

Valuing the Lives of Plaintiffs of Color in Tort Law: A Critique of the Use of Race-Based Data in Damage Award Calculations

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Leslie, a 5-year-old Latina girl, is severely injured in a car accident. As a result of the accident, she is permanently disabled. Her mother sues and the defendant is found negligent. The question before the jury is how much Leslie should be awarded in loss of future earning damages. The defense attorney brings a forensic economist to offer expert testimony on Leslie's loss of future earnings. The expert's calculations are premised on race-based data. The defense attorney then argues that because race-based data shows that Latinos are less likely to obtain Bachelor's degrees or higher, Leslie's loss of future earnings must be reduced. Despite the plaintiff attorney's objections, the judge allows the jury to consider the evidence offered by the defense attorney and the jury adjusts its award based on such calculations.

This is a common scenario in a tort case. Judges and juries are asked to determine what it will take to make an injured plaintiff whole. This determination requires calculating the plaintiff's damages in the form of loss of future earnings. To estimate loss of future earnings, the judge or jury first need to consider other factors—the plaintiff's life expectancy, expected wages, and work-life expectancy. The attorneys bring experts, usually forensic economists, to help judges and juries with these calculations. Expert calculations are often premised on race-based data. In most cases, neither attorneys nor judges question these calculations, which make their way into the court inconspicuously.

At first glance, the common use of race-based data may appear neutral and data-driven, but upon closer review, this practice unjustly devalues the lives of plaintiffs of color and by extension the lives of their families and communities. The problem is that race-based data, such as actuarial tables, reflect disparities caused by systemic subjugation of racial groups. The data does not reflect an assessment of capacity, but the impact of racist policies and exclusions that racial minorities

have faced for generations. When judges and juries rely on such data, they are more likely to award reduced damages based on the idea that plaintiffs of color will live shorter lives or earn less wages than their white counterparts. Thus, race-based data is based on the flagrantly wrong premise that the lives of people of color are worth less than those of whites.

This article argues that when attorneys, judges, and juries rely on race-based data to calculate damage awards, they are violating the plaintiff's Equal Protection rights. In addition to constitutional concerns, this practice is bad policy because it devalues the lives of injured plaintiffs of color, unfairly punishes individuals who overcome race-related risks, reduces incentives for tortfeasors, and perpetuates past discrimination into the future. Part I of this article describes the use of race-based data in court cases. Part II discusses recent case law that rejects this practice. Part III explains why the use of race-based data violates a plaintiff's equal protection rights. Part IV discusses the policy implications for this practice. Finally, Part V suggests legislative solutions. Ultimately, the use of race-based data in damage award calculations must be rejected by economists, the legal community, and legislators. Although excluding this practice will not root out other forms of systemic racism in tort law, it is a step forward in valuing the lives of plaintiffs of color and living up to the ideals of tort law.

I. IN TORT CASES, ATTORNEYS, JUDGES, AND JURIES COMMONLY USE RACE-BASED DATA TO CALCULATE DAMAGE AWARDS

In tort cases, after the plaintiff successfully proves the defendant's liability, the judge or jury try to determine what the plaintiff would have earned had they not been injured. Once a plaintiff establishes the defendant's liability, they are entitled to compensatory damages for lost wages, medical costs, and pain and suffering resulting from the actions of the defendant.¹ It is

¹ Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 Cal. L. Rev. 325, 330–31 (2018).

common for attorneys, judges, and juries to rely on expert testimony to estimate the plaintiff's damage award.² Although expert calculations generally use race-based data, they are widely unquestioned.³

As a starting point, experts provide estimates of the plaintiff's loss of future earning capacity. To calculate the loss of future earning capacity, experts use actuarial tables to determine the plaintiff's expected wages, work-life expectancy, and life expectancy.⁴ To calculate expected wages, experts use the plaintiff's race combined with their established earnings record as a projection of future earnings.⁵ Experts use race-based data to estimate work-life expectancy and life expectancy.⁶ These data "explicitly distinguish and define individuals based on race."⁷ Race-based tables compare members of these groups to each other. Therefore, an individual's earning potential is measured by reference to others in their group.⁸ Additionally, work-life tables predict that racial minorities will spend fewer years in the labor force.⁹

However, there are cases where the plaintiff does not have an established earnings record that reflects projected earnings, for example, children or young adults whose current jobs do not reflect their ultimate career. In this situation, experts rely on the Bureau of Labor Statistics' annual

² See generally *id.* at 326–27 n. 3 (providing examples of cases in which race-based data were used to calculate tort damages). See also Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 95–97 (1994) (listing additional examples of cases in which race-based data were used to calculate tort damages).

³ Yuracko & Avraham, *supra* note 1, at 329.

⁴ *Id.* at 327, 330–31. See also Jesse Schwab, *The Problem with Defining Tort Damages in Terms of Race and Gender*, HARVARD C.R.-C.L. L. REV. (2019), <https://harvardcrcl.org/the-problem-with-defining-tort-harms-in-terms-of-race-and-gender/> (describing the practice of using actuarial race tables by expert witnesses to quantify damages in tort cases and arguing that the use of race and gender-based data is not as neutral as it may seem but instead negatively affects racial minorities and women).

⁵ Schwab, *supra* note 4. See generally Chamallas, *supra* note 2, at 79–80 (discussing future earnings calculations).

⁶ Chamallas, *supra* note 2, at 81.

⁷ Yuracko & Avraham, *supra* note 1, at 330–31.

⁸ Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1439 (2005).

⁹ Chamallas, *supra* note 2, at 81.

wage tables.¹⁰ The wage tables give average national wage statistics for males and females categorized by occupation.¹¹ Experts then routinely adjust wage-rate estimates based on the plaintiff's race.¹² Experts also use race-based tables to predict the child's educational attainment.¹³

Attorneys typically accept the expert's use of race-based data in their damage calculations.¹⁴ Yet, attorneys are not the only ones who accept expert methods; some statutes and courts promote this practice. For example, in Georgia and Rhode Island, statutes allow the courts to use life and work-life expectancy tables that differentiate among races.¹⁵ Other states have pattern jury instructions that allow for life expectancy tables that distinguish along racial lines.¹⁶ In sum, in tort law, it is common for attorneys, judges, and juries to rely on race-based data to calculate damage awards.¹⁷ This reliance is largely unquestioned despite evidence that shows racial inequities.

¹⁰ Yuracko & Avraham, *supra* note 1 at 331; Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263, 272 (2010).

¹¹ *See id.*

¹² *See* Chamallas, *supra* note 2 at 82–83. *See generally* Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, WASHINGTON POST (Oct. 25, 2016), <https://www.washingtonpost.com/graphics/business/wonk/settlements/> (stating that a 2009 survey conducted by the National Association of Forensic Economics showed that 44% of respondents said they account for race when estimating the future wages of an injured child).

¹³ Schwab, *supra* note 4.

¹⁴ *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005) (the expert who provided race-neutral lost income estimates upon request by the court stated that although he had performed thousands of lost income analyses no one had ever asked him to provide race- and sex-neutral calculations in a wrongful death case).

¹⁵ Yuracko & Avraham, *supra* note 1, at 332–33. *See, e.g.*, GA. CODE ANN. § 24-14-44 (2017); 9 R.I. GEN. LAWS § 9-19-38 (2017).

