



HOW **RACE, ETHNICITY,** AND **GENDER** IMPACT YOUR LIFE'S WORTH

Discrimination in Civil Damage Awards



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

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Letter from the President & Executive Director

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, nonprofit civil rights organization whose principal mission is to secure equal justice for all through the rule of law, targeting the inequities confronting African Americans and other racial and ethnic minorities. We stand on the frontlines of some of today's most significant and complex civil rights challenges. The Lawyers' Committee works with the largest pro bono civil rights network in the nation, comprised of more than 150 law firms. We also work with more than 150 national, regional, statewide and local grassroots organizations throughout the country and are affiliated with 8 local committees in San Francisco, Los Angeles, Boston, Chicago, Denver, Mississippi, Philadelphia, and Washington, D.C.

Through its programmatic work, the Lawyers' Committee brings affirmative impact litigation cases across the country

to address issues impacting equal educational opportunities for our nation's children, fair housing opportunities, voting rights, economic justice, criminal justice and more. The organization is also working to combat the spike in hate crimes across the country and working to preserve the integrity and diversity of our nation's courts. The Lawyers' Committee also spearheads the Election Protection Coalition, the nation's largest nonpartisan voter protection initiative coalition, by partnering with local organizations and law firms throughout the country to assist thousands of voters through its network of trained volunteers and its 866-OUR-VOTE hotline.

In addition, the Lawyers' Committee promotes accountability and transparency in the current era, mounting legal challenges against the Administration in response to the many rollbacks and threats to civil rights. For example, the Lawyers' Committee has recently sued:

- the U.S. Department of Housing and Urban Development after it unlawfully suspended a federal requirement that local and state governments address segregated housing patterns as a condition of receiving HUD funding;
- the Departments of Justice and Homeland Security in connection with the now-defunct Election Integrity Commission; and
- the U.S. Department of Commerce and the U.S. Census Bureau to challenge the inclusion of a citizenship question on the 2020 Census.

Founded 55 years ago by President John F. Kennedy, the Lawyers' Committee for Civil Rights Under Law continues to be at the forefront of the most important efforts to advance civil rights and ensure that every American has a voice in our democracy.

Sincerely,



Kristen Clarke

President and Executive Director
Lawyers' Committee for Civil
Rights Under Law



States must prioritize legislative reforms that eradicate discrimination in civil damages awards by prohibiting the use of race/ethnicity- and gender-based statistical tables.

I. Introduction

The U.S. Constitution promises equal protection and due process under the law. Important federal, state, and local civil rights laws prohibit discrimination on the basis of race, ethnicity, gender, and other protected categories in various areas including employment, public accommodations, and education. Yet, no federal or state law prohibits the use of race, ethnicity, or gender in the calculation of civil damage awards in tort actions, which seek to make the victim whole again. Since African Americans, Latinxs, and women in the U.S. earn less than whites and men, respectively, the damages they receive are substantially lower than those received by their counterparts.¹

Historically, courts relied on explicit discrimination to justify lower awards for people of color

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and women. Today, the problem is more insidious: race and gender are embedded in the wage tables used by experts to calculate damages for plaintiffs in wrongful death and personal injury cases. The use of race/ethnicity- and/or gender-based data by experts to predict lost earnings deprives marginalized individuals, especially children of color, from fair compensation by perpetuating systemic inequality and failing to “recognize human potential.”² The practice disproportionately affects communities of color because it “creates an incentive for companies to allocate risks to minority communities in order to minimize potential tort damages in the future.”³

The use of race/ethnicity and/or gender in the calculation of civil damage awards has slowly come under increasing scrutiny by a few judges, legislators, commentators, and academic researchers. One federal judge in particular, Judge Jack B. Weinstein of the Eastern District of New York, stands out for recently ruling that the use of race-based tables is unconstitutional. However, states have largely ignored this issue. States must prioritize legislative reforms that eradicate discrimination in civil damages awards by prohibiting the use of race/ethnicity- and gender-based statistical tables.

II. Discriminatory Damage Awards Harm Minority Children and Communities of Color

Courts rely on damages calculations by experts who use tables that predict, among other factors, plaintiffs' lost earnings and wages on the basis of their race/ethnicity and gender. Typically, experts use the Bureau of Labor Statistics' Current Population Survey, which is updated quarterly, to determine projected lost earnings. Loss of earning potential is a significant component of damages and can "make the difference between a modest and sizable award."⁴ As discussed in Section IV below, race/ethnicity- and gender-specific tables preserve systemic and structural inequalities, reinforce current pay gaps and workforce discrimination, and fail to account for possible progress.⁵ In short, they ascribe lower values to the lives of women and people of color. Despite this discriminatory impact, the use of such tables is

the industry standard: approximately 44% of economists said they consider race when calculating future earnings income and 92% reported they consider gender.⁶ In a survey of 172 members of the National Association of Forensic Economists, when tasked with calculating the loss of a two-year-old African American boy unable to work in the future, 42.4% stated they would only use gender specific data, whereas 44.8% would use both race-specific and gender-specific data.⁷

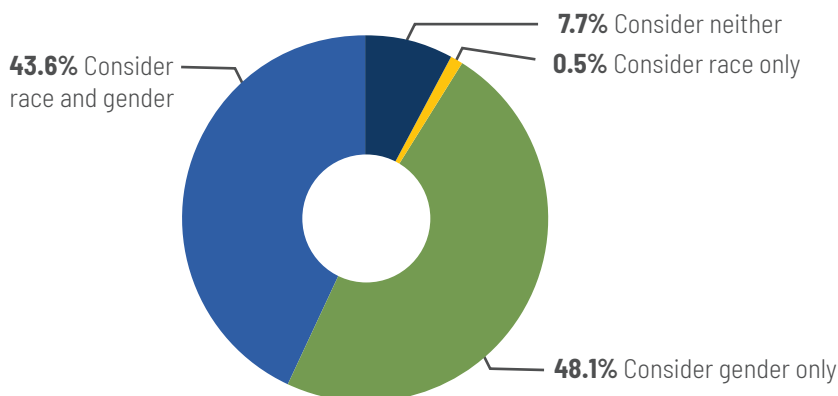
In assessing civil damages, courts generally admit expert testimony from forensic economists who estimate the present value of lost future income.⁸ While most expert economists consider several factors to determine future income earnings—like the number of years a victim would have worked,

This practice is particularly problematic when calculating damages for child victims who have not yet worked, attained a certain level of education, or had an opportunity to indicate a specific career path.

their expected wages, their age, and their wage history—these experts are also more likely than not to take into account gender and race, which tend to outweigh the individualized factors, such as academic ability, work ethic, professional aspirations, or educational attainment.⁹ This practice is particularly problematic when calculating damages for child victims who have not yet worked, attained a certain level of education, or had an opportunity to indicate a specific career path.¹⁰

For example, the use of race/ethnicity tables greatly disadvantages children of color who are most likely to be the plaintiffs in lead paint poisoning cases, but, because of their race, receive the lowest awards.¹¹ 11.2% of Afri-

Percentage of economists who would consider each demographic variable in determining a child's future lost income.



