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Torts, Race, and the Value of Injury, 1900-1949

JENNIFER B. WRIGGINS©*

"[T]he problem of the Twentieth Century is the problem of the color-line."¹

Tort law [is] public law in disguise.²

INTRODUCTION³

Tort law is one of the central, and most familiar, aspects of U.S. law. Every law student, by the end of his or her first year, has a basic picture of the subject of torts. In addition to being a significant mechanism for compensating and deterring injury,⁴ it has significant normative and narrative dimensions.⁵ Tort law values and recognizes injury in ways that create deterrence incentives for potential defendants and send broad messages about what society deems important. However,

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1. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 5 (Everyman's Library 1993) (1903).

2. Leon Green, *Tort Law Public Law in Disguise*, 38 *TEX. L. REV.* 1 (1959).

3. Acknowledgments: I am grateful to David Goldman, Zachary Brandmeir, and Joshua Scott for outstanding research assistance. Thanks to David Achtenberg, Martha Chamallas, George Chauncey, William Corbett, Zanita Fenton, Rachel D. Godsil, James Hackney, Duncan Kennedy, Lois Lupica, and Deborah Tuerkheimer for reviewing drafts. Thanks to Dean Colleen Khoury, Dean Peter Pitegoff, and the University of Maine School of Law for funding this project, and to the University of Maine School of Law Faculty for allowing me to present an early draft at a faculty workshop. The Boston University School of Law Faculty and the Northeastern University School of Law Faculty provided very useful comments at faculty workshop presentations. I also have benefited from discussions with Mary L. Bonauto, Keith N. Hylton, Randall Kennedy, Katharine Silbaugh, Barbara Welke, and John Fabian Witt. Many thanks to the librarians at the Donald Garbrecht Law Library at the University of Maine School of Law, particularly Christine Hepler, Sherry McCall, and Greg Stowe. Thanks to the editors of the *HOWARD LAW JOURNAL*, particularly Brandi Johnson and Autumn Montague.

4. DAN T. DOBBS, *THE LAW OF TORTS* 12 (2000) (noting that "[t]he most commonly mentioned aims of tort law are (1) compensation of injured persons and (2) deterrence of undesirable behavior").

5. See Ellen S. Pryor, *The Stories We Tell: Intentional Harm and the Quest for Insurance Funding*, 75 *TEX. L. REV.* 1721, 1748 (1997).

we have an incomplete and impoverished understanding of the torts system because we have ignored the ways that it has been structured by systems of racial inequality and has reinforced those systems. This Article begins to broaden our understanding of the torts system by focusing on ways in which it measured harm to plaintiffs depending on their race during the first half of the twentieth century.

Readers often approach the topic of race⁶ and torts in the first half of the twentieth century with one of two unexamined assumptions. The first is an ahistorical assumption that the torts system has treated everyone equally, and therefore race has been irrelevant in the torts system in the United States. The second assumption is that the United States' legal system, given the virulent racism of the era, must have denied to all black people all tort compensation for their injuries. This Article demonstrates how both assumptions are incorrect. Despite the barriers imposed by racist exclusionary structures and violence during this period, many black people sued for and received compensation for tort injuries, winning verdicts and appellate decisions in all regions.⁷ However, the fact that black plaintiffs participated in the torts system as plaintiffs does not mean that they were

6. This Article considers cases involving those perceived to be African American and Caucasian. Cases involving other racial or ethnic groups have not been researched for this Article. The term "black" refers to African American people and others identified in cases as "Negro" or "colored." Occasionally the term "African American" is used in such contexts. The term "white" refers to Caucasian people and those perceived or identified as white. This Article's focus on issues involving blacks and whites is not to suggest that such issues comprise the entire subject of race and torts. See generally, Leslie Espinoza, Angela P. Harris, *Afterward: Embracing the Tar-Baby: LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585 (1997). This Article does not discuss the interesting and important issues of racial identification, social construction, and performance that scholarship has begun to address. See, e.g., Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L. J. 109 (1998); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Cheryl J. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); Daniel J. Sharfstein, *The Secret History of Race in the United States*, 112 YALE L. J. 1473 (2003).

7. See *infra* Parts I-III; BARBARA YOUNG WELKE, *RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, & THE RAILROAD REVOLUTION, 1865-1920* (2001). Indeed, favorable jury verdicts, trial decisions, and appellate tort rulings for black plaintiffs were obtained even during the late nineteenth century. See, e.g., *The General Rucker*, 35 F. 152 (W.D. Tenn. 1888). The court referred to "simple-minded Negroes," and described the plaintiff as a "negro man of inferior intelligence," where the black plaintiff was awarded \$100 in an admiralty case for battery by first mate. *Id.* at 154, 159; *Gasway v. Atlanta & W. Point R.R.*, 1877 WL 2979 (Ga. Jan. Term 1877) (reversing award of \$10 for a black man's tort suit against railway for conductor and claims agent's threatening and insulting conduct towards him and ordering remand for new trial because jury instructions were improperly favorable to the defendant); *Louisville, Nashville & Great S. R.R. v. Fleming*, 1884 WL 3325 (Tenn. Dec. Term 1884) (ordering new trial because jury instructions were too unfavorable to the railroad against eighty-three year old black man ejected from a train for allegedly not having a ticket readily available).

treated equally with whites. Examining inequality in the law, both then and now, requires more than knowing whether clear exclusions operated to blatantly fence out groups of people.⁸ As scholars have shown more recently in other contexts, decentralized, informal practices engaged in by individual actors within the legal system, for example, have resulted in a discriminatory structure and discriminatory outcomes when aggregated.⁹ Indeed, race has mattered in torts in ways that have resulted in categorization of harm to black plaintiffs as in some instances necessarily less than to whites. Moreover, individualized, decentralized practices have resulted in lower aggregate compensation to blacks than to whites. This Article claims that a range of evidence compels the conclusion that African Americans' tort claims generally were devalued relative to whites' tort claims during the first half of the twentieth century.

The intersections of race and tort law are particularly provocative because they reflect an ongoing tension in tort law, and they implicate broad questions of equal treatment. This tension is between the notion that liability and damages should be determined on an individual basis, and the notion that similar injuries should be treated similarly. On the one hand, a broad basic principle of the rule of law for hundreds of years has been that everyone in the same situation should be treated the same way.¹⁰ According to basic ideas of formal equality,

8. See JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* (1997); IAN AYRES, *PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559 (1989).

9. See AYRES, *supra* note 8, at 20-25. Subtle but powerful cognitive patterns may result in unequal treatment. See Chamallas, *supra* note 8.

10. The idea that "like cases should be treated alike" dates back to Aristotle. ARISTOTLE, *THE NICHOMACHEAN ETHICS* 112-116 (J. L. Ackrill & J. O. Urmson eds., David Ross trans., rev. ed. 1980). This idea is often seen as a foundational principle of the U.S. legal system. See, e.g., HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 147 (William N. Eskridge & Philip P. Frickey eds., 1994) (describing the idea that "like cases should be treated alike" as an "underlying and pervasive principle of law"). Articulating the broad principle only begins the analysis of determining what are the relevant similarities and differences between cases and situations, because as Peter Westen explains in *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 n.72 (1982), the idea does not provide guidance about what factors are relevant and what are not; see also Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 4-5 (1974) (noting that the idea is incomplete without criteria of likeness and difference). The determinations by courts and legislatures of what constitute relevant similarities and differences often are what is most contested.

Some theorists have argued that the principle of treating like cases alike, also referred to as formal equality, is inadequate, arguing, for example, that sameness should not be a prerequisite

similar injuries should produce similar compensation.¹¹ A similar injury to a black person and a white person should result in similar liability determinations and similar damages. Also, in theory, to determine whether a particular result in a particular situation was equitable, one would look at similar situations and see if the result was the same. If the result was not the same, it was in some way unfair.¹²

On the other hand, the individualized assessment of liability and damages has been and continues to be an important value in the torts system.¹³ The decision-makers often are juries, who have tremendous discretion in deciding liability and assessing damages. Different juries and judges can make conflicting determinations of liability and damages on virtually identical facts. As a result, the notion of rigorously comparing litigation outcomes to determine if parties have been

for fair and equal treatment, *see, e.g.*, CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 45-54 (2005); MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 51-78 (1990), and that formal equality masks structures that perpetuate inequality, *see, e.g.*, Crenshaw, *supra* note 8. Some have attacked the idea as incoherent and tautological, *see, e.g.*, Westen, *supra*, while others have argued that the idea has useful aspects, *see e.g.*, Kent Greenwalt, *How Empty is the Idea of Equality*, 83 COLUM. L. REV. 1167 (1983). This Article takes the position that the principle of treating like cases alike is one tool that can be used to analyze race and valuation of U.S. tort cases in the first half of the twentieth century. This tool can be used for this purpose, without accepting the notion that determining what cases are "like" others is simple or unproblematic. As will be seen, courts' decisions during this period about what cases are "like" others provide great insight into the workings of race, racism, and the civil justice system. *See infra* Part II. For example, the most glaring violation of this idea is the law of slavery, according to which some human beings were treated as less than human. *See e.g.*, THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW 1616 - 1860* (1996); JENNY BOURNE WAHL, *THE BONDSMAN'S BURDEN: AN ECONOMIC ANALYSIS OF THE COMMON LAW OF SOUTHERN SLAVERY* (1998).

11. *See supra* note 10.

12. This methodology is limited because it does not reveal how "similar" different situations must be in order to be comparable. It presumes clarity and consensus about what is to be compared, when in fact that is often what is most contested. *Id.*

13. *See, e.g.*, Robert L. Rabin, *The Quest for Fairness in Compensating Victims of September 11*, 49 CLEV. ST. L. REV. 573, 578 (2001). Examples of the primacy of individual assessment of liability and damages are many. For example, the thin skull rule allows decision-makers broad discretion in determining liability. DOBBS, *supra* note 4 at 464-465 (describing the "thin skull" rule that a negligent defendant is liable for all personal injuries the defendant causes the plaintiff to suffer, even if those injuries are greater than a normal or average person would suffer.). Juries have tremendous, although not unlimited discretion, in determining damages. *See VINCENT R. JOHNSON & ALLAN GUNN, STUDIES IN AMERICAN TORT LAW* 176-177 (2d ed. 1999) (discussing additur & remittitur). Tort law, with its individualized assessment of liability and damages, provides a striking contrast with certain aspects of workers' compensation systems, DOBBS, *supra* note 4, at 1099-1100 (stating that under workers' compensation systems, whether a person is injured is determined on an individual basis but the compensation amount is standardized), and with the September 11 Victims Compensation Fund, *see, e.g.*, Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 75-79 (2003) (discussing the standardized presumed award of \$250,000 for non-economic damages for family members of September 11 victims).

treated fairly is foreign to torts, since each injury is conceptualized as different and each person is different.

Individualized assessment of damages in torts, however, has been and is a double-edged sword for African American plaintiffs in tort litigation. On the one hand, the individualized focus has forced courts and juries to look closely at the facts of each individual plaintiff's injury and reach verdicts with reference to that injury. Tort juries and judges have quantified the unquantifiable, assigning damage amounts to such concepts as pain and suffering and loss of life through consideration of cases one by one. The individualized focus is probably one reason African American plaintiffs attained as much success as they did as torts litigants.¹⁴ On the other hand, the individualized focus allows tremendous inconsistency and makes unequal treatment hard to detect.¹⁵ Rarely do courts systematically compare results in past cases.¹⁶ Torts judges and juries prefer instead to treat each case as unique, using past cases only for very general guidance. Moreover, in a society divided by racial caste, questions arise about what constitutes a "similar" injury to a black or white person.¹⁷ Patterns are and have always been difficult to discern in the multi-tiered and decentralized system of tort litigation.¹⁸ This Article uses a combination of methods to consider ways in which the awards in torts cases were influenced by race: reviewing materials on race and settlement; focusing on one high-profile New York case; and analyzing all wrongful death appellate cases from one jurisdiction, Louisiana, from 1900 to 1949. Compelling and complex patterns have emerged from this exploration.

The discussion of these patterns begins in the early twentieth century because that time period marked a confluence of two striking trends. First, the number of tort cases increased dramatically in the late nineteenth and early twentieth century, in part because of the

14. See *infra* Part II.

15. *Id.*

16. *Id.*; Jennifer B. Wriggins, *The Recognition of Injury: Race, Gender, and Torts, 1900-1950* (June 28, 2005) (unpublished manuscript, on file with The Howard Law Journal).

