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Questioning the Use of Race and Sex-Based Statistics in Economic Loss Valuations in Tort Litigation: A Comparison of Mississippi to New York

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Questioning the Use of Race and Sex-Based Statistics in Economic Loss Valuations in Tort Litigation: A Comparison of Mississippi to New York

By

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ABSTRACT

In tort litigation, specifically catastrophic injury and wrongful death cases, forensic economists are employed to determine a plaintiff's projected worklife and life expectancy, which is then presented to a jury as lost income. Often, projections of life expectancy and worklife use race and sex-based statistics. For example, a white female, on average, may live a significantly longer life than a black male. Additionally, said white female may, on average, work for fewer years than her male counterparts. In this research, case law of Mississippi and New York were read closely for mentions of race and sex-based statistics in forensic economics in tort litigation, and experts were consulted to analyze the current attitudes towards race and sex-based statistics. This research found that Mississippi still actively uses both race and sex discriminatorily, while New York has banned the use of race. The use of sex-based statistics has not been banned in New York, and sex-based statistics are still being used discriminatorily, despite questions of the practice's constitutionality at the federal level.

Keywords: forensic economics; tort litigation; equal protection; due process.

DEDICATION

To Mom, Dad, and Ashton.

Thank you for supporting me in all that I do and forever being my biggest cheerleaders.

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TABLE OF CONTENTS

LIST OF FIGURES

CHAPTER I: INTRODUCTION

New York and Mississippi are often seen as diametrically opposed when it comes to racism and sexism. New York is often thought to be a leader in racial and gender equality. Mississippi, on the other hand, was at the heart of slavery and the Jim Crow South. New York has recently signed into law a package of anti-racism bills including S.2987-A/A.5679, which declares racism a public health crisis (Hochul, 2021). Mississippi often resists progress when it comes to gender and racial equity, as seen by proposed bill HB1020 (which has been passed by both the House and Senate) to create an unelected court in the primarily black city of Jackson that would mirror Jim Crow era policies to disenfranchise black voters (ACLU, 2023). The question becomes, how much variation in law can exist between two states operating under the same union? From a young age, students are taught that the law cannot discriminate on the basis of race and sex. But how true is that notion?

The goal of this paper is to compare the treatment of a specific legal principle in Mississippi and New York to determine if variation occurs in the application of the law. The legal principle in question is the assessment of economic damages in tort litigation. Many Americans will go their entire lives without ever interacting with this tiny facet of the legal world, but for those who do, it is typically life changing. Torts, or wrongdoing causing civil harm, can include anything from assault to medical malpractice to car accidents. If a person causes a car accident, for example, they are typically held civilly liable for the damages that arise from that accident. But how do we hold someone liable?

Say a woman is driving when she is hit by a driver who lost control of their car, leaving her paralyzed. The woman will be left with copious medical bills for the rest of

her life, not to mention emotional trauma from being left permanently disabled. In the civil court system, this woman is entitled to sue the driver of the car for wrongdoing and request several types of monetary damages to be paid to her. One of the more obvious damages would be the cost of past medical treatment. To get an amount for this, her attorneys would tally up all her treatment thus far based on bills from her doctors. But then it gets a bit trickier with determination of future expenses. Typically, a team of doctors will work with her attorney to help determine what future medical care she will need, but there is a certain amount of guesswork necessary. For example, estimating her remaining life expectancy may be reliant on some educated guesses. Even trickier than future medical bills is projecting future lost income. If our example woman was a 50-year-old attorney who has a contract that increases her salary by 5% every 2 years, this would be an easy task. Unfortunately, that rarely happens in the real world. What if our example woman was a 16-year-old with no work history? What if she worked at McDonalds for 3 months prior to her paralysis? Should her future earnings assume that she worked at McDonalds for the rest of her life? Should we interview her family to see what career path she had expressed interest in and base her salary on a median income level for that career? To further complicate the task of assessing potential future income, a jury must also decide how long they expected the person to work before retirement:

> 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. 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. The worklife tables provide an average for the group, reflecting the historical pattern of actual years worked. 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 work life expectancy, as well as life expectancy, than white men. For example, data from the Bureau of Labor Statistics regarding work life 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. (Chamallas, 1994, p.81)

Below is a chart highlighting the differences in projected worklife (Figure 1) (Julian & Kominski, 2011).

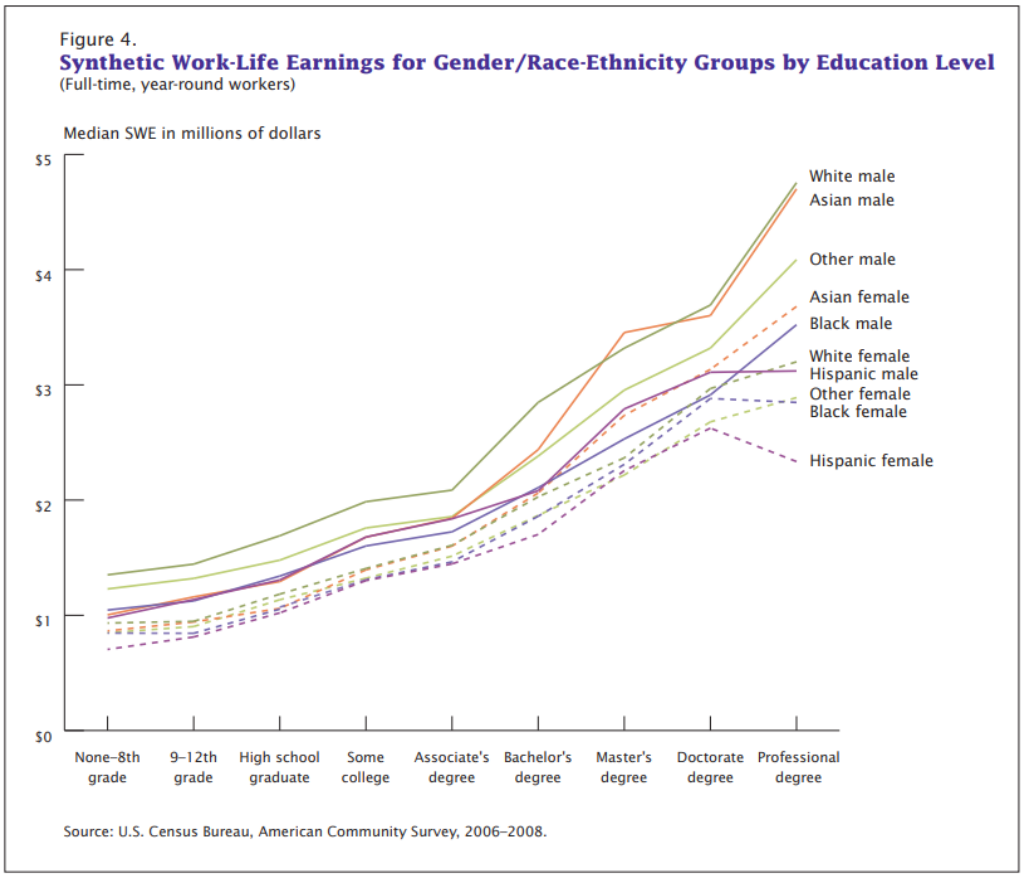


Figure 1: Synthetic Work-Life Earnings for Gender/Race-Ethnicity Groups by Educational Degree

The use of race-based data to determine worklife expectancy and life expectancy has been a long-standing legal tradition. For example, *The Saginaw & The Hamilton*, *1905*, a case originating from a boat accident in the early 1900s, resulted in the deaths of eight

passengers and staff, including six African Americans. This opinion argued against the use of non-race-specific data for measuring life expectancy, quoting “Race Traits and Tendencies of the American Negro” by Hoffman. The appellate court drastically reduced the payout to Black workers aboard the Saginaw due to this race-specific data, which argued that due to the racial differences between black and white workers, the Black workers would have significantly shorter work lives.

Expected gender differences in projected work life also come forward during tort litigation involving women of childbearing age:

> 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 or simply for the "negative" contingency of marriage. Similar discounts have not been made for men who were expected to marry and have children without affecting their working life. (Challmas,1994, p.81-82)

One case, *Frankel v. Heym*, decided by the U.S. 3rd Circuit Court in 1972, which resulted from a car accident involving a 19-year-old woman, particularly demonstrates the use of gender differences. Marilyn, the victim of the accident, faced catastrophic injuries including amputation and mental damage from a brain stem injury. The court opinion details that she was slender and attractive, and had frequent male companionship, therefore her likelihood of marriage and motherhood was high. The court then pointed out that due to her injuries (they also pointed to the fact that she had gained 50 pounds due to her obsessive compulsion related to food and was no longer slim) the chance of marriage and motherhood was now much lower. Because of the likelihood of her marriage, the court decided to reduce her earning capacity to reflect an interruption of her career *(Frankel v. Heym, 1972).*

The use of this practice is pervasive throughout the past century and impacted nearly every personal injury or wrongful death case involving a forensic economist. To fully understand the use of this practice, and to discuss the constitutionality of the practice, a few historical legal concepts must be understood. Several legal concepts come into play in this field- but the primary concern is a concept known as strict scrutiny. *Korematsu v. United States*, which was decided in 1944 and held that the internment of Japanese Americans in the second World War was constitutional, has a notable summation of this concept:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. (*Korematsu v. United States, 1944)*

The debate then becomes, is there a "pressing public necessity" at stake in the case of using race and sex in economic valuation? In *Korematsu*, the court decided that the public necessity of interning the Japanese American population was enough to infringe on their civil liberties[1]. When analyzing matters that would negatively affect an entire racial group (and this has often been expanded to other groups such as national origin, sex, and religion), courts have ruled that it must use the "most rigid scrutiny" to determine if it proves constitutional or not.