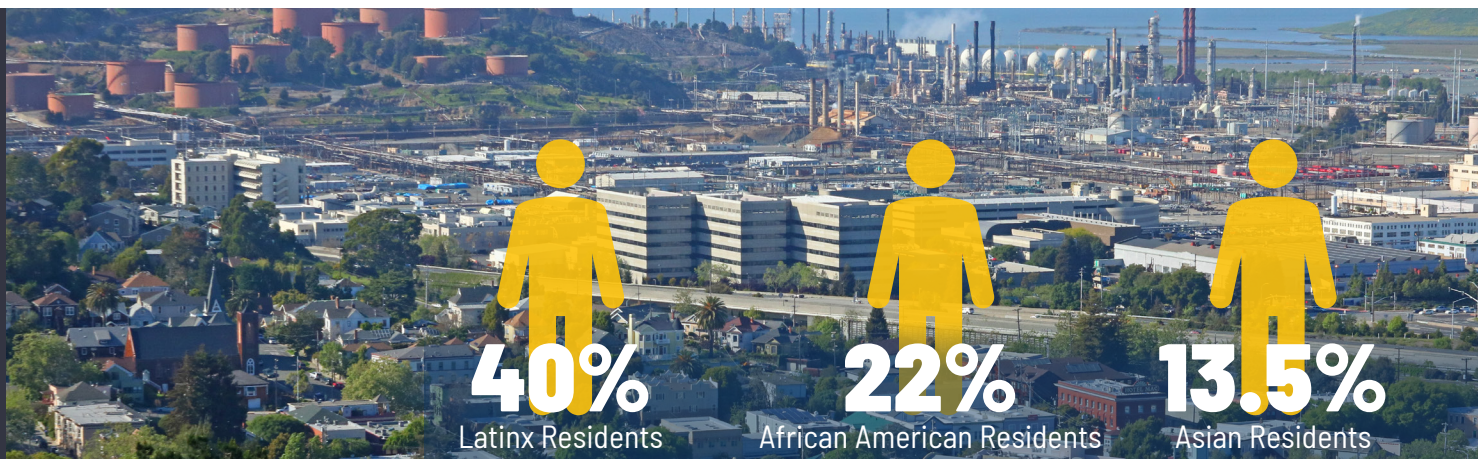
Source: Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, WASH. POST; WONKBLOG (Oct. 25, 2016), <https://www.washingtonpost.com/graphics/business/wonk/settlements/>.

can American children and 4% of Latinx children are poisoned by lead, compared with 2.3% of white children.¹² Segregation and discriminatory redlining practices have perpetuated a cycle where children of color are disproportionately living in low-income housing.¹³ Such housing tends to have high levels of lead-based paint, despite Congress banning the use of such paint in 1971.¹⁴ Lead poisoning from lead-based paint can lead to various seri-

ous health problems, including kidney failure, anemia, seizures, and brain development issues.¹⁵ Despite these well-documented risks, the use of race/ethnicity in paying lower court awards likely disincentivizes defendants from remediating lead-based paint from residential buildings.¹⁶

Communities of color are also disproportionately impacted by environmental hazards created by toxic waste centers, industrial facilities, unsafe drinking water,

and chemical factories.¹⁷ Of the people who live within 1.86 miles of a toxic waste site, more than half are people of color.¹⁸ Children of color comprise almost two-thirds of the 5.7 million children who live within one mile of a high-risk chemical facility in the U.S.¹⁹ Health issues caused by the prevalence of these environmental hazards lead to an increased likelihood of suits seeking personal injury or wrongful death damages. The use of race and ethnicity data



CASE STUDY: Richmond, California

Richmond, California is an example of a community of color dealing with consistent and dangerous environmental exposure. 40% of Richmond residents are Latinx, 22% are African American, and 13.5% are Asian.²¹

Richmond is home to a 3,000-acre oil refinery owned and operated by Chevron, which has repeatedly failed to comply with the Clean Air Act, the Clean Water Act, the National Pollutant Discharge System, and the guidelines for Occupational Safety and Health.²² Between 1989 and 1995, 304 accidents transpired at the Chevron Richmond refinery.²³ These accidents ranged from fires, leaks, explosions, air contamination, and toxic

gas releases. A major fire in August 6, 2012 sent 15,000 residents and 19 workers to the hospital.²⁴ The 17,000 people who live within three miles of the refinery suffer from heightened rates of cancer, asthma, and other pulmonary diseases.²⁵ Children are especially affected by the air issues: Richmond has a much higher than average rate of children requiring hospitalization due to asthma.²⁶

Chevron's long history of disregard for environmental regulations makes it difficult to sort out legitimate claims and establish causation. Most of the claims are dealt with through the city via class actions and then settled without any admission of guilt by Chevron.²⁷ For

instance, after the 2012 fire, the city of Richmond filed suit against Chevron arguing Chevron was guilty of negligence, maintenance of an ultra-hazardous activity, and trespass of pollutants, ash, and soot on city property.²⁸ Five years later, the parties entered into a \$5 million settlement of the claims.²⁹

Richmond, California is one of numerous communities of color suffering from devastating environmental degradation with little to no access to adequate justice. Personal injury damages awards calculated using race-based tables further harm lower-income communities of color like Richmond that are already economically disadvantaged.

in civil damage award calculations incentivizes corporations to place their factories and operations in

low-income communities of color where the cost of damages awards resulting from personal injury and

wrongful death lawsuits would be less than if the community was predominately white.²⁰

III. Historical Use of Race, Ethnicity, and Gender in Civil Damage Awards

The practice of reducing civil damages for African Americans and other racial and ethnic minorities dates back to the early 20th century when judges did so with explicit reference to offensive stereotypes. For example, in *Blackburn v. Louisiana Ry. & Nav. Co.*, the 1911 Louisiana Supreme Court reduced the damages award for an African American man by nearly 70%, citing “the well-known improvidence of the colored race, and the irregular life these colored brakemen lead.”³⁰

A New York federal court in 1905 similarly reduced the amounts awarded to the African American victims of a steamship crash, referencing the book, *Race Traits and Tendencies of the American Negro* to purportedly show “in a forcible way the difference in the vitality of the two races.”³¹ The court relied on this racist “science” to show that the African American victims would have lived shorter lives, and therefore would have had shorter work-lives, thereby entitling the African American victims to lesser damages.³²