17. See *infra* Part II; Wriggins, *supra* note 16.

18. See, e.g., Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1154-55, 1190 (1992) (explaining how aspects of the tort system, such as a decentralized adjudication system and decentralized recordkeeping, make it hard to study). It is impossible to keep track of cases that are settled before litigation is even filed. It is also hard to keep track of cases that settle, see Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1099-1105 (1996), and to study the deterrence impact of litigation, see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does the Tort System Really Deter?*, 42 UCLA L. REV. 377 (1994).

many injuries and deaths connected with industrialization.¹⁹ Torts had only begun to be conceptualized as a distinct branch of the law late in the nineteenth century, and theorists were engaged in analyzing it.²⁰

Second, a burgeoning growth of segregation, violence, discriminatory laws, and racism also marked that time period.²¹ A racial caste system excluded blacks from equal participation in the legal system, and its underlying assumptions required social segregation of blacks and whites, at times in combination with gender.²²

The simultaneous resurgence of racism with the growth of tort law leads to questions about the relationship between tort law, race,

19. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 1-15, 25-26, 59 (2004) [hereinafter WITT, *ACCIDENTAL REPUBLIC*]; Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295 (1990); see also Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351 (1987). Personal injury litigation did not become a major field of law, nor were there many tort cases, until the nineteenth century in the United States. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 300 (2d. ed. 1985) [hereinafter FRIEDMAN, *HISTORY*]; John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717, 722 (2002) [hereinafter Witt, *Origins of Modern Tort*].

20. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 3 (expanded ed. 2003); see also Oliver Wendell Holmes' influential article, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

21. See, e.g., C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 98 (1966) (noting growth of discriminatory and segregation laws during the first two decades of the twentieth century). More broadly, violence against blacks by whites in the South was pervasive during the Jim Crow period. WELKE, *supra* note 7, at 364. Lynching was at its height between 1900 and the New Deal, and blacks had no political power. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 117 (2002).

22. FRIEDMAN, *supra* note 21, at 111-147, 280-348, 280 (describing the racial caste system and asserting that the "American system of apartheid was firmly in place in the first half of the century"); see generally, JOHN DOLLARD, *CASTE AND CLASS IN A SOUTHERN TOWN* (1957) (describing social caste system requiring separation of white women from black men while allowing white men's access to black women as well as white women). Juries were likely to have been all white and all male from at least 1900 to at least the 1950s. See Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 75-93 (1990) (describing exclusion of blacks from juries in south and north by exclusionary practices that continued at least until the mid 1960s). Although the Supreme Court in 1879 held that a statute which on its face barred everyone but white males from serving on juries was unconstitutional in *Strauder v. West Virginia*, 100 U.S. 303 (1879), exclusion of blacks from juries continued, see Gilbert Thomas Stevenson, *Race Distinctions in American Law*, 43 AMER. L. REV. 869, 884, 888-900 (1909) (describing results of survey sent to Southern county clerks that reveal very few blacks served on juries).

Similarly, the vast majority of attorneys were white and male in the South during the first half of the twentieth century: "It is generally known that the Negro lawyers in the Southern States are few, and it is considered that the field there for the Negro lawyer is not promising." *Id.* at 872. By 1940, there were 1,052 black lawyers and judges in the United States, and of these thirty-nine were women. J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, app. 2, tbl. 13 (1993).

racism, and equality that have not been considered before.²³ What kinds of cases did black tort plaintiffs win, if any, in the first half of the twentieth century? When blacks and whites prevailed in tort cases, were the awards similar for similar injuries, or were awards to blacks less? Did the torts system recognize different kinds of harm to black and to white plaintiffs? How was the intersection of race and torts affected by gender?²⁴ Because appellate courts in the first half of the twentieth century often identified the race of the plaintiff as “negro” or “colored,” we can begin to formulate answers to these questions.²⁵

This Article primarily focuses on situations where harm to both blacks and whites was recognized as tortious, such as physical injuries caused by a railroad company’s negligence; and also focuses on how the torts system measured harm to blacks and whites.²⁶ Underlying

23. Previous discussions of tort law and history generally have not discussed the racial dimensions of tort law. See, e.g., *TORT LAW IN AMERICAN HISTORY: MAJOR HISTORICAL INTERPRETATIONS* (Kermit L. Hall ed., 1987); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); WHITE, *supra* note 20; WITT, *ACCIDENTAL REPUBLIC*, *supra* note 19. A notable exception is WELKE, *supra* note 7. Previous publications about race and law generally have not focused on tort law, however, work that has focused on race and torts includes: Chamallas, *Architecture*, *supra* note 8; Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 *LOY. L.A. L. REV.* 1435 (2005); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 75 (1994) [hereinafter Chamallas, *Questioning*]; Okianer Christian Dark, *Racial Insults: “Keep Thy Tongue From Evil,”* 24 *SUFFOLK L. REV.* 559 (1990); Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *HARV. C.R.-C.L. L. REV.* 133, 150 (1982); Rachel D. Godsil, *Race Nuisance: The Rule of Law in the Jim Crow Era* (unpublished manuscript, on file with The Howard Law Journal); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 *U. CIN. L. REV.* 269 (1994); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 *RUTGERS L. REV.* 761, 780 (1996); Jennifer B. Wriggins, *Toward a Feminist Revision of Torts*, 13 *AM. U. J. OF GENDER SOC. POL’Y & L.* 139 (2005) [hereinafter Wriggins, *Toward*]; Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 *B.U. L. REV.* 1025 (1997).

24. Complete consideration of issues involving race and gender is beyond the scope of this Article. See *infra* Part II. See WELKE, *supra* note 7, and Wriggins, *Toward*, *supra* note 23, for related discussion.

25. WELKE, *supra* note 7 (discussing hundreds of cases from the early twentieth century which identify the race of black plaintiffs).

26. Related questions involve whether the tort system imposed different standards of liability according to race. For example, did the courts through explicit doctrinal rules make it harder for blacks or whites to win tort cases? The preliminary answer is largely no; I believe many structural factors, such as the all-white legal system, probably made it more difficult for black plaintiffs to win on liability, but clear doctrinal rules were not discernable.

Courts sometimes rejected race-based generalizations that white litigants argued should apply to help them win their cases. For example, in *Patterson v. Risher*, 221 S.W. 468 (Ark. 1920), a young white man was killed in a mine when a mule that was pulling the cart he was riding in got free and the cart smashed into a door. The deceased man’s father argued that the mine superintendent had created an unsafe workplace and that the mule driver, a black co-defendant, was “ignorant and reckless.” *Id.* at 469. Rejecting the claim, the court wrote that “in the absence of

this inquiry is a broad focus on the relationship between torts, including tort compensation, and racial equality.²⁷

A threshold question at the intersection of race and torts is why and how black tort plaintiffs were able to achieve any access and success in the civil justice arena, given the racism of the society and the legal system.²⁸ One part of the answer must lie in the private enforcement mechanism of torts, namely, contingency fee agreements. These agreements, which came into widespread usage in the late nineteenth century,²⁹ are a widely used method of financing litigation in which the attorney advances the costs of the litigation and takes her fee and

proof tending to show that it was negligence per se to employ a negro driver . . . it cannot be said that there was any testimony in the record to warrant a finding that the appellee company was negligent in employing the negro, Hubbard, as driver." *Id.* at 471. In *Taylor v. Atlantic Coast Line Rail Co.*, 59 S.E. 641 (S.C. 1907), the plaintiff, a white woman, argued that the railroad had a duty to escort her from the train station to a nearby boarding house through a crowd of unruly black men who were on the platform when she got off the train in the middle of the night, because the railroad should have reasonably anticipated danger to her by the mere presence of the crowd of black men. *Id.* at 642. The procedural status makes it hard to glean the exact scope of the duty ruling, but the court seemed to reject such a rule. *Id.* at 643-44. See also *infra* note 53 (discussing whether courts imposed different standards of liability in Louisiana based on race of the plaintiff and reaching a largely negative conclusion). Further research may prompt revisions to this conclusion.

27. There are several reasons for the primary focus ending at mid-century. Not only do published judicial opinions after 1950 generally lack the derogatory racial generalizations that appear in some earlier opinions, but after 1950, courts identify the race of the plaintiff less frequently than earlier. See *infra* Part II.

28. The fact that some cases were brought and won by African American plaintiffs should not lead one to forget the equally, and possibly more, significant cases that probably were not brought. Part of the story about race and torts in the twentieth century is how the torts system has not provided remedies for much racially-influenced or motivated tortious (and criminal) harm such as lynching, an act very rarely prosecuted criminally. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 47-49 (1997). Kennedy defines lynching as "a killing done by several people acting in concert outside the legal process to punish a person perceived to have violated a law or custom." *Id.* at 42. Civil lawsuits seeking compensation for lynching also seem to have been very rare. JAMES HARMON CHADBOURN, *LYNCHING AND THE LAW* 78-80, 119 (1933) (discussing the indictment system and citing newspaper articles that discussed a total of eight civil cases, including one against a railroad for furnishing a special train to a lynch mob, for which the deceased's widow received \$7,000). Although 72.7% of reported lynchings in the United States between 1882 and 1968 were of black victims, the remaining lynching victims were white. KENNEDY, *supra* at 42. Other than *Williams v. Great Southern Lumber*, 277 U.S. 19 (1928), which involved a lynching of a white man, there did not seem to be reported appellate cases seeking compensation for lynching of black people. Doubtless, countless acts by whites towards African Americans, such as assaults and batteries that would otherwise be tortious, were not prosecuted, for a variety of reasons. The under-enforcement in this context must have been particularly extreme for many reasons linked to the racist caste system in which potential black plaintiffs lived.

29. FRIEDMAN, *HISTORY*, *supra* note 19, at 482; see also WITT, *ACCIDENTAL REPUBLIC*, *supra* note 19, at 59-63 (noting that in urban areas after 1860 there were many lawyers, and the use of contingent fee agreements in personal injury cases was widespread).

expenses out of the proceeds.³⁰ For the tort system to work as an effective deterrent, of course, it is essential that lawsuits are brought.³¹ Lawyers who work on a contingency basis have incentives to select and aggressively pursue cases for which their clients are likely to win on liability and recover significant damages, whatever the race of the injured person. Many black clients, such as in the cases discussed in this Article, could not have paid a lawyers' hourly fee or advanced litigation expenses, but were able to bring tort suits. The fact that these suits were brought at all is in part a story of the success of contingency fee agreements.

African Americans may have been successful torts litigants because lawyers selected only the strongest cases to bring, taking into account factors such as liability, the nature of the defendant, and damages. Many of the defendants were railroad companies, which may have enabled lawyers to tap into widespread local anger at railroads for their unchecked power and the number of injuries they inflicted.³² Individual claims brought by injured black people against large defendants may not have fundamentally challenged the racial caste system. However, some personal injury cases won by black plaintiffs were summarized by the National Association for the Advancement of Colored People in its magazine, *The Crisis*, suggesting that they were important statements of self-determination to many blacks at the time.³³

This discussion has laid the groundwork for further exploration of how the tort system valued harm to whites and blacks differently in

30. For more recent discussion of contingency fee agreements, see Symposium, *Contingency Fee Financing of Litigation in America*, 47 DEPAUL L. REV. 227 (1998).

31. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 191 (4th ed. 1992).

32. See WELKE, *supra* note 7, at 99-100 (describing widespread anger at railroads in the early twentieth century and at the height of Jim Crow).

33. See, e.g., NAACP, *THE CRISIS, Courts*, May 1914, at 11 (reporting on five personal injury awards won by black plaintiffs); *Id.*, *Courts*, Aug. 1913, at 168 (reporting on \$5,000 New York jury verdict for widow of black man against a man for causing the murder of her husband); *Id.*, *Courts*, June 1913, at 68-69 (reporting on \$300 award in a Mississippi court to "Pope Swint, a Negro, for discomfort on an excursion train," and a \$20,000 jury verdict in Oregon to "John Mathews, a Negro, for personal injuries caused by the Oregon Independent Paving Company"); *Id.*, *Courts*, Feb. 1912, at 145 (reporting on New York court award of \$10,000 to William Chinn against Ferro Construction Company for workplace injuries); *Id.*, *Courts*, Jan. 1912, at 100 (reporting on \$5,000 award to a "colored man" for injury to eyesight in North Carolina); *Id.*, *Courts*, Jan. 1914, at 116 (reporting on a verdict of a former Pullman porter who received a verdict of \$1,250 for personal injuries, and contrasting it with a large damage award affirmed by the Supreme Court of Mississippi to a white woman for having been "compelled to remain in a coach in which there were three colored bishops"); *Id.*, *Courts*, Jan. 1911 (reporting on verdict in false imprisonment case by black Pullman Porter George Griffin against Jim Brady) (discussed *infra* Part III).

the first half of the twentieth century. Since most cases settle before trial, which has been true at least since the early twentieth century, information about how claims were valued in pretrial settlement is important.³⁴ Part I reviews evidence that claims adjusters, for claims against railroad companies, considered injuries suffered by black plaintiffs to be worth less than injuries suffered by white plaintiffs, and thus paid less to settle black plaintiffs' claims. Part II analyzes damages in wrongful death and survival cases decided by appellate courts in Louisiana from 1900 to 1949, by comparing cases brought by families of blacks who were tortiously killed, to cases brought by families of whites tortiously killed. This section also discusses family and gender issues arising from the structure and application of the relevant laws. Part III discusses a 1909 New York tort case, controversial at the time, where the trial judge explicitly endorsed devaluation of blacks' tort claims.³⁵ Part IV suggests that past patterns have not disappeared by briefly reviewing more recent contemporary evidence of devaluation linked with race in torts.

