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Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss

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Abstract

This article explores race and sex bias in the computation of damages for loss of future earning capacity, an important component of economic loss in personal injury cases. It analyzes recent cases in the United States and in Canada which reject the use of race and sex-based tables to determine awards for female and minority plaintiffs and explains the method used by the special master in the September 11th Compensation Fund. Chamallas explores objections to reform – from both the "right" and the "left" — and makes the case for connecting civil rights principles to civil litigation.

CIVIL RIGHTS IN ORDINARY TORT CASES: RACE, GENDER, AND THE CALCULATION OF ECONOMIC LOSS

*Martha Chamallas**

These days "tort reform" has become a code word for initiatives that seek to limit liability and reduce the amount or type of damages plaintiffs receive. It is a one way street that promises few benefits for injured parties or consumers. Tort reform has not always had this meaning. Prior to the 1980s, it was more frequently linked to measures, such as comparative negligence, that sought to soften the effect of restrictive doctrines and ease recovery for seriously injured parties. At that time, reform was more reciprocal in structure. For example, the reform of no-fault compensation for automobile accidents,[1] or the earlier reform of workers' compensation,[2] brought something for everyone—under the *quid pro quo* enacted by these no-fault regimes, plaintiffs were no longer required to prove negligence, while defendants in turn were liable only for economic losses.

In my view, the most influential tort reformers were the mid-century legal realists, such as Leon Green[3] and my former colleague, Wex S. Malone.[4] For this group of legal reformers, legal formalism was the biggest enemy.[5] They sought to reshape legal doctrine to

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1. *See* Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 622–34 (2000).

2. *See* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC 152–86 (2004) (discussing the history of workers' compensation statutes).

3. *See, e.g.*, LEON GREEN, THE LITIGATION PROCESS IN TORT LAW (1965).

4. *See, e.g.*, Wex S. Malone, *Res Ipsa Loquitor and Proof by Inference—A Discussion of the Louisiana Cases*, 4 LA. L. REV. 70 (1941); Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. NW. U. 151 (1946); Wex S. Malone, *Ruminations on Cause in Fact*, 9 STAN. L. REV. 60 (1956).

5. For an analysis of legal realism and its response to legal formalism, see

make tort law connect to real world experience. For example, when I was a student we used Leon Green's casebook in torts.[6] The cases in that book were not organized according to the familiar abstract conceptual categories, such as duty, breach, and proximate cause, but rather according to factual context: there was a section on cases against doctors and hospitals; a section on highway traffic accidents; and even a section on accidents involving fixed track vehicles. This innovative structure showed how serious the authors were about linking tort doctrine to social experience, even if it made the book unteachable.

In my view, the reform project of the legal realists is not over. The unfinished work has to do with linking tort law to our developing understanding of civil and human rights. Tellingly, Green's casebook did not have a chapter on how a person's race or gender might affect the outcome of a civil case. Nor did it examine whether tort recoveries might be affected by the social identity of those suffering the loss.

As a professor who regularly teaches courses in torts and employment discrimination, I can attest that, even today, students rarely see a connection between "ordinary" civil litigation and civil rights. If we look only at the surface of tort claims, issues of social justice—particularly equitable treatment of women and minority social groups—are generally visible only in certain intentional tort claims. One of the more interesting developments of the last few decades is how older causes of action—most prominently battery, assault, false imprisonment, as well as the tort of intentional infliction of mental distress—have been deployed by sexual and racial harassment victims[7] and victims of sexual and domestic violence[8] to challenge longstanding patterns of oppression and

Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 467 (1988) (reviewing LAURA KALMAN, LEGAL REALISM AT YALE: 1927–1960 (1986)).

6. LEON GREEN ET AL., TORTS: CASES AND MATERIALS (1968).

7. *See, e.g.*, Mae C. Quinn, Note, *The Garden Path of* Boyles v. Kerr *and* Twyman v. Twyman: *An Outrageous Response to Victims of Sexual Misconduct*, 4 TEX. J. WOMEN & L. 247 (1995); Leslie Bender, *Teaching Torts as if Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115 (1994); Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against the "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387, 397–420 (1994).

8. *See, e.g.*, Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional*

exploitation. On this front, however, tort law has functioned mainly as a modest supplement to other remedies. As Catharine MacKinnon observed in the late 1970s in her influential book arguing for a federal cause of action for sexual harassment, tort law tends not to see the social dimension of an injury and to conceptualize harm simplistically and dichotomously.[9] In the world of torts, there is either economic loss on the one hand, or individual hurt feelings and emotional distress on the other.

Beyond these intentional tort cases, it is even harder for attorneys, judges, and experts to see a civil rights issue in what appears to be an ordinary tort claim. For many structural reasons—most prominently the fact that civil rights attorneys tend to be a separate and distinct group from personal injury litigators[10]—even attorneys for plaintiffs are not often primed to detect ways in which the value of their clients' injuries is infected by racial and gender bias or to discern how tort rules reflect a devaluation of particular social groups. They may not recognize that the tort claims and types of damages least protected under the law are often the most vital for marginalized groups in society. In my scholarship, for example, I have argued that negligent infliction of emotional harm and negligent interference with relationships are low in the hierarchy of compensable harms, in part because of their cognitive link to women and women's injuries.[11] Most recently, in the debate over damage caps, scholars have documented that non-economic damages are very important to women,[12] particularly homemakers, because such women are not likely to recover large sums for wage replacement and other economic loss.[13] Although some legitimately worry about

Abuse as a Tort?, 55 MD. L. REV. 1268 (1996); Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183 (1995).

9. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 173 (1979).

10. *See* Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. ____ (2005).

11. *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright*, 88 MICH. L. REV. 814 (1990).

12. *See, e.g.*, Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 (2004).

13. For discussions of the valuation of household labor and its effect on women, see MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 192–99 (2d ed. 2003); REGINA GRAYCAR & JENNY MORGAN, THE

the commodification of intangible losses,[14] in my view, the only thing worse than having one's pain reduced to money is having one's pain reduced to very little money.

Hidden race and gender bias in tort awards is also present in the standards used to calculate economic harm, a measurement that purports to be more precise than non-pecuniary losses. In many tort cases, particularly those involving severe injuries to persons who have not yet established a track record of employment, there is much discretion in determining the all-important category of loss of future income. Particularly with the growing popularity of caps on non-economic damages,[15] future earning capacity can be a big-ticket item of damages. It is also of great social importance because it represents a measure of an individual's potential.

When I served as a member of the Iowa and Pennsylvania task forces on gender and race bias in the courts, I was surprised to discover that it is commonplace for expert witnesses to rely on gender and race-based tables to determine both the number of years that a plaintiff would likely have worked (work/life expectancy) and the likely annual income the plaintiff would have earned.[16] Because the measure of lost earning capacity is largely a function of these two variables,[17] discounted to present value, the choice of tables is

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HIDDEN GENDER OF LAW 126–38 (2d ed. 2002).

14. *See* Richard L. Abel, *Torts*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 445, 456 (D. Kairys ed., 3d ed. 1998).

15. As of January 2004, 26 states had caps on non-economic damages. SENATE JUDICIARY COMM., SUMMARY OF STATE LAWS CAPS ON NON-ECONOMIC DAMAGES, http://greenleaf.pasenategop.com/PDF/SummaryofStateLaws.pdf (revised Jan. 28, 2004). President Bush has also been pushing for passage of a federal $250,000 cap on non-economic damages in medical malpractice actions. *See* Jessica Heslam, *Dad Seeks Prez's Ear on Malpractice Caps*, BOSTON HERALD, Feb. 2, 2005, at 23.

16. EQUALITY IN THE COURTS TASK FORCE, STATE OF IOWA, FINAL REPORT 118 (1993); PA. SUPREME COURT COMM. ON RACE AND GENDER BIAS IN THE JUSTICE SYS., FINAL REPORT 236–37 (2003) [hereinafter PA. FINAL REPORT].

For a more comprehensive discussion of the methods for calculating lost earning capacity, see Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation*, 63 FORDHAM L. REV. 73 (1994).