Courts similarly have long justified lower awards to women, including women of color, based

In 1970, a federal district court of the Eastern District of Pennsylvania assessed the worth of a 19-year-old woman who suffered permanent brain damage by judging whether she was marriage-material.

on sexist assumptions that women will have shorter or interrupted careers because of marriage and motherhood. In 1944, the Supreme Court of Pennsylvania reduced the award of a female child who was killed by a city truck, based on “the lower rate of wages ordinarily obtainable in the industrial world by women as compared with men, and the likelihood of marriage and motherhood, with their resulting effect on the girl’s opportunity and capacity to continue through life as a wage earner.”³³ In 1970, a federal district court of the Eastern District of Pennsylvania assessed the worth of a 19-year-old woman who suffered permanent

brain damage by judging whether she was marriage-material: “She was attractive, healthy, talented, well-adjusted, and intelligent. . . . She enjoyed male companionship. . . . Marriage probably would have interrupted her career.”³⁴ In finding the victim to be marriage-material, the court decided to reduce her projected earnings by half.³⁵ In 1975, another federal court found that “eight years . . . falls squarely in the middle of the range of a professional woman’s likely hiatus from her principal occupation in order to raise a family.”³⁶

Courts have also required women to justify professional ambitions used to argue for higher damages awards.³⁷ One court dismissed evidence of a young female accident victim’s lifelong aspirations to become a veterinarian as “purely speculative” and “without evidential foundation” due to the difficulty of getting into the only veterinarian school in the region.³⁸ The same skepticism has not been shown in cases where men aspired to similar professional careers.³⁹ Despite this pervasive discrimination in damages awards, state legislatures have failed to take any meaningful action to rectify this wrong.

IV. Discriminatory Civil Damages Awards Fail to Account for Future Progress

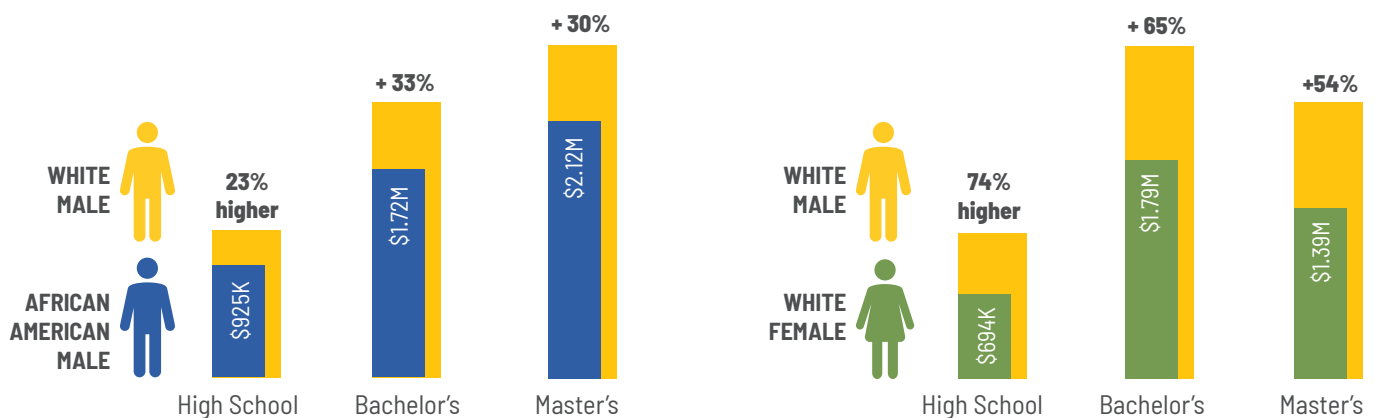
The use of wage and earning tables delineated by race/ethnicity and gender perpetuates economic and racial inequality.⁴⁰ Race and ethnicity-based award calculations sustain structural racial discrimination and inequality stemming from America’s history of slavery, segregation, and mass incarceration. Today, large racial wage gaps persist for men of color: in 2015, African American men made 73% of white men’s earnings and Latino men earned only 69%.⁴¹ College-educated African American men also face significant gaps: African American men with a college education earn

only 80% of the hourly wages of a similarly situated white man.⁴² In addition to facing pay discrimination, African American and Latino men are also disproportionately subjected to high levels of policing and involvement with the criminal justice system, both of which are rife with discriminatory bias. African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites,⁴³ and despite using drugs at similar rates as whites, African American adults are 2.5 times more likely to be arrested for drug possession than whites.⁴⁴ Latinos are imprisoned

at a rate that is 1.4 times the rate of whites.⁴⁵ For many, a criminal record often leads to life-long difficulties in obtaining and maintaining employment.⁴⁶

At the intersection of race and gender, women of color also face significant discrimination, regardless of their education level. The gender wage gap exists at all education levels, worsens as a woman’s career progresses, and occurs within occupations where both men and women work.⁴⁷ African American women and Latina women typically make only 63 cents and 54 cents, respective-

WHITE MEN GET HIGHER COMPENSATION ACROSS THE BOARD



Note: All above compensation projections use a simplified version of a future lost income model with a typical race and gender bias. They do not reflect actual calculations made by any forensic economist, as those economists consider many more variables, but are rather illustrative examples. While economists include race and/or gender in a variety of measures—wage, worklife expectancy, and education level, primarily—this model assumes gender is considered for worklife expectancy and both variables are considered for wage. While this is not the method the majority of economists use (no single method is), it is reflective of the typical impact race and gender have on compensation. They further assume victim is under 25 with no work history and cannot work in the future.

