklife expectancy, as well as life expectancy, than white men.[44] For example, data from the Bureau of Labor Statistics regarding worklife patterns observed in 1979-80 estimates that for eighteen-year-olds, the worklife expectancy of white men was 38.8 years, compared to 32.8 years for black and other men, 28.5 years for white women and 27.1 years for black and other women.[45]

Particularly in some older cases, there is also a related assumption that women will remain out of the labor force for several years to raise children. This assumption has provided the justification for discounting a damage award for a female plaintiff to account for the average female's childbearing years[46] or simply for the "negative" contingency of marriage.[47] Similar discounts have not been made for men who

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ing constitutional principles, I am not challenging conventional valuation practices that have a negative impact on women and minorities if they are not the product of explicit race or gender-based classifications. A more thoroughgoing argument against individualized assessments of future earning capacity based on their tendency to reproduce current patterns of gender and race stratification has been made by Jamie Cassels. *See* Cassels, *supra* note 33, at 485.

41. *See, e.g.*, Deutsch & Raffa, *supra* note 39, § 110.13 tbls. 7b.2 (comparing white men and black men), 7b.5 (comparing white women and black women).

42. *See* Dale Funderburk, *Worklife Tables: Are They Reliable?*, Trial, Feb. 1986, at 44. *See also*, Dobbs, *supra* note 32, at 467; Marvin R. Brams & Norfleet W. Rives, Jr., *The Determination of Economic Loss in Tort Cases: The Relative Impact of Sex and Race*, 6 J. Contemp. L. 121, 125 (1979) (describing working life tables published by the United States Bureau of Labor Statistics which provide gender-specific projections).

43. Deutsch & Raffa, *supra* note 39, § 110.13.

44. *Id.* § 110.13 tbl. 7b.2.

45. *Id.*; *see also* Funderburk, *supra* note 42, at 44-45 (using 1977 data, worklife expectancy for women is 27.5 years, compared to 37.9 years for men).

46. Caron v. United States, 410 F. Supp. 378 (D.R.I. 1975) (P's expert exempted a 10 year furlough period from his computations to account for the average female's child-bearing years). *Cf.* Feldman v. Allegheny Airlines, 382 F. Supp. 1271, 1286 (D. Conn. 1974) (determining that eight years is the "middle of the range of a professional woman's likely hiatus from her principal occupation in order to raise a family").

47. Frankel v. United States, 321 F. Supp. 1331 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226, 1229 (3d Cir. 1972) (predicting that attractive plaintiff would marry and bear children "with consequent substantial interruptions of gainful employment"). For a

were expected to marry and have children without affecting their working life. Significantly, in discounting awards for the negative contingency of marriage or child rearing, courts have deviated from the principle of compensating for earning "capacity." Presumably, a woman or other person who cares for children in the home still retains her capacity to earn money in the labor market, even if she decides not to exercise that capacity. The fact that defendant's conduct has denied plaintiff the option of paid employment is eclipsed in these cases by an assessment of "probabilities" grounded on gender-based generalizations.

Aside from gender-based discounts or contingencies, experts tend most often to resort to gender-based and race-based statistics when the injured party has only a limited or nonexistent work history.[48] Most of the cases involve injury or death of children.[49] Similar techniques, however, could be used to calculate loss of earning capacity if plaintiff's employment record was sporadic and it was not easy to designate his or her line of work.

In a recent practitioner-oriented publication by Matthew Bender, Paul M. Deutsch and Frederick A. Raffa have set forth a detailed procedure for economists to use in calculating lost earning capacity in cases in which the plaintiff has no established earnings record.[50] The authors recommend using gender-based and race-based statistics for each of two proposed methods of calculating the base annual earnings level of the plaintiff.[51] Under the first method, the initial step is to predict the level of educational attainment plaintiff would have achieved.[52] This can be done by "neutral" means,[53] such as subjecting plaintiff to aptitude testing and taking into consideration the socio-economic status of the family, including the educational level of the parents and siblings and the ability of the family to finance higher education.[54] The authors then recommend that the economist consult gender-specific and race-specific government data listing the average earnings of high school or college graduates, respectively.[55] At this point, race or gender has a very significant influence on the calculation of lost earning capacity. The tables presented in the text for this

discussion of the unfairness of using a marriage contingency in cases of female plaintiffs, see Cassels, *supra* note 33, at 453-58.

48. Deutsch & Raffa, *supra* note 39, § 110.11(2).

49. *See* cases cited *infra* notes 100-90.

50. Deutsch & Raffa, *supra* note 39, § 110.11(2).

51. *Id.*

52. *Id.*

53. I call this step "neutral" because the judgments about probable educational attainment are not premised explicitly on the race or sex of the plaintiff. However, because of the high correlation between minority race and lower socio-economic status, assessment of the future educational attainment of minority children will likely be negatively affected by the socio-economic situation of their families.

54. Deutsch & Raffa, *supra* note 39, § 110.11(2).

55. *Id.*

purpose are the P-60 Series (for 1977-90) from the Current Population Reports published by the United States Bureau of the Census.[56] The average earnings are broken down into black and white and male and female.[57] For example, the figures for high school graduates in 1990 are: white men, $16,236; white women, $14,064; black men, $13,574; black women, $12,322.[58] As was the case for most government data collections for these periods, race is reduced to either black or white; there is no separate breakdown for other racial/ethnic groups.[59] The suggested table for college graduates contains only a gender breakdown, giving separate data for male and female B.A.s by curriculum.[60] For example, the average monthly salary offer for a man with a B.A. in psychology in 1990-91 was $1,830, compared to a female with the same degree who received an average offer of only $1,640.[61]

The second approach the authors recommend to calculate lost earning capacity relies even more heavily on explicit gender and race classifications. Rather than resort to individualized factors to determine probable educational attainment, the authors state that economists may choose to consult data from the U.S. Commerce Department that gives the average educational levels by the sex and race of the plaintiff.[62] The relevant table, for example, shows the median school years completed for white men age twenty-five years or older in 1988 was 12.8, compared to 12.6 for white women and 12.4 for black men and women.[63] As under the first method, once the probable educational attainment is predicted, reference would again be made to gender-based and race-based tables to calculate probable earnings.[64]

Resort to race-specific or gender-specific data potentially can have enormous consequences for plaintiffs in tort actions. A colleague of mine—Professor Richard Stevenson from the University of Iowa's

56. *Id.*

57. *Id.*

58. The mean earnings for all high school graduates of both sexes and races is $15,009. Deutsch & Raffa, *supra* note 39, § 110.11(2) tbl. 110-2.

59. The most recent P-60 Series of the Current Population Reports, *Money Income of Households, Families, and Persons in the United States: 1991* includes a breakdown by gender and for white, black and Hispanic persons. *See* United States Department of Labor, *Money Income of Households, Families, and Persons in the United States: 1991*, *in* P-60 Series of the Current Population Reports (1991). There is no separate listing for Asian or Native American. For a discussion of the various types of public data that can be used to calculate future earning capacity, see Lawrence Hadley & John Rapp, *Estimating Future Lost Earnings: Some Common Problems*, Trial, Feb. 1985, at 28.

60. The source the authors recommend is the College Placement Council's Salary Survey. Deutsch & Raffa, *supra* note 39, § 110.11(2).

61. *Id.* tbl. 110-3a.

62. *Id.* § 110.11(2), at 110-8.

63. *Id.* tbl. 110-1. The source of the data is the P-20 Series of the Current Population Reports, *Population Characteristics: Educational Attainment in the United States* and the Statistical Abstract of the United States, 1990 (citing data for 1988, 1989 and 1990).

64. Deutsch & Raffa, *supra* note 39, § 110.11(2), at 110-8 to 110-9.

College of Business Administration—who has been employed as an expert in several cases, calculates the projected lifetime income, discounted to 1990 present value, of a female college graduate as $1,174,772, compared to a male college graduate's projected income of $1,815,850.[65] This means that if two children, a boy and a girl, with the same educational prospects were each permanently disabled by an injury, the girl's award would be only sixty-five percent of the boy's award, a disparity attributable solely to gender.

The size of the male-female disparity in the above calculation is not surprising if one considers the size of the current wage gap. In 1991 for full-time, year-round workers, the median income of white men was $30,266, compared to $22,075 for black men and $19,771 for men of Hispanic origin.[66] The median income for white women was $20,794, compared to $18,720 for black women and $16,244 for women of Hispanic origin.[67] Expressed as a percentage of the median income for white men, black men receive seventy-three percent; Hispanic men, sixty-five percent; white women, sixty-nine percent; black women, sixty-two percent; and Hispanic women, fifty-four percent.[68] Reliance on gender-specific and race-specific data to calculate loss of future earning capacity assures that predictions about the future are tied to present disparities, disparities which are sizable and reinforce the dominant economic position of white men in the American economy.

II. Empirical Studies

In the trial of actual cases, however, juries are not bound to accept an expert's calculation of lost future earning capacity.[69] There is also no requirement that expert testimony be presented in every case; the decision lies within the discretion of the trial court.[70] Thus, there is no precise way to calculate the influence that reliance on gender-based and race-based data exerts in tort litigation or to measure the difference it would make in practice if only gender-neutral and race-neutral data were used.

The available empirical data do confirm, however, that awards received by women and minorities tend to be smaller than those re-

65. Interview with Professor Richard Stevenson of the University of Iowa, College of Business Administration, in Iowa City, Iowa (Aug. 25, 1993).

66. *See* United States Department of Labor, *supra* note 59.

67. *Id.*

68. *Id.*

69. Reilly v. United States, 863 F.2d 149, 167 (1st Cir. 1988); *see also* Renaldi v. New York, N.H. & H.R.R., 230 F.2d 841, 845 (2d Cir. 1956); Gonyer v. Russell, 160 F. Supp. 537, 540 (D.R.I. 1958).

70. Minzer, *supra* note 33, § 10.22(6)(b), at 10-107 to 10-108. However, an attorney's negligent decision not to obtain an economic expert witness in a personal injury or wrongful death suit can form the basis of a malpractice claim. Waldman v. Levine, 544 A.2d 683, 690 (D.C. 1988).

ceived by white men and that the disparity is likely traceable, in part, to lower awards for loss of future earning capacity. Some of these data have been generated by the movement to study race and gender bias in the courts.[71] Task forces in at least eleven states have published reports that discuss gender bias in civil damages.[72] Three reports have discussed racial bias in tort cases involving minority plaintiffs.[73] Although there have been only a few independent studies of damage awards undertaken by the task forces, the discussions in those reports also provide useful reviews of the empirical data and offer insights into the perceptions of lawyers, judges and other participants on the impact of gender and race in civil litigation.

Most empirical studies indicate that women receive significantly lower damage awards than men. For example, a study of wrongful death cases between 1984 and 1988 conducted by the Washington State Task Force on Gender and Justice in the Courts ("Washington Report on Gender") found that the mean damage award for a male decedent was $332,166, compared to a mean award of $214,923 for a woman.[74] Because these figures are unadjusted, there is no way to estimate how much of the disparity was attributable to neutral factors, such as age at the time of death. The authors of the Washington Report on Gender hypothesized, however, that a "significant factor" pro-

71. For descriptions of the work and experiences of the various gender and race bias task forces, see Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 Women's Rts. L. Rep. 109 (1986); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 Fla. L. Rev. 181 (1990); Lynn Hecht Schafran, *Issues and Models for Judicial Education About Gender Bias in the Courts*, 26 C. Rev. 32 (1989); *see also* Judith Resnik, *Gender Bias: From Classes to Courts*, 45 Stan. L. Rev. 2195 (1993).

72. *See* Colorado Supreme Court Task Force on Gender Bias in the Courts, Final Report (1990); Illinois Task Force on Gender Bias in the Courts, the 1990 Report (1990) [hereinafter Illinois Report]; Iowa Equality in the Courts Task Force, Final Report (1993) [hereinafter Iowa Report]; Kentucky Task Force on Gender Fairness in the Courts, Equal Justice for Women and Men (1992); Massachusetts Supreme Judicial Court, Report of the Gender Bias Study of the Massachusetts Supreme Judicial Court (1989); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report (1989), *reprinted in* 15 Wm. Mitchell L. Rev. 825 (1989) [hereinafter Minnesota Report]; New Jersey Supreme Court Task Force on Women in the Courts, First Year Report (1984), *reprinted in* 9 Women's Rts. L. Rep. 129 (1986); New York Task Force on Women in the Courts, Report (1986), *reprinted in* 15 Fordham Urb. L.J. 3 (1986-87); Rhode Island Committee on Women in the Courts, the Final Report (1987); Washington State Task Force on Gender and Justice in the Courts, Report (1989) [hereinafter Washington Report on Gender]; Wisconsin Equal Justice Task Force, Final Report (1991).