17. *See* JEROME H. NATES ET AL., 2 DAMAGES IN TORT ACTIONS 10.30–.34 (2002); PAUL M. DEUTSCH & FREDERICK A. RAFFA, 9 DAMAGES IN TORT ACTIONS, 110.10 (2002). As discussed below, predicting the future income of a young tort victim who has yet to select a career path typically also depends

crucial.

Race and gender-based tables are in effect race-specific and gender-specific assessments, comparing, for example, women only to other women, blacks to blacks, and men to men. Thus, the earning potential of an individual woman plaintiff is measured by reference to others in her gender group. This saddles nonconforming women and racial minorities with generalizations about their group, the very kind of stereotyping that anti-discrimination laws were meant to prohibit. For example, if in the past women have taken several years out of the labor market to raise children, gender-based worklife tables predict that they will continue to do so in the future.[18] If minority men have historically been incarcerated at a much higher rate than white men, race-based worklife estimates predict that they will continue to work fewer years than whites.[19] As a practical matter, the use of race and gender-based tables results in significantly lower awards for minority men and women of all races. It also means that historical patterns of discrimination in the labor market are replicated in tort awards, even though the labor force participation of women and minorities may be changing rapidly.[20]

Let me give you an example from a recent case. In *U.S. v. Bedonie*,[21] an expert testified that the decedent, a young Native American man who had just graduated from high school would have earned approximately $433,000 in his lifetime.[22] The expert arrived at this figure by first estimating what the average high school graduate earns and then multiplying that amount by 58% because 58% was the average ratio of the wages for Native American males to white males.[23] On its own motion, the court asked the expert to calculate the amount the deceased would have earned without making any adjustment.[24] That figure was approximately $744,000.[25] In the same case, a calculation using a race and sex

on the level of education the victim would likely have attained, but for the accident. *See infra* notes 108–109 and accompanying text.

18. *See* Chamallas, *supra* note 16, at 81–82.
19. *See id.* at 81, 115.
20. *Id.* at 88.
21. 317 F. Supp. 2d 1285 (D. Utah 2004).
22. *Id.* at 1313.
23. *Id.*
24. *Id.* at 1314.
25. *Id.*

adjustment for lost earning potential made a huge difference when the decedent was a Native American woman. Unadjusted, her earning potential was estimated to be approximately $308,000, versus only $171,000 when the calculation was based on gender and race.[26]

Significantly, although the expert in that case had performed thousands of lost income analyses, he testified that "no one had ever asked him to provide race and sex-neutral calculations in a wrongful death case."[27] It seems that the lawyers had relied on the economists, and the economists never questioned the appropriateness of using race and sex to predict earning power. This is a dramatic demonstration of how race and sex bias can sometimes be eclipsed by statistics.

In some contexts, the use of race and gender-based economic data can result in a systematic undervaluation of recurring types of injuries. For example, legal commentators have analyzed the impact of using race-based calculations in lead paint litigation.[28] Lead poisoning is often caused by ingesting paint chips or dust, likely to be found in older, deteriorating buildings in low-income neighborhoods.[29] Depressed awards for plaintiffs derive from the fact that the population of lead paint victims is disproportionately young children, typically poor, African-American or Hispanic children.[30] This means that, in making assessments of the lost future earning capacity of these children, there is often a lack of individualized evidence that indicates what career path the plaintiff would have taken and what he or she would likely have earned over a lifetime. In such cases, resort to statistics may well be the best available method of prediction. When lost earnings are calculated using race-based tables, however, whether to measure average earnings or worklife expectancy, the awards are considerably lower

26. *Id.*
27. *Id.* at 1315.
28. *See, e.g.*, Laura Greenberg, Note, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429 (2001); Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025 (1997).
29. Greenberg, *supra* note 28, at 432–33.
30. *Id.* at 430, 432–33 (children under five years of age are most susceptible to lead poisoning).

than they would be for comparably injured white victims. Defendants in such cases, typically landlords or government housing authorities, thus pay far less than they would if their victims were predominantly white, middle-class children. Additionally, because it is cheaper to injure poor minority children, there is less incentive for defendants to take measures to clean up toxic hazards in the neighborhoods most affected by lead paint.

The reliance on race and sex-based economic data, and the comparable practice of making race and sex adjustments to arrive at an estimate of lost earning potential, is the equivalent of using explicit race and sex classifications. This is not subtle discrimination, but overt discrimination of the kind that the constitution and anti-discrimination laws have long outlawed, or at least have made hard to justify. It is well established in constitutional law that race-based classifications trigger strict scrutiny[31] and that sex-based classifications trigger a stringent intermediate scrutiny.[32] Under Title VII, moreover, virtually all race-based classifications are prohibited,[33] while sex-based classifications are allowed only in the rarest of cases in which sex is a bona fide occupational qualification for a particular job.[34] Notably, in *City of Los Angeles Department of Water and Power v. Manhart*,[35] the U.S. Supreme Court held that sex-based actuarial tables could not be used to justify requiring female employees to pay higher monthly contributions to an employer-run retirement fund, despite the fact that women as a group live longer than men.[36] This strong distaste

31. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (landmark case using strict scrutiny to determine validity of racial classification). Even when the classification reflects "reality" in the sense of acknowledging that race often matters in shaping human behavior, the Supreme Court has insisted on applying strict scrutiny. *See* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (race of stepparent could not be considered in child custody decision because the law could not give effect to private prejudice).

32. *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (to withstand intermediate scrutiny, justification for sex-based classification must be "exceedingly persuasive").

33. *See, e.g.*, Ferrill v. Parker Group, Inc., 168 F.3d 468, 473–74 (11th Cir. 1999). The exception is for narrowly tailored affirmative action programs. *See* United Steelworkers v. Weber, 443 U.S. 193, 206–08 (1979).

34. *See* UAW v. Johnson Controls, Inc., 499 U.S. 187, 201 (1991) (BFOQ exception based on gender reaches only special situations).

35. 435 U.S. 702 (1978).

36. *Id.*

for explicit race and sex classifications, however, has not yet carried over into ordinary tort cases. Instead, when experts rely on race or gender-based statistics to calculate tort damages, we tend not to notice the discrimination and to accept it as natural and unproblematic.

I recently read an interesting historical study by Jennifer Wriggins of wrongful death cases in Louisiana decided in the first half of the twentieth century.[37] In several appellate cases, the court reduced an award for a black victim after comparing it to the amount that other black victims had previously recovered. Today, we would likely regard such explicit segregation in evaluating awards as clearly inappropriate, as an artifact of a pre-civil rights era. However, reliance on gender and race-based tables amounts to an updated version of this same discriminatory practice.[38] The prohibited segregative move behind each method is its reliance on the depressed status of the racial or gender group as the benchmark for an award to an individual plaintiff.

The illegitimacy of practice is perhaps most evident when we consider the difficulty courts and juries face when the injured party is biracial or multiracial. One such prominent case is *Wheeler Tarpeh-Doe v. United States*,[39] involving the categorization of a biracial male child, Nyenpan Tarpeh-Doe, whose father was Liberian and whose white mother lived in the United States. In that case, the court was confronted with the uncomfortable question of whether it should select the "white" tables or the "black" tables to determine lost earning capacity. The opinion was notable for its time because the court simply refused to decide whether Nyenpan was black or white for purposes of choosing the appropriate statistic. Instead, the court decided to use blended tables combining persons of all races.[40]

37. *See* Jennifer Wriggins, *The Color of Injury: Race, Gender and Torts in the First Half of the Century* (unpublished manuscript, on file with author).

38. *See generally* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117 (1996); CHAMALLAS, *supra* note 13, at 10–11 (discussing reproduction of patterns of male dominance in updated forms).

39. 771 F. Supp. 427 (D.D.C. 1991), *rev'd on other grounds*, 28 F.3d 120 (D.C. Cir. 1994).

40. *Id.* at 455. The court also decided to use gender-neutral tables. *Id.* For a discussion of this aspect of the case, see *infra* note 134134135 and accompanying text.