Source: Kim Soffen, *In one corner of the law, minorities and women are often valued less*, WAPO; WonkBlog. (Oct. 25, 2016), <https://www.washingtonpost.com/graphics/business/wonk/settlements/>

More recently, ten states have passed strong equal pay protection laws prohibiting pay discrimination and barring employers from asking about salary history in an attempt to further close the gender wage gap.

ly, for every dollar paid to their white, male counterparts.⁴⁸ African American and Latina women with a college degree only earn about 70% of the hourly wages of a white college-educated man.⁴⁹ African American women with an advanced degree earn about \$7 an hour less than white men who only have a bachelor's degree.⁵⁰ Mothers, particularly mothers of color, are offered lower starting salaries and are perceived to be less competent than equally qualified fathers.⁵¹ African American mothers and Latina mothers are paid just 51 cents and 46 cents for every dollar a white father makes, respectively.⁵²

While systemic gender and race discrimination continues to permeate our society, legislative and policy reforms aim to remedy these ills. As a result, women and people of color have made

strides in recent decades, in part due to numerous statutes passed to address historical gender- and race/ethnicity-based inequalities. In 1963, the Equal Pay Act was passed to help ensure that men and women are given equal pay for equal work within the same establishment.⁵³ In 1964, Congress passed Title VII of the Civil Rights Act to prohibit discrimination on the basis of gender, race, and ethnicity in employment.⁵⁴ Since the implementation of the Equal Pay Act and Title VII, labor force participation rate by women has doubled.⁵⁵ Between 1966 and 2013, African American participation rates in the workforce increased from 8.2% to 14%.⁵⁶ Protection from discrimination has helped women and people of color to access jobs, including higher-paying supervisory and management positions, and higher education. In 1960, only 15% of managers were women, but by 2009, almost 40% of managers were women.⁵⁷

Today, there is a continued societal focus on increasing racial and gender equality. More recently, several states have passed strong equal pay protection laws prohibiting pay discrimination and barring employers from asking about salary history in an attempt to further close the gender and racial wage gap.⁵⁸ And, several states, including California, Illinois, and Massachusetts, have all passed resolutions setting voluntary goals for corporate boards to have a minimum number of women directors within a specified time



“We must not assume that individuals forever remain shackled by the bounds of community or class. The law loves certainty and economy of effort, but the law also respects individual aptitudes and differences.”

— *Greyhound Lines, Inc. v. Sutton*, 765 So. 2d 1269, 1277 (Miss. 2000)

period to increase diversity at management levels.⁵⁹ In doing so, these states cited studies finding a correlation between boardroom gender diversity and enhanced corporate performance.⁶⁰ Companies themselves have also joined efforts to promote diversity. Companies like Google, Apple, Yahoo, and Salesforce, among others, voluntarily publish annual diversity employment numbers, leading to increased accountability.⁶¹

While more work needs to be done to increase diversity at every level, high profile jobs in politics and law slowly have become more accessible to women and people of color. In 1965, there were zero African American U.S. Senators or state governors and only six African American U.S. House Representatives.⁶² Since then, there have been 10 African American Senators, including Barack Obama

who later became the first African American President, three African American state governors, and 114 African American U.S. House Representatives. Of all active federal courts of appeal judges, 36% are women and 7% are women of color.⁶³ In 2009, Sonia Sotomayor was appointed to the Supreme Court of the United States and became the first Latina justice. There, she joined two other women, Justice Ruth Bader Ginsburg and Justice Elena Kagan, and one other person of color, Justice Clarence Thomas.

Some progress has also been made on the criminal justice front. Since 2007, more than 30 states have implemented laws to reduce prison sentences, eliminate mandatory minimum sentences, expand parole eligibility, and strengthen diversion programs.⁶⁴ Legislative efforts to reduce incar-

ceration rates in communities of color will minimize collateral consequences and increase economic opportunities.

These reforms demonstrate the ongoing efforts to tackle inequality and create equal economic opportunities for people of color and women. Calculating damages for awards in tort cases based on race/ethnicity- and gender-specific data fails to account for potential future progress of women and people of color as society continues to work towards eliminating gender and racial disparities. As Judge Michael Mills held in *Greyhound Lines v. Sutton*, “We must not assume that individuals forever remain shackled by the bounds of community or class. The law loves certainty and economy of effort, but the law also respects individual aptitudes and differences.”⁶⁵

V. Reforms

Legislators, judges, and scholars are starting to recognize the problems inherent in using race/ethnicity- and gender-based statistics in the calculation of civil damages and have taken some steps to address them.

A. Federal Reform Efforts

To date, only one federal legislative effort has attempted to address the problem of civil damages that perpetuate racial and gender

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discrimination. The Fair Calculations in Civil Damages Act of 2016 was introduced in the Senate by U.S. Senators Cory Booker (D-NJ) and Kirsten Gillibrand (D-NY) and introduced in the House by U.S. Representatives Joseph Kennedy III (D-MA) and Mia Love (R-UT).⁶⁶ The bill sought to prohibit federal courts from awarding civil damages “using a calculation for the projected future earning potential of [a] plaintiff that takes

into account the race, ethnicity, gender, religion, or actual or perceived sexual orientation of the plaintiff.”⁶⁷ The bill directed the Secretary of Labor to “develop guidance for forensic economists to develop inclusive future earnings tables,” and, in conjunction with the Attorney General, to “develop guidance for States on how to make calculations of future earnings in State tort proceedings free of [such] bias.”⁶⁸ The bill separately directed the Judicial Conference of the United States and the Administrative Office of the United States Courts to study how segregation along the enumerated lines has affected civil damage awards, and the Federal Judicial Center to train judges on “how to use tables on future earnings in evidence that comply with this Act.”⁶⁹ In introducing the bill, Senator Gillibrand called the use of such statistics “one of the most damaging and offensive consequences of America’s pay inequality problem.”⁷⁰ The bill never left the Senate Judiciary Committee or the House Subcommittee on the Constitution and Civil Justice.⁷¹

Related federal reform efforts have been successful in prohibiting the use of race and/or gender in damage calculations. On September 22, 2001, Congress established the September 11th Victim Compensation Fund, which was designed to provide a no-fault alternative to tort litigation for those physically injured or killed in the 9/11 attacks.⁷² Initially, the fund proposed distributing awards

using race and gender-based data. During the notice-and-comment period, at least two groups, a group of eleven members of Congress and the National Organization of Women (“NOW”), submitted letters opposing the proposed rules for being discriminatory against women and people of color. On January 14, 2002, Congresswoman Carol Maloney (D-NY) and ten other members of Congress, submitted a letter to the Department of Justice, the agency charged with administering the Special Compensation Fund, criticizing the proposed use of the “Worklife Estimates” charts issued by the U.S. Department of Labor, Bureau of Labor Statistics in 1979.⁷³ They argued that these charts, which showed that women work on average five years less than men were “‘invalid’ and ‘out of date.’”⁷⁴ Likewise, on January 22, 2002, NOW submitted a letter arguing that to base compensation on the “stubbornly persistent [race and gender] wage gap” would violate Equal Protection and Due Process without any “compelling” government objective.⁷⁵ At around the same time, the NAACP Legal Defense Fund also came out in public support of NOW’s position.⁷⁶ The Fund’s Special Master Kenneth R. Feinberg ultimately announced final administrative rules that compensated all victims using race-neutral, male tables “to avoid any gender bias in assumed future work life patterns and to ensure consistency.”⁷⁷

B. State Legislative Proposals and Reforms in Similar Areas

Most states are silent on the disparities in damage calculations caused by race/ethnicity- and gender-specific future earnings calculations in civil damage awards. Only two states, North Carolina and New Jersey, require the use of a blended, race- and gender-neutral, life expectancy table.⁷⁸ Only one state, Arizona, appends a blended, race- and gender-neutral life expectancy table to its model

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jury instructions.⁷⁹ A handful of states have either statutes or jury instructions that use race-neutral but gender-specific life expectancy and work-life expectancy tables.⁸⁰ A few states have gone the other way and either mandate or recommend the use of race- and gender-specific tables.⁸¹

While the majority of state legislatures have not addressed whether civil damages should take into account race, ethnicity, and/



“The legal system does not work fairly and with due process if one class of litigants is unduly burdened in litigation through the application of inappropriate ‘race’-based statistics.”