73. *See* Iowa Report, *supra* note 72; New York State Judicial Commission on Minorities, Report (1991); Washington State Minority and Justice Task Force, Final Report (1990) [hereinafter Washington Report on Minorities].

74. Washington Report on Gender, *supra* note 72, at 89-90; *see also* Jane Goodman, et al., *Money, Sex, and Death: Gender Bias in Wrongful Death Damage Awards*, 25 L. & Soc'y Rev. 263, 268-70 (1991) (discussing Washington Report on Gender).

ducing the disparity was the real difference in the earnings of men and women and the assessment of lower worklife expectancy for women, based on women's lower rates of participation in the labor force.[75] The Report did not specifically mention the practice of reliance on gender-based income tables[76] but seemed instead to accept gender disparities in future earning capacity as a given:

> Despite the fact that there are federal statutes prohibiting discrimination in pay on the basis of sex, data indicate that women workers generally earn less per year than men, even though employed in the same occupation. Thus the economic value of women may be considered less than that of men in determining damages in wrongful death cases.[77]

The disparities in awards found in the Washington Report on Gender have been replicated in other studies. A nationwide study, conducted by Jury Verdict Research, Inc., of jury awards in personal injury cases showed that women in all age groups except two (age groups sixty to sixty-four and over eighty) received significantly lower mean and median awards for compensatory damages than men did.[78] For example, for ages twenty to twenty-nine, women received an average award of $76,117, compared to $236,869 for men in the same group.[79] A Rand Corporation study of damage awards in air crash cases found "strong, consistent differences in loss and compensation by sex."[80] The authors concluded that the "disparity [in awards] results largely from differences between the sexes in income, work-life expectancy, and salary growth."[81]

Even in the one empirical study that adjusted for the current salary level of the plaintiffs, women received considerably lower awards than men did.[82] This study by the Rand Corporation analyzed wrongful termination awards in California between 1980 and 1986.[83] The report concluded that the disparity was likely traceable to generalized assumptions about women's economic potential, specifically expectations of a lower salary growth curve or lower expected labor force participation by women.[84]

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75. Washington Report on Gender, *supra* note 72, at 87.

76. The report did note that "working life tables for women are based on current labor force participation rates and may underestimate future work durations." *Id.*

77. *Id.* at 87-88.

78. 5 Jury Verdict Research, Inc., *Personal Injury Valuation Handbooks: The Aged as Plaintiffs*, pts. I & II (1987), *cited in* Illinois Report, *supra* note 72, at 180-81.

79. *Id.*

80. Elizabeth M. King & James P. Smith, Economic Loss and Compensation in Aviation Accidents ix (1988).

81. *Id.*

82. James N. Dertouzos et al., The Legal and Economic Consequences of Wrongful Termination 31 (1988).

83. *Id.* at 19.

84. *Id.*

The research on the effect of race on damage awards is less voluminous. In an empirical study on racial equity in damage awards conducted by the Washington State Minority and Justice Task Force, substantial disparities were found between settlement amounts in asbestos cases involving minority and non-minority plaintiffs.[85] The Washington study controlled for type of disease, general occupation and age. Minorities received statistically significant lower average settlements than non-minorities overall; the pattern held true for most specific diseases and within occupations.[86] Another report by the Rand Corporation of state and federal civil jury trials in Cook County, Illinois from 1970-79 found that African-American plaintiffs received smaller awards, totaling "only 74 percent as much as white plaintiffs received for the same injury."[87] I have not found any empirical research separately analyzing damage awards for racial minorities other than African-Americans.[88]

The qualitative evidence generated by the gender and race bias task forces—typically survey comments from attorneys and judges—has targeted calculations of loss of future earning capacity as a potential source of the disparities in damage awards.[89] However, the reports rarely focus on the importance of gender-based and race-based economic data; most of the discussion concerns the problem of compensating homemakers fairly for the economic value of their services and

85. Washington Report on Minorities, *supra* note 73, at 123-25.

86. *Id.*

87. Audrey Chin & Mark A. Peterson, The Institute for Civil Justice, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 40 (1985) (published for the Rand Corporation Institute for Civil Justice, R-3249-ICJ). The report also found that disparities were greater for plaintiffs with major injuries. For example, the estimated wrongful death awards for a white person killed in an automobile accident was $79,000 compared to $58,000 for a black person in a similar case. *Id.* at 38-39.

88. The Rand study from Cook County defined "white" to include Hispanics, Asians and Native-Americans. *Id.* at viii n.1.

89. The Task Force reports also have considered whether awards for pain and suffering reflect gender bias or gender stereotyping. There is a widespread belief, for example, that female plaintiffs are more likely to receive higher amounts for disfiguring injuries than male plaintiffs. Minnesota Report, *supra* note 72, at 78-79; Illinois Report, *supra* note 72, at 183-89. Women also may receive higher awards for sexual embarrassment or humiliation than men. A jury in Iowa, for example, awarded $200,000 to a woman and only $100,000 to a man for invasion of privacy when a two-way mirror was discovered in the couple's motel room. Charles Bullard, *$4.3 Million Awarded in Mirror Case*, Des Moines Reg., June 26, 1992, at 2A. Male plaintiffs, on the other hand, may benefit from the societal view that places a higher value on a man's loss of strength and his capacity to do manual labor than the corresponding loss in a woman. Illinois Report, *supra* note 72, at 186.

In this Article, I focus only on loss of earning capacity. I have not attempted to determine whether or to what degree higher awards to women plaintiffs for pain and suffering might possibly offset lower awards for loss of earning capacity. The large disparity in overall awards between men and women, however, suggests that any offset is not considerable.

the problems of combatting juror stereotypes about women and minorities.[90]

The report from the Illinois Task Force on Gender Bias ("Illinois Report") is notable for raising the concern that reliance on generalizations about women's economic potential is problematic, even when supported by statistical data.[91] Based on round-table discussions with attorneys, judges and arbitrators, the task force reported that jurors often assume that women's labor force participation will be less than men's, either because women will take substantial time out of the labor force to give birth and care for children or will work less hours than men per year.[92] The report expressed the view that such assumptions might prevent fact finders from judging the plaintiff as an individual based "on the facts of her particular case, unfiltered through historical or societal biases."[93] The report also faulted the use of statistics based on past experience to predict future patterns. The basic concern seemed to be one of accuracy:

> [S]tatistical models for predicting women's work habits . . . "fail to capture the rapid, sustained increases in women's labor-force participation, and they underestimate future labor-force participation, especially for younger women." . . . Thus, if assessments of female plaintiffs' future income are based upon static assumptions drawn from past employment patterns which are rapidly changing, damage awards may be unfair not only to the individual plaintiff but also to younger women as a class.[94]

The Illinois Report stopped short, however, of challenging the legitimacy of using explicitly gender-based statistics and made no recommendations on this point. The concerns in the report presumably could be met in individual cases by allowing expert testimony about changing patterns of women's labor force participation and by permitting the expert to estimate how much of the wage gap between men and women would decrease in the future.

The only report that deals specifically with the issue of the constitutionality of gender-based and race-based economic data is the report from the state of Iowa.[95] I served on the subcommittee that considered the issue of gender and race equity in damage awards. We first considered the constitutionality question in connection with a written

90. *See, e.g.*, New Jersey Supreme Court Task Force on Women in the Courts, First Year Report (1984), *reprinted in* 9 Women's Rts. L. Rep. 129, 145 (1986) (stating that homemakers are undercompensated because substantive law of damages tied to wage earners); Illinois Report, *supra* note 72, at 186 (noting stereotype that values loss of strength and capacity to do manual labor more highly for men).

91. Illinois Report, *supra* note 72.

92. *Id.* at 187.

93. *Id.* at 189-90.

94. *Id.* at 190 (quoting Elizabeth King & James Smith, Economic Loss and Compensation in Aviation Accidents ix (1988)).

95. Iowa Report, *supra* note 72.

comment received from a respondent in the survey of Iowa attorneys, who recounted his experience as the attorney for the estate of two black men:

> I represented the estates of two black men killed in an automobile accident in a wrongful death action. The defense attempted to introduce probate inventory data to show that black laborers died with 1/3 the estate assets as compared to white laborers whose characteristics were otherwise identical. This would have supported returning a dramatically lower verdict on the "projected accumulations" element, and made black life cheaper to take than white. I was able to get the inventory data excluded on relevancy grounds. However, the economic experts themselves were prepared to present testimony that used race-based statistics to reduce projected accumulations for a black man by about 40% under the white level. I was able to get the economist to revise his testimony based on racially-neutral data.[96]

In discussions, two of the subcommittee members, a lawyer and a judge, reported that they had participated in cases involving minority plaintiffs in which race-based economic data were admitted. The subcommittee's report questioned the constitutionality of the practice of using gender-based or race-based statistics[97] and made the following recommendation, ultimately endorsed by the full Task Force:

> The use of race-specific or sex-specific economic data or expert testimony premised on such data is inequitable. Because minorities and women often have earned less than white men for doing the same or equivalent work, the use of race- or sex-specific economic data to predict future earnings tends to perpetuate past discrimination. As a result, the lives and health of minorities and women are undervalued. The Task Force recommends that only race-neutral and gender-neutral economic data be used to evaluate damages in civil cases.[98]

III. Cases and Commentary

The concern for the use of gender-specific and race-specific economic data has only surfaced in reported cases within the last five years. Prior to that time, the courts accepted the premise that awards to female plaintiffs could properly be based on statistics reflecting economic patterns for women only. In the few cases I have found which mention race-based tables, the courts permitted calculations of future earning capacity to be based on race-specific data. Only recently when a court was forced to choose an appropriate data source to cal-

96. *Id.* at 118-19.
97. *Id.* at 119.
98. *Id.* at 120.

culate loss of future earning capacity in the case of a severely injured bi-racial child did it squarely reject the use of race-based statistics.[99]

A. *Gender-Based Data: Traditional Cases*

The 1970 case of *Frankel v. United States*[100] is a good example of the traditional approach to calculating loss of future earning capacity for women. The court in *Frankel* was willing to assume that a woman would have a much shorter worklife expectancy than a man—that a woman, but not a man, would spend several years out of the workforce during her married life.[101] The principal plaintiff in *Frankel* was a nineteen-year-old woman, Marilyn Heym,[102] who suffered severe brain damage as a result of an automobile accident.[103] At the time of Heym's injury, she had completed two years of a four-year course in commercial art at the Academy of Fine Arts in Philadelphia.[104] Her father was a commercial artist. Her two brothers were embarked on professional careers: one was an engineer, and one was in medical school.[105] She generally did well in school and excelled in art.[106] Despite the evidence that Heym was on her way to a career in commercial art, the court in this non-jury trial concluded that Heym would likely become a wife and mother, and calculated her loss of earning capacity taking this negative contingency into account:

> Marilyn's life of 19 1/2 years, prior to her devastating injuries, presents a clear picture of prospects for marriage. She was attractive, healthy, talented, well-adjusted, and intelligent. From the age of six she was interested in horses and became a proficient rider, winning many awards. She attended and participated in many horse shows. These and school and other activities brought her in contact with the opposite sex. She enjoyed male companionship. She enjoyed teaching others to ride and engaged in hunts with others 15

99. Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427, 455 (D.D.C. 1991).

100. 321 F. Supp. 1331, 1337-38 (E.D. Pa. 1970), *aff'd sub nom*, Frankel v. Heym, 466 F.2d 1226 (3d Cir. 1972). Several of the cases discussed in this section involve claims against the United States government. Perhaps because there are no jury trials under the Federal Torts Claims Act, 28 U.S.C. § 2402 (1988), the damages issue has been brought to light in these cases through trial court opinions and appellate review of trial court findings. Most tort cases, of course, will involve jury trials in state courts. *See* Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 20-22 (1986) (noting that there are 12 times as many tort jury trials in the state courts each year as in the federal courts).

101. 321 F. Supp. at 1337-38.

102. The case is styled *Frankel v. United States* because Alvin H. Frankel was appointed as a guardian for Marilyn Heym, who was declared an incompetent. *Id.*

103. There was no question that Heym's injuries were totally disabling. *Id.* at 1336. After the accident, her mental age was 5.13 years and her memory was worse than 98% of the population. *Id.* She became psychotic, obsessed with food and subject to emotional outbursts. *Id.*

104. *Id.* at 1337.

105. *Id.*

106. *Id.*

> years of age and above. There was a likelihood of marriage and motherhood in her future. Marriage probably would have interrupted her career, but with her training she could have resumed her career, if it had become necessary or desirable during or after marriage.[107]

The economist who testified for Heym had projected her future earnings at $237,630, based on the income of a commercial artist working continuously until retirement.[108] The trial court's estimate, only $125,000,[109] was based on the assumption that Heym would marry, bear children and interrupt her career.[110] The hefty discount for marriage was upheld on appeal.[111] The appeals court held that it was proper for the district court to assume, on the basis of "Miss Heym's temperament and personality," that probably "she would have married and borne children, with consequent substantial interruptions of gainful employment."[112] *Frankel* thus authorized diminished awards to women because of the assumption that women will not work as many years as men at compensated work,[113] despite women's longer life expectancy and despite the fact that loss of earning capacity is supposed to measure potential, rather than probable earnings.