In this paper, I will present several key texts that highlight the current statutes of Mississippi and New York. Then I will present some historical and more recent challenges to this practice and review a few of their main arguments. Next, I will conduct

[1] It is important to note that legal scholars have largely opposed the ruling in this case, and it was overturned in *Trump v. Hawaii - 138 S. Ct. 2392 (2018).*

a close reading of relevant case law in each state to see if they differ in the treatment of race and sex in forensic economics. Finally, I will review my consultations with experts in the field for how this concept is being practically applied in their respective states, as well as to point out some differences in thinking between the states.

CHAPTER II: LITERATURE REVIEW

In reviewing the existing literature, I primarily focused on four main sections: Mississippi case law and statutes, New York case law and statutes, the original calls for change, and recent calls for change. These four sections are meant to act as a comparison between the existing laws in Mississippi and New York, and between the original challenges to this practice to more recent challenges. This led me to four major sources that provide an overview of each of those sections. There are numerous articles written in law journals discussing this topic; however, for this paper, Martha Chamallas's 1994 work was selected due to its citation in Judge Weinstein's opinion in the *McMillan v. New York* opinion (*McMillan v. City of N.Y., 2008*), which is discussed below.

Mississippi Case Law and Statutes

Brooking, Fender, and Fiser, in their 2016 article for the *Journal of Forensic Economics*, present an overview of the state of economic damages in Mississippi. This article acts as an update to a previous version, published in 2004. The previous version stated that "Mississippi courts do not have a history of imposing specific requirements on the calculation of damages" (Brooking, et al., 2004, p.98). Between 2004 and 2016, one court case drastically changed this viewpoint, *Rebelwood Apartments RP, LP v. English (2010).* This case will be discussed at length later in this paper through a viewpoint of the use of race and sex statistics.

In 2013, Mississippi's wrongful death statute was amended to define a specific list of those authorized to bring forth a wrongful death suit (Miss. Code Ann. § 11-7-13). This list includes representatives of the deceased or "unborn quick child" (Brooking, et al., 2016, p.236). One important change regarding earning capacity was also brought

forth in the *Rebelwood* decision, which concluded the expert testimony must be based on "sufficient facts or data (at 494)."

In 2010 in the *Rebelwood* decision the Mississippi Supreme Court endorsed the use of "nationally accepted tables for work-life expectancy" as opposed to simply assuming that a plaintiff would have worked until age 65 - another nod toward more evidence-based testimony from an economic expert (*Rebelwood v. English, 2010,* at 496).

Mississippi courts also allow for the use of household service considerations. Interestingly, gender assumptions are introduced by the court:

> [The court] spelled out specific items which may be included in such a calculation: "physical activities a mother does for her family, such as buying groceries, and taking care of the children, can be quantified" (at 779 of *Mississippi Baptists Health Systems, Inc. v.* Kelly (2011). […] For a 29-year-old mother of two, the court allowed the jury to find a loss of household services of $992,109. (Brooking, et al., 2016, p.239)

However, the article does not mention specific references to race and sex by the Mississippi courts or code.

New York Case Law and Statutes

Spizman and Tinari, in their 2011 article for the *Journal of Forensic Economics*, present an overview of the state of economic damages in New York. In New York, an estate is eligible to claim pecuniary losses as well as household services, and "parental training, guidance, and counsel services that would have been provided to the surviving children claimants had the decedent lived" (Spizman & Tinari, 2011, p.82). When it comes to determining worklife and life expectancy in New York, the New York Code does not delve into the specifics. According to Spizman and Tinari:

> Though regularly updated, its data always seem to lag behind currently available data. […] Pattern Jury Instructions Appendix A provides the out-of-date worklife

> expectancy tables developed by Shirley Smith, Bureau of Labor Statistics (BLS) Bulletin 2254 (1986) which relied on 1979-80 data. Although legislators change the life tables every so often, it is impossible for them to change Bulletin 2254 because it has never been updated. However, use of Bulletin 2254 is not required. (p.83)

Bulletin 2254 revised worklife tables to reflect more updated information, but still found that based on the assumption that "mortality conditions and labor force entry and exit rates" would stay the same as in 1979 to 1980 (a suspect assumption in itself) and that males born during that time would work one-third longer than their female counterparts. Additionally, they estimated that "white women [would work] more than 2 years longer and white men nearly 7 years longer than their minority counterparts" (Smith, 1986, p.1). Table 2 shows the specific ages broken down by race and education and compares the ages to data from previous years.

Table 4. Selected worklife indices by sex, 1970, 1977, and 1979–80, and by sex, race, and years of schooling completed, 1979–80

(In years, unless otherwise indicated)

Index and age	Men								Women							
	Total			1979–80					Total			1979–80				
				Race		Schooling completed						Race		Schooling completed		
	1970	1977	1979–80	White	Blacks and others	Less than high school	High school to 14 years	15 years or more	1970	1977	1979–80	Whites	Blacks and others	Less than high school	High school to 14 years	15 years or more
Life expectancy:																
At birth	67.1	69.3	70.0	70.7	65.3	70.0	70.0	70.0	74.8	77.1	77.6	78.3	73.9	77.6	77.6	77.6
At age 25	45.1	46.8	47.3	47.9	43.3	47.3	47.3	47.3	51.9	53.8	54.2	54.7	51.0	54.2	54.2	54.2
At age 60	16.1	17.0	17.5	17.6	16.5	17.5	17.5	17.5	20.8	22.1	22.4	22.6	21.0	22.4	22.4	22.4
At age 65	13.1	13.9	14.2	14.3	13.8	14.2	14.2	14.2	17.0	18.3	18.5	18.7	17.7	18.5	18.5	18.5
Worklife expectancy:[1]																
At birth	37.8	37.9	38.8	39.8	32.9	[2]34.6	[2]39.9	[2]41.1	22.3	27.5	29.4	29.7	27.4	[2]22.3	[2]30.1	[2]34.9
At age 25	34.0	33.4	33.1	33.8	28.6	29.2	33.8	36.1	19.0	23.0	24.0	24.1	23.5	17.9	24.4	27.9
At age 60	6.0	4.3	4.4	4.5	3.3	3.3	4.7	6.3	3.1	2.5	3.0	3.0	3.0	2.3	3.3	3.5
At age 65	3.1	1.9	2.3	2.3	1.8	1.8	2.4	3.6	1.4	1.1	1.5	1.5	1.5	1.2	1.8	1.8
Percent of life economically active:[3]																
From birth	56.3	54.7	55.4	56.3	50.4	49.4	57.0	58.7	29.8	35.7	37.9	37.9	37.1	26.7	38.8	45.0
From age 25	76.3	71.4	70.0	70.6	66.1	61.7	71.5	76.3	36.6	42.8	44.3	44.1	46.1	33.0	45.0	51.5
From age 60	37.3	25.3	25.1	25.6	20.0	18.9	26.9	36.0	14.9	11.3	13.4	13.3	14.3	10.3	14.7	15.6
From age 65	23.7	13.7	16.2	16.1	13.0	12.7	16.9	25.4	8.2	6.0	8.1	8.0	8.5	6.5	9.7	9.7
Labor force entries per:																
Person born	2.9	3.0	3.9	3.9	4.3	4.3	3.7	4.6	4.6	4.5	5.5	5.6	5.4	5.8	5.6	5.6
Person age 25	1.2	1.1	1.5	1.5	1.8	2.0	1.5	1.4	2.8	2.7	3.0	3.0	3.1	3.3	3.2	2.7
Expectected duration per entry remaining:																
From birth	13.0	12.6	9.9	10.2	7.7	8.0	10.8	8.9	4.8	6.1	5.3	5.3	5.1	3.8	5.4	6.2
From age 25	29.4	29.1	22.1	22.5	15.9	14.6	22.5	25.8	5.8	8.6	8.0	8.0	7.6	5.4	7.6	10.3
Voluntary exits remaining:																
At birth	2.6	2.7	3.6	3.6	3.9	4.0	3.6	4.5	4.5	4.4	5.4	5.5	5.4	5.7	5.7	4.7
At age 25	1.6	1.7	2.3	2.3	2.4	2.7	2.3	2.2	3.3	3.3	3.8	3.8	3.7	3.8	4.0	3.6
Percent dying while active	36.3	27.0	27.4	26.7	31.7	23.0	28.6	34.0	10.8	9.5	10.4	9.7	14.6	8.0	11.2	12.4

[1]Population-based index.

[2]Years of work expected, if this level of education is attained.

[3]Ratio of worklife to life expectancy at the given age.

Figure 2 Selected worklife indices by different metrics

Instead of using the outdated Bulletin 2254 data, the authors report testifying on more recent privately prepared tables from the 2000s without objection. There is no mention in this article regarding the use of race or sex in these worklife tables. It is unclear from this article whether the use of these metrics would be allowed by New York courts, but it is clear that the New York code does not mention banning the use explicitly.

Challenging the Practice

Past Calls for Change

The use of race and sex-specific data seems to have first been called into question in the early 1990s. Martha Chamallas, in her 1994 article for the Fordham Law Review, discussed this practice from a constitutional lens. According to Chamallas:

> 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. 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**. (Emphasis mine) (p.75)

Chamallas continues to state that this practice is unconstitutional because the reliance on these sex and gender-specific tables does not meet constitutional standards. She contends that based on cases such as the infamous *Korematsu v. United States, 1944*, "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" (Chamallas, 1994, p.75). Chamallas argues that the state does not have a "compelling governmental interest," and should instead rely on the individual's own circumstances (which is typically what is used in current-day practice) or race and gender-neutral data.