PART I. RACE AND SETTLEMENT OF RAILWAY INJURY CLAIMS

Railroad injuries in the mid and late nineteenth century spurred the development of tort doctrine and tort practice.³⁶ Thousands of lawsuits were brought against railroad companies in the late nineteenth and early twentieth century for a wide range of injuries, both mental and physical.³⁷ In response, railroad companies organized departments of "claims agents" to attempt to settle claims before trial.³⁸ Most claims never made it to trial or resulted in appellate opinions, but were often settled through claims agents.³⁹

34. WELKE, *supra* note 7, at 112 (noting that by the beginning of the twentieth century, streetcar and railroad companies settled the large majority of claims against them before suit was even filed). For anecdotal discussion of recent race and settlement behavior see McClellan, *supra* note 23.

35. On the importance of trials in understanding law and culture, see Ariela J. Gross, *Essay, Beyond Black and White: Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 650-661 (2001). On the importance of trials in establishing settlement benchmarks, see Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 U.C.L.A. L. REV. 1, 5 (1996). See generally, WELKE, *supra* note 7 at 379-389 (listing trial transcripts of cases brought against railroads by black plaintiffs).

36. See *supra* nn. 19 & 20.

37. See *supra* note 19; WELKE, *supra* note 7, at 82.

38. WELKE, *supra* note 7, at 106.

39. *Id.* at 112.

Racial disparities surfaced through the payment of claims. According to historian Barbara Welke, a 1905 article in the *Street Railway Journal* noted that the Philadelphia Rapid Transit Company kept elaborate files recording settlements by “nationality” and gender for use in valuing and settling future claims.⁴⁰ The nationalities were “American,” “Hebrew,” “Irish,” “Italian,” “Negro,” and “Other Foreigners.”⁴¹ In 1904, 4.7% of the cases settled by the company involved black claimants, but only 2.3% of the damages paid went to these claimants.⁴² This disparity is pronounced, although more research about race and claims paying practices would be necessary before definitive conclusions could be drawn.

An influential text for railroad claims agents published in 1927 endorsed racial inequality in claims practices. It noted:

The Constitution of the United States guarantees its citizens the equal protection of the law and provides that legally no difference shall be made between citizens on account of a difference in race or color But . . . some of these guarantees have come to be greatly modified in the actual life of the nation.⁴³

The manual went on to explain that juries did not value the life of a black man equally with that of a white man, and to state “[c]ertainly that is true in the South, where it is claimed that the true values in such matters are better understood than elsewhere.”⁴⁴ The manual discussed the importance of keeping precise statistical records, by race as well as occupation, in determining the values for which later cases should be settled, noting that “[a] brakeman is not always a brakeman. A white brakeman is a brakeman; but a negro brakeman is most likely only a negro.”⁴⁵ For whites, occupation was the dominant factor, while for blacks, race was the dominant factor, according to the manual.

For blacks’ claims to be devalued in the process of settlement, it did not even need to be true that juries valued black lives less than

40. *Id.* at 111.

41. *Id.*

42. *Id.*

43. WELKE, *supra* note 7, at 111 (citing SMITH R. BRITTINGHAM, *THE CLAIM AGENT AND HIS WORK: INVESTIGATION AND SETTLEMENT OF CLAIMS FOR PERSONAL INJURIES* 270-271 (New York 1927)).

44. *Id.*

45. *Id.* The manual went on to state, “the rude emigrant trackman is often viewed as sub-human. . . . Therefore, for statistical purposes these similar types should perhaps be kept in classes by themselves, although . . . to do so involves palpable and extremely serious difficulties.” *Id.*

white lives, as the manual stated they did. Rather, if claims agents, black plaintiffs, and their lawyers all believed this, then black plaintiffs would have settled for lower amounts, regardless of whether juries had been in fact evenhanded. In other words, the perception that juries valued blacks' claims less than whites' claims could have created a self-fulfilling prophecy so that blacks' claims in fact were valued less in the process of settlement. One can also infer that the devaluation process probably depressed the number of claims that injured black plaintiffs brought, since their claims would have been less profitable and thus less desirable for plaintiffs' lawyers to bring, than whites' claims for similar injuries.

Taken together, this evidence indicates that claims by injured black people were valued less, and settled for less, than claims by injured white people by at least some railroad companies. Informal, decentralized practices by private actors seem to have resulted in reduced compensation to black plaintiffs. In addition, railroads, streetcar companies, and other actors that followed their lead then had reduced incentives to prevent injuries to black people than to whites, knowing that they could more cheaply compensate blacks for their injuries.

PART II. RACE AND WRONGFUL DEATH & SURVIVAL CASES IN LOUISIANA, 1900-1949

A. Introduction

This section examines 152 Louisiana appellate wrongful death and survival cases published between 1900 and 1949, comparing damage awards to black and white surviving family members of people killed by torts.⁴⁶ In considering the broad topic of race and torts, fo-

46. For the discussion in this section, all reported Louisiana wrongful death and survival cases with Westlaw key numbers 117k95-99 from 1900-1949 were reviewed and included in a database. The key numbers covered the following areas under the general heading of "death actions:" measure and amount of damages awarded, in general (k95), statutory limits (k96), discretion of jury (k97), inadequate damages (k98), and excessive damages (k99). Jennifer B. Wiggins, Database (August 24, 2005) [hereinafter Database] (on file with author). Computer searches such as "Negro" and "tort," and "colored" and "tort," and similar searches were also done in the Louisiana cases database and when a case revealed that a decedent was black, that case was included in the database. *Id.* The analysis covered 152 cases. Twenty-six cases were brought by black family members; the remainder, presumably, were brought by white family members. *Id.* See *infra* note 48 for discussion of racial identity in these cases. Between 1900 and 1945, Louisiana had more reported wrongful death cases than many states, including Alabama, Arkansas, Kansas, Massachusetts, Mississippi, Ohio, Oklahoma, New York, Pennsylvania, Tennessee, and Virginia, and fewer than Texas and Missouri. Memorandum from David Goldman (August 10, 2004) (on file with author).

ocusing on damages in cases involving fatalities makes sense. All wrongful death and survival cases ultimately deal with the same injury, death, and so comparison of damage awards and cases facilitates analysis of how race may have affected those damage awards. The 'same injury' point should not be overstated. Different deaths have divergent effects on different families depending on factors such as the financial support provided by the deceased to the family, and the degree of emotional attachment between the deceased and the family. Nonetheless, the injuries are similar enough that careful analysis, which takes into account other factors besides race, is illuminating.⁴⁷

In addition to the fact that appellate courts generally mentioned the race of black tort plaintiffs,⁴⁸ these cases are particularly fertile for researching race and valuation because of two features specific to Louisiana tort law. First, appellate review in Louisiana included review of the facts, so that appellate courts discussed the amount of damages with more frequency and specificity than appellate courts in

47. In a broader sense, of course, quantifying a human life or the loss caused by the loss of a family member is inherently problematic. The ongoing debates about the damage awards of the September 11th Victim Compensation Fund reflect the difficulty. See, e.g., Chamallas, *supra* note 13; Rabin, *supra* note 13. Yet part of the job of tort juries and judges is to quantify the immeasurable, despite the problematic and contested nature of the entire enterprise.

48. Appellate cases in Louisiana, like cases in other states during this period, generally identified the race of black plaintiffs. See generally, WELKE, *supra* note 7, at 379-389 (discussing hundreds of reported civil decisions from the late nineteenth and early twentieth century which identify the race of black plaintiffs).

For the purposes of this Article, the race of a decedent's family members is considered the race of the decedent. Where no mention of, or details pertaining to, a party's race was made, it is presumed the party was white. Inferences that a decedent was white sometimes are based on historical context and details in the decision, such as that the "decedent was in the waiting room for white passengers" when a flying timber struck and killed him. *Taylor v. Vicksburg, Shreveport & Pac. R.R.*, 91 So. 732, 732 (La. 1922); see also *Hebert v. Baton Rouge Electric Co.*, 91 So. 406 (La. 1925) (describing three year old child and "its negro girl nurse" asphyxiated by gas leak; inference that child was white); *Eichorn v. New Orleans & C.R. Light & Power Co.* 38 So. 526, 529 (La. 1905) (describing children as attending "German pay school;" inference that decedent was white); *Donaldson v. Riddling's Succession*, 145 So. 804, 804, 805 (La. Ct. App. 2nd Cir. 1933) (discussing "negro chauffeur" of decedent and "negro boys" who reached the accident scene first; inference that decedent was white). For some cases, the inference that a decedent was white is based on the decedent's high-status occupation, see, e.g., *Gray v. Found. Co.*, 91 So. 527 (La. 1922) (describing decedent as land engineer, salesman and lubrication expert; inference that decedent was white); *Moore v. Jefferson Distilling and Denaturing Co.*, 123 So. 384 (La. Ct. App. 1929) (describing decedent vice president of Lucas E. Moore Stave Co.; inference that decedent was white). In *Williams v. Brown*, 181 So. 679 (La. Ct. App. 2d Cir. 1937), the decedent's race was not listed but it seems probable, from the circumstances including the racial caste system separating white women from black men, *DOLLARD, supra* note 22, that she probably was black. The twenty year old decedent, a farmhand and housekeeper, was killed when traveling home from her mother's funeral, and she was a passenger in a truck with a "cargo of negroes (eight or nine in all)," *id.* at 682, 683. These are not cases where litigants challenge the racial identification made by the courts. See *supra* note 6.

many other states.⁴⁹ Second, under Louisiana tort law, survivors of family members tortiously killed could seek damages for their own grief and emotional losses - an unusual feature in wrongful death statutes.⁵⁰ The ways appellate decisions measured and discussed damages for emotional loss and other types of harm provide insight into how race related to valuing injury in torts.

Questions may be raised about whether Louisiana courts' treatment of blacks' death claims was representative of other states' treatment. Louisiana was typical in that it excluded black people from participating in the legal system and voting, its black population was poor on average, it passed segregation laws, and it experienced a climate of anti-black violence during the early twentieth century and the Jim Crow era.⁵¹ It was unusual in various ways, however, because it had an unusually large black population, it included the survivor's emotional losses in wrongful death damages, and its legal system stemmed in part from French civil law.⁵² However, none of the ways

49. See William E. Crawford, *Life on a Federal Island in a Civilian Sea*, 15 Miss. C. L. REV. 1, 2 (1994) (explaining that Louisiana appellate courts have the authority to: reverse jury findings on the facts and render a contrary judgment; find a defendant negligent when a jury had exonerated her; and make its own finding of damages as long as there is record evidence to support it, because there is no constitutional right to a civil jury trial in Louisiana).

50. DOBBS, *supra* note 4, at 807 (traditional wrongful death statutes allow recovery only for "pecuniary loss" of survivors). See generally, WITT, ACCIDENTAL REPUBLIC, *supra* note 19; FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW 423, § 18-5 (1996) (explaining that each wrongful death beneficiary under Louisiana law is entitled to a damage award that includes loss of love, affection, services, support, society, and grief).

51. See Henry C. Dethloff & Robert R. Jones, *Race Relations in Louisiana, 1877-98*, in XI THE AFRICAN-AMERICAN EXPERIENCE IN LOUISIANA, PART B: FROM THE CIVIL WAR TO JIM CROW 501, 501-17 (The Louisiana Purchase Bicentennial Series in Louisiana History, Charles Vincent ed., The Center for Louisiana Studies 2000) (1968) [hereinafter Dethloff & Jones, EXPERIENCE] (recounting rise of segregation laws, exclusions of blacks from voting and jury service, and increased lynching and other violence in the late nineteenth century and early twentieth century in Louisiana). By 1900, for example, "[t]he vast majority of black voters was stricken from the rolls." Mark T. Carleton, "Judicious" *State Administration, 1901 - 1920* 119, in XI THE AFRICAN-AMERICAN EXPERIENCE IN LOUISIANA, PART C: FROM JIM CROW TO CIVIL RIGHTS 119 (The Louisiana Purchase Bicentennial Series in Louisiana History, Charles Vincent ed., The Center for Louisiana Studies 2002) (1971). Stevenson's early twentieth century survey to court clerks of counties with blacks being more than half the population showed that few black jurors served in Louisiana. *Supra* note 22. One Louisiana respondent made the comment that "the very best of our Negroes [serve on juries] . . . very good service, rather prone to convict in serious personal injury cases." *Id.* at 889.

