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## **Removing Statistical Discrimination in Personal Injury and Wrongful Death Compensation in Rhode Island Wrongful Death Compensation in Rhode**

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Spring 2024

## Removing Statistical Discrimination in Personal Injury and Wrongful Death Compensation in Rhode Island

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# Removing Statistical Discrimination in Personal Injury and Wrongful Death Compensation in Rhode Island

Natalie DeAngelis & Colleen P. Murphy\*

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## INTRODUCTION

Lawyers, economists, and courts commonly use statistical data to “predict the future” in personal injury and wrongful death cases as to how long a victim is likely to live (“life expectancy”), how long the victim would likely have worked to earn income (“work-life expectancy”), and the workplace compensation the person likely would have received (“earnings expectancy”). Life expectancy predictions often affect assessment of compensation for future medical or related expenses and for future pain and suffering or emotional distress, while predictions of work-life expectancy and earnings expectancy together often effect compensation for future lost earnings or impaired earning capacity.<sup>1</sup> Statistical data can be organized according to the United States population collectively (“blended” or “integrated” data) or according to demographic characteristics such as race, ethnicity, or sex (“nonblended” or “segregated” data).<sup>2</sup>

Rhode Island has enacted a statute that makes admissible into evidence segregated statistical data of life expectancy and work-life expectancy that is differentiated by race, ethnicity, or sex.<sup>3</sup> Beyond

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1. See, e.g., Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 671–77 (2017).

2. See, e.g., *id.*

3. R.I. GEN. LAWS § 9-19-38 (2023). The statute states in full:  
Proof of life or work life expectancy.

(a) In any proceeding commenced in any court, commission, or agency, when the life or work life expectancy of a person shall be at issue or when it is necessary to establish the expectancy of continued life or work life expectancy of any person from any period of the person’s life, whether he or she is living at the time or not, the most recent issue of “The United States Abridged Life Tables” (United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics) or Tables of Work Life Expectancies as published in “Work Life Estimates: Effects of Race and Education” (United States Department of Labor, Bureau of Labor statistics) shall be admissible in evidence as competent evidence of such matter. The admissibility of evidence provided for in this section shall not be deemed to render inadmissible evidence as to the health, constitution, habits, or occupation of the person or any other evidence otherwise admissible under the laws of this state.

(b) The life and work life expectancy tables may be evidenced by an official publication of the tables or by a copy of the tables as published in a compiler’s note under this section in the general laws of Rhode Island. The tables as published in the general laws of Rhode Island

the specified statistical data endorsed by the statute, courts in Rhode Island, like many courts elsewhere, allow into evidence statistical data that is segregated according to race, ethnicity, or sex and expert opinion based on that segregated statistical data.<sup>4</sup>

Compensation in personal injury and wrongful death cases should not be affected by statistical data differentiated according to race, ethnicity, or sex; to allow otherwise offends what the American Law Institute terms “a fundamental principle of nondiscrimination law: that no person should be treated as merely the average of a racial or sexual group.”<sup>5</sup> Rhode Island should by legislative and judicial action remove statistical discrimination in personal injury and wrongful death compensation so that only statistical data about the U.S. population as a whole is admissible concerning life expectancy, work-life expectancy, or earnings expectancy.

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shall be sufficient proof of life and work life expectancy without further foundation or authentication; provided, however, that written notice of the intention to offer the life or work life expectancy tables as evidence, together with a copy of the tables, has been given to the opposing party or parties, or to his or her or their attorneys, by mailing it by certified mail, return receipt requested, not less than ten (10) days before the introduction of the tables into evidence, and that an affidavit of the notice and the return receipt are filed with the clerk of the court immediately after the receipt has been returned.

4. See, e.g., RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023) (“Most courts routinely allow such race- or sex-based evidence without considering the issue [of discrimination].”). The membership of the American Law Institute (“ALI”) approved Tentative Draft Number 2 at the ALI May 2023 Annual Meeting; Section 18 thus represents the most current statement of the ALI’s position on lost earnings and may be cited elsewhere until the official text is published. *Id.* at ix (“Once it is approved by both the Council and membership, a Tentative Draft represents the most current statement of the Institute’s position on the subject and may be cited in opinions or briefs . . . until the official text is published. The vote of approval allows for possible further revision of the drafts to reflect the discussion at the Annual Meeting and to make editorial improvements.”); see also 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, 332 (2018) (“The use of such tables reflects not only professional practice, but, in some states, official preference.”).

5. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023). The American Law Institute produces highly influential Restatements of the Law, Model Codes, and Principles of the Law and terms itself the “leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.” *About ALI*, A.L.I., [ali.org/about-ali/](http://ali.org/about-ali/) (last visited Feb. 23, 2023).