In an earlier article, I argued that the use of race or gender-based estimates is an unconstitutional practice that amounts to telling the jury that it is permissible to treat men and women, or whites and minorities differently.[41] Imagine, for example, a state legislature that adopted a statute compelling or authorizing a jury to make a racial adjustment when calculating an award for a member of a minority group whose average member earns less than a white person. If such legislation would be regarded as unconstitutional, the same constitutional infirmity applies to an expert's use of explicitly race-based economic data in a civil case. I submit that there is no less state action when the court permits an expert to base his calculations on race-based tables or to make race-based adjustments in arriving at an estimate.[42] However, even if a court were reluctant to declare that the Constitution forbids the use of race or gender-based economic assessments in tort cases, it still retains the discretion to refuse to admit such assessments on public policy grounds. Some courts may prefer this approach because it avoids the constitutional question, but nevertheless allows the common law to grow incrementally in a manner consistent with constitutional norms.[43]

When I first starting writing about this issue, I received correspondence from attorneys indicating that they had been successful in making jury arguments in individual cases that the damage award should not be lower simply because the victim was a young woman or a member of a racial minority. In one case, a lawyer represented two young children—a brother and a sister—who had been severely injured in a car accident. The plaintiffs' attorney successfully argued that the girl's award should not be lower than her brother's.[44] But there had not yet been a clear trend in the courts that taking race or sex into account was either unconstitutional or against

41. *See* Chamallas, *supra* note 16.

42. *Id.* at 105–11.

43. *See, e.g.*, United States v. Bedonie, 317 F. Supp. 2d 1285, 1319 (D. Utah 2001) (avoiding reaching constitutional question and exercising its discretion to use blended tables to further public policy of "favor[ing] victims of violent crime and against the possible perpetuation of impermissible stereotypes").

44. For a reported case in which a Canadian court awarded the same amount of economic damages to a brother and sister injured by their mother's abuse, see Cho v. Cho, [2003] 36 R.F.L. (5th) 79 (Ont. Sup. Ct. J.), 2003 CarswellOnt 708 (Can.).

public policy.

Recently, however, arguments against race and sex-based calculations have been making headway. In the United States, the movement has largely occurred outside the torts arena, specifically within the context of the September 11th Victim Compensation Fund[45] and an important criminal case involving mandatory victim restitution.[46] In Canada, however, broader tort reform has already begun to take hold. In several significant cases, Canadian courts have rejected female-specific actuarial tables, opting for more egalitarian approaches.[47] The pressing question in that country seems to have shifted from whether gender fairness ought to be a consideration in calculating economic loss, to how best to implement gender equality.

Let me start with the developments in the United States. The authorizing legislation for the September 11th Victim Compensation Fund gave Kenneth Feinberg, the Fund's Special Master, considerable discretion to determine the amounts that families of the victims would receive when they elected to give up their right to sue in tort and instead to take compensation under the no-fault Fund.[48] Initially, Feinberg indicated that in calculating economic loss, he would rely on gender-based tables as is frequently done in tort litigation.[49] It should be noted that although the prototypical 9/11 victim is a man, 739 women were killed in the September 11th attacks.[50] During the comment period before adoption of the final rule governing distribution under the fund, however, the NOW Legal Defense Fund objected to the use of gender-based worklife

45. *See* Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51 (2003).

46. *See Bedonie*, 317 F. Supp. 2d 1285; *see also* Childers v. Sec'y of Health & Human Servs., No. 96-194V, 1999 WL 218893, at *15–*18 (Fed. Cl. 1999) (special master rejects gender-based worklife estimate in favor of neutral figure for all workers in claim under the National Vaccine Injury Compensation Program).

47. *See* Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309 (2004) (collecting cases).

48. Chamallas, *supra* note 45, at 69.

49. Martha F. Davis, *Valuing Women: A Case Study*, 23 WOMEN'S RTS. L. REP. 219, 220 (2002).

50. Chamallas, *supra* note 45, at 69.

expectancy tables and urged Feinberg to reconsider his methodology.[51]

Feinberg ultimately agreed with NOW Legal Defense that the awards should not disadvantage the families of women and set about fashioning a remedy. In my scholarship, I have argued that gender-neutral or blended tables should be used for both men and women.[52] This would generally have the effect of raising awards for women, but lowering awards for men.[53] Rather than use this method, however, Feinberg decided to use male tables for both men and women, thus raising the awards to families of female victims without lowering the awards to the families of male victims.[54] This solution was in keeping with the Act's policy of being generous to the 9/11 families, but did not seriously deplete the Fund, because there were comparatively fewer female victims.

The next important development occurred in May 2004, when Judge Cassel of the federal district court in Utah was faced with the task of determining how much compensation family members of two murder victims should recover under the Mandatory Victims Restitution Act.[55] In *U.S. v. Bedonie*, as described earlier,[56] the murder victims were both Native American, one male, one female. The court decided that as a matter of public policy, no downward adjustments for either race or sex should be made to the awards.[57] Unlike the 9/11 Special Master, however, Judge Cassel decided to use blended, gender and race-neutral tables to determine compensation, rather than to peg the awards to the average, white male earnings.[58]

What I find most significant about these two developments is that when the issue was squarely raised, the connection between civil damages and civil rights was recognized by the both the Special Master and Judge Cassel. I realize that the September 11th Fund may be unusual because the 9/11 victims are often regarded as

51. *Id.* at 71.
52. *See, e.g.*, Chamallas, *supra* note 16, at 122–23.
53. *Id.*
54. Chamallas, *supra* note 45, at 71.
55. U.S. v. Bedonie, 317 F. Supp. 2d 1285 (D. Utah 2004).
56. *See supra* notes 21–27 and accompanying text.
57. *Bedonie*, 317 F. Supp. 2d at 1319.
58. *Id.*

heroes, not simply ordinary tort victims,[59] and the money to finance the Fund came from the general treasury.[60] In the restitution cases, we again had very sympathetic plaintiffs—the families of a murder victim—and perhaps less concern for imposing disproportionate liability on the defendants given their status as a convicted felons.[61]

In my view, however, once the assumptions behind gender-based or race-based tables and race or sex adjustments are made visible, they will no longer be regarded as acceptable for use in civil litigation generally. The Canadian experience on this point is instructive. Starting first in the courts in British Columbia,[62] and then spreading to Ontario,[63] courts have responded positively to arguments by plaintiffs' attorneys that expert calculations of economic loss should be scrutinized to ensure that they are not based on assumptions or tables that are unfair to individual women or that serve to perpetuate patterns of gender inequality.

The most prominent case in Canada to date is probably *Walker v. Ritchie*,[64] decided by the Ontario Superior Court in 2003. In many respects, *Walker* is a good example of an ordinary tort case, if the common tragedy of grievous personal injury can ever be classified as ordinary. Stephanie Walker was seventeen years old when she was injured in a serious car accident.[65] She suffered a head injury and brain damage, which manifested itself in residual paralysis and irreversible cognitive deficits.[66] The court determined that as a result of the accident Stephanie would be permanently disabled and unable

59. Chamallas, *supra* note 45 at 76.

60. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No 107-42, 406(b), 115 Stat. 230, 240 (2001).

61. *Bedonie*, 317 F. Supp. 2d at 1312 ("If an economic tortfeasor may not profit from his own wrong, the same principle applies, *a fortiori*, to . . . a violent criminal. Indeed, violent criminals have far less right to complain about uncertainties left in the wake of their terrible crimes.").

62. *See, e.g.*, Shaw (Guardian ad litem of) v. Arnold [1998] B.C.J. No. 2834 (B.C.S.C.) (QL), 1998 CarswellBC 2731 (Can.); Tucker (Guardian ad litem of) v. Asleson [1993] 102 D.L.R. (4th) 518, 528, 78 B.C.L.R. (2d) 173 (B.C.C.A.), 1993 CarswellBC 94 (Can.).

63. *See, e.g.*, Walker v. Ritchie [2003] O.J. No. 18 (Ont. Sup. Ct. J.) (QL), 2003 CarswellOnt 10 (Can.); Cho v. Cho [2003] 36 R.F.L. (5th) 79 (Ont. Sup. Ct. J.), 2003 CarswellOnt 708 (Can.).

64. [2003] O.J. No. 18 (Ont. Sup. Ct. J.) (QL)(Can.).

65. *Id.* at ¶ 3.