52. Louisiana was one of the states with the highest proportion of black residents during this period; in 1900 the state was 47.1% black; in 1950 it was 32% black. Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For The United States, Regions, Divisions, and States*, Working Paper Series, No. 56, 2002, available at <http://www.census.gov/population/www/documentation/twps0056.html>. Louisiana is a civil code state, its law having derived initially from French law rather than the common law. FRIEDMAN, HISTORY, *supra* note 19, at 171-173; see also MARAIST & GALLIGAN, *supra* note 50.

in which it was unusual suggest that its treatment of tort claims by black people was radically different from other states' treatment of blacks' tort claims.⁵³

B. Wrongful Death Actions and Survival Actions under Louisiana Law

Louisiana's wrongful death and survival provisions frame our discussion.⁵⁴ Wrongful death actions and survival actions are conceptually and legally distinct. Wrongful death actions are traditionally based on a model of lost financial support and are aimed at compensating family members only for the financial loss caused by a loved one's death.⁵⁵ As noted above, Louisiana's wrongful death law also

53. Additional questions involve whether courts applied different standards of liability based on race and whether families of black decedents lost more frequently than families of white decedents in similar cases. The answer to whether more stringent standards of liability or specific doctrinal rules were applied to black plaintiffs seems to be no, although further analysis and study might show otherwise. One context that merits further analysis is the acceptance of self-defense in some circumstances. In two cases, the results of which seem debatable, the families of black male decedents killed by white men were unable to recover because the killers established that they had used reasonable force. *Wade v. Gennaro*, 8 So. 2d 561, 561 (1943) (holding a proprietor of "negro barroom" [sic] was not liable for killing of drunken black man who threw bricks at him); *Williams v. Shreveport Cab*, 183 So. 120 (La. Ct. App. 2d Cir. 1938) (overturning trial court's decision and holding that a white cab driver who fatally shot "drunken negro man" who threatened him was not liable to his widow and child). Courts did not always accept the self-defense claims of white men who shot allegedly drunk or obnoxious black men, however, so it is difficult to draw clear conclusions. See *Randall v. Ridgley*, 185 So. 632 (La. Ct. App. 1939) (holding proprietor of barroom patronized by blacks liable for wounding obstreperous black man with gun because proprietor's use of gun was unreasonable and increasing damage award from \$750 to \$2,000); *Young v. Broussard*, 189 So. 477 (La. Ct. App. 1st Cir. 1939) (rejecting self-defense claim of night watchman who fatally shot drunken black man in the back and holding employer liable for the death).

54. LA. CIV. CODE ANN. art. 2315 (2005). See also MARAIST & GALLIGAN, *supra* note 50, at 415-26, §§ 18-1 to 18-9; Helmuth Carlyle Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201, 223 (1931-1932). In 1931, Voss wrote about the language of the LA. CIV. CODE ANN art. 2315 ("Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it.") that "[t]his wide-sweeping article is the fundamental basis of tort law in Louisiana, and the breadth of its language has rendered it a persuasive invitation to everyone to come into the courts and make claims for which no other law of the state provides." Voss, *supra*, at 201 n.1. It was interpreted by the Louisiana Supreme Court in the mid-nineteenth century to not allow wrongful death or survival actions, making it necessary to amend it for those actions to be asserted. *Hubgh v. New Orleans & Carrollton R.R.*, 6 La. Ann. 495 (1851). Voss noted that the article was amended in 1855 to provide that the tort claims of a person who died could still be asserted after the death of the claimant, and this 1855 provision was a survival provision, not a wrongful death provision. Voss, *supra*, at 221. *But see*, Witt, *Origins of Modern Tort*, *supra* note 19, at 755 n.55 (listing 1855 amendment as a wrongful death law). Voss explains that the 1884 amendments allowed the survivors of a dead family member to file claims for losses connected to the death of a loved one. Voss, *supra*, at 222. This amendment was a wrongful death provision. MARAIST & GALLIGAN, *supra*, note 50.

55. DOBBS, *supra* note 4, at 807.

allowed compensation to family members for their emotional losses.⁵⁶ By contrast to a wrongful death action, a 'survival' action is the continuation of a tort claim after death that the decedent would have had if he had lived, "with damages that he could have recovered had he been able to sue at the moment of death."⁵⁷ Survival actions typically include the decedent's pain and suffering and lost wages.⁵⁸ For example, if a person died instantly from another's tort, his family would not be able to bring a survival action because he did not experience pain or suffering or lose wages before dying.

If a person suffered before dying from a defendant's tort, relatives could claim damages in three categories: loss of financial support; emotional loss; and losses the decedent could have claimed if he had not died, such as pain and suffering.⁵⁹ The first two of these elements would be compensable through a wrongful death claim, while the third would be part of a survival claim. Both would be included in the same lawsuit. Although these three categories are theoretically distinct, appellate decisions rarely divided damage awards into the different categories. Accordingly, it is often impossible to determine how much of a particular award was aimed to compensate for losses in a particular category. The facts discussed in the cases, however, often are helpful in such a determination.

Wrongful death damage awards had the potential simply to reflect preexisting financial disparities between blacks and whites,⁶⁰ because traditionally they were based on a model that evaluated financial support lost by the family as a result of the loved one's death, and blacks in Louisiana were poorer overall than whites.⁶¹ In other words, the death of a family member who earned low wages would cause a relatively small financial loss to the family, so that one would expect the wrongful death award for a low wage earner to be low. However, wrongful death and survival awards in Louisiana had the potential to go beyond reproducing existing economic disparities for

56. MARAIST & GALLIGAN, *supra* note 50, at 423, § 18-5.

57. DOBBS, *supra* note 4, at 805. Both wrongful death and survival actions now exist only when authorized by statute. *Id.* at 803. Survival statutes also provide that if a plaintiff has already instituted an action, the action continues after her death. *Id.* at 805.

58. *Id.* at 805-806.

59. MARAIST & GALLIGAN, *supra* note 50, at 422, § 18-4.

60. See generally, Chamallas, *supra* note 23.

61. See Dethloff & Jones, EXPERIENCE, *supra* note 51, at 503 (noting economically depressed situation of blacks in late nineteenth century Louisiana). See generally, ARNOLD ROSE, THE NEGRO IN AMERICA 68-70, 124-133 (1964) (summarizing information on widespread poverty and low wages among blacks).

two main reasons. First, even if the financial support amounts lost by black family members were less than amounts lost by whites, the total awards should not necessarily have been less, because family members also could seek damages for emotional losses. These emotional losses would include loss of companionship and affection.⁶² Such emotional losses are not linked to financial loss or to race. Second, survival cases called for an exploration of how much the decedent suffered. Since pain and suffering are not correlated with earning power in any obvious way, and on some level, pain and suffering are universal despite linkages to gender and racial tropes,⁶³ survival awards had the potential to go beyond existing financial disparities between blacks and whites. Thus, by allowing emotional loss damages to survivors and by allowing survivors to claim pain and suffering damages suffered by decedents, Louisiana law provided a framework for analyzing loss that went far beyond merely determining the financial loss caused by the loss of a loved one.

C. Race, Gender, and Family Structure

The wrongful death and survival code provisions favored a certain family structure, that of a husband supporting his wife and legitimate children, by recognizing harm to those family members when a husband was killed. To the extent that black families had different family structures, the law disadvantaged and, in many instances, excluded them from recovery. These statutory exclusions form an important backdrop to the comparison of actual decisions in the next section.

One way that wrongful death and survival law structured the recognition of harm was through strictures based on marriage and legitimacy. Louisiana did not recognize common law marriage,⁶⁴ and

62. MARAIST & GALLIGAN, *supra* note 50, at 423, § 18-5.

63. For example, in the nineteenth century, the widespread assumption in medical circles and elsewhere was that black women, because of their race, were immune from the "extreme sensitivity" that characterized white women. MARTIN S. PERNICK, *A CALCULUS OF SUFFERING: PAIN, PROFESSIONALISM, AND ANESTHESIA IN NINETEENTH CENTURY AMERICA* 156 (1985). Black women were thought to experience little suffering even during childbirth and major surgery. *Id.* It was similarly thought that black men were virtually immune from pain. *Id.* at 155-56; see also Verna L. Williams, *Reform or Retrenchment?: Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 46-47 (2004) (describing history and racial and gender stereotypes); see also WELKE, *supra* note 7, at 131, 177-78; Martha Chamallas & Linda Kerber, *Women, Mothers, and the Law of Fright*, 88 MICH. L. REV. 814 (1990) (describing the association of white women with mental distress damages).

64. Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 78 (1981).

“illegitimate” children, those born before or in the absence of a marriage between their parents, could not recover for the death of their father or mother.⁶⁵ Similarly, parents of “illegitimate” children could not recover for the loss of their children in tort.⁶⁶ The code provision’s exclusion of illegitimate children may have shaped the configurations of claims brought by blacks. This is because a greater proportion of black children than white children were born out-of-wedlock during the relevant period nationally, and in Louisiana.⁶⁷ Thus, the code provision probably made tort recovery impossible for a larger proportion of black children whose fathers or mothers were tortiously killed than the proportion of white children that was barred from recovery.⁶⁸ These same “illegitimacy” exclusions also precluded tort recovery for a larger proportion of black parents whose children were killed by torts than the proportion of white parents whose children were killed by torts.

The provisions also reflected gender asymmetry during much of the period discussed here, by not allowing widowers to bring actions for the loss of wives until amendments were passed allowing such re-

65. *Youchican v. Tex. & P. Ry. Co.*, 86 So. 551 (La. 1920) (holding that a child of a Tunica Indian tribal member had no cause of action for his mother’s death because parents had only been married according to customs of Tunica tribe and had never been formally legitimated); *Thompson v. Vestal Lumber & Mfg. Co.*, 16 So.2d 594 (La. Ct. App. 1944) (holding that minor children of black decedent who lived with and were supported by him throughout their lives, and who were recognized by the community as his children, could not recover for his death under torts or workers compensation since parents were only married by “common law,” and decedent never acknowledged children as his in writing as required by statute). The interpretation of LA. CIV. CODE ANN. art 2315 to disallow claims brought by children outside marriage was struck down in *Levy v. Louisiana*, 391 U.S. 68 (1968). The plaintiffs in *Levy* were the five children born out-of-wedlock to a black woman who may have died as a result of medical malpractice. See John C. Gray, Jr. & David Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance*, 118 U. PA. L. REV. 1, 2 (1969).

66. *Lynch v. Knoop*, 43 So. 252 (La. 1907) (holding burden of proof is on mother of deceased child to prove she was legally married; if she failed to so prove she could not recover for loss of her child); *Brown v. T.J. Moss Tie Co.*, 32 So. 2d 848 (La. Ct. App. 2d Cir. 1947) (holding that a mother of deceased black illegitimate son could not recover damages related to his death in tort or workers compensation).

67. See Robert D. Plotnick, *Seven Decades of Nonmarital Childbearing in the United States*, (Working Paper, Feb. 2005). Data from 1935 to 1950 shows that a greater proportion of non-white children than white children was born out of wedlock in Louisiana. Zachary Brandmeier (July 13, 2005) (unpublished memorandum on file with The Howard Law Journal). This data is organized as white versus non-white, and does not appear to be available for 1900-1935. *Id.* According to this data, 87.2% of the out-of-wedlock births in Louisiana in 1935 were to non-whites, while 12.7% of the out-of-wedlock births in Louisiana in 1935 were to whites. *Id.*

68. One factor that supports this inference is that where suits were brought for the deaths of adults, 43% of the cases for deaths of black adults were brought by their parents while only 16% of the cases for deaths of white adults were brought by their parents. Database, *supra* note 46. These adult decedents may have had children who could not sue because they were born out-of-wedlock.

covery in 1918.⁶⁹ By their structure, the laws recognized harm and loss caused to a husband's family by his death, but completely denied that harm and loss were caused to a wife's family by her death. These gendered provisions, both passed in the nineteenth century, were part of a broad cultural move to define the paradigmatic family as one where a male breadwinner supported a stay-at-home wife.⁷⁰ Given black women's historical roles in slavery and afterwards as working outside the family's home and providing financial support to the family, this enduring paradigm was in many ways a "white" family model.⁷¹

Wrongful death and survival laws, then, effectively created a paradigm decedent and paradigm dependents – a husband who provided for his wife and legitimate children. His death would create a financial and emotional loss for the wife and children that the law would recognize, if it was caused by a tort.⁷² To the extent that black families did not fit the paradigms, because wives were not financially dependent on husbands, or because children were born outside of marriage, these provisions reduced or excluded recoveries.⁷³

1. Averages, Medians, and Outliers: The Power of the Paradigm

Comparing average and median damage awards to surviving family members by race in Louisiana, black family members received much lower awards than white family members. The average award

69. According to Voss, *supra* note 54, at 221, when Louisiana law was amended to allow for a survival action in 1855, only the children, widow, or parents could assert the continuation of a decedent's tort claim. Louisiana's wrongful death law, passed in 1884, continued the tradition of limiting recovery to widows while entirely excluding widowers. *Id.* at 222. In 1918, the legislature added language which seems to have been intended to allow husbands to file survival actions, but the drafting was not entirely clear. *Id.* at 240. The Louisiana Supreme Court interpreted the provision as continuing to allow widows but not widowers to bring both wrongful death and survival actions. *Elias v. City of New Iberia*, 69 So. 141 (La. 1915); *Flash v. La. W. Ry.*, 68 So. 636 (La. 1915).

70. WITT, *ACCIDENTAL REPUBLIC*, *supra* note 19, at 717. As Witt notes, the initial wrongful death statutes passed in England allowed widowers to sue for the loss of a spouse, but U.S. versions of these statutes intentionally departed from the gender-neutral English model. *Id.* at 720-721, 737-743, 736 n.54, 746-749.

71. Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 *GEO. L. J.* 2481, 2488 (1994) (describing how the notion of a protected, domestic sphere for women financially dependent on husbands has never applied to black women); Williams, *supra* note 63, at 45-47, 54-56 (describing black women's work during slavery and afterwards).

72. This is not to suggest that the compensation generally provided was generous—it was not. Witt, *supra* note 19.

73. For discussion of the racial and gender effects of the law of legitimacy in the inheritance context, see Mary Louise Fellows, *The Law of Legitimacy: An Instrument of Procreative Power*, 3 *COLUM. J. GENDER & L.* 495 (1993).

to black family members, \$3,559, was less than half the amount of the average award to white family members, \$8,245, during this period.⁷⁴ The same was true for median awards.⁷⁵ Comparing the outliers—the highest and lowest award amounts – to surviving family members by race, black family members also were more poorly compensated. The two highest awards to black family members were all lower than the two highest awards to white family members.⁷⁶ Similarly, the two lowest awards to black family members were all less than the two lowest awards to white family members.⁷⁷ These are blatant disparities in damage awards by race. However, further exploration is necessary, because damage awards may have been affected by factual differences between cases, such as differing amounts of pain and suffering experienced by decedents, the relationship between the decedent and the survivors, or other factors.

Widows and minor children of both races were the recipients of the two largest awards in each racial category.⁷⁸ As such, courts applied the wrongful death and survival laws in a way that recognized and rewarded the favored family structure of paradigm decedents and paradigm dependents. In the highest award case with a black decedent, *Johnson v. Hibernia Bank*, the appellate court awarded \$9,000 for the death of a fifty-five year old soap and perfume salesman, who

74. In the cases reviewed, the average recovery for white family members was \$8,245, while the average recovery for black family members was \$3,559 from 1900-1949. Database, *supra* note 46.

75. Database, *supra* note 46. The median recovery for white family members was \$7,021, while the median recovery for black family members was \$3,200 during the same period for the cases reviewed. *Id.*

76. The two highest awards to surviving black family members were in *Johnson v. Hibernia Bank & Trust*, 1927 WL 3381 (La. Ct. App. Feb. 14, 1927) (awarding \$9,000); and *Foy v. Little*, 197 So. 313 (La. Ct. App. 1939) (awarding \$8,294). The two highest awards to surviving white family members were in *Albright v. Tatum*, 37 So. 2d 888 (La. Ct. App. 1948) (awarding \$29,000); and *Alford v. La. & Ark. Ry.*, 38 So. 2d 258 (La. Ct. App. 1949) (reducing the award of \$25,000 by \$650 for workers compensation expenses previously paid).

77. The two lowest awards to surviving black family members were given in *Russell v. Tagliavore*, 153 So. 44, 48 (La. Ct. App. 1934) (awarding \$500); and *Poindexter v. Serv. Cab Co.*, 161 So. 40 (La. Ct. App. 1935) (awarding \$839). The two lowest awards to surviving white family members were in *Marshall v. La. State Rice Milling Co.*, 81 So. 331 (La. 1919) (awarding \$2,000); and *Constabel v. Miller*, 131 So. 699 (La. Ct. App. 1933) (awarding \$2,500), and *Hebert v. City of New Orleans*, 163 So. 425 (1941) (awarding \$2,500).

78. See *Johnson*, 1927 WL 3381 (awarding \$9,000 to a black decedent); *Foy*, 197 So. 313 (awarding \$8,294 to the widow and children of a black decedent). The two highest awards to surviving white family members were in *Albright*, 37 So. 2d 888 (awarding \$29,000 to the widow and minor children of a white decedent), and *Alford*, 38 So. 2d 258 (awarding \$25,000 to the widow and minor children of a white decedent, reduced by \$650 workers compensation expenses previously paid).

was also "a negro preacher," to his widow and two children.⁷⁹ The appellate court articulated, in familiar terms, the tension between individual adjudication and treating like cases alike. It noted that "each case is considered independently on the merits and on the state of the facts peculiar to it, a due regard, however, being always had to the proper observance of a reasonable conformity of jurisprudence on general lines."⁸⁰ In other words, courts should be reasonably consistent in order to assure fairness, but each case is unique so that rigorous consistency is unnecessary. The second highest award for survivors of black decedents was for \$8,294 for the loss of a thirty-two year old married truck driver who was a father of three minor children.⁸¹

The two highest awards to family members of white decedents also involved paradigmatic decedents and paradigmatic dependents. The highest awards were for \$29,000⁸² and \$25,000 both to widows and minor children.⁸³ Though widows and children recovered the largest awards generally, the damages awarded to black widows and children were significantly lower than those awarded to their white counterparts.

The favored family model also seems to have played a role in the lowest awards for both races. In all of the low award cases, in each

79. 1927 WL 3381, at *1, *2. The children were aged eighteen and seventeen. *Id.* at *1. He was killed by a collapsing wall, lived for thirty minutes with no evidence of pain and suffering, earned \$130 a month and had a life expectancy of seventeen years. *Id.*

80. *Id.* at *3. It awarded the widow \$5,000 for loss of support, \$500 for mental pain, \$500 for funeral expenses and \$1500 for each of two children, which totaled \$9,000. *Id.* The judgment at trial had been \$7,500 for her loss of support and was otherwise the same. The appellate court found that that amount was excessive and reduced it to \$5,000. *Id.* at *2.

81. *Foy*, 197 So. 313.

82. *Albright*, 37 So. 2d 888 (La. Ct. App. 1948). No details of decedent's age, occupation or earnings, but an award of \$14,000 for widow was affirmed but an award of \$8,000 for each of three minor children was reduced to \$5,000 per child. *Id.*

83. Decedent railway engineer who apparently died instantly from collision with another company's train was forty-eight years old, had twenty-two year life expectancy, and earned \$215-\$225 per month. The court affirmed the trial court's award of \$10,000 for widow which also accounted for "loss of support, companionship, love, care and protection," and \$5,000 for each minor child, in addition to allowing workers compensation lien of \$1,900 to be paid from the judgment. *Id.* In addition, there were several white decedent cases that resulted in \$15,000 damage awards. *See, e.g.*, *Gray v. Found. Co.*, 91 So. 527 (La. 1922) (awarding \$15,000 for death of husband and father to his widow and four minor children for engineer who died instantly from boat falling on him); *Feely v. National Packing Co.*, 75 So. 837 (La. 1917) (awarding fifty-four year old widow and thirteen year old son of a fifty-four year old "good husband and father" who earned \$150 a month a total of \$10,000 and \$5,000 respectively after decedent experienced painful death following explosion. However, there was no specificity as to what part of award is for his pain and suffering); *Leitz v. Rosenthal*, 166 So. 651 (La. Ct. App. Orleans 1936) (awarding \$15,000 to widow and two minor children for death of husband in car accident). These were well above the highest awards to survivors of deceased black family members.

racial category, the decedent either was not a husband/father or the survivors were not widows/minor legitimate children (or both). For example, the two lowest awards to family members of black decedents were \$500 awards to widowers for the deaths of their wives.⁸⁴ In each case, the spouses were estranged and not living together and the courts discussed this in their opinions.⁸⁵

Following this pattern, the lowest awards to white family members also were in families that did not fit the paradigms. The lowest award, \$2,000, was made on behalf of an emancipated minor child for the death of his mother.⁸⁶ The second lowest white award, \$2,500, came in the death of a seventy year old mother in a suit brought by her adult, unmarried daughter.⁸⁷ In this context of awards to families that did not fit the paradigmatic structure, awards to white survivors far exceeded those to black survivors.

2. Case Comparisons

Another way to approach race and valuation is by comparing similar cases. Comparing contemporaneous cases that involve decedents of different races indicates that race played a role in devaluing the claims brought by black family members relative to white family members' claims.

84. *Russell v. Tagliavore*, 153 So. 44 (La. Ct. App. 1934) (awarding \$500); *Poindexter v. Serv. Cab Co.*, 161 So. 40 (La. Ct. App. 1935) (awarding \$500 plus \$339 to decedent's father for medical and funeral expenses).

85. *Russell*, 153 So. at 48-49; *Poindexter*, 161 So. at 41-42.

86. *Marshall v. La. State Rice Milling Co.*, 81 So. 331 (La. 1919). The lower court award of \$3,000 to the minor child had included \$1,000 for the mother's pain and suffering, but, on appeal, this was set aside because she died instantly. *Id.* at 333. The siblings were barred from recovery because they were adults and adult children can only sue under the code provision if there are no minor children. *Id.* The decision lacks details about the mother's age, support or relationship to the child. Even though the decision refers to the child as emancipated, this does not seem to have been considered a bar to the assertion of the claims. See generally, Andrew Gates, et. al., Symposium: *Contractual Incapacity in the Louisiana Civil Code*, 47 TUL. L. REV. 1085, 1093, 1098 (1973). There were three ways to become an emancipated minor during the relevant time period. One way was by notary signed by the father, or mother if the father was dead or not available, the second was by a judicial order of emancipation if the parents had treated the child cruelly, and the last was by getting married. *Id.*

87. *Constabel v. Miller*, 131 So. 699, 700 (La. Ct. App. 1933). The mother died less than a month after a car accident. *Id.* Presumably, the mother did not support the daughter financially, because the decision does not specify. Of the \$2,500 award, \$644 consisted of funeral expenses, nursing expenses, and the daughter's loss of salary, which leaves \$1,856 for the mother's pain and suffering, and the daughter's grief. *Id.* The appellate court noted how modest the award was and that the plaintiff did not appeal the award, *id.*, perhaps hinting that they might have increased it had they been asked. An additional \$2,500 award was in a case involving a sixty-three year old sister killed in an accident who suffered twenty days before dying. *Hebert v. City of New Orleans*, 163 So. 425 (La. 1941).

One pair of cases involving black and white decedents, *Hebert v. Baton Rouge Electric Co.* and *Kent v. Baton Rouge Electric Co.*, arose out of the same incident; comparison of these cases leads to a conclusion that devaluing black parental grief or the support provided by the black decedent influenced the evaluation of the two deaths.⁸⁸ A gas outlet was left open in an apartment, and a three year old white child "and its negro girl nurse," a seventeen year old girl, died as a result.⁸⁹ No pain and suffering apparently were involved for either decedent, so the cases were "pure" wrongful death cases. The families of each decedent successfully sued Baton Rouge Electric Company. In each case, the same judge presided at trial, the lawyers for the plaintiffs and defendants were the same, and the defendants appealed to the Louisiana Supreme Court. In the case involving the three year old white child, which was decided first, the court noted that large awards are generally not allowed for deaths of young children, citing a long string of precedents involving compensation for the deaths of young children, and awarded \$2,500 to each parent, a total of \$5,000.⁹⁰ In the later case involving the asphyxiated black nurse brought by the nurse's mother, the defendants tried to argue that the mother should only get \$2,500, just like each of the parents of the three year old white child.⁹¹ But the court stated:

[W]e do not regard the ruling on the amount of damages in that case as a precedent for this case. In the case [for the white three year old's death], there was no financial loss. . . . The daughter of the plaintiff in this case . . . was 17 and a half years old, and the evidence is that she was already of some financial aid to her mother. She attended night school and was comparatively well advanced. Be that as it may, we cannot estimate grief and suffering in dollars and cents.⁹²

The mother of the black teenager was awarded \$5,000 while each parent of the white child was awarded \$2,500 (a total of \$5,000), so the

88. *Hebert v. Baton Rouge Elec. Co.*, 91 So. 406 (La. 1922); *Kent v. Baton Rouge Elec. Co.*, 97 So. 433 (La. 1923).

89. *Hebert*, 91 So. at 406. The child's gender was not specified.

90. *Id.* The precedents included a case where the parents of a deceased black child killed by a neighbor's child playing with a gun were awarded \$2,500 each, a total of \$5,000. *Sutton v. Champagne*, 75 So. 209 (1917) (awarding \$5,000 to parents for death of nine year old black male child who was killed by neighbor's child playing with gun). For discussion of changes in valuation of children, see VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 140-165 (1985).

91. *Kent*, 97 So. at 346. The suit was brought by the mother and there was no indication of the father's location.

92. *Id.*

black teenager's life did not in an obvious way count for less than the white child's life.⁹³

However, further reflection, particularly on the age of the decedents, suggests a different conclusion. If it is assumed that a parent's grief can not be quantified, the threshold for a damage award might be a uniform amount for grief at the loss of a child. The next step would be to apply the model of lost financial support (which would not allow deaths of young children to result in large awards) and add an estimate of the financial support lost by the mother of the black teenager as a result of her child's death. Given that model, the award for the loss of the teenager, who was in school, working as a nurse, and providing some support for her mother, clearly should have been much higher than that for the loss of the three year old who was not providing any monetary support to its parents.