— Judge Weinstein,
McMillan v. City of New York,
253 F.R.D. 247, 255
(E.D.N.Y.).

or gender, certain state legislatures have addressed the use of such data in other areas, such as workers’ compensation. For example, in five states that have no guidance at all on the use of race, ethnicity, and/or gender in the calculation of civil damages, Kentucky,⁸² Montana,⁸³ Nebraska,⁸⁴ Nevada,⁸⁵ and South Dakota,⁸⁶ state legislatures or agencies have promulgated statutes, court rules, or regulations requiring the use of race-neutral life expectancy tables for disability calculations under workers’ compensation. In these states, race cannot be used to calculate workers’ compensation, but, in calculating civil damage awards followed by an injury, there is no prohibition on relying on race-specific data.

C. Reform Efforts from the Bench

Consulting race/ethnicity- and/or gender-based statistical tables or relying on experts who consult them remains the prevailing practice among judges and juries today. However, a small number of courts have rejected calculations that segregate injured plaintiffs based on one or both categories.⁸⁷ These judges generally have found that the use of race/ethnicity and gender-based tables is unreliable and discriminatory. One federal judge in New York, Judge Weinstein, has held the use of race-based tables is unconstitutional.

1. Race, Ethnicity, and Gender-Based Tables Are Unreliable

Several courts have rejected race/ethnicity- or gender-based statistics on the ground that such data are inherently inaccurate and unreliable for the purpose of making future projections. Courts often reason that because actuarial tables are based only on historical facts, they cannot accurately account for the pace of future progress for women and people of color in the workforce. In a case from the 1980s, Judge Raymond J. Pettine of the federal district court of Rhode Island refused to credit an expert’s reduction of a woman’s estimated working life by 40% because it was based on a survey of women’s work histories between 1978 and 1980.⁸⁸ “As a factual matter,” Judge Pettine reasoned, “I seriously doubt the

“It can no longer automatically be assumed that women will absent themselves from the work force for prolonged intervals during their child-bearing/child-rearing years.”

— Judge Pettine,
Reilly v. United States

probative value of such a statistic with respect to twenty-first century women's employment patterns, particularly in light of current, ongoing changes in women's labor force participation rates."⁸⁹ The First Circuit echoed Judge Pettine's concerns, reasoning on appeal that "[i]n an environment where more and more women work in more and more responsible positions, and where signs of the changing times are all around us, it can no longer automatically be assumed that women will absent themselves from the work force for prolonged intervals during their child-bearing/child-rearing years."⁹⁰

2. Race, Ethnicity, and Gender-Based Tables Are Discriminatory

Several courts also have rejected race/ethnicity- or gender-based statistics on the ground that the use of such data is discriminatory.⁹¹ In one case, the Court of Federal Claims declined to use gender-based actuarial tables to calculate damages under the Childhood Vaccine Injury Act because the result would unfairly penalize women.⁹² "Does it follow that because some women have historically been able to spend years out of the workforce, female children in the Program should always get substantially smaller awards for 'lost earnings' than male children?" the judge asked.⁹³ He answered: "I do not think so."⁹⁴ Similarly, in refusing to apply an African American male average earnings table to a biracial child, a

federal district judge in Washington, D.C. explained that "it would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from wages."⁹⁵

In *U.S. v. Bedonie*, a federal district court in Utah also rejected the use of both race-based and gender-based statistics out of anti-discrimination concerns.⁹⁶ That case involved restitution claims in two unrelated homicide cases involving a 21 year old Native American male with a high school education who was killed by a drunk driver and a three month old Native American girl who was killed by her father.⁹⁷ To perform lost income calculations, the court-appointed expert used Native American race-based statistics and recommended substantially reducing the victims' earnings projections.⁹⁸ The expert argued that the Native American man would receive only 58% of the average earnings of a similarly situated white man and the Native American girl would receive only 76% of the average earnings of a similarly situated white female.⁹⁹ In response, the court invoked its discretionary powers and declined to reduce the awards as recommended, reasoning that "as a matter of fairness, the court should exercise its discretion in favor of victims of violent crime and against the possible perpetuation of inappropriate stereotypes."¹⁰⁰

"[e]thnicity, like race . . . is a fictitious, changing, and unreliable social construct"

— Judge Weinstein,
G.M.M. v. Kimpson

3. Race, Ethnicity, and Gender-Based Tables Are Unconstitutional

Among the several judges who have rejected the use of race/ethnicity and gender-based tables, Judge Weinstein stands out as the only federal judge to have repeatedly held that race-based statistical tables are unconstitutional. In *McMillan v. City of New York*, Judge Weinstein first held that when a judge or jury considers a race-based actuarial table, the claimant's rights under the Equal Protection Clause of the U.S. Constitution are violated. Judge Weinstein reasoned that (1) "[j]udicial reliance on 'racial' classifications constitutes state action";¹⁰¹ (2) "state action in reliance on 'race'-based statistics triggers strict scrutiny";¹⁰² and (3) the state presumably cannot meet that rigorous review standard. He concluded that, "[e]qual protection in this context demands that the claimant not be subjected to a disadvantageous life expectancy estimate solely on the basis of a 'racial classification.'"¹⁰³ To "allow[] the use of 'race'-based life expectancy tables, which are based on historical data," courts

would be “reinforcing the underlying social inequalities of our society rather than describing a significant biological difference.”¹⁰⁴ In so holding, Judge Weinstein relied in part on an analysis developed by Professor Martha Chamallas of the Ohio State University Moritz College of Law.¹⁰⁵ Professor Chamallas argued that judicial reliance on race/ethnicity and gender-based tables constitutes state action for equal protection purposes, because “it is impossible to separate the use of the statistics from the underlying legal standard in the case.”¹⁰⁶ Professor Chamallas also explained that, because “no principle of constitutional law is more firmly entrenched than the anti-discrimination principle as applied to explicit racial classifications,” the use of race-based data fails the rigorous level of strict scrutiny required to pass constitutional muster.¹⁰⁷ Although use of gender-based statistics would have to survive a less rigorous form of scrutiny, “[t]he precedents indicate that the Court is hostile to gender classifications premised on traditional sex-role assumptions that tend to reinforce women’s

domestic and maternal roles as wives and mothers, and downplay women’s roles as workers and independent economic actors.”¹⁰⁸ Professor Jennifer Wiggins of the University of Maine School of Law has argued that the only plausible compelling state interest for justifying use of race/ethnicity and gender-based tables—“accuracy in determining tort damages”—is inherently problematic, unreliable, and, even if valid, not as sufficiently “compelling” as other court-approved interests.¹⁰⁹