66. *Id.* at ¶ 43.

to obtain competitive employment during her lifetime.[67]

At the time of the injury, Stephanie was in her last year of high school and did not yet have any definite plans to attend college.[68] The court learned that she was an above-average student and an outstanding athlete[69] and that her two older sisters had attended university and become teachers.[70] However, as is often the case when victims are injured when they are children or teenagers, no one could predict with certainty what path Stephanie's life would have taken if she had not been injured.

The court first determined that given the severity of her injuries, Stephanie was entitled to receive $250,000 for non-economic damages, the maximum allowable under Canada's capped recovery system.[71] Before calculating a figure for lost future earning capacity, however, the court had to choose between an expert-derived figure based on average earnings for female university graduates ($1,070,694) and another expert's figure based on average earnings for all university graduates ($1,690,250).[72] In opting to base recovery on the higher blended figure,[73] the court cited prior decisions which had criticized the use of gender-based tables because of their potential to perpetuate the effects of gender-based wage disparity and for their failure to take account of trends toward a narrowing of the wage gap in Canada and increased labor force participation by women.[74] The court also preferred the blended approach because it saved it the additional step of having to decide whether any upward adjustment should be made to the plaintiff's award.[75] Some courts in Canada have, along these lines, attempted to infuse gender fairness into the damage award for a female plaintiff

67. *Id.* at ¶ 123.
68. *Id.* at ¶ 44, 128.
69. *Id.* at ¶ 44.
70. *Id.* at ¶ 76–80.
71. *Id.* at ¶ 99.
72. *Id.*
73. The court did, however, make a downward adjustment of 10% to account for the contingency that Stephanie might not have chosen to attend a university and another deduction of $100,000, the amount the court estimated Stephanie would earn by engaging in minimum wage (non-competitive) labor suitable for persons with her disability. *Id.* at ¶¶ 141–42. The award for future wage loss was thus reduced to $1,421,225. *Id.* at ¶ 143.
74. *Id.* at ¶ 133, 134.
75. *Id.* at ¶ 135.

by "grossing up" an award based on female-specific actuarial tables to reflect the possibility that plaintiff might not have followed one of the typical career paths for a woman, choosing a male-oriented career instead, complete with higher earnings.[76]

What is striking to me about *Walker* is the practical importance of this one detail of damages computation. In Stephanie's case, the decision to use a gender-neutral approach was worth approximately $600,000, more than double the amount she received for non-economic damages. The case highlights just how much discretion lies in the hands of courts, juries, and experts in computing damages and shows that the treatment of gender can be as significant as the individual facts of the case.

Canadian courts have also employed other approaches to infuse gender equity into damage awards for female tort victims. Similar to the approach of the 9/11 Special Master,[77] some trial courts in Canada have used male tables to calculate awards for female plaintiffs,[78] presumably because such tables are regarded as free of gender bias and better reflect what the earnings will be for both men and women in the future.[79] Some commentators in Canada also prefer the use of male tables over blended tables[80] and have expressed concern that courts might be tempted to use blended tables only for female plaintiffs.[81] It should be noted, however, that the standards used for damage computation in Canadian courts are quite varied and are not always internally consistent. In one case, for example, a court used male tables to compute earnings loss for a female plaintiff and then made a 10% "female-specific" discount to take account of the contingency that women will continue to earn

76. *See* Adjin-Tettey, *supra* note 47, at 316 n.13.

77. *See* text accompanying *supra* note 54.

78. *See, e.g.*, MacCabe v. Westlock Roman Catholic Separate School Dist. No. 110 (1998), [1999] 226 A.R. 1 (Alta. Q.B.), 1998 CarswellAlta 897 (Can.), *rev'd in part* (2001), [2002] 293 A.R. 41, at ¶ 101–09, 2001 CarswellAlta 1364 (Alta. C.A.) (Can.); Tucker (Guardian ad litem of) v. Asleson (unreported) Vancouver Reg. No. B871616 (April 25, 1991, B.C.S.C.)(Can.), *discussed in* Jamie Cassels, *(In)equality and the Law of Tort: Gender, Race and the Assessment of Damages*, 17 ADVOCATES' Q. 158, 182–84 (1995).

79. *See* Adjin-Tettey, *supra* note 47, at 321.

80. *See, e.g.*, *id.*; Ken Cooper-Stephenson, *Damages for Loss of Working Capacity for Women*, 43 SASK. L. REV. 7 (1978–79).

81. *See* Anjin-Tettey, *supra* note 47, at 318.

less than men.[82]

Although the issue has been percolating for over two decades, gender fairness in the computation of damages is now highly visible in Canadian tort law and is likely to gain greater visibility in the United States as soon as the developments in related areas of compensation law migrate into tort law. Not surprisingly, the issue of gender and race equity has also recently caught the attention of forensic economists who are engaged in such projects as developing gender-neutral worklife tables and revising their methods for conducting economic loss appraisals.[83] The pace of change in this area is likely to accelerate as experts become accustomed to challenging gender and race-specific estimates and stand ready to offer alternatives to the court.

Like so many important issues of law and public policy, proposals to change the method of calculating economic loss in tort law are subject to objections from both the "right" and the "left." The objections on the right have been most visible and center on concerns for accuracy.[84] They are typically grounded in the claim that gender and race-based calculations do no more than mirror reality and place tort victims in the position they would have occupied absent the discrimination.

The concerns on the left have mainly appeared in the Canadian commentary. They sound a more progressive tone and stress the incompleteness of this type of incremental tort reform. The worry here is that change will reach only a fraction of injured people and will do little substantively to redistribute income more generally in society.[85] For reasons I summarize below, I believe that these objections can be, and indeed, have already been adequately countered. The developments in Canada suggest that as more light is shed on the issue, the debate in the United States is also likely to shift from whether any change is necessary to what specific alternatives should be adopted.

82. *See* Gray v. Macklin (2000), 4 C.C.L.T. (3d) 13, at ¶ 197 (Ont. Sup. Ct. J.) (Can.).

83. *See* Kurt V. Kruger, Worklife at Home and in the Labor Force, Paper presented at the Conference of the National Association of Forensic Economics, Eastern Economic Association, Session on Gender and Race Issues in Forensic Economics (March 4, 2005).

84. *See infra* notes 86–120.

85. *See infra* notes 121–133133134 and accompanying text.

In assessing the objections that have been made to reform, I start with a specific proposal in mind, namely, that in cases in which a tort victim has no sufficient track record of employment from which an individual assessment of earnings potential can be drawn, an estimate of future earning capacity should be made only from gender and race-neutral statistics (*i.e.*, blended tables) and that no specific gender or racial downward adjustments should be made to reflect the depressed earnings potential of the group. As so framed, the proposal is informed by constitutional considerations, in that it singles out explicit racial and gender classifications—classifications that have been established as constitutionally suspect or disfavored—and does not address other potentially troubling factors, such as the impact of social class and family background on earnings potential. Despite its limits, however, the proposal is far from modest: if adopted, it will make a dramatic difference in recoveries in certain cases, precisely because it does address two important social identities that have historically shaped the workplace and the larger society. Moreover, as mentioned earlier,[86] courts have the discretion to adopt the reform proposal as a matter of public policy in tort litigation, without reaching the constitutional question.

The most familiar objections to abandoning gender and race-specific data are generally couched in terms of "accuracy" and at first blush may seem to fit well with the compensation principle of *restitutio in integrum*, the principle that seeks to restore the accident victim to the condition he or she would have occupied absent the accident. This criticism is most often aligned with the more general tort theory of corrective justice, which sees tort law as aimed at righting individual wrongs and as focused on the personal responsibility of the defendant to rectify conduct causing harm.[87] In its starkest form, the objection based on accuracy starts from the premise that the only legitimate goal of tort law is to restore the victim to the status quo ante. The next step is to assert that gender and race disparities are located in the larger society (*e.g.*, prevailing wage rates) and that accident victims should not seek compensation from defendants to make up for societal inequities. Thus, the

86. *See supra* note 43.

87. *See, e.g.*, Jules L. Coleman, *The Practice of Corrective Justice*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 56, 56 (David G. Owen ed., 1995).

argument goes, if the statistics show that women and minorities work fewer years than white men and/or make lower averages wages, tort damages based on those statistics are a fair and accurate measurement of what they likely lost as a result of the accident.