In several other pairs of cases, such as the roughly contemporaneous Louisiana Supreme Court decisions in *Pierre v. Powell Box Co.*⁹⁴ and *Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*,⁹⁵ the devaluation of black decedents' and survivors' claims is striking. In *Pierre*, where a black sixteen year old suffered a painful workplace injury that resulted in the amputation of his arm and his death eighteen months later, his parents were awarded \$7,500 on appeal.⁹⁶ The award was both for the decedent's suffering for the period between the accident and his death, and for the parents' loss of the "prospective support, companionship, and filial affection" provided by the decedent.⁹⁷ *Vincent* awarded \$10,000 to the parents of a white sixteen year old who was fatally shot by a night watchman as he threw rocks at a train.⁹⁸ Although the ages of the decedents were the same, the facts concerning pain and suffering were extremely different. The black decedent,

93. We do not know if, for example, the child's father had also sued, whether the award to both parents would have been \$10,000.

94. 77 So. 943 (La. 1918).

95. 74 So. 541 (La. 1917).

96. *Pierre*, 77 So. at 947. A \$2,500 verdict was deemed insufficient. *Id.* Louisiana passed a workers compensation statute in 1915. Jill Williford, Comment: *Reformers' Regress: The 1991 Texas Workers' Compensation Act*, 22 ST. MARY'S L.J. 1111, 1145 n.38 (1991). The *Pierre* decision does not specify when the injury was sustained but given the long period of suffering between the injury and the time when the decedent passed away, it seems plausible that the injury took place before the law went into effect.

97. *Pierre*, 77 So. at 947.

98. 74 So. at 549. In several other cases where one parent had sued for the loss of a child, the court awarded \$5,000. *Johnson v. Indus. Lumber Co.*, 60 So. 608 (La. 1912) (increasing award of \$2,326.50 to \$5,000 for mother of deceased minor son); *Parker v. Crowell & Spencer Lumber Co.*, 39 So. 445 (La. 1905) (awarding \$5,000 to father for loss of minor son).

Lucien Pierre, suffered for eighteen months before dying,⁹⁹ while the white decedent did not suffer at all.¹⁰⁰ Moreover, the degree of support provided to the family seems to have been different. The black decedent was working and apparently providing some support to his family,¹⁰¹ while the white decedent had never provided any support to his family.¹⁰² Comparing the pain and suffering of the decedents and the financial support they provided to their parents, Lucien Pierre's parents should have received a much larger award than the parents in *Vincent*. Instead, they received an award that was significantly smaller. Lucien Pierre's suffering, the support he provided, and the grief of his parents seemingly counted for less.¹⁰³

Another vivid contrast is provided by two cases decided by the First Circuit Court of Appeals of Louisiana in 1939, *Young v. Broussard*,¹⁰⁴ and *Thibodaux v. Culatta*.¹⁰⁵ In *Young*, a twenty-nine year old unmarried black man, Pentard Young, was fatally shot by a night watchman at his former place of employment, suffering two days before his death.¹⁰⁶ *Thibodaux* involved an adult, unmarried white male, Alcide Thibodaux Jr., who was killed instantly in a car accident.¹⁰⁷ In *Young*, the parents were awarded \$3,500; in *Thidodaux* the parents were awarded \$5,040. Reviewing the decedents' suffering alone, one would expect a larger award for the parents of the black Pentard Young, who suffered two days, while Alcide Thibodaux Jr. died instantly.¹⁰⁸ Yet, the award to Pentard Young's parents was a significantly lower amount. Differences in the amount of financial support provided by the decedents do not explain the differing damage awards, because the amount that each decedent contributed to his

99. *Pierre*, 77 So. at 945.

100. *Vincent*, 74 So. at 544

101. *Pierre*, 77 So. at 947. It appears he was providing support to his family based on the damages claimed by his parents. *Id.*

102. *Vincent*, 74 So. at 545.

103. A later case that was factually similar to *Vincent* in that it also arose from a railroad employee fatally shooting someone provides an instructive comparison. *Rousseau v. Tex. & Pac.*, 1926 WL 3375 (La. Ct. App. Aug. 2, 1926). It was decided nine years after *Vincent* and *Pierre*; the decedent was a twenty-nine year old black man who provided support to his parents and suffered for several hours before dying as a result of a railroad detective's gunshot. The court awarded his parents only \$6,000. Not only was he not engaging in illegal behavior at the time of the death, but he suffered before death and supported his parents, factors which should have made it a case for a significantly larger award than the \$10,000 award for the rock-throwing sixteen year old who died instantly from a railroad employee's gunshot in *Vincent*.

104. 189 So. 477 (La. Ct. App. 1939).

105. 192 So. 712 (La. Ct. App. 1939).

106. *Young*, 189 So. at 478.

107. *Thibodaux*, 192 So. at 712.

108. *Young*, 189 So. at 479.

parents' was almost identical, and in fact the contributions of the decedent in *Young* were expected to continue while the contributions of the decedent in *Thibodaux* were about to cease.¹⁰⁹ The suffering of the black decedent, his financial contributions, and his parents' grief and loss may have been what was in actuality devalued by the court.¹¹⁰

These comparisons show that while, in theory, the Louisiana courts applied "a reasonable conformity of jurisprudence upon general lines,"¹¹¹ sometimes they departed from that rough consistency in ways that seem unmistakable from today's vantage point. In some instances, the suffering of black decedents, the economic support they provided to their families, and the grief of surviving family members seem to have counted for less than those of whites.

D. Use of Segregated Precedents

Appellate courts in cases involving black decedents sometimes determined the appropriate damage award based on the awards given in earlier cases involving black decedents.¹¹² These cases did not merely reference the race of the decedent, but actually used "black only" or racially segregated precedents to determine benchmarks for damage amounts. In other words, to these courts, the principle of treating like cases alike meant comparing deaths of black people only with the deaths of other black people. Deaths of white people, be-

109. In *Young*, 189 So. at 481, the black decedent contributed three to four dollars a week to his parents' support and this was expected to continue. In *Thibodaux*, the white decedent contributed fifteen dollars a month to his parents' support but this was expected to stop after his marriage which was supposed to take place a week after the accident that ended his life. 192 So. at 714. The First Circuit Louisiana Court of Appeals decided *Thibodaux* six months after *Young* but did not cite *Young* as precedent for the damage award.

110. If we take into account activities that the decedent was engaging in at the time of his injury, we may have a partial explanation. We consider that the white decedent in *Thibodaux* was killed in a car accident while the decedent in *Young* was killed while drunkenly trespassing on his former employer's property. In *Young*, the night watchman who killed the decedent convinced the lower court that he had acted in self-defense in shooting the decedent. *Young*, 89 So. at 480. This was rejected on appeal as implausible, but perhaps the decedent's more blameworthy behavior may have been factored into the damage amount. However, returning to the \$10,000 award for the rock-throwing white sixteen year old decedent in *Vincent*, his blameworthy behavior was not taken into account in reducing the award to his parents. *Vincent*, 74 So. at 549. Moreover, as discussed in the next section, the court in *Young* actually used racially segregated "black only" precedents to determine the low damage award. See *infra* Part II.D.

111. *Johnson*, 1927 WL 3381, at *3.

112. See, e.g., *Young*, 189 So. at 481. But see *Rousseau v. Tex. & Pac.*, 1926 WL 3375 *12-*13 (La. Ct. App. Aug. 2, 1926) (citing cases of wrongful death awards to families of both black and white decedents in determination of amount of wrongful death award to parents of black man killed by defendant). This use of segregated precedents seems to have taken place almost only during the 1930s, and specifically in the Louisiana First Circuit Court of Appeals, for reasons that remain unclear.

cause they were excluded from the analysis, seem to have been considered another kind of harm.

The most glaring example of this is *Young v. Broussard*, discussed above, where Pentard Young was killed by a night watchman.¹¹³ The Louisiana First Circuit Court of Appeals overturned the trial court's judgment for the defendant, and awarded Mr. Young's parents \$3,500. In fixing this amount, the court cited three precedents involving damage awards for a black decedent, first listing a \$3,000 damage award for a black decedent¹¹⁴ and then going on to state:

[I]n the [] case of *Shamburg v. Thompson, Trustee*, we affirmed an award of \$3200 to the mother of a twenty two year old colored boy who was injured by the train at nine o'clock in the morning and died in the afternoon of the same day. The parents of a twenty-nine year old colored boy were allowed \$6,000 for loss of love and affection, support, etc., and for the pain and suffering of the deceased in the case of *Rousseau v. Texas & Pac. R. Co., et al.* We have decided to fix the award in this case at \$3500, which amount we believe to be proper under the facts and circumstances of this case.¹¹⁵

The court, referring to the adult decedents in some of the precedential cases as "boy" even when the cases themselves did not, used as its frame of reference only cases involving black decedents. Those cases resulted in low awards, and although there were cases decided by the same court involving white decedents whose families received higher awards, the court did not cite them.¹¹⁶ In fact, the court actually skipped over a case that it had decided three years before involving the death of a white man in his twenties,¹¹⁷ which resulted in a higher award, and reached back thirteen years to a case involving the death of a black man in his twenties decided by a different appellate

113. *Edwards v. Texas & Pac. R. Co.*, 185 So. 111 (Ct. App. La. 1st Cir. 1938). *Edwards* involved the death of a twenty-nine year old man who "lived with his parents, colored tenants." *Id.* at 113.

114. *Young*, 189 So. at 481.

115. The trial court had ruled in the favor of the employer, accepting the night watchman's argument that he had fired in self-defense. The decedent had been laid off earlier that day and had returned, drunk, to his former employer's property repeatedly in the middle of the night.

116. See, e.g., *Bodin v. Tex. Co.* 186 So. 390 (La. Ct. App. 1939) (awarding \$7,000 for the death of white seven year old child, \$1,000 of which was for pain and suffering); *Boykin v. Plauche*, 168 So. 741 (La. Ct. App. 1936) (awarding \$8,780, of which \$780 was for funeral expenses, to mother of twenty-three year old white son who was educated but had never supported her financially). The court states that losses of adult children are worth more financially than losses of younger children. *Id.* at 746.

117. *Boykin*, 168 So. at 741.

court, which resulted in a lower award.¹¹⁸ The appellate court seems to recognize the harm to the victim and his family as a different, and necessarily, lesser harm than that which would befall a white family in comparable circumstances.

Several other decisions for the tortious deaths of black family members also based their awards only on earlier cases involving black decedents.¹¹⁹ However, the use of precedent is complex and the use of racially segregated precedents was not universal. For example, in the 1927 case *Johnson v. Hibernia Bank & Trust*,¹²⁰ mentioned above, an award to a widow and children of the decedent contained a lengthy list of citations to damage awards in cases involving deaths of husbands and fathers, both white and black.¹²¹ *Johnson*, in turn, was cited by three later cases, one involving a black decedent, and two involving white decedents.¹²² In both cases involving white decedents, *Johnson* was cited as useful authority, without mentioning the decedent's race.¹²³

The use of segregated, "black only" precedents shows that race mattered in creating frames of reference for damage determinations. The judges who used these precedents did not treat like cases alike, but actually treated harm to black people as different in kind from harm to white people, as reflected in their usage of an entirely different frame of reference for damage determinations depending on the race of the litigants. The outcome of using a "black" frame of reference for damage determinations was lower damage awards for black families. The use of racially segregated precedent not only reflected the conceptualization of injury to blacks as different from and lesser than injury to whites, but it also ensured that injury to blacks would continue to be treated as less serious than injury to whites.

118. *Rousseau v. Tex. & Pac.*, 1926 WL 3375 (La. Ct. App. Aug. 2, 1926), 1926 WL 3375 (awarding parents \$6,000 for malicious killing of twenty-nine year old black decedent who supported his parents and suffered before dying).

119. See, e.g., *Coon v. Monroe Material Scrap Co.*, 191 So. 607 (La. Ct. App. 1939); *Poindexter*, 161 So. 40; *Powe v. Morgans La. & Tex. R.R. & S.S. Co.*, 1927 WL 3992 (La. Ct. App. June 7, 1927).

120. *Johnson v. Hibernia Bank & Trust*, 1927 WL 3381 (La. Ct. App. Feb. 14, 1927).

121. *Id.* at *3-5.

122. *Coon*, 191 So. at 612 (La. Ct. App. 1939) (black decedent); *Donaldson v. Riddling's Succession*, 145 So. 804, 808 (La. Ct. App. 2nd Cir. 1933) (white decedent); *Kern v. Knight*, 127 So. 133, 138 (La. Ct. App. 1930) (white decedent).

123. *Donaldson*, 145 So. at 808; *Kern*, 127 So. at 137.

E. Racial Generalizations and Differences in Tone

This section analyzes two aspects of cases that may not directly affect the devaluation of injuries to black people, but may be implicated in it. The first is the use of racial generalizations; the second is differences in judicial tone.