Part I of this Article addresses how statistical evidence about life expectancy, work-life expectancy, or earnings expectancy can enable systemic inequities in assessing compensation in personal injury and wrongful death cases, focusing on current Rhode Island law and practice. Part II details the shifts that have occurred in the American Law Institute and in courts and legislatures elsewhere to prohibit considerations of race, ethnicity, or sex in making monetary awards for victims killed or disabled due to defendants' wrongs. Part III advocates that Rhode Island follow the lead of the American Law Institute and legislatures and courts elsewhere to remove statistical discrimination in personal injury and wrongful death compensation, and it suggests legislative and judicial action in Rhode Island to accomplish this goal.

I. HOW STATISTICAL DATA ABOUT LIFE EXPECTANCY, WORK-LIFE EXPECTANCY, OR EARNINGS EXPECTANCY CAN ENABLE SYSTEMIC INEQUITIES IN DETERMINING COMPENSATION

Persons harmed by tortious conduct generally are entitled to compensation for losses they have sustained or likely will sustain in the future because of the wrong committed. Compensatory damages can encompass an array of harms, both past and future as well as economic and noneconomic.<sup>6</sup> The extent and valuation of past economic losses, such as lost wages and medical expenses, is generally susceptible to documentary proof,<sup>7</sup> while the extent of past noneconomic losses, such as pain and suffering, can be proven on the facts of what has already occurred.<sup>8</sup> However, predicting the extent of future losses and valuing those losses involves an inherent level of uncertainty and often depends on statistical averages.<sup>9</sup>

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6. See, e.g., *Reilly v. United States*, 665 F. Supp. 976, 1020 (D.R.I. 1987) (allowing recovery for noneconomic damages of past and future pain and suffering and economic damages for loss of earning capacity and future care), *aff'd in part and remanded*, 863 F.2d 149 (1st Cir. 1988).

7. See, e.g., *Proffitt v. Ricci*, 463 A.2d 514, 518 (R.I. 1983) (disagreeing with defendant's argument that the trial justice misconstrued evidence impacting damages and finding that "the court awarded compensation only for the medical bill for which proof was presented").

8. See, e.g., *id.* at 519 (detailing the nature and severity of the plaintiff's injuries and allowing damages for past and future pain suffering).

9. See, e.g., RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 cmt. d (AM. L. INST., Tentative Draft No. 2, 2023) (stating that in cases involving the catastrophic permanent injury or death of a young child "reliance upon statistical

With respect to life expectancy or work-life expectancy, Rhode Island General Laws section 9-19-38 instructs that specified statistical data compiled by the federal government may be admitted as “competent evidence of such matter” in “any proceeding commenced in any court, commission, or agency.”<sup>10</sup> Some of the statistical data endorsed by the statute is compiled in an integrated/blended format analyzing the U.S. population as a whole; other data is compiled in a segregated/unblended format, differentiating according to demographics such as race, ethnicity, or sex, or some combination thereof.<sup>11</sup>

The government statistics on life and work-life expectancy that the Rhode Island statute makes admissible into evidence are not conclusive of factual issues; the parties may offer evidence of “health, constitution, habits, or occupation of the person.”<sup>12</sup> Moreover, the statute does not limit the type of statistical data that can be introduced; parties may present evidence on life expectancy or work-life expectancy from other sources.<sup>13</sup> The finder of fact remains the ultimate decisionmaker on the plaintiff’s life expectancy and work-life expectancy.<sup>14</sup>

With respect to earnings expectancy, no Rhode Island statute explicitly authorizes the introduction into evidence of specified statistical data of average wages.<sup>15</sup> Litigants, however, often

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data about average earning capacity is an appropriate measure” and that “no better measure may be available”).

10. R.I. GEN. LAWS § 9-19-38(a) (2023).

11. See *infra* Section I.A.

12. R.I. GEN. LAWS § 9-19-38(a).

13. *Id.* (“The admissibility of evidence provided for in this section shall not be deemed to render inadmissible . . . any other evidence otherwise admissible under the laws of this state.”).

14. See *Reilly v. United States*, 863 F.2d 149, 167 (1st Cir. 1988) (noting that these statistics are tools to help the court and not “handcuffs to shackle its power to find the facts and resolve conflicts in the evidence”).