Another case in the traditional mode, *Caron v. United States*,[114] permitted lower awards to a woman even for those years in which the court assumed that the woman would work full-time. Monique Caron's injuries stemmed from the negligent administration of an adult dosage of a typhoid injection in combination with other immunizations when she was four months old.[115] The treatment produced permanent retardation; at the time her parents sued for damages, Caron was twelve years old,[116] but had the mental capacity of a child of 4.5 years.[117]

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107. *Id.* at 1338.

108. Frankel v. Heym, 466 F.2d 1226, 1229 (3d Cir. 1972).

109. Reduced to present value, the award for loss of future earning capacity was $62,000. *Id.*

110. *Id.* In support of its decision, the court cited Vincent v. Philadelphia, 35 A.2d 65 (Pa. 1944), for the proposition that reduced awards to women are proper because of the "lower rate of wages ordinarily obtainable in the industrial world by women as compared with men, and the likelihood of marriage and motherhood with their resulting effect on the girl's opportunity and capacity to continue through life as a wage earner." *Id.* at 67.

111. Frankel v. Heym, 466 F.2d at 1229.

112. *Id.*

113. *Id.*

114. 410 F. Supp. 378 (D.R.I. 1975), *aff'd*, 548 F.2d 366 (1st Cir. 1976).

115. *Id.* at 385.

116. 548 F.2d at 367. The action was timely filed under the "discovery" rule whereby tort plaintiffs are permitted to file suits years after an injury is sustained if they institute an action when they reasonably discover or should have discovered that defendant's negligence produced the harm. *Id.* at 368.

117. *Id.* at 367.

Plaintiff's attorney did not contest the assumption that because Caron was female, she would likely marry and interrupt her working life.[118] In fact, plaintiff's own expert exempted a ten-year furlough period from his computations to account for "the average female's child bearing years."[119] In computing plaintiff's earnings while she was in the work-force, however, plaintiff's attorney argued that the award should be based on the earnings of the average worker, rather than on the earnings of the average female worker, as defendant contended.[120] In support of using gender-neutral data, plaintiff cited "existing Federal and State legislation and the present trend toward equality in employment."[121] The court disagreed, however, and awarded only $30,251 for lost earning capacity based on average female wages.[122] The court purported to have no authority to consider the factor of sex equity:

> I am constrained to agree with the defense that the present value of prospective earnings, female wages, before taxes must be used. However sympathetic this Court may be to equality in employment, it must look to the reality of the situation and not be controlled by its own convictions. One does not need expert testimony to conclude that there is inequality in the average earnings of the sexes. There is no criterion to help us predict when this unwarranted condition will be remedied and as a consequence I feel compelled to adopt the defendant's position . . . .[123]

On appeal, it was defendant, rather than plaintiff, who contested the damage award, arguing that the amount was purely speculative because plaintiff had not proved that she would ever have gone to work.[124] The appeals court refused to set aside the small amount for future earning capacity, noting that "Monique cannot be blamed for not being able to prove the exact amount of such loss. Here the court allowed less than $1000 per year loss of earning capacity which certainly is no bonanza for her."[125] The court went so far as to suggest that the trial court had been unfair to plaintiff because she was female, citing an earlier case in which an eight-year-old boy had been awarded

118. 410 F. Supp. at 398.

119. *Id.* The defendant argued that a longer furlough period was appropriate to reflect the "average periods of unemployment due to economic conditions." *Id.* The court rejected this argument, stating that "I do not believe that more than ten years should be exempted in arriving at a figure. Of course, there is, in all this, an element of conjecture. In all probability, there will be periods of unemployment, so too, it can be said that Monique might not have had a ten-year child bearing furlough. I feel a ten-year period to encompass both contingencies is eminently fair." *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 399.

123. *Id.* at 398.

124. 548 F.2d at 371.

125. *Id.*

$87,500 for this element of damages.[126] In a final cryptic sentence, the court stated that "we see no reason to distinguish between the sexes, as the Government indicates."[127] The court did not, however, explicitly condemn the reliance on female wages or the assumption of a shorter worklife expectancy for women. To support its holding, the court had only to reject defendant's contention that plaintiff should recover nothing for loss of earning capacity because she lacked precise proof of the type of employment in which she would have engaged.[128]

Despite the appeals court's ruling for plaintiff, *Caron* is an extreme case in which the injured female child was doubly disadvantaged by the court's gender-based assumptions. The amount of lost earning capacity was first reduced because of an assumption that women work fewer years than men.[129] The use of average female wages then served to reduce the amount further, based on the assumption that women earn less than men when they do work outside the home.[130] In this case, gender had the effect of reducing future earning capacity to only a small percentage of the total award ($30,251 out of total award of $656,326).[131]

Additional precedents from the 1970s endorse the use of gender-specific calculations of worklife expectancy and reliance on female wages to project future earning capacity.[132] In *Gilborges v. Wallace*,[133] a case involving a devastating car crash injuring a high school senior, plaintiff's expert witness testified as to three possible amounts in calculating loss of earning capacity.[134] The first two calculations were based on the worklife expectancy of female high school graduates and female college graduates, respectively, and on the average wage for each group.[135] The third calculation of $1,000,000 was based on the income of a practicing veterinarian, the profession in which plaintiff

126. The case cited was Pierce v. New York C.R.R., 409 F.2d 1392 (6th Cir. 1969).

127. 548 F.2d at 371.

128. *Id.* at 370-71.

129. 410 F. Supp. at 398.

130. It is not clear from the published reports that the defendant's table of "female wages" was based only on full-time, year round workers. If the table were based on the earnings of all workers, the lower labor force participation rates for women would have already been incorporated in the table, meaning that the plaintiff would have suffered a double discount for the prospects of marriage and interruption of work. For a discussion of the problem of double discounting, see Cassels, *supra* note 33, at 457-58; Elaine Gibson, *The Gendered Wage Dilemma in Personal Injury Damages*, *in* Tort Theory 185, 198 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993).

131. 410 F. Supp. at 399.

132. *See* Gilborges v. Wallace, 379 A.2d 269 (N.J. Super. Ct. App. Div. 1977); Morrison v. Alaska, 516 P.2d 402 (Alaska 1973).

133. 379 A.2d 269 (N.J. Super. Ct. App. Div. 1977).

134. *Id.* at 276-77.

135. *Id.* The expert estimated that if plaintiff graduated from high school she would have worked for 32 years at an average income of $10,500 a year. *Id.* at 277. He did not, however, provide the jury with a gross amount of potential loss of earnings for this possibility. *Id.* He estimated that if plaintiff attained a college degree, she would have worked for 36 years and sustained a gross loss of approximately $540,00. *Id.*

had expressed an interest.[136] The expert also testified that plaintiff would probably have become a veterinarian.[137] The jury apparently agreed and awarded plaintiff $1,000,000.[138]

On appeal, the court reversed the damage award, holding that there was not enough evidence to support the expert's opinion that plaintiff probably would have become a practicing veterinarian.[139] Although the appellate court did not specifically endorse the use of gender-based tables, it gave its tacit approval by stating that the expert's testimony as to plaintiff's likely losses, had she become a college graduate, was supported by the evidence.[140] The effect of the appellate court's ruling was to validate a lower gender-based award while maintaining that plaintiff's chances of succeeding in a male-dominated field were too speculative to support a jury verdict.

In these traditional cases, it is sometimes the female plaintiff who offers gender-based statistics to counter defendant's claim that there is insufficient evidence even to assume that plaintiff would enter the work-force. The debate then centers not on whether plaintiff is entitled to a higher amount derived from gender-neutral tables, but whether any substantial sum should be awarded at all for loss of earning capacity. *Morrison v. Alaska*[141] is such a case involving the use of race-specific and gender-specific tables. The contested issue was the trial court's assumption that the injured female teenager would likely have worked for only five years as a secretary and then married, an assumption which justified an award of only $40,000 for lost earning capacity.[142] Plaintiff's strategy for overturning the trial court's award, which ultimately was successful, was to rely on gender-based and race-based statistics showing that "the average, white Alaskan female, including women both employed and unemployed, will earn about $175,000 during her lifetime [and] the average white Alaskan female who remains employed throughout her career will probably earn $350,000 to $400,000."[143]

136. *Id.* The opinion does not state the worklife expectancy the expert used to arrive at the $1,000,000 figure. Presumably the amount was based on the average earnings of veterinarians.

137. *Id.*

138. *Id.* at 272.

139. *Id.* at 277. The dissent argued that the issue was fairly debatable and properly left to the jury. *Id.* at 284-85 (Antell, J., dissenting).

140. *Id.* at 277.

141. 516 P.2d 402 (Alaska 1973).

142. *Id.* at 404.

143. *Id.* at 405. The court ruled that the plaintiff was "entitled to recover the full amount of her diminished earning capacity," including the amount of her earning capacity following marriage. *Id.* The court did, however, permit the trial court to allow an "offset" reflecting the fact that plaintiff could still function to a degree as a housewife, even though she had lost the capacity to work in commercial enterprises. *Id.* at 405.

In cases such as *Morrison*, it is impossible to tell whether plaintiff's attorney never considered introducing gender-neutral figures or made a deliberate, strategic choice to rely on the lower, gender-based figure to appear reasonable and moderate to the court.[144] The end result, however, is that even prevailing female plaintiffs recover an amount that is less than a similarly situated male plaintiff.[145]

In addition to cases endorsing gender-based tables, there are numerous wrongful death cases in which the sex of a child is regarded as a legitimate factor to determine the amount of the pecuniary loss suffered by the surviving parents. The typical instruction on this issue asks the jury to consider: "the age, sex and physical and mental characteristics of the child, supplemented, when available, with evidence as to the position in life and earning capacity of the parents, as well as evidence as to the rendition, if any, of household services by the minor."[146] The standard formulation suggests that the sex of the child is relevant because of the assumption that sex is a good predictor of earning capacity. Earning capacity in turn is relevant to calculate the parent's pecuniary loss because it sets a limit on the amount the deceased would have had available to contribute to family members. This means that, all other things being equal, upon their death, female children have less economic worth to their parents than male children. This reasoning perpetuates, in diluted form, old notions of daughters as liabilities to their families, in contrast to sons, who could be expected to increase the wealth of the family.

B. *Race-Based Data: Traditional Cases*

The few reported cases decided during the 1970s and 1980s that used race-based tables resemble the traditional gender cases. The courts and parties seem to accept race-based statistics uncritically, and

144. Indeed the strategy of introducing female wages might well have been prudent for a plaintiff's expert. *See* Drayton v. Jiffee Chemical Corp., 591 F.2d 352, 361-64 (6th Cir. 1978) (reversing the trial court's award to a black female plaintiff because her expert calculated loss of future earning capacity based in part on the average earnings of male college graduates).

145. Some courts have not even permitted female plaintiffs to rely on gender-based statistics, ruling that statistical evidence alone cannot support an award for lost earning capacity. *See, e.g.*, Bulala v. Boyd, 389 S.E.2d 670, 677-78 (Va. 1990).

146. Eakelbary v. Nipper, Summit App. No. 9476 (Ohio Ct. App. 1980) (citing Immel v. Richards, 93 N.E.2d 474, 475 (Ohio 1950)). *See also* Franchell v. Sims, 424 N.Y.S.2d 959 (N.Y. App. Div. 1980); King v. Louisville & N.R.R., No. 87-199-II (Tenn. Ct. App. Dec. 9, 1987) (citing Crowe v. Provost, 374 S.W.2d 645 (Tenn. Ct. App. 1963)). Evidence of future earning capacity of the deceased is sometimes established through expert testimony of an economist, although the courts have upheld verdicts even in the absence of expert testimony. *See, e.g.*, Taft v. Cerwonka, 433 A.2d 215, 220 (R.I. 1981) (discussing state librarian who testified as to worklife expectancy of female high school graduate from actuarial tables and calculated loss of earning capacity using decedent's father's salary as a base). *Taft* is curious in that the witness apparently relied on a gender-based table to measure worklife expectancy, but not to measure the average income of high school graduates. *Id.* at 215.

there is no discussion of whether use of race-neutral data would be preferable. The cases tend to focus instead on whether the use of statistical data is appropriate to measure loss of earning capacity of a child, rather than on which statistical measure is appropriate.