In several cases, judges articulated negative generalizations about blacks and indicated that the decedent either departed from or acted consistently with such generalizations to justify the amount of their award. By contrast, in no case did judges articulate generalizations about white people and indicate that the decedent either departed from or acted consistently with such generalizations. *Blackburn v. Louisiana Railway & Navigation Co.*¹²⁴ presents perhaps the most vivid example of how racial generalizations about a black decedent resulted in a low damage award to his family. In that case, Justice Provosty of the Louisiana Supreme Court reduced a verdict for the mother of a thirty-one year old brakeman from \$6,250 to \$1,985 with the following words: "Considering the well-known improvidence of the colored race, and the irregular life these colored brakemen lead, we think that upon this evidence a regular allowance of \$15 per month would lean more to the side of liberality to the plaintiff than otherwise."¹²⁵

In *McNeil v. Boagni*, the Court of Appeals for the First Circuit described the black decedent, a laborer, in the following terms: "The proof shows that all he earned went to his family to which he was devotedly attached; that he had no vices, did not drink or gamble, unusual qualities for a colored man."¹²⁶ Noting that his remaining life expectancy was over nine years and that although he was sixty-nine years old he was "very vigorous, remarkably well preserved and efficient," the court increased the widow's award from \$1,750 to \$2,000.¹²⁷ In *Powe et al. v. Morgan's La. & Tex. Ry Co.*, the defendant railway company argued that the plaintiff widow had deserted her husband and that since she had been unfaithful to him, she was not entitled to recover damages.¹²⁸ The trial judge, in language that the appellate court later approved, rejected this argument, saying: "It is true that the plaintiff may have been guilty of indiscretions, but such indiscre-

124. 54 So. 865 (La. 1910).

125. *Id.* at 869.

126. 153 So. 352, 356 (La. Ct. App. 1934).

127. *Id.*

128. *Powe v. Morgans La. & Tex. R.R. & S.S. Co.*, 1927 WL 3992 (La. Ct. App. June 7, 1927).

tions can be considered as mostly characteristic of the colored race. There is no positive testimony to convince me that she had abandoned her husband and was living as the concubine of another."¹²⁹ In *Shamburg v. Thompson*, the court referred to the twenty-two year old decedent as "boy."¹³⁰

In some cases courts seemed to use a particularly warm tone in connection with the deaths of white men. For example, in *Horrell v. Gulf & Valley Cotton Oil Co.*, the decedent suffered for about twenty four hours, and the court wrote:

His clothing was literally burned from his body by the acid. It is practically impossible to place a monetary value on human life, and it is quite impossible to value in dollars and cents human suffering. No one knows whether the young man, had he lived, would have soon married. How long he would have continued to assist in the maintenance of his parents we are unable to say. We have considered many awards sanctioned by us and by the Supreme Court in other cases. We find it unnecessary to discuss items making up the respective claims of the two parents. Suffice it to say that, having given due consideration to many former awards, and in view of the *exemplary* habits of the young man and his *most excruciating suffering* during the last hours of his life¹³¹

The court awarded \$5,000 to each parent.¹³² In *Blackburn*, where the damages to the brakeman's family were significantly reduced because of the purported "irregular life" led by "colored brakemen," the decedent's head had been crushed in a grisly manner, but the court calculated a small amount for his pain and suffering because he died so soon after.¹³³ Though the facts of these two cases were different, the description of the decedent's death in *Blackburn* could have been more vivid and sympathy-evoking than it was, and perhaps, the damage amount would correspondingly have been more substantial.¹³⁴

129. *Id.* The appellate court affirmed the trial court's award of \$1,500 for the widow and \$3,000 for each child, noting also that the husband and wife had written letters to each other and that it was common for husbands and wives not to keep letters they sent one another, so no inference should be drawn from the fact that none of the letters were produced. *Id.*

130. 186 So. at 618-19; see also *Young v. Broussard*, 189 So. 477, 481 (La. Ct. App. 1st Cir. 1939).

131. *Horrell v. Gulf & Valley Cotton Oil Co.*, 131 So. 709, 716 (La. Ct. App. 1930) (emphasis added). Another example is the tone employed by the court in *Boykin*, 168 So. at 746, stating decedent was "splendidly equipped mentally and with every prospect of success").

132. *Horrell*, 131 So. at 716.

133. *Blackburn v. Louisiana Ry. & Navigation Co.*, 54 So. 865, 869-70 (La. 1910).

134. This is not to suggest that courts were always callous towards claims for black suffering; for example in *Pierre v. Powell Box Co.*, 77 So. 943, 946 (La. 1918), the Louisiana Supreme

In *Thibodaux v. Culotta*,¹³⁵ mentioned above, where Alcide Thibodaux Jr. was killed instantly in a car accident, the appellate court used flowery language unmatched in cases involving black decedents: “we realize that it is impossible to compensate the parents fully in dollars and cents for the great mental suffering and heartbreak occasioned by the tragic death of their son.”¹³⁶ In *Kent v. Baton Rouge Electric Co.*, involving the gas asphyxiation of the black teen-aged nurse, the court simply said of the mother’s grief, “we can not estimate grief and suffering in dollars and cents.”¹³⁷

The impact of the appellate courts’ difference in tone towards blacks and whites, and of derogatory generalizations about blacks, is difficult to quantify, and it should not be considered in isolation from what appellate courts actually did regarding blacks’ and whites’ claims. The language the courts sometimes used suggests that racist norms affected the decision-making process to the detriment of black plaintiffs.

F. Conclusion

The wrongful death and survival decisions discussed here present a picture that, while more favorable to black plaintiffs than many might expect, does not resemble equal treatment under the law. The appellate courts in wrongful death and survival cases often ruled in favor of black plaintiffs, but black plaintiffs’ claims were often devalued relative to whites’ claims. The average and median awards for black families were less than half those for white families. Awards for the death of a husband who supported his wife and legitimate minor children—the favored family structure—were the highest in each racial category. Yet, awards for deaths of black decedents were on average much lower than awards for the deaths of whites, even in cases brought by black widows for the death of a husband and father of the couple’s children. In addition, the favored family paradigm itself privileged a family model that was more common for white families than for black families, with a consequence that black family members who lost a loved one from a tort would be less likely to be able to seek recovery for the death than white families who lost a loved one.

Court found that the damage amount for the young man’s eighteen months of suffering between the injury and death was inadequate, using quite sympathetic language.

135. 192 So. 712, 712 (La. Ct. App. 1939).

136. *Id.* at 715.

137. 97 So. at 346.

While the law itself provided ample opportunity for courts to evaluate a loved one's loss in a way that went far beyond monetary contribution provided by the decedent, the law as applied seems to have reflected traditional assumptions that placed the highest value on financial support provided by the husband to his widow and legitimate children. Lower value seems to have been placed on emotional losses suffered by survivors. Comparison of roughly contemporaneous cases featuring decedents of different races shows that the financial contributions of black decedents, their pain and suffering, and the grief of black survivors, at times, were weighed more lightly than similar harms suffered by whites. Moreover, courts' use of "black only" precedents to make damage decisions about the value of black decedents' claims, at the same time that they ignored precedents involving white people's deaths, shows that racial categorization contributed to blacks' claims being valued less than whites.' Finally, the courts' use of racial generalizations about blacks and the differences in tone and rhetoric further exemplify how race was implicated in the valuation of tortious injury. The torts system, through the process of individualized adjudication, violated the principle that similar injuries should be treated similarly.

PART III. RACE, STATUS AND HARM: "A COLORED MAN
... HAS NOT THE SAME AMOUNT OF INJURY
UNDER ALL THE CIRCUMSTANCES THAT A
WHITE MAN WOULD HAVE."¹³⁸

One of the most conspicuous departures from the principle of treating like cases alike was a New York case, *Griffin v. Brady*, which was notorious at the time, but has since receded into obscurity.¹³⁹ The New York Times on May 22, 1909 carried the headline, 'Negro Not Equal to White: Suffers Less Humiliation in False Arrest, Court Holds.'¹⁴⁰ George Griffin, a black Pullman porter, had sued Daniel Brady, President of Brady Brass Company, for false imprisonment damages because, he claimed, Brady had "maliciously caused his arrest on the charge of having stolen a card case containing \$20, several

138. *Negro Not Equal to White: Suffers Less Humiliation in False Arrest, Court Holds*, N.Y. TIMES, May 22, 1909, at 16 [hereinafter *Negro Not Equal to White*].

139. *Griffin v. Brady*, 117 N.Y.S. 1136 (App. Div. 1909) (mem.), *aff'd per curiam*, 118 N.Y.S. 240 (App. Div. 1909) (denying motion for reargument and stating that its affirmance "is not to be taken as an approval in any degree of the expression by the trial court of its views in colloquy with counsel."), *aff'd*, 126 N.Y.S. 1130 (App. Div. 1910) (mem.).

140. *Negro Not Equal to White*, *supra* note 138, at 16.

railroad passes, and valuable papers, but the next day, when the case was investigated by a Magistrate, he was discharged.”¹⁴¹ The events took place in Montreal.¹⁴² A jury in New York found Brady liable and awarded Griffin \$2,500.¹⁴³ After the verdict, the trial judge, former Congressman Philip Dugro, told Griffin’s lawyers “that he would set the verdict aside unless their client would consent to a reduction of the amount of damages to \$300.”¹⁴⁴ When they refused, the judge carried out his threat, and this decision was affirmed in three separate appellate orders, none of which discussed its substance.¹⁴⁵ Griffin then apparently accepted the reduction of damages to \$300.

Justice Dugro’s courtroom comments, with a reporter present, attracted attention. Referring to Griffin, Justice Dugro reportedly said:

He was a porter, and while he is just as good as the President of the United States, and if he is imprisoned wrongfully he should be paid for it, it would be a bad argument to say that he is just as good in many senses. He would not be hurt just as much if put in prison as every other man would be. That depends on a man’s standing, what his circumstances are, and, if he is a colored man, the fact that he is a colored man is to be considered . . . [I]n one sense, a colored man is just as good as a white man, for the law says he is, but he has not the same amount of injury under all circumstances that a white man

141. *Id.* Daniel Brady himself went on to become a charter member of the New Jersey Chamber of Commerce. N.J. Chamber of Commerce, *Who are we? NJ Chamber of Commerce Charter Members: 1911-1913*, <http://www.njchamber.com/Membership/chartermembers.htm> (last visited April 22, 2004). Daniel Brady’s brother, the New York Times reports, was “‘Diamond Jim’ Brady, one of the best known financiers of the ‘gilded age.’” *Negro Not Equal to White*, *supra* note 138, at 16.

142. *Negro Not Equal to White*, *supra* note 138, at 16. Presumably Griffin sued in New York because Brady and he were New York residents. There is no way of knowing, of course, whether Griffin would have been so promptly cleared of misconduct had the events of the case not taken place in Montreal but had taken place in the United States.

143. *Id.*

144. *Id.*; see also Infoplease, *Dugro, Phillip Henry, (1855-1920)*, at <http://www.infoplease.com/biography/us/congress/dugro-philip-henry.html> (last visited Aug. 25, 2005).

145. *Griffin*, 117 N.Y.S. at 1136; 118 N.Y.S. at 240; 126 N.Y.S. at 1130. Griffin probably could have appealed to the New York Court of Appeals but may have felt that it would be unavailing. The appellate division denied Griffin’s motion for reargument, stating that “the affirmance by this court without an opinion of an order of the trial court, made in the exercise of its discretion, setting aside the verdict of a jury, is not to be taken as an approval in any degree of the expression by the trial court of its views in colloquy with counsel.” *Griffin*, 118 N.Y.S. at 240. The order also stated, “All that is determined is that this court has declined to reverse an order made in the discretion of the Trial term, directing a new trial, upon which new trial all the issues are to be presented de novo to another jury.” *Id.* This order is not a model of clarity. Paraphrasing, the trial court had the discretion to set aside a jury verdict and order a new trial, and the appellate division affirmed that exercise of discretion. However, still paraphrasing, the appellate division was not intending to endorse the trial court’s expression of his views, in his discussion with Griffin’s lawyer. It is not entirely clear exactly what the appellate division is not endorsing.

would have. Maybe in a colored community down South, where the white man was held in great disfavor, he might be more injured, but after all that is not this sort of a community. In this sort of a community I dare say the amount of evil that would flow to the colored man from a charge like this would not be as great as it probably would be to a white man.¹⁴⁶

The New York Times published a critical editorial on the case, which stated that the judge's decision to reduce Griffin's verdict "made talk all over the country. Nobody could deny that there was a sort of truth in it, and yet almost everybody had an instinctive realization that somehow the thing was, or ought to be, wrong. It was, in short, the indictment and condemnation of a race, without regard to its better part or its exceptional members, and that is repugnant to the modern sense of equity."¹⁴⁷ The editorial also chided the appellate court for the ambiguity of its comments about Justice Dugro's colloquy with counsel, since the comments could be read either as indirect criticism of Justice Dugro's views or the fact that he expressed those views.¹⁴⁸ The Times criticism seemed to echo W.E.B. Dubois' notion of a "talented tenth" of black Americans whose qualities and achievements deserved the respect of white Americans.¹⁴⁹

More incisive criticism came from an article in the Virginia Law Register, later reprinted in the Central Law Journal, entitled *A New York Court Draws The Color Line*.¹⁵⁰ Calling the decision "remarkable," the article sarcastically noted:

We are exceedingly glad that this decision came from a court of justice north of the Potomac. Had it occurred in a southern state we can imagine the agony of mind that it would have cost the New York Evening Post and a few other journals of that character. We

146. *Id.* A Boston newspaper quoted Justice Dugro somewhat differently, including "I think if you were to take the Mayor of the city and arrest him he would feel very much more humiliated than this porter, from the fact that he was the Mayor and not a colored man, for if he were a colored man he might not feel quite as much humiliation and shame." *Negroes' Feelings Cheaper—Judge Says White Man Is Entitled to More Damages*, BOSTON POST, May 22, 1909. Much of the Boston paper's quote is identical to the NEW YORK TIMES quote; it is not clear whether the New York Times omitted the Justice's quote about the Mayor or if there is a conflict in the two accounts.