However, both the starting premise of this argument and the conclusions that purportedly follow from it have been sharply questioned and do not hold up under scrutiny. It is perhaps easiest to see the flaws in the conclusions. Even some critics of reform acknowledge that current practices are deficient insofar as the race and gender-based statistics upon which estimates are based do not mirror current or future realities. As one critic of reform aptly noted: "statistical evidence is cogent only if it is recent."[88] Briefly stated, there are two important respects in which statistics about average worklife and average earnings can produce an unreliable guide to future earning capacity: (1) if they are outdated and reflect patterns of the past, rather than the present, and (2) if they are not refined to take account of future trends affecting the gender or racial group, even if they accurately describe the status quo at the time of trial.

Thus, one nagging problem has been that the worklife tables used by courts and experts to project the length of time a plaintiff is expected to participate in the workforce are often outdated. In public testimony before the Pennsylvania Supreme Court's Committee on Gender and Racial Bias, a forensic economist explained that official worklife estimates were first published by the Bureau of Labor Statistics (BLS) in 1982 and were most recently updated and expanded in 1986.[89] He went on to explain that because labor force participation for women has increased dramatically since 1986, it is commonly recognized that the BLS tables are obsolete.[90] As a result, economic researchers have created worklife tables based on more recent unpublished data from the Current Population Studies (CPS), such as the updated tables created by Ciecka, Donley and Goldman in 1998.[91] In making economic loss estimates, therefore, experts may be forced to choose between the official, outdated estimates and

88. *See* Mitchell McInnes, *The Gendered Earnings Proposal in Tort Law*, 77 CANADIAN B. REV. 153, 154.

89. *See* PA. FINAL REPORT, *supra* note 16, at 237 (reporting testimony of Robert A. Wallace).

90. *Id.* at 238.

91. *Id.*

more current estimates that are not as widely accepted in practice. In this economist's view, experts are sometimes hesitant to use the more current data because they fear that the courts will reject any estimate of economic loss that is not based on official sources.[92] On this point, it is interesting to note that because of concerns for timeliness of the data, the 9/11 Special Master decided to rely on the unofficial, updated tables prepared by Ciecka, Donley and Goldman, rather than to use the official government data.[93] As noted earlier, however, he elected to use the male tables to calculate loss of future income capacity for both male and female victims.[94]

Of course, insofar as worklife estimates are outdated, they will not provide a reliable guide to worklife expectancy for either men or women. However, because there has been such an appreciable rise in women's labor force participation in the past few decades—because more women are working and are taking less time out of the paid workforce to raise children[95]—the use of outdated statistics ends up disproportionately disadvantaging female tort victims and their continued use clearly cannot be justified by any concern for accuracy.

A somewhat more difficult problem derives from the fact there is no unfailingly accurate way to predict the future. Even if worklife tables and tables of average wages were to be compiled from the most recent data on the day before trial, without further refinement, they would still not generate precisely accurate figures from which to derive future estimates, unless we were to assume that there would be no changes in the labor force participation rate of women or in the size of the wage gap between the relevant social groups. Particularly when losses are projected decades into the future, as is the case when the plaintiff is injured as a child or young adult, any estimation of

92. *Id.*

93. September 11th Victim Compensation Fund of 2001, 67 Fed. Reg. 11238 (March 13, 2002).

94. *See supra* note 54 and accompanying text.

95. For example, from 1985–1996, the labor force participation for women grew from 54.5% to 58.8%, with the biggest increase coming from women who were also mothers. Howard V. Hayghe, *Developments in Women's Labor Force Participation*, MONTHLY LAB. REV. (Bureau of Labor Statistics), Sept. 1997, at 42, 45–46. Although the rate of increase is not as high as it was in the 1970s, the trend was described as "continuing, long-term labor force participation rate gains for women, particularly those with children." *Id.* at 46.

future trends is bound to be contestable and contested, provided only that the parties understand the methods of computation. Thus, forensic economists know that the models used in loss appraisals must include variables to account for social change, notably changes in the pattern of women's working lives and the likely narrowing of the wage gap. Several courts in both the United States and Canada have also recognized that if historical data are not refined to take account of such future trends, the effect will be to saddle historically disadvantaged groups with the burdens of the past and to compensate them at below the market rate, simply because they were unlucky enough to become tort victims.[96]

Once we acknowledge that the tables must be refined and cannot be used "off the shelf," we have passed imperceptibly from a discussion about historical facts to a debate about the influence of social forces, the direction and rate of social change, and matters of judgment and interpretation upon which there is no societal or professional consensus. Thus, although most people seem to think that the gender wage gap will narrow in the future, there is no agreement about when and whether parity will occur. Likewise, no confident judgments can be made about how much time women will take away from the paid workforce to raise children twenty years from now. This is not to say that economists are not capable of making reasoned and informed estimates on these matters.[97] Rather, it is merely to highlight that when economic models are uncritically accepted as accurate predictions of the future, it tends to mask the fact the law is handing off this difficult judgment to an outside professional group, a group with no special expertise in matters of gender and race inequality.

More fundamentally, the objections about accuracy fail to appreciate that predictions about the future have a way of simultaneously affecting the present and constructing the future. Take a small example relating to the narrowing of the gender wage

96. *See, e.g.*, Reilly v. United States, 665 F. Supp. 976, 997 (D. R.I. 1987); Reilly v. United States, 863 F.2d 149, 167 (1st Cir. 1988); Childers v. Sec'y of Health and Human Servs., No. 96-194V, 1999 WL 218893, at *17 (1999); Audet (Guardian ad litem of) v. Bates, [1998] B.C.J. No. 1068 at ¶ 76 (B.C.S.C.) (QL), 1998 CarswellBC 644 (Can.).

97. In fact, when economists rely on blended tables, they must still refine the tables to account for future trends and certainly cannot be blind to trends among women in arriving at an estimate for the population as a whole.

gap. Some Canadian courts have noted that the size of the gender gap in wages in part depends on the sector in which the plaintiff would have been employed, noting that pay equity initiatives have been more prevalent in public employment and in organized workplaces.[98] However, the degree to which the pay equity movement will take hold in firms in the private sector is not wholly removed from the debate over computation of damages in tort cases. As one commentator remarked "in compensating both males and females at the same rate, tort law would make a dramatic statement regarding the type of equality to which it aspires."[99] And it is not fanciful to believe that the example set by tort law would generate additional pressure for pay equity in the workplace, similar to the effect that equal pay and other sex equality initiatives have had in stimulating proposals for gender fairness in tort law since they first appeared in the mid-1970s. It is at this point that the line between accuracy and aspiration becomes blurred. It is possible to shape the future in a certain way, in part by predicting that it will take that shape. When courts award damages for loss of earning capacity in tort litigation, they do more than passively pass on the market price of plaintiff's labor; they express a view about the future and should not be oblivious to their own role in constructing that future.

The willingness of economists and courts to rely on sex and race as a measure of an individual's future earning potential may have as much to do with habit as it does with strict fidelity to the *restitutio* principle. With respect to future earnings capacity, the judgment to select race and gender over other possible predictors may be affected by a cognitive bias that overstates the importance of the highly salient personal characteristics of race and sex.[100] Thus, I suspect that if the data clearly indicated, for example, that Catholics earned higher incomes on the average than Baptists, courts would be reluctant to predict future earning capacity based on religious denomination.[101] In such cases, there would likely be a sense that

98. *See, e.g.*, Walker v. Ritchie [2003] O.J. No. 18 at ¶¶ 134–35 (Ont. Sup. Ct. J.) (QL), 2003 CarswellOnt 10 (Can.).

99. McInnes, *supra* note 88, at 155.

100. For a fuller development of this argument, see Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 484–89 (1998).

101. *See id.* at 486 n.81 (describing regression analysis indicating that for years 1991, 1992, and 1994, Catholics were almost one and one-half times

using religion as a variable was somehow inappropriate, even if it seemed to have predictive value. The objection to using religion would be based on a judgment that any past disparity in income between Catholics and Baptists was not a function of a lasting difference between the two groups, but more likely explainable in terms of opportunities that were historically disproportionately available to higher earning Catholics. The argument would be that using religion to predict future income is not only inappropriate, but inaccurate, because as opportunity structures change, religion will cease to be a valid predictor of the future. Thus, because Baptists as a group presumably do not possess personal traits that would prevent them from gaining income parity in the future, it is unjust to saddle individual tort victims who happen to be Baptist with the legacy of a discriminatory past.