In *Morrison v. Alaska*, discussed above,[147] the court simply accepted plaintiff's expert testimony concerning the average income of white Alaskan females, with no discussion of the propriety of using racial data.[148] Similarly, in *Johnson v. Misericordia Community Hospital*,[149] the controversy centered on whether the evidence was sufficient to sustain an award for a seventeen-year-old male, who possessed only an eleventh-grade education and no special skills. Calculating lost earning capacity posed some difficulty because plaintiff had no established work history; his sporadic work record consisted of some part-time work as a busboy and some manual labor.[150] Over defendant's objection, plaintiff introduced tables to estimate the potential earnings of a person of plaintiff's "age, race, and education with a full time job."[151] The parties debated the admissibility of the proffered statistics, without mentioning the salience of race.[152] The only issue was whether to view plaintiff as a full-time worker. The *Johnson* court did not even state plaintiff's race. Race, however, surfaced as a relevant factor because race-based tables were ultimately used to determine future earning capacity.[153]

In *Powell v. Parker*,[154] race-based tables were used to determine a parent's loss in a wrongful death action. Similar to the gender cases, it was plaintiff's expert who introduced race as a relevant factor to determine lost earning capacity, basing his testimony on "decedent's age, race, life expectancy, health, education, the life expectancy of his parents, his work record and earnings, and his living situation,"[155] including statistical averages contained in government publications.[156] Plaintiff introduced the race-based statistics to counter defendant's claim that the deceased's work record was too sporadic to justify an award for lost earning capacity.[157] Like the court in *Johnson*, the

147. *See supra* notes 141-46.

148. 516 P.2d 402 (Alaska 1973).

149. 294 N.W.2d 501 (Wis. Ct. App. 1980).

150. *Id.* at 527.

151. *Id.*

152. *Id.* at 523-27.

153. *Id.* at 527.

154. 303 S.E.2d 225 (N.C. Ct. App. 1983).

155. *Id.* at 228. Using race as a factor to measure the economic value of a deceased child has also been uncritically accepted by commentators. *See* Douglas M. Foley, Note, *Infants, Lost Earning Capacity, and Statistics: Sound Methodology or Smoke and Mirrors?*, 13 Geo. Mason U. L. Rev. 827, 829 (1991).

156. The government publications, however, were not introduced into evidence. 303 S.E.2d at 228.

157. *Id.*

Powell court did not reveal the race of the deceased but simply assumed its relevance.

Race also has had a bearing on the estimate of the number of years a plaintiff would have continued to work. The courts have allowed experts to rely on race-based data to calculate worklife expectancy.[158] One early case even insisted that an estimate based on race-neutral data was improper.[159]

C. *Impact of the Traditional Approach*

The traditional acceptance of the use of race-based and gender-based economic data creates a pattern of awards that replicates the status quo by reinforcing the race privilege of whites and the gender privilege of men. When the injured party is a woman, gender-based statistics have been offered to provide a low (but not meager) figure for loss of earning capacity. The principal concern for plaintiffs has been to contest the damaging assumption that women are likely to become homemakers rather than wage earners. In a case such as *Morrison*,[160] where the plaintiff is a white woman, the use of gender-based and race-based tables simultaneously disadvantages and advantages the plaintiff. The race privilege ameliorates, but does not offset, the gender disadvantage. Similarly for African-American men, the use of race-based data depresses the award they receive below that of white men. As men, however, they tend to benefit from use of gender-based data. For minority women plaintiffs, the use of race-based and gender-based tables produces a double disadvantage with no offsetting advantage. Only white male plaintiffs stand to benefit consistently from the use of race-based and gender-based tables, which yield the highest possible damage estimate for this group.

D. *New Directions in the Case Law: United States and Canada*

The traditional view permitting the use of gender-based and race-based tables has been questioned by three significant cases decided in the last five years.[161] These new precedents challenge the propriety of assuming that women have a shorter worklife expectancy than men as well as the use of gender-based and race-based tables to establish av-

158. *See* Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1286 n.24 (D. Conn. 1974) (using a mortality table for white females to determine earning capacity); Gonzalez v. City of Franklin, 403 N.W.2d 747, 760-61 (Wis. 1987) (using a mortality table for white males to determine earning capacity of Mexican citizen); *cf.* Harlow v. Chin, 545 N.E.2d 602, 612 (Mass. 1989) (using a mortality table for white males to calculate future medical expenses).

159. O'Connor v. United States, 269 F.2d 578, 584 (2d Cir. 1959).

160. Morrison v. Alaska, 516 P.2d 402 (Alaska 1973).

161. Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427 (D.D.C. 1991); Reilly v. United States, 863 F.2d 149 (1st Cir. 1988); Tucker v. Asleson, Vancouver Reg. B871616 (B.C.S.C. Apr. 25, 1991) (unreported).

erage incomes.[162] The solution proposed by a United States federal district court has been to use only gender-neutral and race-neutral data.[163] A Canadian court has opted to rely on the average income of white men in an effort to establish a fair measure of earning capacity for all groups.[164] None of these cases, however, has cast the issue in constitutional terms.

The first reported case seriously to challenge[165] the use of gender-based statistics was the 1987 case of *Reilly v. United States*,[166] tried by the same judge—Judge Pettine—who, twelve years earlier, wrote the very traditional opinion in *Caron v. United States*.[167] In *Reilly*, the conflict was over how to estimate plaintiff's worklife expectancy: plaintiff's expert based his estimate on an assumption that plaintiff would have worked steadily until retirement age of seventy—forty-eight years after starting at age twenty-two.[168] Defendant's expert relied on statistics from the Bureau of Labor Statistics showing that women with fifteen or more years of education would only work twenty-eight years from age twenty-two to age seventy, a forty percent reduction from plaintiff's figures.[169] In ruling for the plaintiff, Judge Pettine rejected the assumption behind defendant's statistics that the past was an accurate guide to the future:

> I cannot accept . . . [the] reduction of Heather's estimated working life by 40%. The reduction relies solely on a survey of women's work histories between 1978 and 1980 . . . . As a factual matter, I seriously doubt the probative value of such a statistic with respect to twenty-first century women's employment patterns, particularly in light of current, ongoing changes in women's labor force participation rates.[170]

Judge Pettine's analysis was accepted by the First Circuit.[171] The appellate court ruled that reliance on sex-based worklife expectancy tables in this case was factually suspect and certainly not required by law.[172] Although the court did not state that gender-based tables could never be used, the reasoning in this case could easily be given general application:

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162. 771 F. Supp. at 455; 863 F.2d at 167.

163. 771 F. Supp. at 456-57.

164. Tucker v. Asleson, Vancouver Reg. B871616 (B.C.S.C. Apr. 25, 1991) (unreported).

165. The appellate court in *Caron v. United States*, 548 F.2d 366, 371 (1st Cir. 1976), *aff'g* 410 F. Supp. 378 (D.R.I. 1976), however, did state, without elaboration, that it saw "no reason to distinguish between the sexes."

166. 665 F. Supp. 976 (D.R.I. 1987), *aff'd*, 863 F.2d 149 (1st Cir. 1988).

167. 410 F. Supp. 378 (D.R.I. 1976).

168. 665 F. Supp. at 995.

169. *Id.* at 997.

170. *Id.* at 997 (citation omitted).

171. Reilly v. United States, 863 F.2d 149, 165-67 (1st Cir. 1988).

172. *Id.* at 167.

> [A]ppellant's theory is questionable as a matter of fact. In an environment where more and more women work in more and more responsible positions, and where signs of the changing times are all around us, it can no longer automatically be assumed that women will absent themselves from the work force for prolonged intervals during their child-bearing/child-rearing years.[173]

After characterizing the assumption underlying the gender-based tables as "sexist" and "antiquated," the court went on to rule that the trial court was not bound to accept the defendant's statistics: "Death and taxes, arguably, may be certain; statistics, though often a valuable predictive aid, usually are not. The district court did not commit clear error in refusing to yield to the government's suggested assumption that a woman, invariably, works less and, therefore, earns less than her male counterpart."[174]

Reilly is important for its willingness to look critically at gender-based statistics regarding women's labor force participation. The major theme is that women's work patterns are dynamic and that projections about future earnings that do not take into account trends toward greater participation are unfair to women.[175] *Reilly* does not take up the question of the propriety of using gender-based statistics that might be sensitive to trends but which continue to reflect disparities among men and women.

The most far-reaching case in the United States to confront the issues of race-based and gender-based statistics is *Wheeler Tarpeh-Doe v. United States*,[176] decided in 1991. The dilemma was how to categorize the earning potential of a bi-racial male child, Nyenpan Tarpeh-Doe, whose father was Liberian and whose mother was white. The plaintiff's expert used census tables to determine the income of an American male college graduate.[177] The defendant's expert argued that the appropriate measure was "the average earnings of black men, not those of all men."[178]

The court refused to decide whether Nyenpan was black or white for purposes of selecting the appropriate statistic.[179] Instead, the court chose to examine the legitimacy of being forced to select—not only on the basis of race, but on the basis of gender as well.[180] Its solution was to base the calculation on gender-neutral and race-neutral data:

> [I]t would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for dam-

173. *Id.*
174. *Id.*
175. *Id.*
176. 771 F. Supp. 427 (D.D.C. 1991).
177. *Id.* at 455. Plaintiff's expert calculated the lost income at $1,008,434. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

> ages resulting from lost wages. The parties did not cite any precedent on this question. Accordingly, upon request by the Court, [defendant's expert] submitted a calculation of the average earnings of all college graduates in the United States without regard to sex or race.[181]

The court's initiative had a significant impact on the amount of damages that the plaintiff received. Because the average wage for all persons was below that of both white men and black men, plaintiff recovered less than even the amount argued for by the defendant.[182] The objective of the court was to "eliminat[e] any discriminatory factors," whether stemming from gender or race privilege.[183]

The one Canadian decision to reject the use of female wages took a different approach by designating male wages as the appropriate measure for both men and women.[184] In *Tucker v. Asleson*,[185] also decided in 1991, the court ruled that the earning capacity of a severely brain damaged twelve-year-old girl "should not be limited by statistics based upon her sex."[186] The court reasoned that all occupations were open to the plaintiff, stating that "[i]n Canada, no educational or vocational opportunities were excluded to her. She could have become a doctor, lawyer or business person. Or, in line with her childhood wish, a veterinarian."[187] This predictive judgment led the court to accept as an initial estimate of lost earning capacity the figure offered by plaintiff's attorney, which was based on the average lifetime earnings of male university graduates ($947,000).[188] Defendant's counsel argued that the appropriate compensation for lost earning capacity was $302,000, the average earnings for women.[189] Perhaps because neither party argued for use of gender-neutral statistics, there was no discussion of the propriety of designating male earnings as the fair value of earning capacity for both sexes.

E. *Canadian Commentary*

The recent trend among courts to question the legitimacy of reliance on gender-based and race-based data has not yet been examined by commentators in the United States. A rich scholarship on the is-

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181. *Id.*
182. *Id.* at 456.
183. *Id.*
184. *See* Cassels, *supra* note 33 (citing Tucker v. Asleson, Vancouver Reg. B871616 (B.C.S.C. Apr. 25, 1991) (unreported)).
185. Tucker v. Asleson, Vancouver Reg. B871616 (B.C.S.C. Apr. 25, 1991) (unreported).
186. *Id.*
187. *Id.*
188. *Id.* The final award was not nearly as generous. Plaintiff recovered only $350,000 because the court discounted the initial figure to take into account the possibility that she would not obtain a university education. *Id.*
189. *Id.*

sue, however, has been generated by a few scholars in Canada.[190] The most recent Canadian commentary not only takes issue with the use of explicitly gender-based and race-based data, but also broadly questions reliance on the market as the appropriate measure of loss.

The Canadian criticism began in 1978 with the publication of Ken Cooper-Stephenson's *Damages for Loss of Working Capacity for Women*.[191] A major premise of the article is that courts treat women unjustly when they base awards of lost earning capacity on the current depressed earnings level for women. Cooper-Stephenson analogized the judicial reliance on gender-based statistics to basing an award for lost earning capacity on a plaintiff's past receipt of illegal earnings. He reasoned that "[i]f no award should be made condoning the receipt of illegal earnings, equally an award should not reflect . . . low job-opportunity on the part of women in a particular occupation by comparison with men."[192] Implicit in Cooper-Stephenson's argument is the belief that men's wage levels represent a nondiscriminatory, fair wage for all persons. Like the approach of the *Tucker* court,[193] Cooper-Stephenson would base awards to women on "an estimation of what pay scale would be applied to a man with similar skills and training as the female plaintiff possessed."[194] His reforms respond to what he regards as discriminatory features of the market, while not rejecting the market as the basic measure of loss.[195]

Cooper-Stephenson's early scholarship has recently been expanded upon by two commentators who criticize the continued gender disparity in damage awards for catastrophic injury.[196] Jamie Cassels' *Damages for Lost Earning Capacity: Women and Children Last!*[197] contains the most extensive and sophisticated treatment of the issue. Cassels takes as his problem the question of why women and female children receive less than their male counterparts in damages assessments.[198] He locates a major portion of the problem in the law's reliance on the market:[199]

> One important reason women receive lower awards is because of the near exclusive reliance on the market as the measure of value and loss. This reliance on the market gives rise to two problems.