¹⁶ The four states with such jury instructions are Kansas, North Dakota, and Tennessee: Kan. Civil Pattern Jury Instructions: § 171.45 (2016); N.D. Civil Pattern Jury Instructions: § C - 70.47 (2002) (Personal Injury); 8 Tenn. Civil Pattern Jury Instructions: app. C (2012).

¹⁷ *See, e.g.*, Chamallas, *supra* note 2, at 76; Yuracko & Avraham, *supra* note 1, at 326 n.3; Maytal Gilboa, *The Color of Pain: Racial Bias in Pain and Suffering Damages*, 56 GA. L. REV. 651, 654–55 (2021). *See also* Johnson v. Misericordia Cmty. Hosp., 294 N.W.2d 501, 527–28 (Wis. Ct. App. 1980) (affirming race-based statistics for lost income calculation).

II. ALTHOUGH THE USE OF RACE-BASED DATA TO CALCULATE DAMAGE AWARDS IS COMMON AND ACCEPTED IN TORT LITIGATION, SOME CASELAW REJECTS SUCH PRACTICE

So far, this article has reviewed how experts, attorneys, and courts use race-based data to calculate damage awards, including loss of future income. Although this is a subtle and standard practice in tort litigation, it has momentous consequences for plaintiffs of color. Some courts recognize the adverse effects and reject the use of race-based data to calculate damages. The decisions described below are not binding outside of their district; nonetheless, they raised awareness about this hidden practice and even sparked action as addressed in Part VI.

A. *Some Caselaw Rejects the Use of Race-based Data in Damage Calculations Because Such Practice Raises Constitutional Concerns and Reinforces Societal Inequalities*

Although it is standard practice for attorneys and courts to rely on race-based data in damage calculations, a few courts have questioned this practice.¹⁸ *U.S. v. Bedonie* involved claims for restitution under the Mandatory Victim Restitution Act in two unrelated homicide cases. In one of the cases, a drunk driver killed Brian Johnson, a young Native American male and recent high school graduate.¹⁹ The court appointed an expert to provide lost income calculations for Mr. Johnson. The expert testified that Mr. Johnson would have earned about \$433,562 in his lifetime.²⁰ He arrived at such a figure by assuming that Mr. Johnson would have been employed at his high school level education for about 37 years – his expected work life.²¹ The expert calculated that Mr.

¹⁸ See, e.g., *Bedonie*, 317 F. Supp. 2d at 1319; *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008); *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015).

¹⁹ *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1288–89 (D. Utah 2004), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005).

²⁰ *Id.* at 1313.

²¹ *Id.*

Johnson's earnings, as a Native American male, would have been 58% of the average earnings of a high school graduate.²²

After reviewing the expert's calculations, the court was concerned that the expert's use of race and sex assumptions raised constitutional issues.²³ Thus, the court asked the expert to calculate the loss of earnings without including race or sex. The expert relied on "normal wages for all American workers" to estimate Mr. Johnson's lost income.²⁴ The new calculations were drastically different—\$744,442 with a high school education and \$850,959 with one or more years of post-secondary education.²⁵ The court used the race-neutral estimates to calculate the lost income award because it reasoned that courts should exercise their discretion against perpetuating inappropriate stereotypes.²⁶

In *McMillan v. City of New York*, Federal District Judge Jack B. Weinstein rejected the use of race-based calculations to estimate damage awards.²⁷ In 2003 the Staten Island Ferry crashed into a dock because the pilot lost consciousness, leaving eleven people dead,²⁸ and James McMillan, a Black male, quadriplegic.²⁹ It was determined that the city was negligent.³⁰ Mr.

²² *Id.*

²³ *Id.* at 1314. The court noted that race-based data raised constitutional concerns but did not answer that question in this case.

²⁴ *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1314 (D. Utah 2004), *rev'd on other grounds*, 413 F.3d 1126 (10th Cir. 2005).

²⁵ *Id.*

²⁶ *Id.* at 1315–1319, 1321. The court provided a brief review of cases that accepted race- and sex-based statistics to calculate damage awards and cases where such practice was rejected. The court also noted that Prof. Chamallas's claim that while the use of race- and sex-based data in calculations of damage awards is unconstitutional is deserving of considerable attention, it is a novel argument.

²⁷ *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

²⁸ *In re City of N.Y.*, 475 F. Supp. 2d 235, 237–238 (E.D.N.Y. 2007), *aff'd*, 522 F.3d 279 (2d Cir. 2008).*Id.* at 237.

²⁹ *McMillan v. City of New York*, 2008 WL 4287573 1–3 (E.D.N.Y. 2008).

³⁰ *In re City of New York*, 475 F. Supp. 2d 235 (E.D.N.Y. 2007), *aff'd*, 522 F.3d 279 (2d Cir. 2008).

McMillan sued the city of New York to recover for the damages he sustained as a result of the accident.³¹ His life expectancy was a crucial determinant of his damage award.³²

The city offered life-expectancy tables for quadriplegics categorized by race, which showed that Black quadriplegics had lower life expectancies than white quadriplegics, and argued that the Black life expectancy tables should be used in this case.³³ Instead, Judge Weinstein used predictions for the general male population suffering from quadriplegia.³⁴ Notably, Judge Weinstein addressed Equal Protection and Due Process concerns and held that race-based life expectancy and related data may not be utilized in computing damages.³⁵ Further, he ruled that life expectancy tables were inadequate as a matter of actuarial science because race is a “biological fiction” and that lifespan variations among races were attributable largely to socioeconomic status, not biology.³⁶ In *McMillan*, Judge Weinstein boldly rejected the use of race-based data to calculate damages on constitutional grounds.

Seven years after *McMillan*, Judge Weinstein once again ruled against race-based data in the calculation of damage awards.³⁷ In *G.M.M. v. Kimpson*, a young couple expecting their first child moved into an apartment in Brooklyn, New York.³⁸ A year after the child’s birth, a medical exam revealed devastating news – the child’s blood was poisoned by dust from lead paint in their new home.³⁹ Although the family moved out immediately, permanent damage to the child’s central

³¹ *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 248–49.

³⁵ *Id.* at 248, 255–56 (“Equal 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.”).

³⁶ *Id.* at 249–52.

³⁷ *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015).

³⁸ Soffen, *supra* note 12.

³⁹ *Id.*

nervous system was done.⁴⁰ As the child grew, he manifested cognitive delays and severe social and emotional impairments.⁴¹ The child's mother sued the landlord, who was found negligent.⁴²

At trial, the jury heard expert testimony about the child's future economic prospects.⁴³ To determine the child's economic prospects, the plaintiff and defendant experts considered, to a different extent, the fact that the child was Hispanic. When the parties considered the child's race, it lowered the damage estimate in comparison to what the estimate would be if the child were white. The plaintiff's attorney requested \$3.4 million in damages, but the defense counsel proposed \$1.5 million.⁴⁴ Using race-based data, the defense counsel argued there was only a 7.37% chance that the child would have earned a Master's degree because he was Hispanic.⁴⁵ Consequently, the child's future loss of earnings would be lower. The defense counsel emphasized the low general educational backgrounds of Hispanics.⁴⁶ The plaintiff's expert acknowledged the child was Hispanic but primarily focused on the parents' backgrounds.⁴⁷ For example, the mother held a Master of Fine Arts, the father had a Bachelor's degree, and 75% of his family members had some college education—60% held Bachelor's degrees and 30% held Master's degrees.⁴⁸

The court did not allow the jury to rely on race-based data to find a reduced likelihood of obtaining higher education, which would in turn lower damages.⁴⁹ Judge Weinstein reiterated that the use of race-based data to calculate damages is unconstitutional on Equal Protection and Due

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015).