In her article, Chamallas reviews the sizes of damage awards between men and women, and between white men and minorities. In her review of existing literature at the time (1994), she notes that "a study of wrongful death cases between 1984 and 1988 conducted by the Washington State Task Force on Gender and Justice in the Courts [...] found that the mean damage award for a male decedent was $332,166, compared to a mean award of $214,923 for a woman" (Chamallas, p.85). The authors of that study hypothesized that the difference was likely influenced by the wage gap and lower rates of participation in the workforce for women. Another study by the Rand Corporation adjusted for their current salary level and found that women still received much lower

salary awards, which they hypothesized was due to “generalized assumptions about women's economic potential, specifically expectations of a lower salary growth curve or lower expected labor force participation by women” (Chamallas, 1994, p.86). One report also noted the following:

> [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. (p.88)

Chamallas also discusses several cases in her legal analysis of this practice, including the aforementioned case of Marilyn Heym (*Frankel v. Heym, 1972*). She was able to find that “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. The trial court's estimate, only $125,000, was based on the assumption that Heym would marry, bear children and interrupt her career. The hefty discount for marriage was upheld on appeal” (Chamallas, 1994, p.91). She also notes that this case explicitly allowed the court to reduce a woman’s damages even if there was significant evidence to prove the woman would have had a career (Marilyn was enrolled in college and doing well in her classes).

Chamallas also points out cases in which the Plaintiff’s attorney seems to actively support facts that would disfavor their own clients. For example, in *Caron v. United States, 1976*, the “plaintiff's own expert exempted a ten-year furlough period from his computations to account for the average female's childbearing years” (Chamallas, 1994, p.92). The plaintiff’s attorney did, however, argue that the earnings should be based on an

average worker rather than an average female worker, which was eventually rejected by the court:

> 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. (p.92)

Unfortunately, throughout the 1970s and 1980s, it seems that the plaintiff's attorneys were forced to rely on sex-based worklife data to receive any lost earnings at all. In one case, *Morrison v. Alaska (1973),* the trial court awarded $40,000 for lost earnings based on the assumption that the injured female plaintiff would have worked for only 5 years as a secretary before getting married. On appeal, the plaintiff was successfully able to argue 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," and therefore the valuation of $40,000 was incredibly low (Chamallas, 1994, p.94). Chamallas goes on to discuss that the choice to rely on female-specific worklife data may have been based on gender assumptions or perhaps was a calculated move "to appear reasonable and moderate to the court" (p.95).

Intersectionality is also a factor in these cases, as Chamallas points out:

> In a case such as *Morrison*, 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. (p.97)

Unfortunately, Chamallas notes, the body of research on racial discrimination in litigation was much smaller. She found one study from 1970-1979 that "found that African American plaintiffs received smaller awards, totaling 'only 74 percent as much as white plaintiffs received for the same injury'" (p.87). She states that she did not find any research that investigated damage awards for minorities other than African Americans.

Chamallas argues that the use of this practice is unconstitutional for a myriad of reasons. She argues that "state action" is required for the guarantee of equal protection to come into play and theorizes that one reason this has not been constitutionally challenged yet is that some may argue that the use of this practice does not rise to the level of state action. This valuation is likely to be presented by an expert (forensic economist) in the form of testimony. That expert's testimony is subject to challenge by the opposing counsel, and they must prove that their testimony is based on sufficient facts and data (i.e., the *Daubert*[2] standard). Then, the decision falls to the jury on whether or not they accept the expert's valuation. They are not bound to accept the dollar amount that the expert gives, and typically a jury will hear from experts on both sides who are subject to cross-examination to help them decide where to fall on this issue. Chamallas notes that the data that forensic economists typically use is government data (such as census data). She goes on to argue that when a court accepts an expert's testimony, they are making an "implicit judgment about the substance of the common law of damages" (1994, p.105).

[2] *Daubert v. Merrell Dow Pharmaceuticals Inc., 1993,* established that an expert's testimony must be based on scientifically valid reasoning and is properly applied in the case.

Thus, a court's acceptance of this practice is de facto state action. If a court accepts that the state action requirement is met, Chamallas argues that the use of race and sex to be blatantly discriminatory to individuals would never hold up to the strict scrutiny doctrine as mentioned earlier. Simply put, there is no "pressing public interest" that would override the burden necessary to use racial or sexual categorization in this manner.

Recent Calls for Change

In a recent release from the Lawyers' Committee for Civil Rights Under Law, Rodriguez and Kwiatkowski called for an effort to legislatively ban the use of this practice. This brief stresses that "no federal or state law prohibits the use of race, ethnicity, or gender in the calculation of civil damage awards in tort actions, which seek to make the victim whole again," which they argue runs counter to the constitutional right of equal protection and due process (2018, p.2). They quote Kimberly A. Yuracko and Ronen Avraham, stating that "the practice disproportionately affects communities of color because it 'creates an incentive for companies to allocate risks to minority communities in order to minimize potential tort damages in the future'" (2018, p.2). The article also commends Judge Jack B. Weinstein of New York for declaring this practice unconstitutional, which he did in the case of *McMillan v. City of N.Y., 2008* and will be analyzed in depth later in this paper.

Rodriguez and Kwiatkowski also compiled data showing the percentages of economists who utilize this practice, as seen in Figure 3:

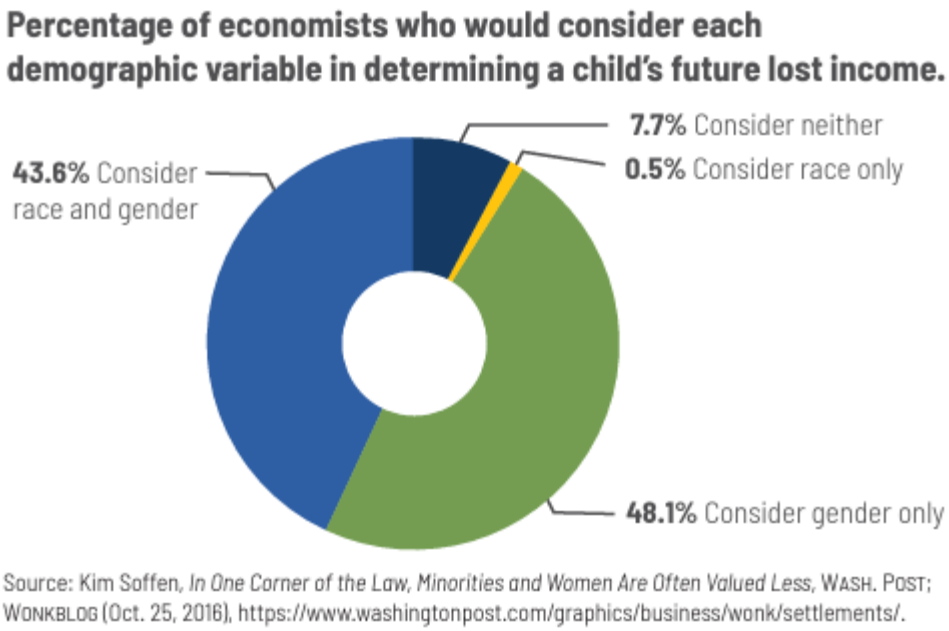


Figure 3: Percentage of economists who would consider each demographic variable

They note that this practice is especially pervasive in cases involving plaintiffs who have not worked (i.e., minor children), which may force economists to rely solely on worklife and life expectancy tables. Additionally, this practice is doubly harmful because minority children are more likely to be affected by certain harms such as lead poisoning. Rodriguez and Kwiatkowski state that "11.2% of African American and 4% of Latinx children are poisoned by lead, compared with 2.3% of white children" (2018, p.3-4). They argue that the use of race and sex-specific data may disincentivize defendants such as landlords from fixing issues like lead paint.

In their article, Rodriguez and Kwiatkowski also discuss that the use of this practice "perpetuates economic and racial inequality" and "fail[s] to account for future progress" because the data is based on historical trends, which may not be accurate to an individual's circumstances (2018, p.6). The gender and race income gap continues to close, so basing a child's income on data from the year they were born may not be an

adequate estimate of their future income potential. Interestingly, they also quote the Mississippi case *Greyhound Lines v. Sutton*, "We must not assume that individuals forever remain shackled by the bounds of community or class. The law loves certainty and economy of effort, but the law also respects individual aptitudes and differences" (p.8). This case, which will be explored in depth later in this paper, actually allows explicit discrimination on the basis of sex.

Rodriguez and Kwiatkowski point out that in 2018, there had been only one federal effort to reform this practice, " The Fair Calculations in Civil Damages Act of 2016 was introduced in the Senate by U.S. Senators Cory Booker (D-NJ) and Kirsten Gillibrand (D-NY) and introduced in the House by U.S. Representatives Joseph Kennedy III (D-MA) and Mia Love (R-UT)," which sought to "prohibit federal courts from awarding civil damages 'using a calculation for the projected future earning potential of [a] plaintiff that takes into account the race, ethnicity, gender, religion, or actual or perceived sexual orientation of the plaintiff'" (p.8). The bill failed to leave the originating committees. However, there have been successful attempts to prohibit the use of this practice in the past, such as the September 11th Victim Compensation Fund. This fund attempted to use race and sex-based data; however, after multiple groups including the NAACP and National Organization of Women protested, "The Fund's Special Master Kenneth R. Feinberg ultimately announced final administrative rules that compensated all victims using race-neutral, male tables 'to avoid any gender bias in assumed future worklife patterns and to ensure consistency'" (2018, p.9) (quoted from the Final Report of The Special Master for the September 11th Victim Compensation Fund of 2001: Volume I, 2004).