190. *See* Cassels, *supra* note 33; Ken Cooper-Stephenson, *Damages for Loss of Working Capacity for Women*, 43 Sask. L. Rev. 7 (1978-79); Gibson, *supra* note 130.
191. Cooper-Stephenson, *supra* note 190.
192. *Id.* at 14.
193. *See supra* notes 184-89 and accompanying text.
194. Cooper-Stephenson, *supra* note 190, at 14.
195. *Id.*
196. Cassels, *supra* note 33; Gibson, *supra* note 130.
197. Cassels, *supra* note 33.
198. Cassels examined a large sample of British Columbia decisions, both reported and unreported, as well as illustrative cases from other jurisdictions. He concluded that "despite some real advances, there is still a substantial downward bias in awards to women." *Id.* at 446.
199. *Id.*

> First, it excludes, or at least depresses, the valuation of productive activities carried on outside of the market and not rewarded by a wage. The most prominent manifestation of this is the economic invisibility of housework and the corresponding devaluation, or non-valuation, of losses to homemakers. Second, reliance on the market simply introduces into court the systemic inequalities faced by women in the workforce. Even where a woman is, or is likely to be, a wage earner, she is likely to earn far less than a man. By using existing wage rates as the basis of assessment, personal injury awards will thus reproduce the large wage differentials and gender biases that occur in labour markets.[200]

Cassels' arguments are constructed to deal with the problem of gender bias, although he observes that replicating the market in assessing wage loss also tends to reproduce race and class distinctions.[201] His primary quarrel with a market-based system is that it fails to value certain kinds of work—most prominently uncompensated work in the home—and assumes that current wage rates for all occupations are free from gender bias.[202] His critique is thoroughgoing, encompassing many of the arguments made by comparable worth advocates and feminists who seek a revaluation of traditional female endeavors, including homework, child care and care of dependents. He also exposes the courts for failing to take the conceptual approach to earning capacity seriously, *i.e.*, for measuring what female plaintiffs probably would have earned, rather than what these plaintiffs could have earned if they had not been injured.[203]

Cassels carefully catalogues and analyzes how Canadian courts have engaged in practices that serve to depress damage awards for women, including contingency deductions for marriage,[204] and the use of sex-based tables to estimate wage loss, a practice he refers to as "statistical discrimination."[205] Cassels concludes that there may be a fundamental problem with a system dedicated to individualized reconstruction of plaintiff's lost opportunities:

> What remains, then, is the issue of whether the law of damages should seek to replicate with precision the results that would have been achieved in an inegalitarian and unfair society. While there may be good reasons to rely on market pricing in the allocation of

200. *Id.* at 446-47.
201. *Id.* at 485.
202. *Id.* at 446-47.
203. *Id.* at 448-49.
204. *Id.* at 454-58. Cassels also discusses what he terms the "remarriage contingency deduction." In these cases, the court discounted the award to a female plaintiff because of the possibility that she might remarry and share the benefit of her new husband's earnings. Cassels points out that such a deduction is inconsistent with the principle behind the award—to repair lost earning capacity. Even if plaintiff is materially better off because of a remarriage, this event in no way changes the fact that she cannot earn money in the workplace because of her disability. *Id.* at 459-60.
205. *Id.* at 471-72.

> resources in the market, should this system be extended in its entirety to the way in which society provides care for the victims of accidents? Why should the concern, care and respect to which an injured person is entitled turn on a guess about how they would have fared in the unfair lottery of life? These considerations indicate that individualized measures of opportunity costs may not be desirable.[206]

Cassels' critique of the market leads him to suggest the radical solution of fashioning tort awards "with an eye to need."[207] Once individualized reconstruction is abandoned as a principle, tort awards could be based on a "conventional sum representing some proportion of average provincial earnings of men and women."[208] This change would, of course, eliminate disparities based not only on race and gender, but also on social class and educational levels.[209] As an alternative reformist proposal, Cassels suggests eliminating the marriage contingency and rejecting gender-based and race-based earnings statistics.[210] His argument is based on equity, not actuarial soundness: "Race and gender, while perhaps an accurate indicia of later income prospects, should, as a matter of public policy, simply be rejected as irrelevant."[211]

In line with Cassels' approach, Elaine Gibson also has recently challenged the soundness of basing tort awards on the principle of *restitutio in integrum* or restoring the individual victim to his or her previous condition.[212] Like Cassels, she is interested in exploring the possibility of revamping the tort system more generally, substituting need, rather than individualized restitution, as the basis of compensation.[213]

To a greater degree than Cassels, however, Gibson targets the use of gender-based actuarial tables as evidence that the current system is

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206. *Id.* at 485.

207. *Id.* at 489.

208. *Id.* at 485.

209. In support of his tentative recommendation, Cassels points out that:

> Individualizing damage awards is speculative and expensive . . . [and] we should at least question whether the results are worth the effort, especially when the fairness of wage markets is questioned. Moreover, any liability insurance system that focuses so heavily on individualized earnings capacity is regressive. While the costs are borne equally by all, the compensation benefits are distributed towards higher income (male) Canadians.

Id. at 489.

210. *Id.* at 489-90.

211. *Id.* at 490. Cassels is undecided, however, as to whether the *Tucker* approach of using male statistics or the approach of using gender-neutral statistics is preferable. *Id.*

212. Gibson, *supra* note 130, at 190.

213. Gibson regards a needs-based approach as implementing the victim's perspective in tort law because it would "look at the situation the victim finds herself in as a result of the injury." *Id.* at 210. Under such an approach, the "crystalline question becomes how best to meet her needs for appropriate care resulting from the disabling condition." *Id.*

unfair. Gibson views use of such tables as both inaccurate and contrary to law.[214] She argues that tables constructed from an era when women had fewer job opportunities are not a valid predictor of the future, making their use "antiquated and deceptive."[215] Beyond advocating an end to reliance on gender-based tables as a matter of public policy, however, Gibson also contends that the practice violates Canadian human rights statutes,[216] as well as the Charter provision guaranteeing women's right to equal protection and equal benefit of the law without discrimination based on sex.[217] In this respect, Gibson's argument shares some of the same premises as the argument in this Article.

IV. The Constitutional Case Against Reliance on Gender-Based or Race-Based Data

The argument against the use of race-based and gender-based data in this Article is narrower than the critiques of the Canadian commentators. My focus on explicit classifications corresponds to the importance given those classifications in American constitutional law.[218] Since at least 1976, when the Supreme Court decided the pivotal case of *Washington v. Davis*,[219] the Court has drawn a distinction between lines drawn explicitly or intentionally upon sex and race and facially neutral practices that have a disproportionate impact on racial or sexual groups.[220] Only the former will be scrutinized carefully by courts and require a high level of justification. The more thoroughgoing critiques of the market advanced by the Canadian commentators,[221] even if persuasive as a matter of policy, currently have little chance of being accepted by American courts as a matter of constitutional law. For this Article, I focus exclusively on practices that are constitutionally vulnerable.

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214. *Id.* at 196-97.

215. *Id.* at 197.

216. *Id.* at 204.

217. *Id.* at 205-07.

218. My argument addresses federal constitutional challenges. David Jung suggested to me that litigants might also object to the use of sex-based or race-based data on state constitutional grounds, specifically as a violation of "remedies clauses" that guarantee "open access to the courts" or "a remedy for every wrong." The theory would be that certain classes of litigants (*e.g.*, women, minority men) are being denied full compensation for their injuries because of the social group to which they belong. The state constitutional argument is plausible because remedies clauses have recently been used with some success to attack statutory damage caps in medical malpractice cases. *See generally* Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims and Defenses 6-2 to 6-19 (1992).

219. 426 U.S. 229 (1976).

220. *See* 426 U.S. at 245 (race discrimination); Personnel Adm'r v. Feeney, 442 U.S. 256, 260 (1979) (gender discrimination).

221. *See supra* notes 190-217.

A. *State Action*

The constitutional guarantee of equal protection, the provision which supports the prohibition on race and sex discrimination, protects individuals only against governmental or state action.[222] A finding of sufficient state action is required, therefore, before any constitutional challenge can be made to the use of race-based or gender-based data in tort litigation.

One possible reason why the use of explicit race-based and gender-based economic data has not yet become the subject of a constitutional challenge in the United States may be a perceived lack of state action. As noted earlier,[223] the data are likely to be presented in the form of expert testimony of an economist setting forth a projection of the future earning capacity of the plaintiff.[224] The economist will often base the projections on government publications, which break out the information in terms of gender and race (typically using racial categories of black and white, or black, white and Hispanic).[225] The economist is likely to prepare a report prior to trial and it is not uncommon for the economist to present alternative calculations, for example, for different levels of educational attainment, or using gender-based and alternatively gender-neutral or inclusive figures.[226] An attorney wishing to challenge the expert's projections on constitutional grounds would likely object to the admission of testimony or reports using gender-based or race-based data. The court then would be called upon to rule upon the objection and implicitly to decide whether the plaintiff's race or gender ought to be regarded as a relevant consideration in determining loss of future earning capacity.

The pivotal question then becomes whether admission of an expert's testimony based on race-based or gender-based statistics constitutes sufficient state action to permit such a constitutional challenge. My principal argument for finding state action is that it is impossible to separate the use of the statistics from the underlying legal standard in the case. When the court allows an expert to testify as to the plaintiff's future earning capacity, it makes a determination of relevancy and an implicit judgment about the substance of the common law of damages. The court's action authorizes the jury to base its decision on

222. *See generally* John E. Nowak & Ronald D. Rotunda, Constitutional Law 452-86 (4th ed. 1991); Laurence H. Tribe, American Constitutional Law § 18, at 1688-1720 (2d ed. 1988).

223. *See supra* note 38 and accompanying text.

224. The issue also could conceivably arise in a case in which no expert testimony was introduced. For example, the attorney for the plaintiff might seek a jury instruction to the effect that the race or sex of the plaintiff is irrelevant to the determination of damages. If the court refused to give such an instruction, it arguably would have accepted the use of race and gender as a legally permissible factor in the calculation of damages, even though no race-based or gender-based economic data was introduced.

225. O'Connor & Miller, *supra* note 38, at 356.

226. *Id.* at 356.

the race or gender of the plaintiff, in effect establishing a common law rule that the future earning capacity of a plaintiff depends upon the plaintiff's gender and racial classification.[227] If such a standard were explicitly embodied in a statute (*e.g.*, "In determining the future earning capacity of a plaintiff who has no established record of earnings, damages may be based on projections that take into account the plaintiff's race and gender"), the legislation would clearly constitute state action. The outcome should not be different simply because the governing legal standard is a common law or nonstatutory standard.[228]

The decision to admit race-based or gender-based projections is closely connected to the judge's lawmaking role and is not equivalent, for example, to permitting an eyewitness account of an accident to be received into evidence. In the latter case, the judge can be neutral, in the sense that admitting the testimony does not mean that the judge believes the eyewitness or that the eyewitness perceives the event accurately. By conceding the relevance of race-based or gender-based data through its admission into evidence, however, the judge necessarily leads the jury to believe that gender and race are legally permissible factors and thus cannot be said to be neutral on the issue.

The most recent state action precedents from the United States Supreme Court support my argument in favor of state action. The leading case, *Edmonson v. Leesville Concrete Co.*,[229] also involved the interjection of a race-based classification during the course of a civil trial. *Edmonson* held that the use of race-based peremptory challenges by a private litigant in a civil case is unconstitutional.[230]

The technical framework the *Edmonson* majority employed to guide its analysis of the state action question consisted of two general inquiries: "first, whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority . . . and second, whether the private party charged with the deprivation could be described in all fairness as a state actor."[231]

The purpose of these two inquiries was to determine whether the state's encouragement of a private activity is enough to justify treating the private actor as acting with the authority of the government. Like so many constitutional multi-factor tests, the state action framework is

227. My characterization of the court's endorsement of a common law rule of damages means that even in the rare case in which no expert testimony is presented, the court's refusal to instruct the jury that race or gender is legally irrelevant to the determination of damages would constitute sufficient state action upon which to ground a constitutional challenge.

228. *See* Tribe, *supra* note 222, § 18-6, at 1711 ("The general proposition that common law is state action—that is, that the state "acts" when its courts create and enforce common law rules—is hardly controversial.").

229. 500 U.S. 614 (1991).