In contrast, I believe that what lies behind the willingness to use race and sex to predict future economic loss is the unspoken assumption that, regardless of equal opportunity initiatives, race and gender will continue to be powerful predictors of income because, in the final analysis, women and racial minorities lack what it takes to compete with white men in the workplace.[102] In this context, the selective use of race and gender as a supposedly accurate measure of the future has the effect of naturalizing racial and gender differences and eclipsing the role that lack of opportunities and the persistence of racial and sex bias play in producing pay disparities in the workplace. Relying on race and sex-based statistics reinforces the view that race and sex differences are inevitable and enduring, rather than a product of political and social arrangements that are subject to change. What looks on the surface to be a hard-boiled argument about accuracy turns out to implicate the politically-charged debate about the sources of disparities in our society and the role of law and the courts in reproducing patterns of inequality.

Along a similar vein, the current debate about privatizing Social Security shows how race-based statistics can sometimes be uncritically accepted as objective fact, without noticing that projections of the future inevitably involve speculation and political judgments that cannot flatly be declared to be either accurate or

more likely than Baptists to have a household income above $25,000).

102. *Id.* at 487.

inaccurate. In a recent editorial, Paul Krugman criticized President Bush's claim that Social Security was a bad deal for African Americans. The Bush position is that statistics show that African American males die sooner than other males and thus do not live long enough to collect their fair share of benefits.[103] Krugman argued that such use of race-based life expectancy statistics was misleading for a variety of reasons,[104] one of which was that it took "as a given that 40 or 50 years from now, large numbers of African-Americans will still be dying before their time."[105] Krugman likened such an assumption to a "bigotry of low expectations"[106] and one likely to shift focus away from the variable quality of available health care in the United States and a black infant mortality rate that is two and one-half times higher than that of white infants.[107]

Thus, even if the only concern of tort law was to accurately measure losses, the foregoing arguments indicate that continued reliance on gender and race-based tables would not achieve that objective. However, it is also important to recognize that the starting assumption that undergirds the argument in favor of gender and race-based tables—the assumption that the only legitimate concern of tort law is accuracy—is also highly debatable.[108] Even a traditionalist scholar, such as noted treatise writer Dan Dobbs, introduces students to tort law by explaining that tort law is not limited to corrective justice ideals, such as the *restitutio* principle in damages, but has also been shaped by ideals of distributive justice and by public policy concerns that look at the impact of tort rules on how goods are

103. *See* Paul Krugman, *Little Black Lies*, N.Y. TIMES, Jan. 29, 2005, at A21.

104. Krugman stressed that President Bush's remarks perpetuated a "crude misunderstanding about what life expectancy means." *Id.* He explained that low life expectancy for black males is largely due to high death rates in childhood and young adulthood and that African-American men who live to 65 can expect to collect benefits at a rate not that far below the rate for white men. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *See, e.g.*, Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653 (1998) (disputing contention that tax and welfare laws are a more efficient means of redistribution than private law).

distributed within the larger society.[109]

Because both corrective and distributive justice ideals, including a concern for group equality, can be found in tort law, the public dimension of tort law should not be overlooked.[110] To give just one prominent example, consider the public policy exception to the at-will employment rule that gained strength in the 1970s and served to redistribute a measure of wealth from employers to discharged employees.[111] This doctrinal reform was prompted by concerns that looked beyond the individual parties to the dispute, as courts took the position that employers should not always be free to use their power to terminate workers in ways that undermined larger societal goals. Notably, one of the earliest cases to endorse the public policy exception was a sexual harassment case in which the court held that it violated the state's public policy to allow a private employer to terminate a female employee for refusing to have sex with her foreman.[112] In that case, the court balanced the public interest in fostering sex equality against the employer's interest in running its business, *i.e.*, the court deemed it proper to consider distributive ends in shaping the private law.

Because distributional considerations have affected the shape of tort law, the key question in my view is not whether it is ever proper to deviate from tort law principles to interject distributional considerations, but whether social justice concerns ought to influence the shape of the particular tort rule in question. As Canadian scholar Elizabeth Adjin-Tettey has pointed out, to insist that distributional concerns have no place in tort law presupposes that the status quo is fair and equitable and deserves to be replicated. In criticizing such a narrow corrective justice position, she argues that "corrective justice is only aimed at formal equality. It does not question the justice of the status quo or the relative positions of the parties."[113]

When seemingly neutral tort rules replicate an unequal status quo, it becomes that much more difficult for disadvantaged social

109. DAN B. DOBBS, THE LAW OF TORTS 9, 13–16 (2001) ("Tort law often takes policy and utility into account as well as rights or corrective justice.").

110. *See* Adjin-Tettey, *supra* note 47, at 341–47.

111. For a general discussion of the public policy exception, see MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 9.9, at 438–43 (3d ed. 2004).

112. Monge v. Beebe Rubber Co., 316 A.2d 549, 550–51 (N.H. 1974).

113. Adjin-Tettey, *supra* note 47, at 344.

groups to bring about social change. In a recent Canadian law journal, for example, Tsachi Keren-Paz discussed the "systematic regressive effects" of the Learned Hand formula.[114] Building on the scholarship of Richard Abel,[115] Keren-Paz starts from the insight that under the Hand definition of negligence, "it is cheaper to harm poor victims than rich ones,"[116] and thus "the existing tort system provides incentive to tortfeasors to harm the disadvantaged."[117] He gives an example in which "J.R." is deciding where to build a refinery.[118] J.R. knows that there is a safety device costing $800,000 that would decrease the probability of an explosion by half, from 0.2 to 0.1. An explosion would cause $10M in damages in Richtown, but only $7M in Poortown, because of differences in property values and future lost earnings. Thus, the savings in expected loss from installing the device in Poortown is only $700,000 (.1 x $7M), less than the cost of the device. However, the savings in expected loss in Richtown is $1M (.1 x $10M), more than the cost of the device. The Hand formula instructs that J.R. is negligent if he builds the plant without the safety device in Richtown, but that he is not negligent if he builds it in Poortown. The upshot is that if the plant is ultimately built in Poortown and an explosion occurs, the residents will have to absorb the $7M loss without the benefit of tort compensation, making Poortown that much poorer.

My argument is that the current method of relying on race-based and gender-based tables to calculate lost earnings potential has similar regressive effects. This is most evident when large scale harm disproportionately affects members of a minority group, as in the example of lead paint victims discussed earlier.[119] The regressive effect is present, however, whenever the measurement of damages is based exclusively on a market that is itself not free from gender and race bias. The important point to recognize here is that because the

114. *See* Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution Through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J. L. & JURIS. 91, 94–95 (2003).

115. *See* Richard L. Abel, *A Critique of Torts*, 37 UCLA. L. REV. 785, 822–31 (1990).

116. Keren-Paz, *supra* note 114, at 94.

117. *Id.*

118. *Id.* at 95–97 (containing example).

119. *See supra* notes 28–30 and accompanying text.

status quo is neither natural, nor always fair,[120] injecting gender and race equity into tort rules serves a neutralizing function, as a modest corrective offsetting built-in regressive effects. Thus, critics of the use of gender and race-based tables tend to frame their arguments in the alternative—first, emphasizing that the traditional approach does not lead to accuracy and, alternatively, arguing that accuracy is not everything.

Once we get beyond the concern for accuracy, the scholarly debate over the proper measurement of damages for lost earning capacity becomes more of a discussion about the advisable scope of reform, rather than a defense of gender and race-based tables. The concerns on the "left" address a variety of specific issues but tend to focus on the incomplete or incremental nature of some of the proposals to change the method of calculating future income loss and generally express a desire for more radical reform of tort law. Cast in its broadest terms, the issue is whether compensation in tort should be fundamentally redirected, away from its current reliance on the market in computing compensable losses more toward a system that would determine compensation in accord with individual need. Perhaps not surprisingly, given the difference in political climate in Canada and the United States, Canadian scholars have been more willing to advocate needs-based reform.[121] My scholarship, in contrast, is less utopian and reflects the limited prospects for widespread progressive tort reform in the United States.