Additionally, Rodriguez and Kwiatkowski note that attempts have been made by the judiciary to limit the use of this practice based on the following principles: they are unreliable, discriminatory, and unconstitutional. As mentioned earlier, "Courts often reason that because actuarial tables are based only on historical facts, they cannot accurately account for the pace of future progress for women and people of color in the workforce" (2018, p.10). Therefore, the use of this practice is by nature unreliable and may turn out to be untrue for many plaintiffs. Regarding the discriminatory effect of these statistics, the authors point out one case that stated, "It 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 damages resulting from wages" (*Wheeler Tarpeh-Doe v. United States, 1994).* This also goes to show why the practice may be unconstitutional, and they, as Chamallas did 24 years prior, specifically argue that the Equal Protection Clause of the Constitution is violated. They cite Chamallas, who as stated previously, argues that this use of race and sex does not meet the constitutional test of strict scrutiny required by the Equal Protection Clause. Rodriguez and Kwiatkowski also discuss that Judge Weinstein, in the case *McMillan v. City of N.Y.,* argues that the right to due process is violated by this practice. In their summation of the case opinion, the authors state that "Accordingly, because race-based statistics are inherently unreliable, their use in a courtroom to deprive someone of his or her right to compensation constitutes 'arbitrary and irrational state action,' and therefore a denial of due process" (Rodriguez, Kwiatkowski, 2018, p.12).

In the concluding statements, Rodriguez and Kwiatkowski on behalf of the Lawyers' Committee for Civil Rights Under Law, advocate for state legislators to "pass

laws that prohibit the use of wage and earnings tables delineated by race and gender in the calculation of damages so that the practice is no longer detrimental to women and people of color" (2018, p.13). This call for legislative action has been echoed by many other groups, but the following research shows that this avenue of change is deeply opposed by some experts in the field.

CHAPTER III: METHODOLOGY AND LIMITATIONS

Methodology

Due to the legislative landscape surrounding these cases, I hypothesized that New York will be more progressive than Mississippi and oppose the use of race and sex in assessing damages in tort litigation. Using the case research tool Westlaw, I initially searched for cases that reached the Mississippi and New York Supreme Courts (or Mississippi/New York Federal Courts) that were on appeal due to the forensic economist testimony. This led me to find the *Rebelwood* and *McMillan* decisions. To review the case law preceding these cases, I again used Westlaw to find more cases that were either cited by *Rebelwood* or were similarly related to the issue of forensic economist testimony. To find such cases, I searched terms such as "forensic economist," "race," "sex," "work life," and "work-life tables." There were very few cases cited by the McMillan decision, so I relied heavily on the search results of the above terms for sourcing the New York cases. I then briefly read these results and attempted to find the hallmark cases that surrounded this issue. For Mississippi, this was *Rebelwood v. English* and *Greyhound v. Sutton*. For New York, this was *McMillan v. City of New York* and *G.M.M. ex rel. Hernandez-Adams v. Kimpson*. All these cases were frequently brought up in my correspondence with the attorneys and economists as benchmark cases in the field of forensic economy.

After finding the cases, I conducted a close reading of the case for specific mentions of race and sex. I attempted to answer the following questions:

Race/ Ethnicity:

1. Is race mentioned in the case?

2. Is race a central issue in the appeal?

3. What language is used to describe the use of race in the appeal?

4. Does the court accept the use of race in assessing damages?

Sex/gender:

5. Is sex/ gender mentioned in the case?

6. Is sex/gender a central issue in the appeal?

7. What language is used to describe the use of sex/gender in the appeal?

8. Does the court accept the use of sex/gender in assessing damages?

Other discriminatory issues:

9. Does the court, the plaintiffs, or the defense mention any other discriminatory issues?

10. If yes, are they mentioned in conjunction with the use of race/ sex?

11. If a case does mention the discriminatory nature of race, sex, or another factor, is the use of the other factors also mentioned? (I.e., if race is seen as discriminatory by the court, is sex also seen as discriminatory?)

As a part of this research, I also consulted with several professionals in the field. These experts included forensic economists from each state and an attorney from Mississippi. I asked questions surrounding their familiarity with this issue and what their professional duty involved, and if their professional opinion differed from what they are bound to do by the standards of their respective field. Next, I asked about their familiarity with the respective hallmark cases in each state, and their opinions on Dr. Glover's testimony in the *Rebelwood* decision to see if they would either approve of their

economist making such comments or (for the economists) if they would make those comments themselves.

In the discussion portion of this paper, I pulled out several themes that emerged from the research pertaining to race and sex and compared both the case law and consultations of experts to determine key differences or similarities.

Limitations

Several limitations are present in this research methodology. The most glaringly obvious is that specific case writings are not available on Westlaw. For example, none of the cases available had the forensic economists' report included on Westlaw. Instead, I had to rely on case opinions, which may or may not cite the report. At most, they only cite portions of the report. This, of course, limits the information to only cases the appellate court found most relevant to their appeal, as opposed to what this area of research may have found most relevant. It is possible to obtain these forensic economist reports by traveling to the originating court and looking through court records for the economist report, but due to time and travel restrictions, they were inaccessible for the purposes of this research. Future research may include going to the originating courts and pulling the full reports to compare to the appellate court's opinions.

Additionally, due to time restrictions, I was unable to perform an exhaustive review of all mentions of race and sex in case opinions in Mississippi and New York. Instead, I focused on two hallmark cases of this practice in each state and reviewed the foundational cases they relied on. Due to this limitation, some cases that may mention this practice in a more positive or negative light may have been inadvertently excluded. I was also unable to find a New York attorney who could speak with me for this research,

which may show a difference in understanding of the current state of the law than the economist I spoke with.

CHAPTER IV: REVIEW OF MISSISSIPPI

Review of Mississippi Cases

Greyhound v. Sutton

In 1995, Cheryl May and her three children (aged eight, three, and one), were traveling when Ms. May ran a stop sign and struck a Greyhound bus. All four of the May family were killed instantly, and several of the passengers of the bus were injured. The father of two of the children and the Administrator of the estate of the other child filed a wrongful death suit against Greyhound. The trial court found that Greyhound was 10% responsible and awarded $1.1 million for each child, which Greyhound appealed. The Court of Appeals affirmed the liability but reversed and remanded the damage amounts for the children. There were two primary challenges in the Mississippi Supreme Court opinion: Greyhound's liability and the damage awards of the children (beginning paragraph 18).

In this case, the forensic economist hired by the children's estate, Carroll David Channell, "based his figures on the projected worklife expectancy for each child that he attained from a February 1986 bulletin of the U.S. Department of Labor, entitled Effects of Race and Education Bulletin 2254; on the average earnings of a high school graduate" *(Greyhound v. Sutton, 2000).* The children's economic loss was valued at the following: Marcus's (age 8) economic loss at $613,436, Nicholas's (age 1) economic loss at $589,697, and Sumone's (age 3) economic loss at $334,074. The differences in these economic losses were based on the assumption that "each child would enter the workforce at different years, and the fact that a female child will earn less money and work less time over her lifetime" *(Greyhound v. Sutton, 2000).* In contrast, the forensic

economist hired by Greyhound, Boudreaux, based his projections of the children's income on their mother, Ms. May. Cheryl May was earning roughly $8,000 per year, and Boudreaux projected a 5% increase per year. The opinion did not specify if the economic loss projections were the same for all children or if they were discounted like Channell's projections.

The Supreme Court cited the Court of Appeals decision, which stated that the trial chancellor incorrectly assumed that both economists based their projected economic loss on Cheryl May's past earnings. They then stated;

> It is manifest error to tie the children's projected future income to that of their mother. [...] We see no reason to ground the future income of the children based solely on the income of the mother. We can only guess if Greyhound would still want to tie the children's future income to that of their mother if at the time of her death she was making six figures. We hold that the base income of the children should be established with some type of average income for persons of the community in which the decedents lived. (paragraph 19)

The Supreme Court ultimately rejected this conclusion, stating that the assumption that income should be based on a community average "has no basis in our law," and that using a mother's income or the average community income may "result in potentially disparate recoveries for children from affluent communities or with affluent parents, as opposed to children from less affluent areas or with less affluent parents" *(Greyhound v. Sutton, 2000).*

They continued to state that today's society is very mobile, and that "we must not assume that individuals forever remain shackled by the bounds of community or class" *(Greyhound v. Sutton, 2000).* The Supreme Court ultimately held that in wrongful death cases involving children with no past work history, "there is a rebuttable presumption that the deceased child's income would have been the equivalent of the national average as set

forth by the United States Department of Labor" *(Greyhound v. Sutton, 2000).* They took care to note that both parties may rebut this presumption by presenting evidence such as age, precocity, or family circumstances.

Race and sex are not directly central issues to this case but are rather dubiously left out of the discussion. The Court of Appeals rejected the assumption that future earnings should be based on a mother's income and then argued that it should be based on a community average instead. Importantly, the crash took place in Jefferson Davis County of Mississippi, which was 57.8% black in 2000, and 28.2% of the population lived under the poverty line (U.S. Census, 2000). The Supreme Court ultimately rejected both conclusions, arguing that they are arbitrary. Instead, they stated, a national average should be used. What type of national average remains unclear; the United States Department of Labor statistics can be broken down by race and sex. The only time race is mentioned is when they discuss Bulletin 2254, "Effects of Race and Education," which is produced by the United States Department of Labor. This bulletin was used in the trial by the Plaintiff's economist to value the projected future incomes mentioned earlier and breaks down worklife by race and sex. As quoted earlier, the court explicitly mentioned reducing a female child's damages on the sole basis of her sex yet seems to have no issue with it. It is odd that a court would reject "shackling" a child by the bounds of their community or class, but outright accepts "shackling" them by their race or sex. There is no second thought to "the fact that a female child will earn less money and work less time over her lifetime," yet it seems unfair of the court to project future income based on a community average *(Greyhound v. Sutton, 2000).*

It may be the case that economists would take this case to mean that wrongful death cases involving children should not use race and sex (as the economist Dr. Carter whom I discuss later in this paper does), but a close reading of the text would imply that race and sex could be used. This is, of course, not to say that they must be used, because the Department of Labor also produces general national averages not broken down by race or sex, and economists could certainly argue that was the spirit of the opinion written by the Mississippi Supreme Court.