230. *Id.*

231. *Id.* at 620 (citing Lugar v. Edmondson Oil Co., 457 U.S. 922, 939-42 (1982)).

malleable and is capable of producing divergent results.[232] The analysis often amounts to an assessment of how closely the case at hand resembles a case already decided by the Court.

In *Edmonson*, the Court had no difficulty finding that the exercise of a peremptory challenge satisfied the first inquiry—that the right clearly emanated from state law.[233] Parties were permitted to exercise peremptory challenges only because they were authorized to do so by statute or decisional law and there were special rules or statutes that governed the number and use of peremptories.[234] Moreover, the use of peremptories had no private analogue.[235] The practice had no significance outside a court of law.[236]

This inquiry is not so clearly satisfied in the case of admission of expert testimony using race-based and gender-based statistics. Unlike peremptory challenges, economic projections of future earning capacity have a use outside the courtroom—in settlement negotiations and in a wide variety of financial transactions in which it is useful to determine the likely earning power of a given individual. I would argue, however, that the focus should be on the special function of economic data in refining the legal standard for damages. With the question so framed, a strong argument can be made that the admission of the expert's projection has its source in state authority.

Additionally, an argument could be made that state action occurs when the opinion of an economist, admittedly a private actor, is transformed into an expert opinion, sanctioned by the state at the moment the trial judge certifies the witness as qualified. Very much like the regulation of peremptory challenges, there are statutes and rules governing the use of experts, and permitting them to express opinions and draw conclusions that other witnesses may not.[237] The special status of expert testimony has no parallel outside the courtroom. Although the jury is rarely bound to accept the conclusions of an expert, expert testimony carries unusual weight due to the trial judge's endorsement of the expert as qualified in matters outside the common understanding of the jurors. The transformation of the economist's projection into expert testimony is accomplished through state authorization of

232. Laurence Tribe, for example, believes that the results in this area are so chaotic that he claims that the Supreme Court has not really developed a state action doctrine, in the sense of "a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation." Tribe, *supra* note 222, § 18-1, at 1690. Peter Shane has argued that the results are incoherent because the Court "has failed to elaborate a compelling normative vision underlying the public/private distinction that [the state action] cases necessarily delineate." Peter M. Shane, *The Rust That Corrodes: State Action, Free Speech, and Responsibility*, 52 La. L. Rev. 1585, 1586 (1992).

233. 500 U.S. at 620.

234. *Id.* at 620-21.

235. *Id.* at 620-22.

236. *Id.* at 620.

237. *See* John W. Strong, McCormick on Evidence § 13-15 (4th ed. 1992).

courtroom procedures and direct involvement of the trial judge. Once so treated, the testimony should no longer be regarded as private, simply because the state did not dictate the content of the testimony nor pay the witness for the expenses incurred in connection with the trial.[238]

The Court's second inquiry in *Edmonson*—whether the private actor can fairly be described as a state actor in this context—is acknowledged by the Court to be an imprecise "factbound inquiry."[239] Sorting through the Court's voluminous precedent in this area, *Edmonson* lists three factors as having general relevance: (1) "the extent to which the actor relies on governmental assistance and benefits;" (2) "whether the actor is performing a traditional governmental function;" and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[240]

In determining whether the private actor had the "overt, significant assistance"[241] of a state official (the first *Edmonson* factor listed above), the Court emphasized that the state was responsible for administering the jury system—from summoning the jurors, to controlling *voir dire*, to enforcing the peremptory challenge.[242] Particularly significant for the Court was the moment that the trial judge enforced a discriminatory peremptory challenge, making the court not only "a party to the [biased act]," but also placing "its power, property and prestige behind the [alleged] discrimination."[243]

This reasoning would seem to apply without much modification to the admission of expert testimony premised on race-based or gender-based statistics. The state creates the evidentiary rules, including the rules governing expert witnesses. At the moment when the court rules to admit the expert's economic projection over an objection, it tells the jury that race or sex is a legally permissible criterion in determining the amount of the damage award. In a nonsubtle way, this amounts to state assistance of private discrimination. Moreover, because the jury may well witness the exchange between the objecting counsel and the court when admission of expert testimony is challenged, this could be argued to present a stronger case than *Edmonson* for a finding of state action. If the Court was willing to consider the trial judge a participant in discriminatory action simply by enforcing a peremptory challenge that is exercised without stating a reason and without any discussion by counsel, the same reasoning should ap-

238. In the case of court-appointed experts, of course, the state involvement would appear to be even greater.

239. 500 U.S. at 621.

240. *Id.* at 621-22.

241. *Id.* at 622.

242. *Id.* at 623-24.

243. *Id.* at 624 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

ply with greater force when the court overrules an objection specifically challenging an expert's testimony as discriminatory.

The second factor of whether the private party was involved in a "traditional governmental function" was easily fulfilled in *Edmonson*. The Court first characterized the jury as "a quintessential governmental body, having no attributes of a private actor"[244] and then conceptualized jury selection, including the use of peremptory challenges, as the selection of state officials.[245] The *Edmonson* Court also stressed the pivotal fact-finding role of the jury, whose verdict is ultimately incorporated in a judgment enforceable by the court.[246]

Initially, it might not seem that an expert witness appearing at the request of a party to a private litigation is performing a traditional government function. As only one witness in the trial, the expert's role is not as crucial as that of the jury and the expert is not being paid by the state.[247] The *Edmonson* Court, however, did not ask whether the jury members ought to be regarded as state actors, but whether private counsel's discriminatory use of a peremptory challenge was state action.[248] As the Court framed the question, the focal point was whether counsel's role in determining "representation on a governmental body" constituted state action.[249]

Along similar lines, I would argue that the focus should be on whether judicial admission of discriminatory expert testimony constitutes state action. The *Edmonson* Court regarded the exercise of a peremptory challenge as state action because its objective was to determine representation on a governmental body, even though the motive behind the challenge was to protect a private interest.[250] Similarly, although the parties to a tort action have private interests at stake, the objective of expert testimony is to help the jury apply the law to the facts, a process that is intricately connected to choice of the governing legal standard. I would argue that the court's acceptance of an expert's use of race-based or gender-based data is inseparable from its determination of substantive law and as such is appropriately viewed as a traditional governmental function.[251]

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244. *Id.*

245. *Id.* at 626.

246. *Id.* at 624-25.

247. It is clear that compensation by the state does not by itself transform an actor into a state actor. Polk County v. Dodson, 454 U.S. 312 (1981), held that a public defender was not a state actor in his or her representation of a criminal defendant. The Court focused on the purpose and function of the representation, which was adversarial to the state, rather than on the source of the compensation.

248. 500 U.S. at 620.

249. *Id.* at 626.

250. *Id.*

251. For a similar analysis of the state action issue in the context of judicial endorsement of racial generalizations to support a claim of self defense, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 Stan. L. Rev. 781, 808 (1994).

Finally, the *Edmonson* third factor—whether the injury is aggravated in a unique way by the incidents of governmental authority—is satisfied in the case of admission of discriminatory economic projections as fully as it was in *Edmonson*. A clear message of *Edmonson* is that discrimination which takes place in the courtroom produces a special injury attributable to the state.

> Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done .... Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.[252]

Particularly when the challenge is one of race discrimination, the Court has been inclined to be more liberal in finding state action.[253] Justice Scalia described the Court's posture as one of "uncompromising hostility to race-based judgments, even by private actors!"[254] If Scalia is correct, race-based (and presumably also gender-based) economic projections admitted as evidence in a civil trial should qualify as state action.

It is possible, of course, to construct an argument distinguishing *Edmonson*. The case against a finding of state action would emphasize the private status of the expert and de-emphasize the role of the trial judge in qualifying the witness and admitting the testimony. An opponent of state action would argue that juries are fully aware that experts are paid witnesses for a particular party and, if necessary, can be instructed that the substance of the expert testimony does not represent the views of the court or the dictates of the law. Echoing Justice O'Connor's dissent in *Edmonson*, this strategy would paint the civil trial as a "stage on which private parties may act," and for which the government is not responsible for every discriminatory private act "that occurs upon it."[255]

Beyond formal attempts to distinguish *Edmonson*, the case against finding state action could also be made on prudential grounds. Despite the forceful and general language of the Court, the practice condemned in *Edmonson* was a narrow one and required only that the courts extend the procedures developed in the criminal context to civil

252. 500 U.S. at 627.

253. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (holding that judicial enforcement of privately negotiated, racially restrictive covenants constitutes state action); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that racial discrimination by restaurant operated on public property constitutes state action); Norwood v. Harrison, 413 U.S. 455 (1973) (holding that state aid to students who attended racially discriminatory private school constitutes state action).

254. 500 U.S. at 630 (Scalia, J., dissenting).

255. *Id.* at 628 (O'Connor, J., dissenting).

cases.[256] Arguably, the requirement that trial courts monitor the statistical foundation of expert opinions is unfamiliar and may seem onerous. Once the merits are reached, the constitutional questions may not always be easily resolved. It is possible that in some contexts even racial categorization is constitutionally permissible, provided that the data are necessary to promote a compelling governmental interest. For example, statistical data on the incidence of a particular disease among racial groups might be necessary to show whether a physician treated a patient with reasonable care. As a practical matter, courts might be reluctant to find state action because they do not want to confront novel questions of whether common empirical methodologies that utilize race and gender can be used properly in the courtroom.

On both formal and prudential grounds, however, I believe the case for finding state action is strong. The admission of race-based and gender-based expert testimony is much more likely to affect the outcome of a case than racial bias in jury selection. The court's admission of arguably biased expert testimony has more than symbolic value; it inscribes a rule of decision that systematically undervalues the potential of women and minorities. The formal requirement of "fair attribution" of the private action to the state is met because the amount of damages awarded by a state court judgment can be attributed fairly to the expert's projection. To meet the prudential concern, I would argue that the distinction between explicit and de facto classifications necessarily circumscribes the court's scrutiny. Courts will not be asked to determine the motivations of expert witnesses, nor to determine whether the methodology employed has a disparate impact on protected groups. The inquiry is confined to two components: whether racial or sexual classifications have been used (a question about which the experts themselves can readily answer), and the less obvious, but nevertheless manageable, question of whether use of such classifications is constitutionally justified.

B. *Race-Based Discrimination*

If the merits of the constitutional challenge are reached, the use of explicitly race-based data is very likely to be prohibited. Perhaps no principle of constitutional law is more firmly entrenched than the anti-discrimination principle as applied to explicit racial classifications. Expressed doctrinally, the anti-discrimination principle holds that ra-

256. *Id.* at 628. Before *Edmonson* was decided, the Court had already prohibited racially discriminatory use of peremptory challenges by prosecutors in criminal trials. Powers v. Ohio, 111 S. Ct. 1364 (1991); Batson v. Kentucky, 476 U.S. 79 (1986). Subsequent to *Edmonson*, the Court ruled that criminal defense attorneys could not use their peremptory challenges in a racially discriminatory manner. Georgia v. McCollum, 112 S. Ct. 2348 (1992).

cial classifications are inherently suspect and can only be justified in the most compelling of circumstances.[257]

The Supreme Court has not upheld a racial classification that disadvantages a minority group since it first announced the suspect classification/compelling interest test in *Korematsu v. United States*[258] in 1944. Classifications that are race-dependent but purport to treat racial groups equally have fared no better, as exemplified by the Court's rejection of anti-miscegenation laws[259] and state sponsored racial segregation.[260] In their hornbook, John Nowak and Ronald Rotunda venture that the chances of a racial classification being upheld are exceedingly slim:

> It is not possible to anticipate every possible argument the government may make to justify such classifications, but the Court's refusal (since the World War II Japanese internment cases) to uphold any racial classification which burdens minority members or appears to have a stigmatizing effect would lead one to believe that few governmental interests, other than a possible interest in protection of human life, could justify any use of such classifications.[261]

The now-familiar rationales for this strong distrust of racial classifications have been extensively articulated in the scholarship, from both individualist and group-based perspectives. Commentators have persuasively argued that explicit racial classifications are likely to emerge from a biased process,[262] reflecting either racial antagonism, "assumptions of the differential worth of racial groups," or "racially selective sympathy and indifference."[263] Racial classifications also produce harmful results, stigmatizing minorities as inferior and inflicting cumulative burdens on those groups in society who are subjected to pervasive patterns of discrimination. Even when racial generalizations are statistically accurate or rational, they can harm atypical members of the racial group for whom the generalization is inaccurate. From a group-based or anti-subordination perspective, racial classifications burdening minority groups are considered invidious because they deepen power disparities among social groups and make it less likely that systemic discrimination will be dismantled in the future.[264]

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257. *See generally*, Nowak & Rotunda, *supra* note 222, at 605-06; Tribe, *supra* note 222, at 1451-54.

258. 323 U.S. 214, 223 (1944).