147. Editorial: *No Light on the Main Point*, N.Y. TIMES, July 16, 1909, at 6.

148. *Id.* The case was also mentioned critically by Stevenson, *supra* note 22, at 905, in a way that suggests the author expected more public criticism of it would ensue.

149. W.E.B. DU BOIS, THE TALENTED TENTH, IN THE NEGRO PROBLEM 33 (Humanity Books 2003) (1903).

150. *A New York Court Draws The Color Line*, 69 CENT. L.J. 118 (1909) [hereinafter *Color Line*]. The Central Law Journal was a weekly journal for practicing lawyers, published in St. Louis, Missouri starting 1874, which mainly contained information about cases in the Mississippi Valley. 1 CENT. L.J. 1 (1874).

do not believe that in our Court of Appeals the court would have listened for one moment to an argument based upon the color of the suitor before it.¹⁵¹

The article ridiculed the decision, stating that the court would have had to go back to the fourteenth century to find support for it, and that color should have been irrelevant.¹⁵² It said that if punitive damages were at stake as in this case, a plaintiff's "station" should not be relevant to damage determinations.¹⁵³

It is impressive that in 1909, a jury awarded \$2,500 to Mr. Griffin against the President of Brady Brass Company for what were essentially mental distress and dignitary damages.¹⁵⁴ Yet, it is equally noteworthy that the reduction in damages, based solely on the plaintiff's race, was upheld by the New York appellate courts.

The trial judge's justification, and the controversy it created, illuminate enduring tensions linked with torts and race. The trial judge attempted to avoid the basic principle of formal equality that similar injuries should be treated similarly, by categorizing the injury to a black person caused by false imprisonment as different in kind from an injury to a white person caused by the same tort. He justified the damage reduction by imagining a comparison between the actual situation and a hypothetical one. The actual situation (black plaintiff falsely imprisoned) and the hypothetical one (white plaintiff falsely imprisoned) were *not* the same, in his analysis. Although the defendant's actions were tortious in both situations, a different injury occurred and therefore a difference in treatment *was* called for because

151. *Color Line*, *supra* note 150, at 119.

152. *Id.* The article cited *Bodrengam v. Arcedekne*, "which was reported in Year Book 30 and 31, Edw. I, page 106, decided in the year 1302 . . ." *Id.* Justice Brumpton apparently stated in that case, "that a buffet given to a knight or noble was as bad as a wound given to one of the rabble." *Id.* A "buffet" in this context is "a blow or cuff with or as if with the hand." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). The article noted that "we imagined the world had advanced a little since that time and that the law knew no man's color when he was impleaded in the courts." *Color Line*, *supra* note 150, at 119. The article went on to say that that "we are inclined to think that the majority of the court was right and that in fixing damages the station of a man in life should be the guide in the ascertainment, but we do not think that the law books have always sustained this in questions where exemplary damages are allowed." *Id.* The article noted that *Griffin* was purely about exemplary damages, and under Virginia law, once some damage was established (as was clearly the case here) it was up to the jury to determine them and the amount could not be reviewed unless they were "influenced by improper motives." *Id.*

153. *Id.*

154. See *supra* note 22, regarding racial composition of juries. Pullman porters were not paid much, so it is likely that the litigation was financed by contingency fee agreement. LARRY TYE, RISING FROM THE RAILS: PULLMAN PORTERS AND THE MAKING OF THE BLACK MIDDLE CLASS 88 (2004). See also WELKE, *supra* note 7.

of the different race of the victim in each situation. His statements about different damage amounts based on race, then, supposedly did not violate the general principle that similar injuries should be treated similarly, because the injuries were not similar.

Moreover, the judge's decision, by tying damage amounts to group-based concepts of race and status, ignored the tort principle that injuries should be evaluated individually.¹⁵⁵ Part of the purpose of the false imprisonment tort is to compensate individual victims for personal humiliation and insult.¹⁵⁶ Thus, the judge's decision that this victim did not suffer as much as the jury thought he did, runs directly contrary both to the purpose of this tort and to the principle that the damages for this tort are necessarily subjective.

The reasoning that justified the result was circular, rather like the use of segregated precedents to determine damages. The generalized inferior caste status of blacks was the reason for them to receive less compensation than whites when injured by the same torts.¹⁵⁷ Mr. Griffin was inferior in the first place, and so damages awarded to him should be less than those of a white man who, by definition, had a higher status than a black man, according to the judge. The fallacy of this argument, pointed out by the Virginia Law Register article, is that

[t]he injury to a man for false imprisonment might be far greater in the case of a humble man working for a daily wage than in the case of a millionaire. The fact that the former had once been in prison, although innocent, might cause him to have great trouble in securing a position such as a porter upon a Pullman car The injury, therefore for false imprisonment to a porter on a Pullman car, even though he was colored, might be far greater than to a Vanderbilt or a Rockefeller.¹⁵⁸

Moreover, the injury to Mr. Griffin's actual sense of dignity might have been far greater than the injury Mr. Brady would have suffered; but at any rate the jury had the task of making that determination.

One reason that the case received widespread attention is that it clearly deviated from two familiar ideas which were central to torts even in times of particularly virulent racism: These are the ideas that,

155. See *supra* note 13 and accompanying text.

156. W. PAGE KEETON, ET. AL., PROSSER & KEETON ON THE LAW OF TORTS 48 (W. Page Keeton, 5th ed. 1984).

157. Race-specific economic earnings projections, which project that blacks will earn less, because they have earned less, are sometimes used in tort litigation to this day. See, e.g., Chamallas, *supra* note 23.

158. *Id.*

first, damages should be assessed with reference to the individual's situation; and second, similar injuries should be treated similarly. Instead of assessing the damages with reference to the individual's situation, with only a sweeping glance at whether damages are consistent to satisfy (or seem to satisfy) equal treatment principles, the judge instead insisted that damages correspond to race and status. In the scores of appellate decisions read for this Article involving tort claims brought by African American victims in the twentieth century, explicit justifications for compensating white plaintiffs more than African American plaintiffs because of race are rare.¹⁵⁹ Trial judges, of course may have made similar remarks that were not reported. Nonetheless, racial inequality has appeared more commonly in subtler guises, such as in individualized adjudication or settlement practices that collectively resulted in overall lower awards for blacks than for whites.¹⁶⁰ The tort principle that injuries should be evaluated individually, combined with the principle that similar injuries should be treated similarly, render unacceptable, or at least controversial, broad statements that the race and status of an injured person should correlate with the amount of damages.

PART IV. POST-1949 EVIDENCE

Tort decisions no longer reference the race of the parties, and formal mechanisms of racial exclusion from the legal system are no longer allowed. Debate persists about how much difference race and racism continue to make in the U.S. legal system. Issues pertaining to tort litigation in general, much less issues of race in tort litigation, are extremely difficult to study because of challenging empirical issues.¹⁶¹ In depth consideration of contemporary issues pertaining to race and

159. One similar instance is in *Blackburn v. Louisiana Ry. & Navigation Co.*, 54 So. 865, 869 (La. 1910) (reducing damage amount because of "the well-known improvidence of the colored race, and the irregular life these colored brakeman lead . . .").

160. See *supra* Part. I; Part. II.B.1.

161. See Galanter, *supra* note 18; Saks, *supra* note 18; Schwartz, *supra* note 18; see also AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS viii (1985) (analyzing effect of race on civil justice system and verdicts); MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979 1, 1 (1982) (noting that most information about civil jury trials is based on anecdotal evidence). In a 1990 Washington State report, average settlements for minorities with asbestos claims were lower than for non-minorities, but the report itself acknowledges that more information is needed to understand the significance of that outcome. JUSTICE CHARLES Z. SMITH, WASHINGTON STATE MINORITY & JUSTICE TASK FORCE FINAL REPORT 11 (1990); cf. Chamallas, *supra* note 8, at 463 (noting that "[g]ender and race have disappeared from the face of tort law" but arguing that they remain significant).

torts is beyond the scope of this Article, but some general observations will be made.¹⁶²

The most systematic published study of civil trials and race analyzed 9,000 civil jury trials in Cook County, Illinois, from 1959-1979.¹⁶³ It found that "race seemed to have a pervasive influence on the outcomes of civil jury trials."¹⁶⁴ When black plaintiffs won, they "received smaller awards, only 74 percent as much as white plaintiffs received for the same injury."¹⁶⁵ The pattern of blacks' claims being devalued, which we observed in the Louisiana cases, appears to have continued. The Cook County study noted that "[t]he disadvantage for black plaintiffs did not lessen in recent years."¹⁶⁶ However, the period this study covered ended about twenty five years ago. The report also noted that blacks were underrepresented in proportion to their population in Cook County as both plaintiffs and defendants, suggesting that perhaps "[b]lacks might have been more reluctant to file lawsuits—and lawyers might have been less willing to take their cases—if they foresaw a lesser chance of winning or a small award if they won."¹⁶⁷ The Cook County study demonstrates how race had a significant impact in torts in the latter half of the twentieth century. Inequality and bias may still persist in the tort system in submerged forms today, for example in devaluing harm to blacks relative to whites or in informal barriers to participation in the torts system.¹⁶⁸

162. For more contemporary consideration, see McClellan, *supra* note 23, and Chamallas, *supra* note 23.

163. CHIN & PETERSON, *supra* note 161.

164. *Id.*

165. *Id.* The study notes that "[b]lack plaintiffs won somewhat less often than white: 40% as opposed to 46%, for example, in automobile accident trials." *Id.*

166. *Id.* at ix. Regarding black defendants, the study notes that they "also lost somewhat more often than whites, with the difference again similar to that for plaintiffs. Liability decisions were about the same, then, when both parties were of the same race, but lawsuits between parties of different races produced substantial differences: White plaintiffs, for example won 62% of slip and fall trials against black defendants, but black plaintiffs won only 50% of such suits against white defendants." *Id.* at viii. The report goes on to note that awards against black defendants were 10 percent less than awards against black defendants in similar trials. *Id.* at ix. Thus, jury decisions did not always work to the disadvantage of blacks, however, the report speculates that juries may have perceived that black defendants had fewer resources and so made lower verdicts, *id.* But "the lower awards against black defendants further reduced awards to black plaintiffs," since most suits against blacks were brought by other blacks. *Id.* at ix.

167. *Id.* at ix.

168. See *supra* note 23.

CONCLUSION

Part of the story of "the color line"¹⁶⁹ in twentieth century law is the role that race and racism played in valuing injuries caused by torts in the United States. African Americans were systematically excluded from authoritative roles in the legal system, but participated as tort plaintiffs with considerable success in the first half of the century. Institutional characteristics of the torts system, such as the use of contingent fee agreements that broadened access to the tort system, and the practice of individualized adjudication, all contributed to this success.

However, the principle that like cases should be treated alike was clearly violated in many instances, with claims brought by black plaintiffs devalued in the settlement and adjudication of torts cases during the first half of the twentieth century. The process of racial categorization was a significant mechanism in devaluing blacks' claims. Powerful actors in the torts system, ranging from railway company claim agents to trial and appellate judges, focused on the race of injured black people in the course of measuring their injuries, finding that their race necessarily made their injuries from torts worth less than injuries to whites. From a claims manual that asserted "a negro brakeman is likely probably only a negro," to a trial judge who said that a black man's injury was necessarily less substantial than a white man's injury, to appellate judges who measured harm caused by the deaths of black family members based only on earlier cases involving deaths of blacks, these actors put harm to blacks in different categories than harm to whites. This categorization process was one mechanism that enabled decision-makers to ignore and evade the principle, important even during this era, that like cases should be treated alike.

Moreover, the tradition in torts that every injury is individualized, with no exacting requirement that results in cases be compared, gave free reign to whites' bias and unfavorable treatment of blacks' claims, and also made such bias and unfavorable treatment very difficult to detect. Aggregate analysis of awards in dozens of fatality cases shows that awards to black families for the loss of a loved one were less than half of those to white families in similar situations. Losses suffered by blacks were treated as less valuable than losses to whites in otherwise comparable cases, and by the structure of wrongful death law. As awards to blacks were lower than awards to whites, torts cases both reflected and reinforced racial inequality. Such lower awards were

169. DU BOIS, *supra* note 1.

significant in themselves, but they also gave potential defendants lower incentives to prevent harm to blacks than to whites. Torts cases collectively gave a "public law" message that blacks were inferior to whites.¹⁷⁰ Despite the achievements of the Civil Rights Movement against racial inequality, evidence suggests that devaluation of injury to blacks persisted past the first half of the twentieth century. Going forward, although race is no longer on the surface of tort law, we must be alert to the ways that different aspects of the torts system may contribute to devaluing blacks' tort claims.

170. Green, *supra* note 2.