⁴³ *Id.* at 131–35.

⁴⁴ Soffen, *supra* note 12.

⁴⁵ *See G.M.M.*, 116 F. Supp. 3d at 133.

⁴⁶ *See id.* at 132–133.

⁴⁷ *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 131–32 (E.D.N.Y. 2015).

⁴⁸ *Id.* (the plaintiff's expert also noted that among the Hispanic population, there is a pronounced tendency that the children will have higher levels of educational achievement than their parents.).

⁴⁹ *Id.* at 129.

Process grounds.⁵⁰ He stated that using these statistics in damage award calculations “reinforces rigid racial and ethnic barriers that our society strives to abolish.”⁵¹ For example, race-based data assumes that current racial inequities will continue in the future even though the workforce is becoming more diverse as racial and ethnic majorities make up a larger portion of the population, and ongoing legal and institutional efforts mitigate discrimination.⁵² Additionally, race-based data ignores the fact that some individuals fulfill their potential despite the myriad obstacles they face as people of color, including inequality and racism.⁵³ Further, Judge Weinstein asserted that when courts allow the use of race-based data—which is based on historical patterns—they reinforce the underlying inequalities of society.⁵⁴ *Bedonie, McMillan, and Kimpson* depart from the common practice of using race-based data to calculate damage awards. These cases illustrate the dangers of using race-based data in damage award calculations and offer important constitutional and policy arguments for rejecting this practice.

III. THE USE OF RACE-BASED DATA IN DAMAGE AWARD CALCULATIONS VIOLATES THE PLAINTIFF’S EQUAL PROTECTION RIGHTS

Tort cases are typically not associated with civil rights, but the issue of compensation for personal injury plaintiffs is a civil rights issue.⁵⁵ Using race-based data to calculate damage awards is a civil rights issue, as it violates plaintiffs of color’s Equal Protection rights under the Fourteenth Amendment of the U.S. Constitution.⁵⁶

⁵⁰ *See id.* at 140–43, 152.

⁵¹ *Id.* at 152.

⁵² *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 152–53 (E.D.N.Y. 2015).

⁵³ *Id.* at 152.

⁵⁴ *Id.* at 137 (quoting *McMillan v. City of N.Y.*, 253 F.R.D. 247, 250 (E.D.N.Y. 2008)).

⁵⁵ *See Chamallas, supra* note 8, at 1435–37.

⁵⁶ *See Chamallas, supra* note 2 (arguing that the use of explicit race-based and gender-based economic data is unconstitutional); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998) (exploring the dominant structures or hierarchies in tort law that disadvantage women of all races and minority men); Yuracko & Avraham, *supra* note 1 (arguing that the use of race-based age, life expectancy, and work

The Equal Protection Clause states “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵⁷ The Supreme Court has held that the Equal Protection Clause prohibits states from drawing distinctions among individuals based solely on differences irrelevant to legitimate governmental interests.⁵⁸ This interpretation applies to tort cases.⁵⁹ Generally, Equal Protection analysis requires some state action.⁶⁰ Then, the court determines whether there is a suspect classification.⁶¹ If there is, the court determines which level of scrutiny applies.⁶² If the suspect classification is race-related, the court applies the highest level of scrutiny.⁶³ Under this standard, the racial classification must be narrowly tailored to promote a compelling interest.⁶⁴ Following this analysis, the use of race-based data to calculate damage awards violates the Equal Protection Clause because the judicial admission of race-based data constitutes state action that involves a suspect racial classification that does not survive strict scrutiny.⁶⁵

A. Judicial Admission of Expert Testimony Premised on Race-Based Data is State Action for Equal Protection Purposes.

life tables when calculating damage awards in tort cases violates the Equal Protection Clause of the Fourteenth Amendment).

⁵⁷ U.S. CONST. amend. XIV, § 1.

⁵⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964).

⁵⁹ *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008) (rejecting reliance on race-based statistics in life expectancy estimates to calculate damages on grounds that the Equal Protection Clause prohibited the claimant from being subjected to a disadvantageous life expectancy estimate on the basis of a racial classification).

⁶⁰ See *Edmonson v. Leesville Concrete Co., Inc.* 500 U.S. 614, 619 (1991) (“Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.”); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172 (1972); John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 632 (6th ed. 2000); *Yuracko & Avraham*, *supra* note 1, at 337; *Chamallas*, *supra* note 2, at 105.

⁶¹ See *Loving*, 388 U.S. at 12; *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); Nowak & Rotunda, *supra* note 60, at 682–83.

⁶² Nowak & Rotunda, *supra* note 60, at 682–83.

⁶³ See *Loving*, 388 U.S. at 12; *Brown v. Board of Educ.*, 347 U.S. at 495; Nowak & Rotunda, *supra* note 60, at 683.

⁶⁴ Nowak & Rotunda, *supra* note 60, at 683.

⁶⁵ See *Chamallas*, *supra* note 2; *Yuracko & Avraham*, *supra* note 1; *Wriggins*, *supra* note 10; *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008); *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126 (E.D.N.Y. 2015).

Before a constitutional challenge can be made regarding the use of race-based data in tort litigation, there must be a finding of state action.⁶⁶ Initially, the state action in the use of race-based data seems obscure. However, recall how the situation unfolds. Race-based data is typically presented as an economist's expert testimony, giving a projection of the plaintiff's future earning capacity.⁶⁷ The economist's testimony—in the form of a report—includes calculations that use race-based data.⁶⁸ The plaintiff's attorney objects to the reports, and the judge must then rule upon the objection and determine whether the plaintiff's race may be considered relevant in determining the loss of future earning capacity.⁶⁹ The focus of the argument is “whether judicial admission of discriminatory expert testimony constitutes state action.”⁷⁰ Professor Chamallas makes two arguments in favor of the court's ruling as state action.⁷¹ First, the court engages in state action by using economic data, premised on race, to refine the legal standard for damages.⁷² The purpose of expert testimony, even if presented by a private litigant, is to help the jury apply the law to the facts; this process is interwoven with the choice of the governing legal standard.⁷³ Second, the court engages in state action when it transforms the economist's opinion into expert opinion through courtroom procedures and the trial judge's direct involvement.⁷⁴

Scholars Yuracko and Avraham offer another perspective on state action.⁷⁵ The Equal Protection Clause only applies when states distinguish between individuals based on illegitimate

⁶⁶ See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); Chamallas, *supra* note 2, at 105.

⁶⁷ See Chamallas, *supra* note 2, at 105; Yuracko & Avraham, *supra* note 1, at 331.

⁶⁸ Chamallas, *supra* note 2, at 105.

⁶⁹ *Id.*

⁷⁰ Chamallas, *supra* note 2, at 109.

⁷¹ *Id.* 105–11.

⁷² *Id.* at 107, 109. Prof. Chamallas uses the framework outlined in *Edmonson v. Leesville Concrete Co.*, which involved race-based classifications in a civil trial in the context of race-based peremptory challenges by a private litigant.