Rebelwood v. English

Another hallmark case, *Rebelwood v. English* centered around a twenty-three-year-old black woman, Crystal Coleman, who was found dead in her car at the Rebelwood Apartments in South Jackson in 2007. The suit was brought forth by her beneficiary, Dwight English, the father of her youngest child. The key issue was whether the apartment complex was at fault for her death for failing to provide adequate security. At the end of the trial, the jury returned a verdict of $3,000,000 against Rebelwood Apartments. However, Rebelwood appealed on the basis of two key issues, and the decision was reversed, and the suit was remanded for a new trial. Those two issues were as follows:

> (1) Plaintiffs failed to prove that the alleged lack of security at Rebelwood Apartments caused Ms. Coleman's death; thus the trial court erred in failing to grant Defendants' motions for directed verdict and judgment notwithstanding the verdict. (2) The trial court erred in failing to reduce the verdict for noneconomic damages in accordance with Mississippi Code Section 11-1-60. (Statement of Issues)

The issue of this research will focus on the latter, whether the trial court erred in allowing Dr. Glenda Glover's opinion on noneconomic damages.

In the opinion, written by Justice Randolph, the court analyzed this issue in the section titled, "Allowing Plaintiff's economist to use the earning-capacity approach and national-average incomes to calculate the loss of future earnings as opposed to relying on the decedent's actual earnings." In this section, the court ruled that the trial court had erred in admitting the Plaintiff's economist's (Glover) testimony, reasoning that the testimony was not based on "sufficient facts or data" (paragraph 58).

The subject of race was first brought up in paragraph 49 of the opinion, where the court discussed Rebelwood's claims that Glover's testimony was "an overt attempt to inject improper racial considerations into the jury's deliberations." In paragraph 56, Rebelwood argued that Glover mentioned race to "justify the use of national averages." Glover's discussion of race is below:

> Q. Well, economist[s] are well aware of the disparity in numbers, […] well, I'm just going to say, you know, there is an inherent assumption in that a black person in Mississippi has no value, that life is almost valueless. In the life, if you're going to be say $6.70 an hour for life for an individual at age 23, just because that person was working in preparation for something else, for a higher profession, I mean, that's why we use the national average because it eliminates that discriminatory [sic] on the numbers. Q. And in all fairness, that would also apply to white people, too? A. Yeah. Poor, it's poor in general, but it's more often applied to black Americans in the models that we have come in contact with. (paragraph 71)

English argued that this subject was a side issue, but Rebelwood argued that the injection of race was more central, stating that:

> Race was injected at least twice in Glover's testimony: first, upon prompting by English's counsel, and second, when asked by Rebelwood's counsel how she could assume a base income of more than $38,000. This Court has held it in error to allow 'irrelevant, prejudicial and inflammatory statements.' *Gen. Motors Acceptance Corp. v. Baymon, 732 So.2d 262, 272 (Miss. 1999)*. The Baymon Court found that, through the 'unsupported declarations of [Baymon's] expert and counsel,' the 'trial counsel had blatantly played the 'race card'. . . .' (paragraph 56).

The court then continued on to state that Glover's opinion was conceptually flawed as well, arguing that it was not the court's job to decide the "value" of a person, but instead to ensure "a 'reasonable and workable system for establishing damages. . . .' to replace what has been lost. See *Culver v. Slater Boat Co., 722 F.2d 114, 121 (5th Cir. 1983)*." Finally, the opinion ended by clarifying that even if the court decided to limit damages to actual income, they were not placing a valuation on a person's life. Instead, they argued that the court's job was to replace what has been lost.

A concurrence in part and in result was written by Kitchens, who argued that Glover's testimony was "a far cry" from playing the race card. He provided greater context (listed above as paragraph 56) as to why race was brought up in Glover's testimony and argued that her testimony was legally sound enough to be included. His central issue with the majority opinion was whether it was the court's job to decide if Dr. Glover's testimony was "truthful" or not. In his opinion, once Glover was cleared as an economic expert, it was the jury's job to decide if they agreed with her interpretation of the facts. Kitchens posited that if the defense had an issue with her assertions, they should have brought an expert to disagree, and then allowed the jury to decide for themselves whom they agreed with more (paragraph 66). A dissent in part and concurrence in part was written by Chandler J., highlighting how split the court was on this case.

The court also distinguished *Greyhound v. Sutton* from the facts outlined in *Rebelwood*. They argued that the *Sutton* standard of taking a national average for the children is not applicable because Crystal had an earning history of more than 5 years, was 23 years old, and had three children herself.

Race and sex are not central issues at stake in this opinion, but race is explicitly mentioned and discussed in relation to assessing damages. The central issue in this case regarding the forensic economist was whether to use a national average earning capacity or to use the deceased's past earning history (dating back to when she was under the age of 18). Race was mentioned as the reason why the forensic economist would decide to increase the value earning capacity as she did in her report, and the court accuses her of "playing the race card" and being "inflammatory" by quoting the *Baymon* court. The mention of race in this context is seen negatively by the Mississippi court. Although race is not central to the reasons given to reverse the decision, it was important enough for the judges to discuss extensively in their opinion. The use of race in the trial court also allowed the Mississippi court to clarify their opinions on the role of the court, which is not to provide a "valuation" of life, but rather to subscribe to the "made whole" doctrine. Sex is minimally mentioned in the *Rebelwood* opinion:

> Dr. Glover stated on cross-examination, "What I'm assuming is that I'm going to apply the national average to her life. I'm not going to apply at $6.70 because that's not her value. I'm not going to get into the black-woman-no-value theory, and we're not going to go there. I refuse to go there with you today." (paragraph 29)

It is interesting to ponder if the court would have found the mention of sex inflammatory or prejudicial if the "black-woman-no-value theory" was explored, but unfortunately, it was not. One would assume that the court would take a similar stance to the use of sex in determining damages as it does race- that it is irrelevant, and valuation should be based on past earnings alone.

Rebelwood has set a standard in Mississippi and hints that they would continue to support the use of race in assessing economic damages. Particularly, their discussion

about the role of the court in reflecting reality rather than assessing value. Obviously, most would agree it is not the court's decision to assess "value." But what the court is essentially saying here is that the court's job is to reflect reality- even if that reality is laced with racism. Crystal Coleman's life was affected by the social pressures around her. The myriad of social pressures may (and probably did) include racism and sexism. The court, in their opinion in *Rebelwood,* has also narrowed the possibility of bringing this issue up in the future. Because of the dicta regarding the "race card" being played, it may make it more difficult for future economists to argue against the use of race and sex in assessing damages for fear of being accused of being "inflammatory." However, future cases may be able to appeal to Kitchens' opinion and discussion on Dr. Glover's statements. Kitchens gave greater context to the discussion of race and the "Mississippi Black Effect," and argued that she was simply explaining her methodology, and not trying to appeal to the sympathies of the jury as she was accused.

Consultations with Mississippi Professionals

Thoughts of a Mississippi Attorney

The Mississippi attorney I consulted wished to remain anonymous and will be referred to by the pseudonym Mr. Smith for this paper. Mr. Smith is a plaintiff's attorney primarily working in personal injury and wrongful death and has been practicing for 12 years. When asked if he was familiar with this practice, he stated that he was "very familiar" with the fact that economists use age, race, and sex-specific tables for their valuations. He went on to state that every economist he had ever worked with or was aware of used this practice. Regarding his professional feelings towards this issue, he stated that he would be obligated to defer to the economist. Without the economist being

on board, Mr. Smith could never and would never challenge the use of this practice. Regarding his personal feelings on the matter, he argued that it should be left up to the jury. He stated:

> I wouldn't want the court to set some sort of hard and fast rule. I think it should be fleshed out with the litigation process to where the attorneys and the litigants and ultimately the jury can decide […] it should be decided on a case-by-case basis. We do that in other areas of these reports. For instance, if you have a wrongful death case, the economist is going to put a dollar amount to the loss of household services. For instance, if you have a mother who passes away- if she cooks, if she cleans, if she mows the grass, these household services have an inherent value that they put a dollar figure to and one economist will differ in that opinion, and we argue about that in the litigation. We say, you know, the amount of money that should be paid for someone cutting grass is X amount versus another amount. Other folks will argue that you know a person owns a home, this is just something you have to do, you shouldn't be compensated for it. So these are already things that we argue about anyway in these economic reports, and again this is my opinion that the race and sex issues should just be one other thing that we're arguing about. (Anonymous, personal communication, March, 22, 2023).

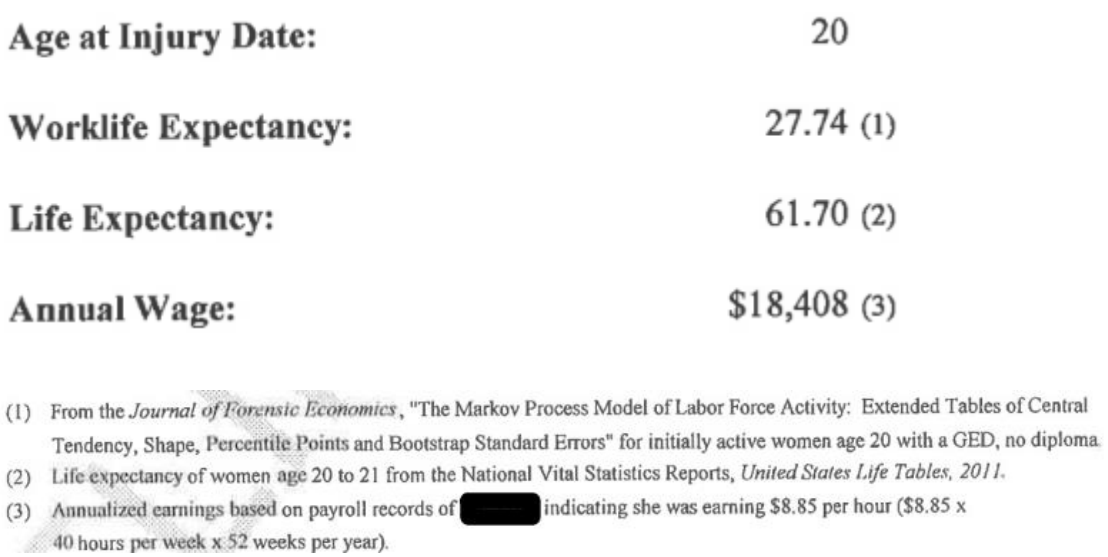
When Smith was asked about the *Rebelwood v. English* case, he said he was familiar with the case and the fact that the forensic economist's testimony was a part of the appeal. I read a section of the testimony to him, specifically Dr. Glover's testimony on the Mississippi Black Effect. In response to that he stated:

> I would agree with most of it. I disagree with her saying that a black person, by virtue of being black, does not have any value under the law in their life. And to be honest, if I was defending that case I would immediately move for a mistrial because, it seems to me, she would be playing to the passions and sympathies of a jury. And just assuming, if it was in Hinds County, there would have most likely been an African American jury in the majority there. So, to be an expert, specifically being an expert economist, to make a statement and have an opinion, it can't just be your personal opinion. It has to be a peer-reviewed and tested methodology to arrive at that opinion, and to say something to the effect, that's so stupid, as a black person has no value here. That's just her ranting. It's not based on anything. (Anonymous, personal communication, March, 22, 2023).