259. Loving v. Virginia, 388 U.S. 1, 12 (1967).

260. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).

261. Nowak & Rotunda, *supra* note 222, at 630 n.119.

262. John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 145-48 (1980).

263. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7 (1976).

264. *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1007-10 (1986).

The distrust of racial classifications also may reflect a desire to disassociate the law from an odious history of using racial classification to enforce white supremacy. In a multi-racial society, such as the United States, people do not fall naturally into discrete racial groupings. Legal definitions of "white" or "black" have been used coercively to maintain a bright line between the two groups where, in reality, such a line does not exist. In many Southern states, for example, persons were classified as "black" if any of their remote ancestors were African-American.[265] Under such a rigid scheme, there is little room for mixed-race or multi-racial lineage; race tends to be constructed as a dichotomous concept.[266] Additionally, in the United States, legal discourse has often treated "whites" and "blacks" as the only racial groups, marginalizing other minority groups such as Mexican-Americans, Native-Americans and Asian-Americans. Legal classifications of race tend to be unrefined and often reflect ignorance of differences within a given category (*e.g.*, Hispanic is an umbrella term that includes such distinct groups as Cuban-Americans, Mexican-Americans, Puerto Ricans and persons with European heritage who have a Spanish surname).[267] The problems that come with imposing racial classifications upon persons can sometimes be avoided or mitigated by allowing persons to self-identify and accepting their statement of racial identity. In adversarial contexts, such as personal injury litigation, however, opponents are likely to contest a plaintiff's statement of racial identity whenever another plausible classification would serve to reduce the amount of recovery.

The use of race-based data to estimate the future earning capacity of an individual does not warrant creating an exception to the near-absolute ban on racial classifications. The argument for using race-based tables is likely to center on the need for accuracy: the claim would be that if there is no reliable individual record of earnings, statistical data are necessary to make a reliable projection and that race-based data provide a more refined statistical measure than integrated data. Race, under this argument, functions as a good proxy for earn-

265. For discussions of the historical system of racial classification used in the United States, see Julie C. Lythcott-Haims, *Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption*, 29 Harv. C.R.-C.L. L. Rev. 531, 533-37 (1994); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 Stan. L. Rev. 1, 23-36 (1991); Cheryl I. Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1709, 1737-41 (1993).

266. *See generally* Elizabeth Martinez, *Beyond Black/White: The Racisms of Our Time*, 20 Soc. Just. 22 (1993) (critiquing the traditional black-white framework in American society). Recently, however, there have been calls for recognition of the multi-racial lineage of many Americans. The federal government is considering adding a new multi-racial category in the census to be conducted in 2000. *See* Lythcott-Haims, *supra* note 265, at 543-48; Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 55 Ohio St. L.J. (forthcoming Oct. 1994).

267. *See* Nicholas Lemann, *The Other Underclass: Puerto Ricans in the United States*, The Atlantic, Dec. 1991, at 96.

ing potential because race continues to be an important social dimension in American life, particularly in the workplace. A proponent of the use of race-based tables would also likely assert that an economist's use of race-based data is "neutral" in the sense that the economist is only trying to measure what "is" the reality for all racial groups, not what the reality "ought to be."

The accuracy/neutrality justification for the use of race-based data will not withstand strict scrutiny. Even assuming for the moment that using race-based data could be shown to produce the most accurate individualized prediction of future earning capacity, the Supreme Court would probably not regard the argument as sufficient to justify government use of race-based statistics. The most damning precedent is *Palmore v. Sidoti*,[268] holding that the government may not "neutrally" reflect private prejudice.[269] The case involved the removal of a child from the custody of her mother, a white woman, upon her remarriage to an African-American man.[270] The state courts were convinced that the change in custody was in the best interests of the child to avoid the stigma and harassment the child might suffer from peers when they discovered her stepfather was not white.[271]

A unanimous Court in *Palmore* held that it was improper for the state courts to consider the race of the stepparent, despite the importance of the government's objective.[272] It did not suffice that race was relevant to predicting the difficulties the child would face.[273] The Court stated that:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist .... There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.
>
> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[274]

Palmore would seem to preclude the contention that reliance on race-based data is nondiscriminatory because it merely reflects the re-

268. 466 U.S. 429 (1984).
269. *Id.*
270. *Id.* at 430.
271. *Id.* at 431.
272. *Id.* at 434.
273. *Id.* at 433.
274. *Id.* at 433 (footnote omitted).

ality of a racially stratified workplace.[275] Instead the government is required by the reasoning of *Palmore* to attempt to break the cycle of discrimination by refusing to accept racial disparities as a fact of life that must be reinscribed in legal standards. To the extent that *Palmore* insists that the government refrain from using racial categories, even when they function as good proxies for other legitimate variables, the objective of accuracy is subordinated to the goal of racial equity. Particularly once it is acknowledged that estimating future earning capacity of injured children is already an imprecise process, this seems an easier case than *Palmore*.

Moreover, it is far from clear that reliance on race-based data generates the most accurate estimation of future earning capacity. As the Canadian commentators have argued with respect to gender,[276] the approach is static in that it assumes that earnings disparities by race will continue into the future.[277] The assumption may underestimate the impact that anti-racist public initiatives might have in changing employment patterns, an impact that might gain momentum if racial equality were treated seriously in the law as an attainable goal. It seems anomalous for courts to profess a commitment to racial equality and equal protection on the one hand, and at the same time to bet against equality by endorsing race-based earnings projections. Requiring tort damages to be awarded on a race-neutral basis puts force and faith behind the anti-discrimination principle (the legal equivalent of "putting your money where your mouth is").

Looked at from an individualistic perspective, the use of race-based data unfairly ties an individual to the track record of his or her racial group. For example, the minority plaintiff may well dispute the accuracy of using race-based worklife expectancy tables that incorporate the fact that a disproportionate number of African-American men lose working years while in jail or have their lives shortened because of higher exposure to violence. The Constitution should prohibit the state from requiring that an African-American man prove that he would have escaped the race-correlated risks of incarceration or an early death in order to boost his worklife expectancy. Equal protection means that individuals seeking legal redress for damages should not be hindered by race-based presumptions about their individual potential or their life prospects.

Finally, the case law provides no persuasive basis for carving out a new exception for the use of race-based data in tort litigation. The Supreme Court generally has been unreceptive to states' claims for the necessity to compile and maintain race-based information, except

275. *Cf.* Armour, *supra* note 251, at 793-96 (arguing that it is unconstitutional to employ race-based generalizations regarding crimes committed by African-Americans to establish claim of self-defense).

276. *See* Gibson, *supra* note 130, at 197; Cooper-Stephenson, *supra* note 190, at 14.

277. Cooper-Stephenson, *supra* note 190, at 14.

when done only for statistical purposes, that is, for the limited purpose of allowing states to discern the racial impact of their practices.[278] Thus in 1964, the Court held that a state could not require that a candidate's race be designated on nomination papers and ballots,[279] and summarily affirmed the invalidation of a state provision requiring separate lists of blacks and whites in voting, tax and property records.[280] According to the Court, presenting racial information, despite its facially neutral application to blacks and whites, was unconstitutional because it directed "the citizen's attention to the single consideration of race or color."[281] The Court was concerned that when the state compiled racial information, there was a danger of "casually promot[ing] a distinction in the treatment of persons solely on the basis of their color."[282] In only one instance—an aspect of the Court's summary affirmance in *Tancil v. Woolls*[283]—was a state permitted to require recitation of the race of the spouses in divorce decrees.[284] That instance had been distinguished by the lower court because the divorce data in *Tancil* would be used only for statistical and identification purposes and would not stimulate others to act upon it.[285] Because the racial information presented through expert economic witnesses is intended to be used to calculate damages, the *Tancil* exception for statistical purposes is inapplicable.

The racial information cases establish that the government may compile non-individualized racial data to monitor economic and social trends.[286] These cases, however, reinforce the argument that racial data cannot constitutionally be relied upon to value the injury of a plaintiff in a tort action.

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278. *See* Nowak & Rotunda, *supra* note 222, at 630 ("Although racial considerations may not be used to burden members of minority races, the government appears to have some right to know the racial impact of its actions. Thus, it would appear that the government can compile racial information so long as it not used to burden anyone because of his race.").

279. Anderson v. Martin, 375 U.S. 399, 403-04 (1964).

280. Hamm v. Virginia Bd. of Elections, 230 F. Supp. 156, 158 (E.D. Va. 1964), *aff'd per curiam sub. nom.* Tancil v. Woolls, 379 U.S. 19 (1964).

281. 375 U.S. at 402.

282. 230 F. Supp. at 157.

283. 379 U.S. 19 (1964).

284. *Id.*

285. The district court stated that:

> [T]he designation of race, just as sex or religious denomination, may in certain records serve a useful purpose, and the procurement and compilation of such information by State authorities cannot be outlawed per se. For example, the securing and chronicling of racial data for identification or statistical use violates no constitutional privilege.

230 F. Supp. at 158.

286. It is more debatable whether the government may compile and act upon race-based data as part of an affirmative action program. For the view that such affirmative action use is permissible, provided there is little chance of abuse or demeaning demands, see Tribe, *supra* note 222, § 16, at 1481-82 n.9.

C. *Gender-Based Discrimination*

As a conceptual matter, I would argue that the use of sex-based and race-based data are indistinguishable because each case poses the same problem of unfairness to individuals through state reinforcement of private discrimination. For this reason, the arguments made against the use of race-based data above can be used to challenge gender classifications as well. Because the constitutional standard for reviewing gender classifications differs from the strict scrutiny applied to racial classifications, however, it is necessary to construct a separate case against gender-based data.

After a short period of instability in the early 1970s, the Supreme Court settled upon an intermediate level of scrutiny to evaluate the constitutionality of gender classifications. *Craig v. Boren*,[287] decided in 1976, is most often cited for the governing standard, expressed as whether classifications by gender serve important governmental interests and are substantially related to the achievement of those interests.[288] At its most superficial level, the difference between strict and intermediate scrutiny is that while classifications virtually never pass strict scrutiny, they more often survive the less demanding intermediate scrutiny. Some explicit gender classifications have been upheld by the Supreme Court.[289]

The precedents indicate that the Court is hostile to gender classifications premised on traditional sex-role assumptions that tend to reinforce women's domestic and maternal roles as wives and mothers, and downplay women's roles as workers and independent economic actors.[290] Thus, the Court has struck down a number of schemes that presumed wives to be economically dependent on their husbands and conditioned financial benefits on the sex of the spouse.[291] The Court refused to allow sex to be used as a proxy for dependency, despite the strong statistical evidence that most wives were, in fact, financially de-

287. 429 U.S. 190 (1976).

288. *Id.* at 197.

289. The Supreme Court has occasionally upheld noncompensatory gender classifications. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft registration policy); Michael M. v. Superior Ct., 450 U.S. 464 (1981) (upholding gender-based statutory rape law); Parham v. Hughes, 441 U.S. 347 (1979) (permitting restrictions on unmarried fathers' rights to sue for the wrongful death of their biological children); *see also* Califano v. Webster, 430 U.S. 313 (1977) (upholding favorable computation of women's earnings for Social Security benefits to compensate for past discrimination).

290. Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175, 178-79 (1982) (describing how the Supreme Court, beginning in the 1970s, invalidated classifications premised on the "breadwinner-homemaker, master-dependent dichotomy").

291. *See* Califano v. Goldfarb, 430 U.S. 199 (1977) (rejecting requirement that widowers prove dependency to collect Social Security survivor benefits); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (rejecting restriction of "mother's" survivor benefits to surviving wives); Frontiero v. Richardson, 411 U.S. 677 (1973) (rejecting requirement that spouses of female soldiers prove dependency).

pendent on their husbands. The Court's distaste for gender stereotyping in equal protection cases can best be described not only as a concern for overbroad generalizations, but also as providing legal support for women in nontraditional roles (and conversely, for men in traditionally female arenas). Laurence Tribe sums up the line of sex discrimination cases in the 1970s in this way:

> It is clear that the laws invalidated in these cases, from *Reed*[292] to *Caban*,[293] shared an important characteristic in terms of impact on behavior: All either prevented, or economically discouraged, departures from "traditional" sex roles, freezing biology into social destiny. The government's almost uniform argument in justification of these laws emphasized the economy achieved by the accurate and therefore "rational" assumption of traditional male and female inclinations and capacities. The Supreme Court's thoughtful response to this argument has recognized the argument's essence as self-fulfilling prophecy: The "accuracy" of the government's assumption is derived in some significant degree from the chill on sex-role experimentation and change generated by the classifications themselves.[294]

The Court's approach advances an individualistic philosophy insofar as it frees nonconformist women from government-imposed structures that make it harder for them to compete in the workplace and public sphere. From a group perspective, the Court's disapproval of gender classifications also can be seen as weakening the system of gender subordination by prohibiting paternalistic or protectionist arguments from becoming excuses for segregating women into lower paying, lower prestige jobs and occupations.