⁷³ *Id.* at 109.

⁷⁴ *Id.* at 107.

⁷⁵ Yuracko & Avraham, *supra* note 1, at 349.

differences.⁷⁶ If a judge or jury award a plaintiff of color lower damages compared to a similarly situated white plaintiff because of personal bias, this is clearly state action.⁷⁷ Less clear is when they are not acting based on their personal biases, but relying on the testimony of a private actor—the expert witness.⁷⁸ In this context, the economist provides expert testimony on the plaintiff’s life expectancy, expected earnings, and expected work-life duration of the victims; the estimates are premised on race-based data.⁷⁹ Although the expert’s testimony might not reflect private bias, it does reflect the disparities found in race-based actuarial tables.⁸⁰ These disparities show the extent of “private and public racial bias.”⁸¹ Consequently, when the judge admits into evidence such expert calculations that reinforce racial discrimination, the judge engages in state action.⁸² In other words, “by conceding the relevance of race-based data through its admission into evidence...the judge necessarily leads the jury to believe that . . . race [is a] legally permissible factor and thus cannot be said to be neutral on the issue.”⁸³ Upon close review, it is clear that various strong arguments support the assertion that judicial admission of expert testimony premised on race-based constitutes state action.⁸⁴

B. Race-Based Data is Inherently a Racially Suspect Classification

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 331.

⁸⁰ See *McMillan v. City of New York*, 253 F.R.D. 247, 250 (E.D.N.Y. 2008); Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 447 (2001) (asserting that race-based economic data reinforces “the status quo of racial disparities” and “propels race to the forefront of predictions about individual achievement and fails to recognize that many other factors influence an individual’s ability to fulfill his or her potential.”).

⁸¹ Yuracko & Avraham, *supra* note 1, at 349–50.

⁸² *Id.* at 348–57 (explaining various forms of state action); Chamallas, *supra* note 2, at 104–06 (explaining that by “conceding the relevance of race-based or gender-based data through its admission into evidence, however, the judge necessarily leads the jury to believe that gender and race are legally permissible factors and thus cannot be said to be neutral on the issue.”).

⁸³ Chamallas, *supra* note 2, at 106.

⁸⁴ See Chamallas, *supra* note 2, at 105–11; (Prof. Chamallas further asserts that the Supreme Court has been more liberal in finding state action when there is a challenge of race discrimination.); Yuracko & Avraham, *supra*.

Having established that a court's admission of race-based data into evidence is state action, the second step in an Equal Protection analysis is to determine whether the use of race-based data creates a racially suspect classification.⁸⁵ For decades, the Supreme Court has repeatedly struck down race-based discrimination on Equal Protection grounds.⁸⁶ Anti-discrimination jurisprudence holds that racial classifications are inherently suspect and only compelling circumstances justify such classifications.⁸⁷ In fact, the Court has not upheld a race classification since 1945.⁸⁸ Scholars articulate that racial classifications stigmatize minorities as inferior and impose burdens on those subjected to pervasive patterns of discrimination.⁸⁹ Further, racial classifications that burden minorities are invidious because "they deepen power disparities among social groups and make it less likely that systemic discrimination will be dismantled in the future."⁹⁰ Racial classifications in the context of race-based data calculations in personal injury cases are no different. Race-based data compare individuals to their broader class; they predict how an individual will perform based on their race.⁹¹ Thus, such data are inherently racial classifications of the kind that the Equal Protection Clause prohibits.

On the other hand, supporters of race-based data argue that such data are not racial classifications.⁹² For instance, in the context of suspect identification, it is possible that race classifications are only used as physical biomarkers, and not as generalizations about the

⁸⁵ See Nowak & Rotunda, *supra* note 60, at 634–38; Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

⁸⁶ *McMillan v. City of New York*, 253 F.R.D. 247, 255 (E.D.N.Y. 2008).

⁸⁷ See *supra* note 62.

⁸⁸ Nowak & Rotunda, *supra* note 60, at 683; *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

⁸⁹ Chamallas, *supra* note 2, at 112.

⁹⁰ *Id.*

⁹¹ Yuracko & Avraham, *supra* note 1, at 338–40.

⁹² *Id.*

“characteristics, behavior, or appropriate treatment of the racial group.”⁹³ However, race-based data in tort damages are different. In this context, race-based data describe groups and predict future behavior and preference based on one’s membership.⁹⁴ For instance, race-based, work-life data predict the type of work individuals will obtain, the success they will have in it, and the attachment to it based on their group membership and opportunities available to their group.⁹⁵ Therefore, such data reinforce racial group generalizations.⁹⁶ Race-based data do not describe the individual tort victim, but they reflect and promote the group-based “stereotypes that the Equal Protection Clause targets.”⁹⁷

Another argument is that race-based tables are not racial classifications because “their use reflects race-neutral policies.”⁹⁸ However, this argument falls short given that the Court regularly looks beyond facially neutral practices.⁹⁹ For example, the Court in *Palmore v. Sidoti* unanimously held that the state could not consider a stepparent’s race even if there was an important government objective.¹⁰⁰ *Palmore* supports the contention that the government must not use racial categories, even if the state’s policy is facially neutral and a good proxy for other legitimate interests.¹⁰¹ Additionally, the Court sees past facially neutral policies and determines whether there is racially

⁹³ Yuracko & Avraham, *supra* note 1, at 338 (supporters of the use of racial biomarkers in suspect identification agree that such use leads to “unequal burdens on race” and “the use of such biomarkers should be subject to strict scrutiny.”).

⁹⁴ *Id.* at 338–39.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 346; Chamallas, *supra* note 2, at 112 (“A proponent of the use of race-based tables would also likely assert that an economist’s use of race-based data is ‘neutral’ in the sense that the economist is only trying to measure what “is” the reality for all racial groups, not what the reality ‘ought to be.’”).

⁹⁹ See *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

¹⁰⁰ *Palmore*, 466 U.S. at 432–34.

¹⁰¹ *Id.*; Chamallas, *supra* note 2, at 114–15.

disparate treatment.¹⁰² In *Loving v. Virginia*, the Court’s analysis centered on what the law meant for individuals seeking to marry and concluded the law was based solely on race distinctions.¹⁰³

In the context at issue, although using race-based data may seem like a race-neutral policy, the practice results in the devaluation of injured plaintiffs of color based on their race.¹⁰⁴ The expert’s testimony premised on race-based calculations predicts that the individual plaintiff will have reduced future earnings. Thus, the jury may use such predictions to award a plaintiff of color significantly lower damages compared to a similarly situated white plaintiff. Hence, the use of race-based data inherently creates a suspect racial classification that creates a disparate impact on plaintiffs of color.

C. Strict Scrutiny Applies to the Use of Race-Based Data in Damage Award Calculations

The third inquiry in the Equal Protection analysis requires determining what level of scrutiny the reviewing court will apply.¹⁰⁵ When a reviewing court is faced with racial classifications, it must apply strict scrutiny.¹⁰⁶ Under strict scrutiny review, the government must prove that a racial classification is narrowly tailored to promote a compelling government interest.¹⁰⁷ The court conducts a balancing test to determine whether the harm of the racial classification is outweighed by such a compelling interest.¹⁰⁸ Because strict scrutiny sets a high bar, most laws subjected to such a level of review fail.¹⁰⁹

¹⁰² *Loving*, 388 U.S. at 11.