Though scholars have focused on potential equal protection violations, Judge Weinstein also held in *McMillan* that reliance on race-based tables violates the Constitution’s Due Process Clause. He began with the premise that “[t]here is a right—in effect a property right—to compensation in cases of negligently caused damages to the person under state and federal law.”¹¹⁰ The use of race-based statistics to calculate compensation violates this property right because it “is not scientifically acceptable in our current heterogeneous population” to categorize people based on race, a social

construct more than a biological difference.¹¹¹ Instead, disparities between “races” are “associated with socioeconomic differences and tend to diminish significantly . . . when socioeconomic factors are controlled.”¹¹² Accordingly, because race-based statistics are inherently unreliable, their use in a courtroom to deprive someone of his or her right to compensation constitutes “arbitrary and irrational state action,” and therefore a denial of due process.¹¹³

Seven years later, in *G.M.M. v. Kimpson*, Judge Weinstein stopped the defendant’s expert from testifying about the percentage of people of Latinx descent with master’s degrees, on constitutional grounds.¹¹⁴ Judge Weinstein wrote that “[e]thnicity, like race . . . is a fictitious, changing, and unreliable social construct,” and that racial disparity in achievement is often just a front for socio-economic factors.¹¹⁵ Had Judge Weinstein in this case accepted the defendant expert’s race-based calculations, the injured Latino child would have received half the damages award a similarly situated white child would have received.¹¹⁶

VI. Recommendations

The use of race/ethnicity- and/or gender-based data in calculating lost earnings not only deprives women and people of color, and by extension their families and communities, of fair compensation, but also perpetuates negative, inaccurate stereotypes that diminish the individual's worth and fail to account for human potential.¹¹⁷ The practice provides economic justification for the devaluation of these communities, which could result in more reckless behavior by tortfeasors, because the perceived "costs" of that conduct is lower.¹¹⁸ It risks decreasing access to justice when these torts do occur because plaintiffs' attorneys are less willing to take on cases perceived to have lower-value.

Finally, the practice is inconsistent with new laws that are being passed aimed at reducing discrimination and promoting equality. We urge state legislators to pass laws that prohibit the use of wage and earnings tables delineated by race and gender in the calculation of damages so that the practice is no longer detrimental to women and people of color. Specifically, states should codify in statutes that future earnings predictions in any damages calculation may not be based on the race or the gender of the plaintiff and that they may not rely on racial or gender stereotypes surrounding gender identity, sexual orientation, family choices (including marriage and motherhood), or professional goals.

We urge state legislators to pass laws that prohibit the use of wage and earnings tables delineated by race and gender in the calculation of damages so that the practice is no longer detrimental to women and people of color.

Endnotes

- 1 Note: The scope of this report is limited to the impact of race/ethnicity-based damage award calculations on African Americans and Latinxs. The report acknowledges that other people of color are impacted and that a discussion of African Americans and Latinxs is not inclusive. For an analysis of Asian-American wage issues, see *The Wage Gap and Asian Women*, NAT'L WOMEN'S LAW CTR. (Mar. 2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/03/Asian-Women-Equal-Pay-3.pdf>. For an analysis of the issues impacting Native Americans, see Kayla Patrick & Jasmine Tucker, *Equal Pay for Native Women*, NAT'L WOMEN'S LAW CTR. (Sept. 2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/09/Equal-Pay-for-Native-Women-2017.pdf>; Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON. POL. INST. (Dec. 17, 2013), <https://www.epi.org/files/2013/NATIVE-AMERICANS-AND-JOBS-The-Challenge-and-the-Promise.pdf>; *Discrimination in America: Experiences and Views of Native Americans*, NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH (Nov. 2017), <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/94/2017/11/NPR-RWJF-HSPH-Discrimination-Native-Americans-Final-Report.pdf> (the findings here refer to people who self-identify as "American Indian," "Alaska Native," or "Native American").
- 2 Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263, 274-75 (2010) (hereinafter "Wriggins I").
- 3 Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 327 (2018).
- 4 Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 437 (2004).
- 5 *Sens. Booker and Gillibrand, Reps. Kennedy and Love Introduce Bill to Address Discriminatory Legal Practices*, (Dec. 1, 2016), https://www.booker.senate.gov/?p=press_release&id=499.
- 6 See Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, WASH. POST; WONKBLOG (Oct. 25, 2016), <https://www.washingtonpost.com/graphics/business/wonk/settlements/>. Almost 95% of personal injury cases are settled behind closed doors and these settlements are almost always attached to confidentiality agreements. Because of the lack of transparency surrounding personal injury cases, the data available to show the differences in awards given in each case is limited.
- 7 Michael L. Brookshire, Michael R. Luthy, & Frank L. Slesnick, *2006 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 19 J. FORENSIC ECON. 35, 37 (2006).
- 8 Most frequently cited tables include: the U.S. Department of Health and Human Services, National Center for Health Statistics' United States Life Tables ("U.S. Life Tables"), which are published annually, and contain numerous life-expectancy tables categorized by race, gender, and Latinx origin; the U.S. Census Bureau and Bureau of Labor Statistics' Current Population Survey ("CPS"), which is an annual report containing race- and gender-specific tables on average income and poverty rates; the Center for Disease Control and Prevention's Healthy Life Expectancy ("HLE") tables, which are race- and gender-specific predictions of individuals' work-life based on probability of death at a given age and likelihood that an individual in a specific age/gender/racial group would be an active member of the work force; and the U.S. Bureau of Labor Statistics' Work-life Expectancy Tables, which were last published in 1986, but at least some experts rely on a similar methodology to calculate work-life expectancy.
- 9 Luthy & Slesnick, *supra* note 7, at 35.
- 10 Anne M. Anderson, *How Much Are You Worth? A Statutory Alternative to the Unconstitutionality of Experts' Use of Minority Based Statistics*, 73 WASH. & LEE L. REV. ONLINE 206 (2016) (citing *Childs v. United States*, 923 F. Supp. 1570, 1580 (S.D. Ga. 1996)); see also Greenberg, *supra* note 4, at 441.
- 11 Greenberg, *supra* note 4, at 430.
- 12 Anne M. Wengrovitz & Mary Jean Brown, *Recommendations for Blood Lead Screening of Medicaid-Eligible Children Aged 1-5 Years: an Updated Approach to Targeting a Group at High Risk*, CTR. FOR DISEASE CONTROL & PREV. 1-11 (Aug. 7, 2009), <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5809a1.htm>; see also Biomonitoring: Lead, Env'tl. Prot. Agency (Oct. 2015), https://www.epa.gov/sites/production/files/2015-10/documents/ace3_lead.pdf.
- 13 See Terry Gross, *A 'Forgotten History' Of How the U.S. Government Segregated America*, NPR (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.
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- 20 While the presence of a corporation in a racial minority community may increase employment opportunities and better economic development, such benefits are outweighed if the corporation fails to comply with