15. In determining loss of future earning capacity, Rhode Island case law suggests that the proper measure is the difference in value of what the injured person would have been capable of earning prior to the tort compared to what the injured person is projected to be capable of earning after the accident. See, e.g., *D’Andrea v. Sears, Roebuck & Co.*, 287 A.2d 629, 634 (R.I. 1972) (noting that the plaintiff’s father could recover damages for loss of earning capacity of his eighteen-year-old son who suffered severe brain injuries in a fall while working at a warehouse). Recovery of compensation for impairment of future earning capacity is warranted even if the individual was not employed at the time of the injury or death caused by the defendant. See, e.g., *id.* Damages for



introduce into evidence statistical data about average earnings from a variety of sources, and experts may make predictions of the plaintiff's future losses based on the statistics.<sup>16</sup>

The following sections provide more detail about the kind of statistical data that Rhode Island courts allow into evidence, illustrate systemic inequities that flow from the use of segregated statistical data, and describe constitutional issues with the use of segregated statistical data that others have identified.

A. *Statistical Data on Life Expectancy, Work-life Expectancy, and Earnings Expectancy That Is Admissible Under the Rhode Island Statute and in Rhode Island Courts*

1. *Life Expectancy*

When determinations of life expectancy are at issue in any proceeding, the Rhode Island statute specifies that the most recent issue of the United States Abridged Life Tables from the United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Health Center for Statistics ("CDC life expectancy tables") is admissible as competent evidence.<sup>17</sup> The life tables provide estimates of life expectancy in the United States based on mortality statistics.<sup>18</sup>

In the most recent report, *United States Life Tables, 2021*, data is provided in both a blended and nonblended format.<sup>19</sup> Table A, titled "Expectation of life, by age, Hispanic origin and race, and sex: United States, 2021," contains the following categories: "All origins [and races], Hispanic, Non-Hispanic American Indian and Alaska Native, Non-Hispanic Asian, Non-Hispanic Black, and Non-

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impairment of future earning capacity, as for most future damages, must be reduced to their present value. *See, e.g., Kay v. Menard*, 754 A.2d 760, 770 (R.I. 2000) (recognizing the practice of reducing loss of future earning damages to their present-day value under Rhode Island law, however finding that because defendant failed to mention the discounting procedure prior to instructing the jury, the trial judge did not err in refusing to reinstruct the jury).

16. *See, e.g., Reilly v. United States*, 665 F. Supp. 976, 995 (D.R.I. 1987) (mentioning that an economist "relied on Bureau of the Census figures relevant to workers of Heather's projected age and educational level"), *aff'd in part and remanded*, 863 F.2d 149 (1st Cir. 1988).

17. R.I. GEN. LAWS § 9-19-38(a).

18. Elizabeth Arias et al., *United States Life Tables, 2021*, NAT'L VITAL STAT. REPS., Nov. 7, 2023, at 1.

19. *Id.*

Hispanic White.”<sup>20</sup> Within each category, the data is further subdivided between “Total,” “Male,” and “Female.”<sup>21</sup> The data included in the “All origins [and races]-Total” column is the “blended” data; all other data in the table is “nonblended” because it is presented according to race, ethnicity, sex, or some combination of those demographic characteristics. Subsequent tables in the report include even more demographic differentiations.

## 2. *Work-life Expectancy*

When determinations of work-life expectancy are at issue in any proceeding, the Rhode Island statute specifies that the Tables of Work Life Expectancies as published in *Work Life Estimates: Effects of Race and Education* (United States Department of Labor, Bureau of Labor Statistics) (“BLS work-life expectancy tables”) are admissible as competent evidence.<sup>22</sup> This publication contains no blended tables as to work-life expectancy for the U.S. population as a whole; rather, it divides data according to race, sex, and education levels.<sup>23</sup> Statistics are presented for men and women separately and then further divided within the male and female categories into “White” and “Blacks and others” and levels of schooling completed.<sup>24</sup>

The tables were published in 1986 based on data collected before 1981.<sup>25</sup> The publication has not been updated since.<sup>26</sup> Yet, the Rhode Island statute makes this thirty-seven-year-old publication admissible in evidence, despite its troubling demographic categorizations and the fact that work patterns have changed markedly

20. *Id.* at 3 tbl.A.

21. *Id.*

22. R.I. GEN. LAWS § 9-19-38(a).

23. See generally Shirley J. Smith, *Revised Worklife Tables Reflect 1979–80 Experience*, in BUREAU OF LAB. STAT., U.S. DEPT OF LAB., BULLETIN 2254, WORKLIFE ESTIMATES: EFFECTS OF RACE AND EDUCATION 1 (1986), <https://www.bls.gov/opub/reports/worklife-estimates/archive/worklife-estimates-1986.pdf>.