¹⁰³ *Id.*

¹⁰⁴ Yuracko & Avraham, *supra* note 1, at 347.

¹⁰⁵ Nowak & Rotunda, *supra* note 60, at 638–39.

¹⁰⁶ *Id.* at 691; *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Palmore*, 466 U.S. at 432–33.

¹⁰⁷ *Adarand Constructors Inc.*, 515 U.S. 200 at 226–27, ; *Johnson v. California*, 543 U.S. 499, 505 (2005).

¹⁰⁸ *Adarand Constructors Inc.*, 515 U.S. at 226; Wriggins, *supra* note 10, at 274.

¹⁰⁹ Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (stating that 70 percent of applications of strict scrutiny result in the law being invalidated); Wriggins, *supra* note 10, at 271 (stating that strict scrutiny generally means “that racial distinctions in

D. *There is No Compelling Government Interest that Outweighs the Harm Caused by the Use of Race-Based Data*

As established above, the use of race-based data to calculate damage awards constitutes a racial classification. Hence, strict scrutiny applies. A possible compelling interest served using race-based data is award accuracy.¹¹⁰ This is because award accuracy is helpful to ensure proper compensation for tort victims and decrease tortfeasors' burdens.¹¹¹ At a societal level, award accuracy is arguably important because it encourages society to engage in "economically efficient levels of caretaking and risk-avoidance."¹¹² From this point of view, it follows that the compelling interest—award accuracy—outweighs the harm of using race-based data to calculate damage awards and is thus constitutional.¹¹³

However, there are strong arguments that refute the argument that award accuracy is a compelling interest.¹¹⁴ For example, tort cases are individualized, meaning that whether the plaintiff receives adequate compensation depends on the particular situation of the case.¹¹⁵ Thus, speaking about accuracy from data that compare individuals by race, consequently leading to different amounts of damage awards based on race, does not make sense.¹¹⁶ Second, race-based data is inaccurate—flawed by disparities.¹¹⁷ However, these disparities are not a reflection of

law are treated with great suspicion and most often struck down as equal protection violations, even if aimed at furthering racial equality").

¹¹⁰ Yuracko & Avraham, *supra* note 1, at 362.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*; Chamallas, *supra* note 2, at 114 (explaining that the ruling in *Palmore v. Sidoti* makes it unlikely that the Court would agree with the contention that use of race-based data is nondiscriminatory because it reflects the social reality, considering that in *Palmore* the Court held that although private biases may be outside the reach of the law, the law cannot directly nor indirectly give them effect); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

¹¹⁵ Wriggins, *supra* note 10, at 274–75.

¹¹⁶ *Id.*

¹¹⁷ *See G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 136–37 (E.D.N.Y. 2015) (stating that emphasizing immutable differences among racial groups only "reinforces racial inequality," and that "by allowing the use of 'race'-based life expectancy tables, which are based on historical data, courts are essentially reinforcing the underlying social

individual capacity, but the impact of systemic oppression on racial minorities.¹¹⁸ For instance, consider the long history of subjugation of racial groups as evidenced by slavery, educational and economic discrimination, health disparities, exclusions in public spaces, disproportionate mass incarceration, and pervasive violence—such as lynching and police brutality.¹¹⁹ It is not surprising that in light of such oppression, racial minorities have lower life and work-life expectancies and

inequalities of our society rather than describing a significant biological difference.”); Yuracko & Avraham, *supra* note 1, at 339; Laura Kihlstrom and Russell S. Kirby, *We Carry History Within Us: Anti-Black Racism and the Legacy of Lynchings on Life Expectancy in the U.S. South*, 70 HEALTH PLACE 102618 (July 2021) (The study concludes that geographical health disparities in the U.S. are connected to the South’s violent past and institutionalized racism. The study’s findings suggest that “the legacy of lynching also applies to the context of one of the most commonly used population health indicators, life expectancy. In other words, although the official form of social control (lynchings) may have disappeared, the underlying racial contract of upholding White supremacy was made possible by institutionalized measures.”); Martin J. Katz, *Insurance and the Limits of Rational Discrimination*, 8 YALE L. & POL’Y REV. 436 (1990) (Arguing that insurance companies’ rational discrimination of Black insureds must be scrutinized, as it is racist to rely on data that assumes Black insureds are inherently more risk prone than Whites. In fact, there are underlying problems that cause Blacks to have higher risk than Whites, such as less experience and resources due to being excluded from the market in the first place and experiencing intentional discrimination.).

¹¹⁸ Schwab, *supra* note 4.

¹¹⁹ See generally *Brown v. Board of Education*, 347 U.S. 483 (1954) (Supreme Court declaring racial segregation of children in public schools unconstitutional); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) (Supreme Court reviewing a school board’s plans to desegregate students and faculty, and holding that the Court’s objective was to “eliminate from the public schools all vestiges of state-imposed segregation that was held violative of equal protection guarantees by *Brown v. Board of Education*.); *Bailey v. Patterson*, 368 U.S. 963 (1962) (Supreme Court remanded case to District Court for review of appellants’ claims of right to nonsegregated interstate and intrastate transportation facilities); Kihlstrom & Kirby, *supra* note 117 (“From 1877 to 1950, an estimated 4,075 Black Americans were killed in lynchings by White mobs over suspicions of sexual assault, murder, and ‘transgressions in racial etiquette,’ which could refer to political activity or to simply not meeting White expectations of deference.” The article further asserts that “lynchings were one outcome of social forces which allowed and continue to allow the White population to claim power over non-White populations through various means of exploitation, oppression, violence, and marginalization.”); Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J.L. & MED. 203 (2001); James Y. Nazroo, Ph.D., *The Structuring of Ethnic Inequalities in Health: Economic Position, Racial Discrimination, and Racism*, AM. J. OF PUB. HEALTH (2003) (“Experiences of and awareness of racism appear to be central to the lives of ethnic minority people, and there is growing evidence that these contribute to ethnic inequalities in health.”); Zinzi D. Bailey, Justin M. Feldman, Mary T. Bassett, *How Structural Racism Works – Racist Policies as a Root Cause of U.S. Racial Health Inequities*, 384 NEW ENGLAND J. OF MED., 768 (2021); Seleeke Flingai, Mona Sahaf, Nicole Battle, and Savannah Castaneda, *An Analysis of Racial Disparities in Police Traffic Stops in Suffolk County, Massachusetts, from 2010 to 2019*, VERA INST. OF JUST. (June 2022) (Report finds that Black drivers are disproportionately stopped, especially for offenses not related to traffic safety, by law enforcement in Suffolk County, Massachusetts.); Amanda Graham, Murat Haner, Melissa M. Sloan, Francis T. Cullen, Teresa C. Kulig & Cheryl Lero Jonson, *Race and Worrying About Police Brutality: The Hidden Injuries of Minority Status in America*, 15 VICTIMS & OFFENDERS 549 (2020); Rod K. Brunson, Jody Miller, *Young Black Men and Urban Policing in the United States*, 46 THE BRITISH J. OF CRIMINOLOGY 613 (2006); PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN (2017).

earn less wages compared to their white counterparts.¹²⁰ Thus, the award accuracy in the use of such race-based data is not a compelling interest.