With respect to the use of blended tables for plaintiffs with no track record of earnings,[122] there are three "incompleteness" concerns that are interrelated and most likely to surface in any future debate. The first and second relates to the class of plaintiffs who would directly benefit from the reform. The third relates to the alternative method of computing losses the law should endorse.

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120. For a more theoretical discussion of this point, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 70–78 (1990) (disputing the unstated assumption that the status quo is "natural, uncoerced and good").

121. *See, e.g.*, Cassels, *supra* note 78; Jamie Cassels, *Damages for Lost Earning Capacity: Women and Children Last!*, 71 CAN. B. REV. 445 (1992); Elaine Gibson, *The Gendered Wage Dilemma in Personal Injury Damages in* TORT THEORY 185, 209–11 (Ken Cooper Stephenson & Elaine Gibson eds., 1993).

122. *See supra* notes 52–53, 73–76.

The first concern arises from the fact that the proposal covers only those injured parties with no established earnings record and would have an impact principally in cases involving young tort victims.[123] This means that the large majority of female and minority plaintiffs would not see their awards increased because their awards would continue to be calculated using their current earnings as a baseline. Thus, an adult female tort victim who worked in a low-paying predominately female occupation would not benefit from the proposal, except insofar as her worklife expectancy were increased by the use of gender-neutral tables. Because the proposal applies mainly to young tort victims, it does not address the situation of large numbers of adult women who suffer pay inequities as a result of gender segregation in the labor market.[124] As the debate over comparable worth has shown,[125] any reform that does not challenge job segregation is bound to be limited. A more radical proposal, for example, would allow adult women plaintiffs to receive an award based on average earnings (using blended or male tables) to make up for the devaluation of predominately female jobs.

Despite its limited effect, restricting reform to plaintiffs without an established earnings record makes sense to me, at least in the short run, precisely because it does not require a radical redirection of the basis for calculating damages in tort. The proposal authorizes use of general statistics only in those instances where resort to more individually-based assessments is not feasible. It thus does little to disturb the *resitutio* principle of tort compensation and still fits within an overall corrective justice orientation to tort law. Because at this moment in history, the individualistic focus of tort law in the United States is so solidly entrenched, it is highly unlikely that any

123. There are also some unusual cases in which the victim suffers injury as a young child but does not sue until many years later, such as a child molestation case against an abusive parent. *See, e.g.*, D v. F., [1995] B.C. J. No. 1478 (Can.), *discussed in* McInnes, *supra* note 88, at 165–66. The court in such cases would have to decide whether the abuse lowered the plaintiff's past and future ability to earn even if the plaintiff had already "chosen" a career path.

124. Nor does it address any gender pay discrimination suffered in the past by the individual plaintiff beyond that which is traceable to working in a predominantly female job.

125. For a discussion of some of the major sources addressing the issue of comparable worth, see KATHARINE T. BARTLETT ET AL., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 303–20 (3d ed. 2002).

reform that departed substantially from it would gain much support. Compared to a proposal that would allow an adult plaintiff to measure economic loss by reference to average earnings, moreover, my proposal avoids grappling with the related and equally difficult question of whether individual tort victims—male or female—whose economic loss is above the average should be fully compensated in tort.[126] Proposed reforms that extend to plaintiffs with established earnings records would more directly challenge the historical practice of basing tort recoveries on the market-based earnings history of the individual plaintiff, and for that very reason, may die on the vine. Finally, I would note that, for those young female and minority plaintiffs covered by the proposal, it is not a meager reform: because the proposal computes loss of future earnings capacity on blended tables of average wages overall, not on the lower wage rates of predominantly female or minority jobs, it ameliorates disparities arising from devaluation of those jobs to some degree.

The second concern stems from that fact that the proposal prohibits resort to gender-based and race-based data only and does not attempt to deal directly with disparities that arise from social class or family background. Admittedly, this limitation is most important in the subset of cases in which the proposal operates, namely, when the plaintiff is young and has no established track record of earnings. In those cases, an expert estimating a plaintiff's lost future earning capacity will typically first determine the level of education the plaintiff would likely have attained, *e.g.*, a high school, community college, or university education. After making that determination, the next step is to look at a table of average wages for that category, often further divided by gender and/or race. As framed, the proposal does not take issue with an expert's initial determination and reliance on educational attainment in determining average wages and instead targets only the factors of gender and race.

The case law demonstrates that predicting what level of educational attainment plaintiff would have achieved absent the injury is both an important determination and one that is not always

126. *See, e.g.*, Chamallas, *supra* note 45, at 67–69 (describing the controversy surrounding the decision by the September 11th Special Master to presumptively cap economic damages at a yearly salary of $231,000, representing the 98th percentile of individual income in the United States).

easy to make.[127] Although courts will generally consider plaintiff's expressed career desires and any educational accomplishments prior to the accident the plaintiff can document (*e.g.*, grades in school, scores on standardized tests), there is often not that much in the record to go on. Thus, it is not unusual for courts also to consider the educational level of plaintiff's parents and the level and type of education that the siblings of the plaintiffs have received,[128] two variables that are closely tied to social class. Children from poor or working-class backgrounds are therefore likely to recover significantly lower awards than children from middle and upper class homes. To this degree, the method of calculating lost future income has a tendency to reproduce social class, in much the same way that reliance on gender and race-based tables perpetuates race and gender disparities in society. A more comprehensive egalitarian approach would simply be to set the award for loss of future income at average earnings in all cases involving child plaintiffs.

Such an average earnings approach has its appeal, particularly because it would obviate the need for speculative predictions that might prove hurtful to plaintiffs and their families, where, for example, an expert concludes that the plaintiff would probably not have gone on to college. Nevertheless, in my opinion, a proposal limited to race and gender that allows estimates to be based in part on predicted level of education and other class-inflected factors remains the single best reform at this time.

There are three reasons why I would limit reform to gender and race. First, as mentioned above, there is a decided preference for individualized determinations in U.S. tort law. Despite its possible class bias, the determination of the level of educational attainment the plaintiff would have achieved (and the career the plaintiff might have pursued) is essentially an individualized determination that involves considerations of a variety of factors, rather than a simple classification of the plaintiff into a social category. Unlike classifying the plaintiff as male or female, or white or black, this

127. *See, e.g.*, Gilborges v. Wallace, 379 A.2d 269, 276–77 (N.J. Super. Ct. App. Div. 1977) (selecting among three possible amounts depending on differing levels of educational attainment).

128. *See, e.g.*, Ross (Guardian ad litem of) v. Watts, [1997] B.C.J. No. 1998 (B.C.S.C.) (QL), at para. 118, 121, 144, 1997 CarswellBC 1901 (Can.); Ahridge v. Iglesias, 950 F. Supp. 1187, 1193 –94 (D.D.C. 1996).

factual determination can be "opened up" to take into account more factors, simultaneously making the determination more individualized and less class-biased. Thus, relying on what is known as the psychological theory of "resiliency,"[129] commentators have urged experts and courts not to overlook those "protective factors" in a person's life that lead to success and allow many to rise to the top despite adversity.[130] For example, although poverty is a significant risk factor that reduces the chance for economic success later in life, in some cases, a strong "multigenerational network of kin and friends" can help an individual overcome the risk and be upwardly mobile.[131] Particularly because the determination of lost future incapacity is aimed at measuring human potential, it seems desirable to encourage individualized evidence that tends to deconstruct potential and to show how it is not always dependent on social class. Thus, there is less need in this instance to rely on average statistics to reduce class bias and achieve more egalitarian results.

Second, under our constitutional system, classifications based on sex and race have been treated differently, and with a much greater degree of suspicion, than class-based distinctions. It is well established, for example, that legislation that is disproportionately harmful to low-income persons is not entitled to heightened scrutiny and will not be struck down by courts unless it is utterly irrational.[132] This feature of constitutional law is also reflected in the larger social discourse that tends to regard race and gender distinctions as more controversial than distinctions based on social class, at least insofar as ability to pay is the measure of social class. Thus, I believe it would be far easier for courts and legislatures to support the notion that, as a matter of public policy, a plaintiff's race or sex should play no role in determining a damage award, than it would be to convince them that it is wrong to consider predicted educational levels in setting damage awards because this tends to disadvantage poor and working-class children.