24. See, e.g., *id.* at 5 tbl.4.

25. See generally *id.*

26. The Bureau of Labor Statistics (“BLS”) website states that this is the last report on work-life expectancy issued by the BLS. *NLS FAQs*, BUREAU OF LAB. STAT., <https://www.bls.gov/nls/questions-and-answers.htm> (May 18, 2023).

among different demographic groups in the over four decades since the tables were published.

### 3. *Earnings Expectancy*

Proof of earnings expectancy is not addressed in Rhode Island General Laws section 9-19-38.<sup>27</sup> Adult victims typically will have had a record of education, employment, and earnings that will inform predictions as to what the victim's workplace compensation would have been but for the defendant's tort.<sup>28</sup> When the victim is a child, courts commonly allow into evidence statistical data of average wages and expert projections based on that data; federal labor statistics often are used.<sup>29</sup> The federal Bureau of Labor Statistics wage tables are published weekly and quarterly and provide data on average earnings in tables by "selected characteristics," including race, ethnicity, and sex.<sup>30</sup>

#### B. *Systemic Inequities Enabled by the Admissibility of Statistical Data Differentiated According to Race, Ethnicity, or Sex*

The financial disparities produced by statistical tables differentiated according to race, ethnicity, or sex are striking. Wage tables produced by the Bureau of Labor Statistics show substantial differences in earnings according to race, ethnicity, and sex.<sup>31</sup> Moreover, current categories in government statistical tables do not reflect the reality of individuals who are biracial, multiracial, of multiple ethnicities, intersex, gender non-conforming, or gender nonbinary.

Professors Avraham and Yuracko have illustrated the financial disparities produced by race- and sex-based statistics on life

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27. See R.I. GEN. LAWS § 9-19-38.

28. Avraham & Yuracko, *supra* note 1, at 675.

29. *Id.* at 675–76; see also *Reilly v. United States*, 665 F. Supp. 976, 995 (D.R.I. 1987) ("In calculating gross earning capacity for each of Heather's lost work years, Dr. Wright relied on Bureau of the Census figures relevant to workers of Heather's projected age and educational level."), *aff'd in part and remanded*, 863 F.2d 149 (1st Cir. 1988).

30. See, e.g., BUREAU OF LAB. STAT., U.S. DEPT OF LAB., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY SELECTED CHARACTERISTICS tbl. 37 (2023), <https://www.bls.gov/cps/cpsaat37.pdf>.

31. *Id.*

expectancy and work-life expectancy with two simple hypotheticals that we have paraphrased:

*Life expectancy tables:* Assume a Black boy and a white boy suffer an identical injury at age one and that annual medical expenses for each boy are \$2,000. Using the 2008 U.S. Life Tables, the Black boy's life expectancy based on his race would produce estimated medical expenses that are \$11,000 less than those of the white boy. Changing the scenario to a white boy and a white girl, the white boy's life expectancy based on his sex would produce estimated medical expenses that are \$9,600 less than those of the white girl.<sup>32</sup>

*Work-life tables:* Assume a white male and a Black female, both identically injured at age sixteen, with the same projected education level and projected averaged annual income of \$25,000.<sup>33</sup> Using the work-life statistics from the 1986 BLS work-life expectancy tables, a white male of this age would have a work-life expectancy of 39.9 years, while a Black female of this age would have a work-life expectancy of 27.8 years, producing a \$302,500 lower projected loss of earning capacity for the Black female than the white male.<sup>34</sup>

The Rhode Island statute, by endorsing the CDC Life Tables and the BLS work-life expectancy tables as competent evidence, allows for such widely disparate financial figures to be admitted into evidence, which in turn enables systemic inequities in compensating victims because of their race, ethnicity, or sex.

As will be discussed at length in Part III, there is a shift elsewhere to prohibit the use of race, ethnicity, or sex in making monetary awards for victims killed or disabled due to defendants' wrongs. For now, it suffices to mention some of the policy concerns raised by scholars and judges concerning the use of nonblended/seg-regated statistics in predicting future losses. Commentators have observed that the use of nonblended statistics enables disparate

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32. Avraham & Yuracko, *supra* note 1, at 671–72.

33. *Id.* at 675.

34. *Id.*

compensation for tort victims solely based on their race, ethnicity, or sex;<sup>35</sup> they have asserted that nonblended statistics on work-life expectancy and average wages reflect discriminatory practices in education, hiring, and workplace compensation and that the use of such statistics perpetuates inequity;<sup>36</sup> and they have noted that the use of race- and sex-based data “saddles nonconforming individuals with generalizations about their group, a kind of stereotyping generally prohibited by the constitutional guarantees of equal protection and statutory antidiscrimination laws.”<sup>37</sup> Further, some commentators have argued that the use of nonblended statistics that typically result in lower compensatory awards for Black and Hispanic individuals may influence potential tortfeasors to allocate risk to the disadvantage of Black and Hispanic communities; they cite the contexts of lead-based paint, healthcare, and pollution as examples.<sup>38</sup>

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35. See, e.g., *id.* at 661; MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 159 (2010).