Additionally, the use of race-based data to calculate damage awards does not compare to other previously held compelling interests. For example, compelling interests include protecting the well-being of minors,¹²¹ rectifying the ramifications of past discrimination, preventing crime, and ensuring diversity in higher education.¹²² These compelling interests reflect goals and priorities that are socially and publicly oriented. Instead, when judges and juries rely on race-based data, they rely on data that reflect past racial discrimination and distinguish individuals by their racial groups' historically narrowed opportunities. As a result, tortfeasors pay lower damage awards to minority plaintiffs. A practice that relies on past discrimination and tells tortfeasors that injuring minority victims is cheaper does not raise a compelling interest.¹²³ The use of race-based data violates the Equal Protection rights of plaintiffs of color because the practice constitutes state action, involves a suspect racial classification that does not survive strict scrutiny, and does not involve a compelling government interest.

IV. ALLOWING ATTORNEYS, JUDGES, AND JURIES TO USE RACE-BASED DATA IN DAMAGE AWARD CALCULATIONS IS BAD SOCIAL POLICY

The use of race-based data to calculate damage awards has strong policy implications because it concerns the value placed on human potential.¹²⁴ This reliance is bad policy for various

¹²⁰ Yuracko & Avraham, *supra* note 1, n.127–28; Kihlstrom & Kirby, *supra* note 117.

¹²¹ Yuracko & Avraham, *supra* note 1, at 362; Grutter v. Bollinger, 539 U.S. 306, 328 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

¹²² See *N. Y. v. Ferber*, 458 U.S. 747, 756–57 (1982); *Adarand Constructors, Inc.*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United States v. Salerno*, 481 U.S. 739, 749 (1987).

¹²³ Yuracko & Avraham, *supra* note 1, at 362.

¹²⁴ Chamallas, *supra* note 2, at 77.

reasons: it devalues the lives of injured plaintiffs of color, unfairly punishes individuals who overcome race-correlated risks, reduces incentives for tortfeasors, perpetuates past racism, and promotes future discrimination.¹²⁵

A. Allowing Attorneys, Judges, and Juries to Use Race-based Data in Damage Award Calculations Devalues the Lives of Injured Plaintiffs of Color

Empirical studies indicate that in personal injury and wrongful death suits, women of all races and minority men receive significantly lower damage awards than white men.¹²⁶ These data suggest that in tort law, the lives of white men have a higher value and that their injuries are worth more than the injuries suffered by other less privileged groups in society.¹²⁷ Although there are many possible reasons for the differences in award amounts, one explanation is that race-based data were used to calculate damages.¹²⁸ When race-based data are used, damage awards are lowered and the lives of plaintiffs of color are devalued.¹²⁹

Consider the expert's calculations in *Bedonie*. Initially, the expert witness testified that the Native American deceased male would have earned approximately \$433,562 in his lifetime.¹³⁰ When the court asked him to recalculate the figure without regard to race, the amount was between

¹²⁵ Yuracko & Avraham, *supra* note 1; Chamallas, *supra* note 8, at 1441; Chamallas, *supra* note 2, at 89; Schwab, *supra* note 4; Martha Chamallas, *Race and Tort Law*, Ohio State University Moritz College of Law, 11, (July 27, 2020).

¹²⁶ See Chamallas, *supra* note 57, at 464–65; Chamallas, *supra* note 2; Jennifer B. Wriggins, *Torts, Race, and the Value of Injury, 1990-1949*, 49 *How. L. J.* 99, 118 (2005); Soffen, *supra* note 12 (stating that a 2016 Washington Post analysis found that the use of race-based tables in the case of a 20-year-old Black female plaintiff, results in that she would recover only \$1.24 million in future lost wages, while her white male counterpart would recover \$2.8 million, even when holding constant both of their educational attainment).

¹²⁷ See Chamallas, *supra* note 57 (applying critical race theory, Professor Chamallas argues that contemporary tort law devalues or undervalues the lives, activities, and potential of women and minorities, and that this devaluation is executed subtly, through the social construction of legal categories that create hierarchies of injuries and damages.); Chamallas, *supra* note 2, at 84.

¹²⁸ Chamallas, *supra* note 2, at 84; Wriggins, *supra* note 10, at 271.

¹²⁹ Chamallas, *supra* note 2, 82–84; Wriggins, *supra* note 10, at 271; Chamallas, *supra* note 125, at 10.

¹³⁰ *U.S. v. Bedonie*, 317 F. Supp. 2d 1285, 1313 (D. Utah 2004), *rev'd on other grounds*, *United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005).

\$744,442 and \$850,959, nearly twice the original amount.¹³¹ In *McMillan*, the defendant's counsel offered life-expectancy tables for quadriplegics categorized by race, which showed Black quadriplegics had lower life expectancies than white quadriplegics.¹³² He argued that, therefore, the damage award should be reduced.¹³³ Similarly, in *Kimpson*, the defendant's counsel relied on race-based data to argue that because the plaintiff was Hispanic, he was unlikely to obtain higher education, which would reduce his loss of future earnings and thus his damage award.¹³⁴

At first glance, it seems accurate to reduce the damage award if the data show that the plaintiff has a shorter life expectancy or is unlikely to obtain a post-secondary degree. However, using these data is unfair to the plaintiff because the data reflect disparities caused by the subjugation of communities of color. Ultimately, *Bedonie*, *McMillan*, and *Kimpson* rejected the experts' and attorneys' use of race-based data to estimate the damage awards—avoiding reduced damages for the plaintiffs. But, when courts allow the use of race-based data, injured plaintiffs are deprived of the compensation they deserve because their race is discreetly used to reduce their damage award.

***B. Attorneys, Judges, and Juries Punish Individuals Who Overcome Race-related Risks
When They Use Race-based Data to Calculate Damage Awards***

Race-based data are premised on race-specific comparisons, meaning they compare Blacks to Blacks, Latinos to Latinos.¹³⁵ In effect, when such data are used in damage calculations, the earning and educational potential of each individual is measured in comparison to others in their racial group.¹³⁶ For example, race-based data suggest that Black men have lower work-life

¹³¹ *Id.* at 1315.

¹³² *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008).

¹³³ *Id.*

¹³⁴ *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 133 (E.D.N.Y. 2015).

¹³⁵ Chamallas, *supra* note 125, at 11; Chamallas, *supra* note 8, at 1437, 1439.

¹³⁶ *Id.*

expectancy due to the high correlation between being a Black male and incarceration.¹³⁷ Even if an individual overcomes race-correlated risks, such as incarceration,¹³⁸ earlier death,¹³⁹ or lower education, race-based data nonetheless “subject[s] each individual within a particular race group to the average achievement within the broad class of their race.”¹⁴⁰ Another problem is that race-based data do not reflect inherent assessments of capacity. Instead, they reflect the long history of “intentional economic subjugation”¹⁴¹ and the impacts of systemic oppression that racial minorities have carried for generations. Thus, when individuals who overcome race-related risks are held to their group’s record, they are punished for past discrimination that their group has faced.