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- 21 *Richmond (City), California, State & County QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/richmondcitycalifornia/PST045216> (last visited May 8, 2018).
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- 26 *Community Health and Wellness, City of Richmond General Plan 2030, Element 11*, CITY OF RICHMOND, <http://www.ci.richmond.ca.us/DocumentCenter/View/8579/Health-and-Wellness-Element> (last visited May 8, 2018).
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- 29 CBS Article, *supra* note 27.
- 30 54 So. 865, 869 (La. 1911).
- 31 *The Saginaw & The Hamilton*, 139 F. 906, 914 (S.D.N.Y. 1905).
- 32 *Id.*
- 33 *Vincent v. City of Philadelphia*, 35 A.2d 65, 67 (Penn. 1944).
- 34 *Frankel v. United States*, 321 F. Supp. 1331, 1338 (E.D. Pa. 1970), *aff'd sub nom. Frankel v. Heym*, 466 F.2d 1226 (3d Cir. 1972).
- 35 *Id.* at 1337-38.
- 36 *Feldman v. Allegheny Airlines, Inc.*, 382 F. Supp. 1271, 1286 (D. Conn. 1974), *aff'd in part, rev'd on other grounds*, 524 F.2d 384 (2d Cir. 1975).
- 37 See, e.g., *Wash. Metro. Area Transit Auth. v. Davis*, 606 A.2d 165, 178 (D.C. App. 1992) (holding that there was no authoritative source for the expert's opinion that the decedent, a young African American girl, "would have been the one among 200 women to graduate from graduate school").
- 38 *Gilborges v. Wallace*, 379 A.2d 269, 276-278 (N.J. Super. Ct. App. Div. 1977) (holding that even though the decedent, a sixteen-year-old girl, had expressed lifelong interest in becoming a practicing veterinarian, there was "no support" that she would "probably have become a veterinarian student or graduate" because there was "no veterinary school in the State of New Jersey and only one in the State of Pennsylvania, with consequent grave difficulty of a student from New Jersey obtaining admission to such school."), *rev'd in part on other grounds*, 396 A.2d 338 (N.J. 1978).
- 39 See e.g. *Hoffman v. Sterling Drug, Inc.*, 374 F. Supp. 850, 859-60 (M.D. Pa. 1974). The male plaintiff never took a licensing exam to become a registered architect, but the court nonetheless assumed he would become an architect because "grim statistics on the percentage who fail the architectural examination [are not] dispositive of the issue of admissibility...".
- 40 Gender-based award calculations also reinforce binary gender identities which fail to account for transgender or gender queer individuals. Experts may choose to use the gender-identity of the individual prior to transition or may use the gender-identity of the individual after transition, conflicting with that individual's gender identity at the time. Or, the expert may calculate the award specifically for a transgender individual. In doing so, the expert would perpetuate a long history of discrimination against transgender individuals in housing and criminal justice, as well as high rates of unemployment and homelessness. See generally Loren D. Goodman, *For What It's Worth: The Role of Race and Gender Based Data in Civil Damages Awards*, 70 *VAND. L. REV.* 1353, 1379 (2017); Jaime Johnson, *Recognition of the Nonhuman: The Psychological Minefield of Transgender Inequality in the Law*, 34 *LAW & PSYCHOL. REV.* 153, 154 (2010).
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- 45 Nellis, *supra* note 43.
- 46 Marina Duane, Nancy La Vigne, Mathew Lynch, & Emily Reimal, *Criminal Background Checks: Impact on Employment and Recidivism*, URBAN INST. (Mar. 2017), <https://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf>. The majority of employers conduct criminal background checks before hiring and a criminal record may impact the employer's hiring decision. African American applicants are most impacted by discrimination in hiring against people with criminal records. One study showed that only 5% of African American job applicants with criminal records received callbacks while 17% of white applicants with criminal records received callbacks. Emily Fetsch, *No Bars: Unlocking the Economic Power of the Formerly Incarcerated*, EWING MARION KAUFFMAN FOUND., 4 (Nov. 2016), http://www.kauffman.org/~media/kauffman_org/microsites/mayors2016/occupational%20licens-

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- 55 *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future*, NAT'L EQUAL PAY TASKFORCE, 6 (June 2013), https://obamawhitehouse.archives.gov/sites/default/files/equal-pay/equal_pay_task_force_progress_report_june_2013_new.pdf.
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- 68 *Id.* at § 4.
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- 77 Kenneth R. Feinberg, *Final Report of The Special Master for the September 11th Victim Compensation Fund of 2001: Volume I*, DEP'T OF JUSTICE, 31 (2004), <https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/September-11-Victim-Compensation-Fund-Final-Report-Volume-I-1.pdf>. This Final Report does not mention race. However, the Special Master used the blended "All Active Males" tables to calculate future earnings for all claimants. *Victim Compensation Fund Frequently Asked Questions*, DEP'T OF JUSTICE, 5.34 (Apr. 13, 2004), <https://www.justice.gov/archive/victimcompensation/faq5.pdf>.
- 78 N.C. Gen. Stat. § 8-46; N.J. Ct. R. 1:13-5.
- 79 Ariz. Pattern Jury Instr. Civ. Personal Injury Damages (RAJI (Civil) PIDI) 5.
- 80 Statutes in three states (Alabama, Georgia, and South Carolina) provide life expectancy tables that are blended by race but not gender. ALA. CODE §§ 35-16-3, 35-16-4; GA. CODE ANN. §§ 24-14-44, 24-14-45; S.C. CODE ANN. § 19-1-150. Three states, California, New York, and Washington, reference or append racially blended but gender-spe-