Mr. Smith stated that he did agree that Dr. Glover should be allowed to bring up the fact that injecting race into the data would reduce the damages. If she felt that it was

supported by data, he argued that she should feel free to present that testimony to the jury. When asked if he would ever challenge the use of this practice, he stated that he would, especially if it increased the damages for his client. To do so, Smith would attempt to find peer-reviewed data and present that to the economist. If the economist agreed, then they would present that testimony to the court. But Mr. Smith also argued that it should ultimately be left up to the jury if they accept that valuation or not (similar to the view presented in the dissent by Judge Kitchens).

Smith then told me about a case where he had argued with the hired forensic economist regarding this matter. In his case, two young Black women died in a car accident. The forensic economist projected their future earnings based on the assumption that they would earn the same amount for the rest of their life as they were making when they died. Additionally, the economist projected that they would never marry or have children, reducing their consumption projections. A portion of these reports is shown below, showing their projected income:



Age at Injury Date:	20
Worklife Expectancy:	27.74 (1)
Life Expectancy:	61.70 (2)
Annual Wage:	$18,408 (3)

(1) From the *Journal of Forensic Economics*, "The Markov Process Model of Labor Force Activity: Extended Tables of Central Tendency, Shape, Percentile Points and Bootstrap Standard Errors" for initially active women age 20 with a GED, no diploma.
(2) Life expectancy of women age 20 to 21 from the National Vital Statistics Reports, *United States Life Tables, 2011*.
(3) Annualized earnings based on payroll records of [redacted] indicating she was earning $8.85 per hour ($8.85 x 40 hours per week x 52 weeks per year).

Figure 4: Example economist report and notes

Mr. Smith told the economist that he took issue with the expectation that she would never earn more than $8.85 in hourly pay for her entire life, and that she would never marry or have children. Mr. Smith spoke with the decedent's mother, who told him that the decedent was planning to become a nurse and had always expressed a desire to have children. The forensic economist told him that he was unwilling to change the report. This case is very similar to the *Rebelwood* decision, which ultimately decided that the decedent's earnings must be based on her prior work history.

However, Mr. Smith argued that in general, he is not opposed to the use of race and sex to determine life expectancy and work-life projections. He stated that those tables are based on some data, and in general, that should be trusted. If he was representing a white woman, he argues, it would be unfair to discount her projected life expectancy to some lower national average that includes less healthy populations.

Thoughts of a Mississippi Economist

Forensic economist Dr. George Carter was consulted for this paper as well. He had been practicing for 29 years, and several years before that as an academic economist, and had lived and worked in Mississippi for his entire life. He works almost exclusively in personal injury, wrongful death, and wrongful termination litigation. He stated that when he is hired by an attorney, his first step is to collect demographic information including gender, race, ethnicity, date of birth, date of accident/ death, number of children under 18, spousal information, education, income, and benefits paid by the employer. In terms of using this information, Dr. Carter said that if the attorney presented him with case law that advised him not to use certain data (race was the example he mentioned),

then he would not. However, he stated that the economics profession as a whole prefers the most specific data possible, i.e., including race and sex. Dr. Carter stated:

> An economist will always want to go to more discrimination. I want to define a person to the maximum extent, in terms of characteristics, as possible. For example, as far as gender, race, and ethnicity go- I want to go with, let's say a non-Hispanic white male. I run into this in other professions, for example, life care planners and vocational people, they don't want to do that. They just want to go with gender. (G. Carter, personal communication, March 29, 2023).

Dr. Carter stressed that his primary feeling on the matter is to leave politics out of it. He argued that if an economist injects their own beliefs, or if their testimony is not based on case law, they can get into hot water quickly. I then brought up *Rebelwood v. English*, which he was familiar with. When asked if he agreed with the court's interpretation of Dr. Glover's comments, he stated;

> It wasn't economics. [...] She played her cards that way. It wasn't economics that she was playing at the time, and that has really bedeviled people ever since. It's not something I would do. I would stay just in economics, and not start rendering social, political, or any other kind of judgment that is outside of my expertise unless I had been qualified before the court on it. (G. Carter, personal communication, March 29, 2023).

Overall, Dr. Carter, as an economist, prefers to use the most specific data possible for his projections- including race, ethnicity, and sex data. However, he would be open to using national averages if presented with relevant case law by the attorney. His primary concern is staying neutral and acting as an independent source for the jury, regardless of his personal feelings on the matter. He emphasized many times that postulating on the "correctness" of using such data is outside of his wheelhouse and disagreed with economists (like Dr. Glover) making comments that delve too far into the political sphere.

Interestingly, he brought up that "many" attorneys have begun asking him to take race out of the valuations and only use sex. Further research may be needed to determine why an attorney would have an issue with one factor, but not the other, given that both pieces of data can be used discriminately. Dr. Carter also discusses the *Greyhound v. Sutton* case described earlier, and he stated;

> [The Mississippi Supreme Court] didn't say this, but they just said take the national average. But basically, ignore race; just take the national average of what a child who has an established income would make if that child had lived in a [wrongful] death case and basically, it was based on ignoring race, ignoring economic circumstances of the family, ignoring gender. A child would get the national average. That goes against the grain as far as the data that's available and what economists would normally select, but if I'm told to use *Greyhound v. Sutton* in a case, I certainly do that. (G. Carter, personal communication, March 29, 2023).

This interpretation of *Greyhound v. Sutton*, as mentioned earlier, is contrary to a close reading of the text due to the court's acceptance of reduced damages for a female child and the reliance on the United States Department of Labor statistics, which can be based on race and sex. Another interesting comparison of Dr. Carter and Mr. Smith was determining who is in charge of making the call to leave out this data. Mr. Smith said that he lets the economist take the lead and assumed that they use some standardized treatise to help them determine whether or not to use race and sex. Dr. Carter stated that he uses race and sex unless the attorney presents him with case law asking him not to. These two individuals have worked together on numerous cases, so this contradiction is especially interesting.

Summary

Mississippi case law appears to turn its head from obvious issues at play. In *Greyhound v. Sutton*, the court admits that it would be prejudicial to base a child's

income on their community or class yet refuse to directly remove race or sex from the equation. In *Rebelwood v. English,* they admonish an expert for "playing the race card," and emphasize that it is the court's job to reflect reality. In discussions with experts in the field of law and forensic economics, they echo this sentiment. To them, race and sex discrimination are a part of reality, and they have no qualms with using these factors to assess damages.

CHAPTER V: REVIEW OF NEW YORK

Review of New York Cases

McMillan v. City of N.Y

This case arose out of a ferryboat that was found to be operated negligently (resulting in a crash) by the City of New York in 2007. James McMillan, a black man, was rendered quadriplegic after the accident and sued the city for "pain, suffering, and cost of necessary medical care" (*McMillan v. City of N.Y., 2008).* Senior District Judge Jack B. Weinstein then issued this order as a response to testimony that McMillan's life expectancy would be reduced on the basis of his race. Specifically, the expert testified that African Americans with spinal cord injuries lived statistically shorter lives than people of other races with similar injuries. Judge Weinstein wholeheartedly rejected this conclusion based on several facts, stating:

> The question posed is whether such "racially" based statistics and other compilations may be relied upon to find a shorter life expectancy for a person characterized as an "African-American," than for one in the general American population of mixed " ethnic" and "racial" backgrounds. The answer is " no." "Racially" based life expectancy and related data may not be utilized to find a reduced life expectancy for a claimant in computing damages based on predictions of life expectancy. As indicated below, the unreliability of " race" as a predictor of life expectancy as well as normative constitutional requirements of equal treatment and due process support this conclusion. (p.2)

Judge Weinstein cited that racial mixing has occurred in the United States for centuries, and simple phenotype is not accurate enough to determine who is or isn't a specific race. He pointed out that future President Barack Obama himself was racially mixed, with Obama stating, "my father ...was black as pitch, my mother white as milk" (*McMillan v. City of N.Y., 2008).* The unpredictability of these classifications, as well as the fact they are a largely social construction, makes them unfit for a court of law, Judge Weinstein

argued. He rebutted the argument that race is a predictor of certain outcomes such as health, stating:

> But those disparities are associated with socioeconomic differences and tend to diminish significantly and, in a few cases, to disappear altogether when socioeconomic factors are controlled. By allowing the use of "race"-based life expectancy tables, which are based on historical data, courts are essentially reinforcing the underlying social inequalities of our society rather than describing a significant biological difference. (p.4)