Recall in *Kimpson*, if the court had relied solely on race-based data, the plaintiff would have been held to his racial group’s record and thus received a significantly lower damage award. Defendant’s counsel wanted to use race-based tables to give the plaintiff a lower award because as a Latino child, compared to his racial group, his probabilities of obtaining higher education were low.¹⁴² However, the plaintiff’s situation was opposite to what the race-based tables showed. Both of the plaintiff’s parents had post-secondary degrees and 90% of his family members had at least a Bachelor’s degree.¹⁴³ Had the court accepted the use of race-based data—without considering the plaintiff’s particular situation—the court would have punished the plaintiff and saddled him with generalizations about his group, consequently diminishing his potential and his damage award.

C. Allowing Attorneys, Judges, and Juries to Use Race-based Data in Damage

Award Calculations Reduces Incentives for Tortfeasors

¹³⁷ Chamallas, *supra* note 2, at 115.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Schwab, *supra* note 4.

¹⁴¹ Schwab, *supra* note 4.

¹⁴² *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 133 (E.D.N.Y. 2015).

¹⁴³ *Id.* at 131–32.

The use of race-based economic data can result in making it cheaper for tortfeasors to injure communities of color. For example, plaintiffs in lead paint injury cases are disproportionately Black and Latino children.¹⁴⁴ In these cases, there is a lack of individualized data that projects what career path plaintiffs would have taken or what they would have earned over a lifetime. Thus, experts use race-based data to calculate lost earnings. When courts rely on the expert's calculations, the awards are lower for Black and Latino children than for white children. Consequently, tortfeasors—landlords or government housing authorities—pay less than they would if the plaintiffs were white, middle-class children. Since it is cheaper to injure children of color from low socioeconomic status families, tortfeasors have less incentive to eliminate toxic hazards in neighborhoods affected by lead paint.¹⁴⁵

D. Allowing Attorneys, Judges, and Juries to Use Race-based Data in Damage Award Calculations Perpetuates Racism and Promotes Future Discrimination

The use of race-based data perpetuates discrimination. People of color have endured generations of racism, facilitated by social and legal structures, including economic discrimination and exclusion in education and the workforce.¹⁴⁶ It follows that racism limits minorities' access to education, jobs, health, and more. The limited access is reflected in race-based life and work-life tables. Although the tables show that people of color will have lower life and work-life expectancies, they do not take into account why—systemic racism that has oppressed people of color for generations.

¹⁴⁴ Greenberg, *supra* note 80; Jennifer Wriggins, *Genetics, IQ, Determinism, and Torts: The Example of Discovery in Lead Exposure Litigation*, 77 B.U. L. REV. 1025 (1997); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OH. ST. L. J. 661, 687 (2017).

¹⁴⁵ Chamallas, *supra* note 8, at 1440–41.

¹⁴⁶ *See supra* note 119.

For example, racial minorities often earn less than whites for doing the same or equivalent work.¹⁴⁷ Imagine that in a personal injury case, the jury is determining how much a Latina plaintiff would have made in future earnings had she not been injured. If the jury uses race-specific data to calculate her future earnings, it is relying on data that reflects past discrimination—Latinas earning less than whites for equivalent work. As a result, the jury will decide that the plaintiff's future earnings are lower and award less compensation. Thus, the use of race-based data perpetuates past discrimination into the future.¹⁴⁸

V. ECONOMISTS, THE LEGAL COMMUNITY, AND LEGISLATORS SHOULD REJECT THE USE OF RACE-BASED DATA IN DAMAGE AWARD CALCULATIONS

As previously established, the use of race-based data to calculate tort damages is a common and subtle practice among forensic economists, lawyers, judges, and juries. Yet over the past decade, some tort scholars have questioned this practice, and a few courts have rejected race-based calculations in cases before them.¹⁴⁹ A minority of state legislatures have prohibited the use of

¹⁴⁷ See Abbie Langston, Justin Scoggins, Matthew Walsh, *Race and the Work of the Future: Advancing Workforce Equity in the United States*, NAT'L FUND FOR WORKFORCE SOL. (Nov. 12, 2020), https://nationalfund.org/wp-content/uploads/2020/11/Race_and_the_Work_of_the_Future_United_States_FINAL.pdf; Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH CTR (July 1, 2016), <https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>; Valerie Wilson, *African Americans are Paid Less than Whites at Every Education Level*, ECON. POL'Y INST. (October 4, 2016), <https://www.epi.org/publication/african-americans-are-paid-less-than-whites-at-every-education-level/>; Milia Fisher, *Women of Color and the Gender Wage Gap*, CTR. FOR AM. PROGRESS (April 14, 2015), <https://www.americanprogress.org/issues/women/reports/2015/04/14/110962/women-of-color-and-the-gender-wage-gap/>.

¹⁴⁸ See Chamallas, *supra* note 2, at 89; Schwab, *supra* note 4; Chamallas, *supra* note 125, at 11.

¹⁴⁹ See *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126 (E.D.N.Y. 2015); *McMillan v. City of New York*, 253 F.R.D. 247, 248 (E.D.N.Y. 2008); *U.S. v. Bedonie*, 317 F. Supp. 2d 1285, (D. Utah 2004), *rev'd on other grounds by United States v. Bedonie*, 413 F.3d 1126 (10th Cir. 2005); Chamallas, *supra* note 2; Schwab, *supra* note 4; Yuracko & Avraham, *supra* note 1; Wriggins, *supra* note 10; Greenberg, *supra* note 80; Chamallas, *supra* note 8; Dariely Rodriguez & Hope Kwiatkowski, *How Race, Ethnicity, and Gender Impact Your Life's Worth: Discrimination in Civil Damage Awards*, LAW. COMM. FOR C. R. UNDER L. (July 2018), https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf.

race-based data to reduce damage awards for plaintiffs of color.¹⁵⁰ These advancements suggest that it is possible to eliminate this common practice.

A. *Solutions in the Discipline of Forensic Economy*

A possible path to reform starts with forensic economists. Forensic economists who use race-based data argue that it is an accepted practice in their profession and their goal is to rely on precise data.¹⁵¹ They argue that race-based data are simply a snapshot of reality and do not intentionally discriminate.¹⁵² However, race-based data are far from neutral. Such data reflect and perpetuate past racial discrimination.¹⁵³ Thus, forensic economists should seriously consider the call to prohibit race-based data in their profession. A coalition of prominent civil rights organizations called on the National Association of Forensic Economists (NAFE) to adopt an official position against the use of race-based data that results in awards below what a similarly situated white person would receive.¹⁵⁴ These organizations argue that while it might not be the intent of forensic economists to purposefully perpetuate bias by using race-based data, the use of these statistics reinforces structural racism and perpetuates discrimination.¹⁵⁵ When forensic economists present expert opinion for purposes of calculating compensation for tort plaintiffs, they

¹⁵⁰ See 2018 Cal SB 41; 2018 Ore. HB 4008; 2021 N.J. Laws 405.

¹⁵¹ Charles Toutant, *'It's Hard to Have a Discussion About This': The Uncomfortable Truth About Setting Tort Damages*, N.J. L. J., (March 29, 2022), available at <https://www.law.com/njlawjournal/2022/03/29/its-hard-to-have-a-discussion-about-this-the-uncomfortable-truth-about-setting-tort-damages/>; Joe Scanlon, *It's Time to End the Use of Race & Gender Statistics in Damage Award Calculations*, MINN. J. OF L. & INEQUALITY, <https://lawandinequality.org/2022/01/27/its-time-to-end-the-use-of-race-gender-statistics-in-damage-award-calculations/>.