- cific life expectancy tables in their model jury instructions, with New York’s jury instruction including both blended data and gender-specific data. Cal. Jury Instr. Civ. 14.69 (appending a table from the National Vital Statistics Report); N.Y. Pattern Jury Instr. Civil Appendix A (appending a table published in the National Vital Statistics Report); Wash. Pattern Jury Instr. Civ. 34.04; *id.* Appendix B (appending a table published by the Insurance Commissioner of the State of Washington). Rhode Island provides by statute that race-neutral but gender-specific work-life expectancy tables from the U.S. Department of Labor’s Bureau of Labor Statistics (“BLS”) Bulletin 2254: Work Life Estimates: Effects of Race and Education are “admissible in evidence.” 9 R.I. GEN. LAWS § 9-19-38. New York includes the same table in the appendix of its jury instructions. N.Y. Pattern Jury Instr. Civil Appendix B.
- 81 Virginia and Rhode Island have codified life expectancy tables that include both blended and unblended tables. V.A. CODE ANN. § 8.01-419; 9 R.I. GEN. LAWS § 9-19-38. Colorado is the only state that specifically mandates the use of a race- and gender-specific life table. COLO. REV. STAT. § 13-25-102. Three states—Kansas, Pennsylvania, and Tennessee—appear to recommend the use of race- and gender-specific life tables, but only Pennsylvania does not also include a blended table. Pattern Inst. Kan. Civil 171.45; 8 Tenn. Prac. Pattern Jury Instr. T.P.L.-Civil Appendix E; Pa. Suggested Standard Civ. Jury Instr. (PA-JICIV) 7.240.
- 82 803 KY. ADMIN. REG. 25:036 Appendix A (race-neutral and gender-specific but includes a combined column).
- 83 MONT. ADMIN. R. 24.29.1203(4) (Workers’ compensation insurers “shall determine the remaining life expectancy in accordance with the most recent Life Table: Expectation of Life at Single Years of Age, by Race and Sex; United States, all races, both sexes column, in Vital Statistics of the United States, Volume II-Mortality, Part A, U.S. Department of Health and Human Services, Public Health Service, National Center for Health Statistics.”).
- 84 NEB. WORKERS’ COMP. CT. R. OF PROC. ADDENDUM 2. (blended life expectancy table).
- 85 NEV. REV. STAT. § 616C.495 (blended life expectancy table enacted in January 2017); Arslan Malik & Linda S. F. Marshall, *Updated Static Mortality Tables for Defined Benefit Pensions Plans for 2018*, INTERNAL REVENUE SERV., <https://www.irs.gov/pub/irs-drop/n-17-60.pdf> (last visited Mar. 31, 2018).
- 86 S.D. ADMIN R. 47:03 APPENDIX A (race-neutral but gender-specific table).
- 87 *See, e.g.*, United States v. Serawop, 505 F.3d 1112, 1126-27 (10th Cir. 2007) (finding that the lower court acted correctly in eliminating minority-based statistics from consideration for damages).
- 88 Reilly v. United States, 863 F.2d 149 (1st Cir. 1988).
- 89 *Id.*
- 90 *Id.*
- 91 The judge has discretion regarding whether or not to allow the testimony from the witness. Drayton v. Jiffee Chem. Corp., 591 F.2d 352, 362 (6th Cir. 1978).
- 92 Childers v. Sec’y of Health & Human Servs., 1999 U.S. Claims LEXIS 76, at *56-57 (Fed. Cl. 1999).
- 93 *Id.* at *57.
- 94 *Id.*
- 95 Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427, 455 (D.D.C. 1991), *rev’d on other grounds*, 28 F.3d 120 (D.C. Cir. 1994). Relatedly, the Mississippi Supreme Court held that it was “unfair and prejudicial” to base a child’s projected income on both the income of the mother and/or “some type of average income for persons of the community in which they lived.” Greyhound Lines, Inc. v. Sutton, 765 So.2d 1269, 1276 (Miss. 2000). The Court did not directly address the racial implications of these alternatives, instead focusing on the socio-economic implications: “Both methods result in potentially disparate recoveries for children from affluent communities or with affluent parents, as opposed to children from less affluent areas or with less affluent parents.” *Id.* The Court required that all calculations of projected future income for children be based on a “rebuttable presumption” of the national average set forth by the United States Department of Labor. *Id.* at 1277.
- 96 United States v. Bedonie, 317 F. Supp. 2d 1285, 1315-19 (D. Utah 2004), *rev’d on other grounds*, 410 F.3d 656 (10th Cir. 2005).
- 97 *Id.*
- 98 *Id.* at 1314.
- 99 *Id.*
- 100 *Id.* at 1319.
- 101 McMillan v. City of New York, 253 F.R.D. 247 (E.D.N.Y. 2008).
- 102 *Id.* at 255.
- 103 *Id.*; *see also* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 135-40 (E.D.N.Y. 2015) (arguing the same).
- 104 McMillan, 253 F.R.D. at 250.
- 105 *Id.* at 255 (citing Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994)).
- 106 Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 105 (1994); *see also id.* (“When the court allows an expert to testify as to the plaintiff’s future earning capacity, it makes a determination of relevancy and an implicit judgment about the substance of the common law of damages.”).
- 107 *Id.* at 111-12.
- 108 *Id.* at 117.
- 109 Wiggins, *supra* note 2, at 274-75.
- 110 253 F.R.D. at 255 (citing Martinez v. State of California, 444 U.S. 277, 282 (other citations omitted)).
- 111 *Id.* at 249.
- 112 *Id.* at 250 (citing Audrey Smedley & Brian D. Smedley, *Race as Biology is Fiction, Racism as a Social Problem is Real*, 60 AM. PSYCHOLOGIST 16, 23 (2005)).
- 113 *Id.* at 256; *see also* Kimpson, 116 F. Supp. 3d at 135-40 (arguing the same).
- 114 Kimpson, 116 F. Supp. 3d. at 126.
- 115 *Id.* at 148, 137; *see also* McMillan, 253 F.R.D. 250-51.
- 116 *Id.* at 134-35 (Defendant’s expert projected the child’s future economic loss between \$1.5 million and \$2.5 million whereas plaintiff’s expert projected a total future economic loss between \$2.5 million and \$4 million).
- 117 *See, e.g.*, Expert Report at 3, Bushong v. Huebner, D.P.M., No. ADV100402, 2016 WL 9825521 (Mont. Dist. Ct. Aug. 9, 2016) (“To determine [decendent’s] normal work-life expectancy, we utilized *The Markov Process Model of Labor Force Activity: Extended Tables of Central Tendency, Shape, Percentile Points, and Bootstrap Standard Errors*. These tables provide work-life expectancy information for persons by gender and level of educational attainment.”).
- 118 Yuracko & Avraham, *supra* note 3, at 327.



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