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129. *See* Greenberg, *supra* note 28, at 453–58.

130. *Id.* at 455–56.

131. *Id.* at 456 (quoting EMMY E. WERNER & RUTH S. SMITH, VULNERABLE BUT INVINCIBLE: A LONGITUDINAL STUDY OF RESILIENT CHILDREN AND YOUTH 155 (1982)).

132. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17–29 (1973) (declaring that poverty is not a suspect classification and that discrimination against the poor receives only rational basis review).

Finally, I would point out that eliminating race and sex-based calculations will to some degree capture and reduce class-based disparities. There is no dispute that racial minority groups are disproportionately poor, and addressing race-based disparities will help to ameliorate poverty for plaintiffs who fall within these groups. Moreover, because there is a correlation between poverty and being female—as the phrase "the feminization of poverty" so well describes[133]—eliminating explicit gender bias has a progressive class effect for women as a group. One needy group that will not benefit from the proposal as it is framed is non-minority, low-income men because their disadvantage stems exclusively from social class.

The third and most troubling concern relates to which method for computing loss of future income capacity should be adopted, once it is decided that the use of gender and race-based tables are inappropriate. To date, there has been a split in opinion. My proposal aligns with those courts—most prominently the *Wheeler*[134]and *Bedonie*[135] decisions in the United States and the *Walker*[136] ruling in Canada—that have chosen to rely on blended tables for both men and women. However, there is also strong support for using the higher male tables for all plaintiffs, as the 9/11 Special Master[137] elected to do and as reflected in some court rulings[138] and thoughtful commentary in Canada.[139] It does not take long to realize that the choice of tables is significant: under the blended tables, men, including some minority men,[140] would receive lower awards than under the old system and women of all races would receive higher awards using male tables than if blended tables were selected.

133. *See, e.g.*, Vicki Lens, *Supreme Court Narratives On Equality And Gender Discrimination in Employment*, 10 CARDOZO WOMEN'S L.J. 501, 510–11 (2004).

134. Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427, 455 (D.D.C. 1991), *rev'd on other grounds*, 28 F.3d 120 (D.C. Cir. 1994).

135. United States v. Bedonie, 317 F. Supp. 1285, 1319 (D. Utah 2004).

136. Walker v. Ritchie [2003] O.J. No. 18 at ¶ 135–36 (Ont. Sup. Ct. J.)(QL), 2003 CarswellOnt 10 (Can.).

137. *See supra* note 54 and accompanying text.

138. *See supra* note 78 (collecting cases).

139. *See* Adjin-Tettey, *supra* note 47.

140. *See Wheeler Tarpeh-Doe*, 771 F. Supp. at 456 (noting that minority male plaintiff recovered less using blended tables than he would have using race-based male tables).

At the outset, it is important to counter an initial objection that might be made to use of male tables, namely, that because the male tables amount to gender-specific classifications, they are subject to the same objections as the use of female-specific tables. Such an argument is simply untenable in this remedial context. Behind the constitutional prohibition and public policy objection to gender classifications lies the principle that men and women should not be subject to disparate standards under the law, that there should be a uniform rule governing both sexes. Thus, as counterintuitive as it may initially seem, there is no constitutional infirmity with using male tables for all plaintiffs, precisely because both sexes are being treated identically.

In my view, the core of the debate behind the choice of remedies can be found in two important inquiries: whether use of blended tables would result in undercompensation of women (and men) and whether courts could reliably resort to male tables, without also reinforcing longstanding stereotypes of women as marginal workers whose primary career is motherhood and domestic labor. I regard both as close questions, but ultimately come down in favor of using blended tables to determine loss of future income in the United States.

The argument against use of blended tables starts with the proposition that women's wages have been depressed because of a variety of gender-biased practices and policies: the devaluation of women's work, the inequitable treatment of part-time workers and the social perception that as the primary caretakers of children, women are less committed to their jobs. Given these features of the labor market, opponents of blended tables reason that because such tables combine depressed average female wages and average male wages, they still are tainted by discrimination and thus are an inappropriate measure of earning potential.[141] They prefer to use the higher, nondiscriminatory male figures for everyone. Under this view, the remedy should be to "level up" women to the higher male standard[142] and thereby ensure that no one's award is lowered as a

141. *Id.* at 321–22.

142. For a discussion of the choice to level up or level down as a remedy for equal protection violations, see Deborah L. Brake, *When Equality Leaves Everybody Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513 (2004).

result of the reform.[143]

I have no quarrel with the first important observation about the gender-biased features of the labor market that have a depressing effect on women's wages. In my view, there is ample evidence of widespread discrimination in and devaluation of the work that women perform.[144] However, I am less convinced by the corollary arguments that the male wage rate is fair and nondiscriminatory or that the male standard is the preferable standard to use in this context. Instead, we have reason to believe that the male rate may be inflated because some men are earning above the market or fair rate. Thus, in their case studies of pay equity cases, Robert L. Nelson and William P. Bridges found that there were gender pay disparities in both the private and public sector, in part because of a built-in inertia in pay scales within organizations that resulted in paying women wages at or below the market, while paying some groups of men well above the market rate.[145] In other words, in the world of wages, it is probably the case that there is both female disadvantage and male privilege. The key question becomes whether some of that male privilege is unjustified. Particularly in an era where there is great political pressure to reduce tort awards, it seems important not to press for a reform that will produce an increase in awards overall, if the major inequity is in the distribution of awards. When it comes to economic loss, women and minorities may deserve a larger slice of the pie, but I am not sure that the pie should be enlarged.

Perhaps equally as important, I am concerned about the message that endorsement of the use of male tables might send to courts, experts, and other actors in the legal process. As mentioned earlier, use of male tables in this context is not truly a gender-specific practice because the male tables are used as a proxy for a fair,

143. Using the male standard would also track the approach of the Equal Pay Act, 29 U.S.C. § 623(a)(3) (2000), which makes it unlawful to reduce the pay of any employee in order to comply with the Act. The employer's only option is to raise the pay of women to the male rate.

144. *See* CHAMALLAS, *supra* note 13, at 187–92 (discussing devaluation of predominately female jobs and part-time work).

145. *See* Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579, 586–87, 593, 595 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (1999)).

nondiscriminatory measure of earnings.[146] However, I suspect that many courts will nonetheless balk at using the male tables in cases in which they conclude that the injured female plaintiff would likely have followed a "female" career path, for example, where a young girl expressed the wish to become a pre-school teacher and her sister had already chosen such a path. Even if this is not the intent of reformers, use of male tables might well reinforce a gender-consciousness in this area, particularly because the issue involves such "gendered" topics as occupational choice, duration of working life, and potential income. It has been my experience that when there is talk about "gender difference" in the workplace, it is often code for "women's inferiority," making it hard to notice gender without also reinforcing women's subordinate status. Among the most resilient stereotypes relating to women workers are maternal stereotypes,[147] namely, that women are better suited to homemaking and domestic life, than to work and public life. For me, a decided advantage of using blended, rather than male, tables is that it does not highlight the gender of the prototypical worker and thus does not subtly encourage decision makers to question whether the particular plaintiff is "male" enough to qualify for the higher rate of compensation. Finally, there is the hope that endorsement of blended tables will encourage economists and government data collectors to generate new and more refined gender and race-neutral tables and will expose the need for infusing gender equity into the methods adopted and used by non-legal professionals.

In the final analysis, I find the use of blended, gender and race-neutral tables an appealing solution because such an approach does not produce a false neutrality, but instead relies on a composite measure that incorporates the experiences of both men and women and persons of diverse races. I realize that advocacy of gender neutrality or color blindness can have perverse effects, if it serves only to produce formal equality and actually deepens the substantive disparities between social groups. In computing future income capacity, however, use of blended tables will substantively raise

146. *See supra* note 79 and accompanying text.

147. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 90–98 (2003) (discussing the content of stereotypes affecting mothers and other caregivers in the workplace).

awards for women plaintiffs and will lessen disparities traceable to race. I favor such a solution because it is a formal, easily understood reform that will make a substantive difference.