The one respect in which the Court's sex-based discrimination doctrine is less exacting than its approach with respect to race classifications has been its treatment of classifications arguably premised on biological differences between men and women.[295] For these purportedly real differences, some members of the Court have regarded the sexes as not similarly situated and have reasoned that different treatment does not violate the core requirement of equal treatment: that likes be treated alike. The most dramatic example of this reasoning is the Court's refusal to regard discrimination based on pregnancy as explicit sex discrimination.[296] Legislative classifications implicating issues of sexuality[297] and parental rights to young children[298] are the

292. Reed v. Reed, 404 U.S. 71 (1971).

293. Caban v. Mohammed, 441 U.S. 380 (1979).

294. Tribe, *supra* note 222, §§ 16-26, at 1565 (footnotes omitted).

295. *See generally* Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 Yale L.J. 913, 931-49 (1983) (critiquing "real differences" approach of Justices Rehnquist and Stewart).

296. Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974).

297. Michael M. v. Superior Ct., 450 U.S. 464 (1981) (upholding gender-based statutory rape law); Dothard v. Rawlinson, 433 U.S. 321 (1977) (upholding exclusion of women prison guards from prison populated by sex offenders).

most likely candidates for this more relaxed scrutiny. In this type of case, the Court may not question whether the assumption made about women as a group invariably holds true for individual women or whether it poses a threat of reinforcing traditional attitudes. The dichotomy the Court seems to have drawn between sex (biological or natural differences) and gender (socially constructed differences) has no analogue in the contemporary race cases which assume that all differences among races are culturally or socially based.

The Court's more lenient stance toward classifications based on "real" differences, however, has no bearing on the question of the propriety of the use of gender-based statistics to predict future earning capacity. Because the difference between men's and women's earning capacity cannot be traced to biology, it is not a real difference in the Court's lexicon. The most plausible argument that can be made in this context is that women's greater commitment to child rearing accounts for part of the pay gap. The Court, however, has consistently refused to accept women's traditional maternal role as the type of real difference that might justify a gender classification.[299] In fact, a prominent feature of the line of cases since *Reed* is the Court's rejection of old precedents that tended to regard "women" as synonymous with "wives and mothers" and to map onto all women the conventional wisdom about maternal and wifely behavior.[300] The use of gender-based statistics to project future earning capacity most closely resembles the economic dependency presumptions invalidated by the Court in the 1970s. In each situation, the gender-based classification is a generalization based upon women's historical lack of earning power compared to that of men and represents an attempt to bind individual women to the experience of the gender group. The Court's reluctance to uphold classifications which might disadvantage women in their nontraditional role as wage earners should carry over to the use of sex-based earnings projections.

There is some possibility, however, that the Court might extend its lenient approach to permit statistical discrimination in cases in which an individualized determination is not only costly but impossible. Ad-

298. In cases involving unmarried parents, the Court has afforded greater rights to mothers than to fathers. Lehr v. Robertson, 463 U.S. 248 (1983), held that a biological father could be denied the right to block the adoption of a two-year-old daughter because he had never established a relationship with the child.

299. *See, e.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (holding that surviving fathers, as well as mothers, are entitled to benefits to care for dependent children); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (holding that state cannot require only surviving husbands to prove economic dependence to qualify for workers' compensation).

300. *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961) (upholding exemption of women from jury duty unless they volunteer); Goesaert v. Cleary, 335 U.S. 464 (1948) (permitting prohibition of licenses to women as bartenders unless owner was applicant's husband or father); Muller v. Oregon, 208 U.S. 412 (1908) (upholding protective labor legislation for women only).

vocates of actuarial schemes would point out that gender-based tables are used only when there is insufficient information to make an individualized projection. Unlike some cases decided by the Court in which an individualized determination is the obvious alternative to use of gender-based classification,[301] invalidation of gender-based data would require experts to resort to inclusive, gender-neutral statistics which would arguably still not serve the goal of treating the plaintiff like an individual.

The argument for treating gender-based actuarial data as an exception to the rule disfavoring gender-based classifications, however, has already been debated and rejected by the Court in cases decided under Title VII of the Civil Rights Act of 1964. The clearest statement of the Court's reasoning is found in *Los Angeles Department of Water & Power v. Manhart*,[302] holding that an employer could not require women to make larger contributions to a pension fund because women as a group lived longer than men.[303] The Court interpreted Title VII as mandating an individualized focus and refused to approve the gender-based actuarial approach simply because it was common practice in the industry.[304] In this context, the Court could see no relevant distinction between race and gender classifications.[305] Writing for the majority, Justice Stevens drew the analogy to race, and consequently ruled that the classification could not stand:[306]

> Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute which was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification.
>
> Even if the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals. The generalization involved in this case illustrates the point. Separate mortality tables are easily interpreted as reflecting innate differences between the sexes; but a significant part of the longevity differential may be explained by the social fact that men are heavier smokers than women.[307]

Additionally, the Court refused to create an exception for actuarial data; even if sound from the standpoint of actuarial practice, the use

301. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (alimony determinations); Reed v. Reed, 404 U.S. 71 (1971) (determination of administrator of estate).
302. 435 U.S. 702 (1978).
303. *Id.* at 711.
304. *Id.* at 710.
305. *Id.* at 709.
306. *Id.*
307. *Id.* at 709-10.

of explicit gender-based data was treated as discriminatory.[308] Justice Stevens was not swayed by the argument that insurance presented a different case because individualized determinations were impossible:

> It is true that insurance is concerned with events that are individually unpredictable, but that is characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII.[309]

If *Manhart* had been decided under the equal protection clause, rather than under Title VII, there would be little question that its reasoning discredits the use of gender-based projections in civil suits. If anything, *Manhart* presents the harder case: the difference in longevity between the sexes can plausibly be regarded as a biological difference, while the wage gap is clearly social in origin. The Court's insistence on an individualized focus in *Manhart* underscores its commitment to equalizing women's position in the workplace. The result in *Manhart* signals that women workers have a right to the same financial security in retirement as is accorded to male workers. That women live longer means that equal security may cost more for women as a group. If the goal, however, is to assure that all workers are protected from poverty for the remainder of their lives after retirement, the "subsidy" provided by men does not appear unjust.[310] Only if men's needs are used as the standard for all workers, does women's greater longevity appear to justify affording them less financial security after they retire.

The one remaining question is whether the *Manhart* approach should be applied to the constitutional context where it will reach beyond employment practices, with no possibility of a congressional change in policy. To answer this, there is no need to address the question of the constitutionality of all gender-based actuarial or insurance practices.[311] A strong case can, nevertheless, be made that the two

308. *Id.* at 709-11.

309. *Id.* at 710.

310. One helpful framing of the issue in *Manhart* appears in the notes to a recent employment discrimination casebook where the editors ask if *Manhart* might be "explained by the view that true equality for female workers requires the removal of any extra burden imposed by the greater average longevity of their sex?" Samuel Estreicher & Michael C. Harper, Cases and Materials on the Law Governing the Employment Relationship 286 (2d ed. 1992).

311. The use of gender-based mortality tables was upheld against a constitutional challenge in Manufacturers Hanover Trust Co. v. United States, 775 F.2d 459 (2d Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). That case, however, dealt with the IRS's valuation of a reversionary interest in a decedent's estate. *Id.* The Court distinguished the IRS practice from the typical gender discrimination suit because the IRS practice resulted in a "patchwork distribution of relative advantages and disadvantages" to women directly affected by the practice. *Id.* at 466. The IRS nevertheless changed its practice in 1983 to use unisex tables. Treas. Reg. § 20.2031-7(f) (as amended by T.D. 7955, 1984-1 C.B. 40). *See also* Estate of Darrin v. Taxation Div. Director, 9 N.J. Tax 419, 435 (N.J. Tax Ct. 1987) (use of gender-specific life expectancy tables for valuation of life estate violates equal protection).

specific practices challenged in this Article—gender-based projections of worklife expectancies and gender-based wage projections—so closely resemble those sex-based classifications already held unconstitutional that no exceptional treatment is warranted. The use of gender-based projections are premised upon highly contested cultural assumptions. Imbedded in the projections of shorter worklife expectancy for women is the presumption that all women will interrupt their careers for a substantial period of time for the purpose of child-rearing. The lower sex-based earnings projections presume that women's inferior status in the workplace will continue. *Manhart*'s concern for individualized equity is also a strong theme in constitutional jurisprudence, at least when the practice is not one directly implicating sexuality or biology. When the underlying assumption is not only that there is a difference in longevity between the sexes, but that sex-differentiated cultural patterns will persist, the constitutional precedents provide no support for more lenient treatment of gender-based statistical practices. As in *Manhart*, the racial analogy holds and justifies invalidation of sex-based as well as race-based projections.

D. *Remedying the Constitutional Violation: Mandating Use of Inclusive Statistics*

The remedy most often prescribed for the unconstitutional use of prohibited classifications is to require the substitution of gender-neutral or race-neutral categories. In practice, this would seem to require that expert witnesses rely only upon inclusive statistics—not refined according to gender and race—to project future earning capacity. The Canadian solution of selecting the highest earning group, *i.e.*, white men, as a measure of the fair level of earnings for all persons, does not fit well with United States constitutional notions of equality. In contrast to the approach of statutory schemes, such as the Equal Pay Act,[312] the equal protection clause has not been interpreted to require that the disadvantaged group be raised to the standard of white men. The mandate is solely one of equality, even if the effect of equalizing the standard means worse treatment for some groups.[313] In the case of economic projections, as discussed above,[314] because the gender gap in earnings is the most pronounced, women of all races stand to gain the most from equalization. White men will be the biggest losers, with minority men faring somewhat worse than at present.

312. 29 U.S.C. § 623 (1994). The Equal Pay Act makes it unlawful for employers to reduce the pay of any employee in order to comply with the Act. 29 U.S.C. § 623(a)(3). The employer's only option is to raise the pay of women to the male rate.

313. Stanton v. Stanton, 421 U.S. 7, 16 (1975) (state is free to remedy equal protection violation either by extending favorable treatment or expanding unfavorable treatment).

314. *See* discussion *supra* notes 69-98 and accompanying text.

An argument perhaps could be made that if white male statistics were adopted as the uniform measure in all cases, the measure would lose its gender-specific and race-specific nature and could be used without violating the equal protection clause. This argument is problematic, however, because it implicitly adopts the experience of white men as the standard by which to measure all persons' treatment. In this world view, only white men have been treated fairly, with others suffering disadvantage. Missing from this account, however, is a persuasive argument for conceptualizing the situation of white men as constituting fair treatment, as opposed to privileged treatment.

The argument for equalization does not take the experience of white men as the standard, but presupposes that some groups have been privileged and some groups have been disadvantaged. It also recognizes that some groups—notably, white women and minority men—are simultaneously privileged and disadvantaged. White women retain their race privilege, even though their gender is a disadvantage; minority men benefit from being in the dominant gender group, but suffer from race discrimination. The statistical norm that equalization requires by mandating the use of inclusive statistics is facially gender and race neutral. It goes beyond superficial neutrality, moreover, because it takes the experience of all persons into account in setting the norm. In this process, traditionally disadvantaged groups are not singled out as different, as the only groups requiring attention. Instead, the earning capacity of all persons is subject to review. Even if fewer dollars in damages are awarded overall than in the Canadian solution, it strikes me as a preferable solution. In this context, the dismantling of gender and race classifications means not only lifting burdens, but destroying privilege.

V. POSTSCRIPT

Racist and sexist practices stem from deep-seated cultural assumptions and have an infuriating capacity to take on new forms, to change with the times, without doing much damage to the status quo. Using gender-based and race-based economic data to determine the earning capacity of tort victims is one contemporary mechanism by which the lives of women and racial minorities are devalued, while still preserving the appearance of neutrality and rationality. I doubt whether most defense attorneys would openly argue today that women have less economic value than men because women are domestic creatures whose labor is not worthy of compensation or capable of being evaluated in dollars. Nor would it be likely that an expert witness would defend a low estimate of lost earning capacity of an African-American child by stating that such a child cannot expect to achieve what a white child would in this racially stratified society. Instead, lowered estimations of the potential of women and racial minorities are disguised by relying on statistics, without questioning the legitimacy of this use of

gender-based and race-based classifications. My argument against the use of such economic data is straightforward and consistent with conventional constitutional analysis. In the context of assessing damages in personal injury cases, the use of race-based and gender-based statistics reflects a history of race and gender prejudice and a denial of equal employment opportunity. Because the practice reproduces racial and sexual subordination without serving any compelling or important governmental interest, it is unconstitutional.