He continued to state that life expectancy differences between white and black Americans are largely impacted by socioeconomic factors and those factors are typically a better estimator for future life expectancy than race. This is proven by Judge Weinstein by pointing out that well-off African Americans typically live longer lives than poorer African Americans. According to him, "Given the significant impact of socio-economic factors, it is natural for courts to be concerned with the use of life expectancy tables that ignore important distinctions such as education, place of residency, and employment, collapsing all members of a 'racial' group into a single number" (*McMillan v. City of N.Y., 2008).* In the conclusion of his section on the unpredictability of race, Judge Weinstein argued that even if certain factors lead to health problems for African Americans specifically, such as "stress-related diseases potentially linked to structural racism," that is not enough reason for the court to "enforce the negative impacts of lower socioeconomic status while ignoring the diversity within populations" (*McMillan v. City of N.Y., 2008).*

Judge Weinstein then moved on to analyzing legal decisions surrounding race-based statistics, beginning with the aforementioned case, *The Saginaw and The Hamilton, 1905*. He noted that in the case, which has no precedential value due to *Brown v. Board*

of Education, 1954, the New York court rejected the use of standard mortality tables in favor of tables broken down by race. On average, the court lowered black decedents' awards by 10% more than white decedents in this case. Judge Weinstein continued on to point out cases in which other courts had rejected the use of race-based statistics in recent years, such as in *Wheeler Tarpeh-Doe v. United States, 1991*. That court argued that it was "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 damages resulting from lost wages." Id. at 455. He also pointed out, as mentioned previously, that the 9/11 Victim Compensation Fund successfully removed race and sex-based statistics from consideration, instead using averages from "the general population of active males" for determining worklife expectancy (*McMillan v. City of N.Y., 2008).*

Regarding the constitutionality of such a practice, Judge Weinstein cited Martha Chamallas's work, which argued that this practice violates equal protection and due process. Judge Weinstein agreed with her assessment that this use of race would trigger strict scrutiny, and further agreed that the court's acceptance of such statistics constitutes state action. Therefore, equal protection requires that classification in this context does not disadvantage the claimant (which raises an interesting question of how the court would treat a classification that provided advantages to the claimant, such as using a female claimant's life expectancy, which is much longer than a male's). Judge Weinstein then argued that using race statistics would create "arbitrary and irrational state action" (*McMillan v. City of N.Y., 2008).* Further, he stated that the legal system that burdens its claimants with such statistics would not work fairly and with due process.

In his conclusion, he stated that the lack of factual basis, as well as the constitutional issues, caused him to reject this practice. Judge Weinstein stated that "Reliance on "race"-based statistics in estimating life expectancy for purposes of calculating damages in this case is rejected in computing life expectancy and damages" (*McMillan v. City of N.Y., 2008).*

This order is of course unique from the other cases mentioned thus far. This order was written for the explicit purpose of disallowing the use of this practice, however, certain inclusions were not made. For one, the court rejected the use of race-based statistics for life expectancy, but as discussed previously, other aspects of economic loss may take race into account, namely worklife. Interestingly, Judge Weinstein did not mention rejecting these race-based statistics in worklife determinations, which also tend to reduce damages for African Americans (and women). Although, I don't know that any attorney would attempt to use racially classified worklife after reading this order for fear of being swiftly rejected by the court. Another interesting factor left out of the discussion is, again, sex-based discrimination. One may wonder if Judge Weinstein would have a similar distaste for the practice if applied to a female plaintiff.

G.M.M. ex rel. Hernandez-Adams v. Kimpson

Arising out of a lead dust injury, this case showed Judge Weinstein's holding in *McMillan* in practice. Niki Hernandez–Adams, mother of infant plaintiff G.M.M., was a tenant of a New York apartment that was found to have lead-based paint. G.M.M.'s pediatrician found elevated blood lead levels, which eventually lead to injury to his central nervous system. According to the brief:

> Posed is the question: can statistics based on the ethnicity (in this case, "Hispanic") of a child be relied upon to find a reduced likelihood of his obtaining higher education, resulting in reduced damages in a tort case? The answer is no. [...] The total verdict in favor of plaintiffs was $2,005,000. (p.3)

The primary consideration in this case was whether ethnicity was a more accurate predictor of educational achievement than his family of origin. In G.M.M.'s case, his father had a baccalaureate degree, and his mother had a Master of Fine Arts. In fact, of the 14 family members surveyed by the economist, "One hundred percent of them had graduated from high school. 75 percent of them had some college education. 60 percent of them had completed baccalaureate degrees. And 30 percent of them had completed master's degrees" *(G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015).* However, the defense counsel argued that of males in general, only 41% had bachelor's degrees. In terms of Hispanic males earning professional degrees, the number fell to 1.97% *(G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015).* The plaintiff's economist testified that there was "a better than 70% chance of [the child] earning a master's degree and a better than 50% chance of earning a professional degree," which the defense took issue with based on the low levels of degree attainment by Hispanics in general. The court first addressed the defense counsel, stating:

> Excuse me. I won't allow you to continue along those lines. Hispanics is too general a category.... You'll have to be more definitive with respect to this particular family. We have professors as well as gardeners who are Hispanics, and I don't believe that we ought to go forward in federal court with that assumption of uniformity.... (p.7).

The judge then addressed the jury, stating:

> Now, ladies and gentlemen... I am now instructing you that as a matter of constitutional and federal law, it is inappropriate where there is a case involving an individual with a Hispanic background to rely upon a table which is undifferentiated as to Hispanic individuals. (p.7)

Following this assessment by the court, a separate economist hired by the plaintiff projected G.M.M.'s future losses to be between $2.5 million and $4 million, without any inclusions of what an "average" Hispanic would do. The defense's economic expert, in his report, had included an average Hispanic educational attainment. On the stand, the judge pointed out that this would not be allowed, and instead, the defense economist presented two possible situations: 1) The plaintiff obtained a high school diploma, or 2) The plaintiff obtained a postsecondary degree and pursued a career in arts and design (like his mother).

The opinion then reiterated the *McMillan* rule, arguing that this practice violates both equal protection and due process. This decision also goes further than the *McMillan* opinion by discussing the impact of "life, worklife, and educational expectancy tables negatively affect other disadvantaged groups, such as women, lesbians, gays, bisexuals, transgender persons, and those with disabilities" *(G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015).* For example, life expectancy of the queer community is often much shorter than the life expectancy of straight, cis-gendered individuals; the opinion noted that one sample study found a 12-year gap between the two groups *(G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015).* The opinion also pointed out that certain populations are disproportionately affected by issues such as lead exposure, namely Hispanic and African American individuals. Minority families are more likely to inhabit older homes where lead paint was used *(G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015).* Other issues exist within the classification of "Hispanic," such as the fluidity at which the term is applied. The court noted that certain groups such as the Irish were

thought to be a separate racial group in the past. Both race and ethnicity data are reflected in more recent census collections, but census data is self-reported, further complicating the reliability of such statistics.

Judge Weinstein pointed out that he was unable to confront gender-based statistics because the mother of the child was not physically harmed and had no loss of income. He also discussed the aforementioned Bulletin 2254, pointing out that the Bureau of Labor Statistics had not revised the tables and they were still widely circulated, yet only 4.8% of forensic economists purport to still use the data *(G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015).* The court also noted that, again as mentioned before in the review of New York law, Bulletin 2254 is included in the state's pattern jury instructions. However, a statement is included in these directions recognizing that this data is outdated, and the jury can instead rely on expert testimony.

In sum, this case expands the restriction of the use of race-based statistics to ethnicity-based statistics as well. Judge Weinstein stated:

> Race and ethnicity are not, and should not, be a determinant of individual achievement. To support such a proposition distorts the American dream, denigrating minorities' chances of climbing the socio-economic ladder. Using these statistics to calculate future economic loss reinforces the rigid racial and ethnic barriers that our society strives to abolish. (p.22)

At the end of the opinion, the court also took care to note that this order pertains only to situations in which racial and ethnic classification would disadvantage the minority group, rather than provide an advantage (and Judge Weinstein specifically names Affirmative Action as an example of race-based advantages).

Similar to *McMillan*, this court writing is distinct from the Mississippi cases analyzed because it is confronting this issue head on, rather than tangentially. This case

also goes further than *McMillan* by explicitly banning the use of ethnicity, and directly confronting other aspects of discrimination that certain groups may be subject to, such as women and LGBTQ+ individuals. Although the court is unable to rule on these issues directly, the dicta present would almost certainly imply that any use of gender or sexual identity-based discrimination would also be struck down by the New York court.

Judge Weinstein's comment about race being used advantageously also presents an interesting conundrum. Should groups that live and work statistically longer lives (such as white females) be allowed to use their race and sex in economic valuation? Or should they instead be bound by a national average?

Consultations with New York Professionals

Thoughts of a New York Attorney

Attorney Kate Carballo practices in both New York and New Jersey and has been in personal injury/wrongful death litigation for the past 14 years (exclusively on the plaintiff's side). When asked if she was familiar with this issue, she said that she was very familiar with the process of forensic economy in her litigation but was not very familiar with this specific practice being at the center of debate. She stated that she was sure gender was used in projecting life expectancy and worklife:

> There are statistics that women live longer than men. In New York and New Jersey, we have a life expectancy table, I almost always have it on hand. […] In New York it delineates female life expectancy. We also know that women don't earn as much, and I'm sure the same thing for minorities. There will definitely be a discrepancy. (K. Carballo, personal communication, April 13, 2023).

Carballo emphasized that not every situation can be mapped out for a plaintiff's specific life experiences, and attorneys rely on certain standardizations. She continued to state that she would absolutely challenge the use of this practice. She presented a possible situation

of a male who was outperforming his peers in some way; she would argue to the jury that his life expectancy would be longer than those peers (perhaps even arguing for longer than the economist had projected). She had no issue with bringing it up to a jury that the projections are merely averages and encouraged the adversarial system to decide where they fell on the issue.