¹⁵² Soffen, *supra* note 12.

¹⁵³ See Chamallas, *supra* note 2; Schwab, *supra* note 4; Yuracko & Avraham, *supra* note 1.

¹⁵⁴ American Civil Liberties Union *et. al.*, *Use of Damages Tables that Discriminate Against Women and People of Color*, C.R. Under L. (April 26, 2019), <https://lawyerscommittee.org/wp-content/uploads/2019/04/2019.04.26-Letter-to-NAFE.pdf>.

¹⁵⁵ See Nora Freeman Engstrom, Robert L. Rabin, *California Bars the Calculation of Tort Damages Based on Race, Gender, and Ethnicity*, THE RECORDER (Nov. 12, 2019), <https://www.law.com/therecorder/2019/11/12/calif-bars-the-calculation-of-tort-damages-based-on-race-gender-and-ethnicity/?slreturn=20221021220900>; American Civil Liberties Union *et. al.*, *supra* note 154.

have a responsibility to ensure that their profession does not further perpetuate the effect of historical discrimination.¹⁵⁶

B. Solutions in the Discipline of Forensic Economy

A major path to reform lies within the legal profession. Attorneys must abstain from seeking to present evidence of race-based data to determine damages. Because using race-based data is currently standard practice, plaintiff attorneys either introduce such data themselves or rarely object when opposing counsel does.¹⁵⁷ One possible explanation is that the legal community classifies civil rights attorneys as separate from personal injury litigators.¹⁵⁸ Personal injury litigators are not primed to identify race inequities in a context removed from a civil rights case.¹⁵⁹ As a result, plaintiff attorneys fail to detect how racial bias devalues their clients' injuries.¹⁶⁰ Thus, a mental framework shift is needed in the legal community. Personal injury attorneys must not separate themselves from civil rights attorneys. Instead, they must see themselves as civil rights attorneys. They must be ready to defend their clients' civil rights by not presenting race-based data themselves and objecting to such practice from opposing counsel's expert testimony.¹⁶¹

After all, plaintiff attorneys must find the best strategy to obtain fair and full compensation for their injured clients. Plaintiff attorneys should rely on individualized determinations that look at the plaintiff's particular situation. When such individualized determinations are not possible,

¹⁵⁶ American Civil Liberties Union *et. al.*, *supra* note 154 (Arguing that the NAFE should amend its principles of ethics, which include Engagement, Compensation, Diligence, Disclosure, Consistency, Knowledge, Discourse, and Responsibility, to also include Equality as a principle).

¹⁵⁷ Chamallas, *supra* note 2, at 76.

¹⁵⁸ Chamallas, *supra* note 8, at 1437.

¹⁵⁹ See Chamallas, *supra* note 2, at 76; Chamallas, *supra* note 125, at 1 (stating "inattention to race [in tort law] is often replicated in first-year torts courses and leaves the misimpression that tort law is race-neutral and bears little connection to constitutional or civil rights law, where issues of racial justice are more frequently analyzed and debated.").

¹⁶⁰ Chamallas, *supra* note 8, at 1437.

¹⁶¹ Schwab, *supra* note 4; Chamallas, *supra* note 8.

attorneys must rely on inclusive, race-neutral statistical data.¹⁶² In the most extreme cases, plaintiff attorneys may be pushed to argue that the correct measure of damages is what their clients would receive if they were white males. This will lead to a higher damage award at its best and negotiation at its worst. However, using white men as the standard still devalues plaintiffs of color and reinforces racial hierarchies and inequities. Regardless of which strategy is used, if plaintiff attorneys truly value the lives of their clients, they must be ready to challenge the use of race-based data in damage award calculations.

C. Legislative Solutions

Legislation is a more comprehensive and definitive solution to the harm caused by the use of race-based data in calculating tort damages. Currently, the use of such data is widespread and despite its dangers, there are no federal laws that prohibit it.¹⁶³ However, some states have adopted laws that limit the use of race-based data in damage calculations. In 2018, Oregon was the first state to enact a law that prohibits calculations of projected future earning potential that take into account the plaintiff's race or ethnicity.¹⁶⁴ California passed legislation that prohibits "the estimation, measure, or calculation of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death from being reduced based on race, ethnicity, or gender."¹⁶⁵ Most recently, a New Jersey law provides that in personal injury or wrongful death lawsuits, calculations of lost or impaired earnings capacity not be reduced because

¹⁶² Chamallas, *supra* note 2, at 76.

¹⁶³ The Fair Calculation in Civil Damages Act has been introduced multiple times since 2016, and most recently in 2022 by Representative Sean Casten (see H.R.6758, 117th Cong. (2021-2022)). The bill has never proceeded to a vote in committee or on the floor of either legislative chamber.

¹⁶⁴ 2018 Ore. H.B. 4008.

¹⁶⁵ CAL. CIV. CODE § 3361. The law became effective on January 1, 2020.

of race, ethnicity, among other classes.¹⁶⁶ Other state legislators should follow Oregon, California and New Jersey and pass laws that prohibit the use of race-based data to calculate damages.¹⁶⁷

The use of race-based data is a common and accepted practice in tort litigation, which is why it is difficult to depart from such practice. Even plaintiff attorneys may be unlikely to recognize that such practice devalues their clients. But there are clear indications that the practice deprives plaintiffs of color—and by extension, their families and communities—of fair compensation. It perpetuates negative and misleading stereotypes that decrease individual worth and ignores human potential.¹⁶⁸ Because of these harmful consequences, forensic economists, the legal community, and legislators must oppose the use of race-based data to calculate damage awards in tort litigation.

VI. CONCLUSION

Prohibiting the use of race-based data in damage award calculations will not eradicate other forms of systemic racism in tort law, as manifested in generational disparities in healthcare, education, or wealth. But it will be a step forward in valuing the lives of plaintiffs of color. To make this change, economists, the legal community, and legislators must reject what has become a widespread practice of relying on race-based data to calculate damage awards. There are additional reasons to reject such practice, most notably because the use of race-based data is a violation of the Equal Protection Clause and bad policy, as evidenced by the reduced damages awarded to plaintiffs of color, the unfairness of generalizations about racial groups, the reduced incentives to care for communities of color, and the furtherance of racial discrimination.

¹⁶⁶ N.J. STAT. ANN. § 2A:53A-5.1. The law became effective on January 18, 2022.

¹⁶⁷ Rodriguez & Kwiatkowski, *supra* note 149.

¹⁶⁸ *Id.* at 12.

The use of race-based data is not as neutral and data-driven as it first appears. This practice unjustly devalues the lives of plaintiffs of color. The problem with race-based data is that it reflects disparities caused by systemic subjugation of racial groups. The data does not show an assessment of capacity, but the impact of racist policies and exclusions that racial minorities have historically faced. When judges and juries rely on such data, they tend to award lower damages justified by the idea that plaintiffs of color will live shorter lives or earn less wages than their white counterparts. Race-specific data is based on the flagrantly wrong premise that the lives of people of color are worth less than those of whites.

Leslie, the 5-year-old Latina girl, who became disabled after a severe car accident should not be seen as less valuable simply because data based on her race says so. The experts, attorneys, judge, and jury involved in her case should not use race to calculate her damage award. If tort law is genuinely committed to making plaintiffs whole, Leslie's race must not matter.