Carballo was unfamiliar with *McMillan v. City of N.Y.* but agreed with Judge Weinstein's concerns of the unreliability of race categorizations. She argued that it is clear there are blatant discrepancies between things like health outcomes, and we cannot turn a blind eye and pretend there is not. She also had a different opinion from the Mississippi attorney, arguing that a change should be brought about legislatively. Finally, she stated:

> Race/ethnicity and compensation may very well play a large role (and perhaps should play a large role) in the context of employment litigation (wrongful termination, employment discrimination, harassment, etc) criminal cases, and other areas of practice that I do not handle. I think it's important to distinguish. Obviously where the issue of race/gender/ethnicity is a factor in a claim or defense of a cause of action, then the experts must consider those factors. (K. Carballo, personal communication, April 13, 2023).

Thoughts of a New York Economist

Dr. Dave Sharp, an economist with EconOne, was consulted for this project relating to his thoughts on the use of this practice. Dr. Sharp practices in jurisdictions across the country, including New York. He acts as an economist for all types of litigation, including wrongful death, personal injury, and wrongful termination, and has been consulting for over 20 years. In terms of his professional take on this matter, he never uses race in determining economic value. Dr. Sharp argued that race simply isn't relevant anymore, instead, they use socioeconomic status and education, which are better

indicators of worklife and income expectancy. Interestingly, he does use gender. He discussed a few reasons why he feels gender is used but not race:

> I have a vague theory. Well one of them is just practical. We use statistics out there on things like worklife expectancy. Worklife expectancy is not broken down by race. But it is broken down by gender and education. If you've got sex, you've got the education, and that's considered to be the relevant factors that go into worklife expectancy. How long you would have worked, had this bad thing not happened? Also, we use these statistics on personal consumption. If it's a death case, we have to take out the personal consumption deduction, and that doesn't differ by race, but it does differ by gender. The last one I could think of that is by gender but not race is, sometimes you value an injured or decedent's household production- what they would have produced had they lived. Those stats are not broken down by race, but they are broken down by gender. Women do a lot, but men are basically just lazy slobs, as best I can tell. (D. Sharp, personal communication, March 31, 2023).

Dr. Sharp then argued that taking out gender may disadvantage women in certain respects as mentioned above, like life expectancy and household production. For that reason, economists often leave it in, even if that means a lower worklife expectancy. He echoed Mr. Smith's worry that in the case of a white female plaintiff, it would be unfair to her to take a life expectancy national average that would include men and drive down the age.

Dr. Sharp could not speak about why some economists still used race other than an age factor. He thought that perhaps they had just been doing it one way for so long they didn't want to do it any other way. This rings especially true in comparison to Dr. Carter, who still uses race and has been practicing for decades. Dr. Sharp was unfamiliar with *Rebelwood v. English* but had a similar opinion to both Mr. Smith and Dr. Carter that Dr. Glover was out of line with her comments regarding race and stated that he would never comment on that while giving testimony. He argued that this sort of comment would be outside of the bounds of his expertise and disagreed with the assertion that a "black person in Mississippi has no value." Dr. Sharp was familiar with *McMillan*

v. City of N.Y. but stated that since he has not used race in decades, it didn't change much for him or his colleagues.

Summary

New York case law has been set for the past 15 years: Race cannot be used to assess damages. Judge Weinstein took it a step further in 2015 and clarified that ethnicity could not be used either and if the matter of sex were to ever come to his court, he would strike it down as well. In discussions with experts, the economist agreed that using race is irrelevant now, and other metrics are much better indicators of future income. However, sex is still being used widely, even by economists who have accepted that using race is discriminatory. In speaking with the two experts, they seemed more favorable to the idea of taking race out of consideration, but still expressed faith in the statistics that backed up these projections.

CHAPTER VI: DISCUSSION

Mississippi and New York confront the issue of race and sex-based statistics in alarmingly different ways. Mississippi courts seem to encourage the "reflection of reality" view of this issue, while New York seems to recognize that the reality is often injected with racism and sexism. New York explicitly bans the use of race and ethnicity-based statistics, and hints at banning sex and sexual orientation-based statistics if the issue were to ever come before the court. In contrast, Mississippi courts reprimand an economist for "playing the race card," and have no comment on reducing a female plaintiff's damages on the basis of her sex. A stark difference also appeared in the economist and attorney's view of this issue. The Mississippi economist Dr. Carter argued in favor of using race and sex, while the New York economist stated that he hadn't used race in decades and didn't know any colleagues who did. Mississippi attorney Mr. Smith stated that every economic report he had ever encountered factored in race and sex.

Many ideological issues are also discussed in this paper regarding this practice. Judge Weinstein points out one key issue with race and ethnicity-based statistics; "[A] person is not more likely to be denied a mortgage because he or she is black (or Hispanic or Chinese), but because another person believes that he or she is black (or Hispanic or Chinese) and ascribes particular behaviors with that racial or ethnic category" (*G.M.M. ex rel. Hernandez-Adams v. Kimpson, 2015)*. If a plaintiff is genotypically black, but phenotypically white, should they be bound by statistics of black individuals? Is it skin color itself that leads to lower educational achievement, or rather the way the world treats an individual that would lower the availability of educational achievement?

Another key issue is the practical implications of lower damage awards for minority plaintiffs. Disadvantaged groups may be the most likely to encounter certain societal harms (such as lead poisoning or wrongful termination) yet are the cheapest to pay out to. This, in turn, creates a nightmarish situation in which it is less expensive for a defendant to injure poor minority children. Sometimes this valuation separates groups by hundreds of thousands of dollars. Take for example Sumone May, the female child injured in the *Greyhound v. Sutton* case, where her damages were estimated as follows:

Child	Age	Sex	Valuation
Marcus	8	Male	$613,436
Nicholas	1	Male	$589,697
Sumone	3	Female	$334,074

Figure 5: Age, sex, and valuation difference in Greyhound v. Sutton

The difference in Sumone's damages compared to Marcus and Nicholas's are $279,362 and $255,623 respectively. Her economic valuation is a little more than half that of her brothers, largely based on her gender.

Another key ideological issue with this practice is its reliance on past data. As the Mississippi Supreme Court points out, today's society is much more upwardly mobile than in the past, with children frequently outperforming their parents. Racial and gender-based differences in life expectancy and worklife grow smaller and smaller by the year. Sumone's mother may have left the workforce after having children, but by the time she reached child-bearing age (this is even assuming she wanted to have children, which

seems to be an automatic assumption by the courts due to her gender) in 2014, many women were delaying having children and returning to the workforce quicker than ever.

The primary issue that all these other factors boil down to is the unreliability of projecting future income on the income of a class as large as an entire race. Projecting future income to any degree of certainty is nearly impossible, but diminishing this valuation on the basis of a class is dubious at best. In addition, the reliance on these statistics is arguably unconstitutional due to violations of equal protection and due process, as Judge Weinstein and Martha Chamallas argue. By allowing such statistics, the court is implicitly allowing individuals to be judged on the basis of these suspect categories that would normally trigger strict scrutiny.

While this issue has only nominally been mentioned by the Mississippi Supreme Court, New York's Federal District Court has approached it head on several times. Future research may be needed to figure out why this practice has never been challenged at the federal level in Mississippi. As the correspondence with experts in Mississippi suggests, the use of this practice is pervasive, and shows little sign of being stopped anytime soon. A challenge may be needed at the federal level to truly stop race and sex-based statistics. Mississippi, through *Rebelwood v. English* decided that it will reflect reality regardless of how discriminatory that reality is. Their discussion of the "value" of a person, as mentioned earlier, highlights a fundamental misunderstanding of what impact this practice will have on minority plaintiffs. While they correctly point out that it is not their job to determine the value of a person, it is their job to take a critical look at how this practice plays out in the real world. And of course, it *is* their job to review the constitutionality of this practice.

It is also interesting that while race-based statistics have been dismissed as discriminatory by some economists and attorneys, gender is still used. This double standard may be due (as Dr. Sharp pointed out) to the advantages that using gender has on life expectancy. However, this advantage in life expectancy does not make up for the disadvantage of a shorter worklife. As shown in the case of Sumone, her economic damages for worklife were nearly half of her brothers' (although her total amount was the same for some reason). Further research is necessary as to why this phenomenon takes place. All the experts that consulted on this project were well aware of statistical discrepancies between groups, but all seemed to accept those numbers as fact. Several of the experts made comments along the lines of "those statistics exist for a reason; they must be based on fact." Further research may benefit from looking into what preconceived notions experts have, and if those beliefs could be challenged when presented with the possible unreliability of these statistics.

CHAPTER VII: CONCLUSION

This research investigated potential differences in states' treatment of race and sex-based statistics in tort litigation and came to several alarming conclusions. Race-based statistics are particularly concerning due to their unreliability as a metric, and race and ethnicity are largely social constructions and are often poor indicators of future outcomes. Mississippi still uses race in many (if not all) projections, while New York has explicitly banned using race. Sex-based statistics, while somewhat more reliable, are still employed in a discriminatory manner seemingly across the board. Even though New York courts have hinted at their disapproval of using sex, economists still report that they use sex in economic valuation. The variance present even in this analysis of only two states is concerning and may hint at discrepancies across the United States in how this practice is applied.

Further research may be necessary to determine why there is a disconnect across states in the legality of this practice. Several arguments were presented that show the unconstitutionality of this practice due to its violation of the equal protection act and due process clause. However, there still seems to be a popular sentiment amongst attorneys and economists alike that reflecting "reality," should be of the utmost importance- even if that reality is laced with discrimination. The court must ask itself if it wants to rely on (often outdated) assumptions of how an entire gender or entire racial group works and lives to value a plaintiff's lost income. The court does not have a crystal ball to see how a decedent would have lived the rest of their lives, but reliance on race and sex-based statistics only serves to disadvantage minority groups who have long been victims of assumptions about their class. Should those assumptions follow them to the grave?

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