36. Avraham & Yuracko, *supra* note 1, at 661; CHAMALLAS & WRIGGINS, *supra* note 35, at 159; see also Sonja Starr, *Statistical Discrimination*, 58 HARV. C.R.-C.L. L. REV. 579, 603 (2023) (stating that the use of race- and sex-specific statistical tables “bakes into every award the cumulative effect of centuries of racism and sexism” and “turn[s] back the clock on progress in redressing disparities, because disparities observed among previous generations generate projections for future ones”).

37. CHAMALLAS & WRIGGINS, *supra* note 35, at 159.

38. See Avraham & Yuracko, *supra* note 1, at 687–92. Professors Avraham and Yuracko assert that landlords with tenants who are Black or Hispanic have inadequate economic incentive to remove lead-based paint and prevent potentially devastating health consequences because it is “cheaper to injure poor and minority children[.]” *Id.* at 687–88 (“The underlying reason is a familiar one: because most of the victims of lead-based paint poisoning are children, and given the lack of individualized evidence that indicates what career path particular children would have taken and how much they would have earned absent the negative interference, courts rely on statistics from nonblended tables that provide considerably lower awards for [B]lack and Hispanic defendants than for comparable white victims.”). They assert that the disparities in healthcare treatment for minorities could be related to the lower liability risks that minorities present: “In the event of a medical malpractice suit involving a minority or female plaintiff, healthcare providers would be required to pay lower damages than they would have been had a white male plaintiff brought the suit.” *Id.* at 688–90. They also draw a connection between the relationship of low income and minority communities with the allocation of environmental hazards and pollution. *Id.* at 690–92.

U.S. District Judge Jack Weinstein, a renowned judge and legal scholar, in rejecting race-based statistics in valuing future economic losses, remarked:

Race and ethnicity are not, *and* should not, be a determinant of individual achievement. To support such a proposition distorts the American dream, denigrating minorities' chances of climbing the socio-economic ladder. . . .

Propelling race and ethnicity to the forefront of predictions about an individual's future achievement ignores the myriad factors affecting an individual's capacity to fulfill his or her potential.<sup>39</sup>

These policy concerns about the use of segregated statistics are particularly acute in the context of child victims; children have no or little track record of education, employment, or earnings, and thus statistical data is very influential in the prediction of lost future earnings and wages. When the tort victim is an adult, a record of education, employment, or earnings will inform the assessment of future lost wages or impairment of earning capacity, but the problem remains of using statistics on life and work-life expectancy differentiated according to race, ethnicity, or sex that likely produce disparities in compensation for no other reason than the race, ethnicity, or sex of the adult.

*C. Constitutional Barriers to the Use of Statistical Data Differentiated According to Race, Ethnicity, or Sex*

Several legal scholars, in detailed analyses, have concluded that the use of statistical evidence differentiated by race, ethnicity, or sex to assess compensation for tort victims violates the Equal Protection Clause of the U.S. Constitution.<sup>40</sup> Appellate courts

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39. G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015).

40. *See, e.g.*, Starr, *supra* note 36, at 603–12 (arguing that the Equal Protection Clause of the U.S. Constitution bars race- and sex-specific damage calculations); Yuracko & Avraham, *supra* note 4, at 337–69 (arguing that use of race-based wage, life expectancy, and work-life expectancy tables when assessing compensation for tort violates the Equal Protection Clause of the Fourteenth Amendment); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 104–21 (1994) (arguing that use of explicit race-

apparently have not considered the constitutionality of the practice.<sup>41</sup> However, Judge Weinstein in the federal district court held in two decisions that the use of segregated statistics in determining compensation violated constitutional guarantees of equal protection and due process<sup>42</sup> and urged that a “traditional, automatic, unthinking approach by experts in this field can no longer be tolerated.”<sup>43</sup> At least one other court has adopted Judge Weinstein’s constitutional analysis—a federal district court in 2021 that sustained plaintiffs’ objection in a wrongful death case to the use of race-based life expectancy statistics.<sup>44</sup>

Judge Weinstein first analyzed the constitutionality of using race-segregated statistics to determine personal injury compensation in *McMillan v. City of New York*; that case involved a projection of how long the plaintiff would likely live, with life expectancy an important factor in assessing compensation for the plaintiff’s future medical care and pain and suffering.<sup>45</sup> Judge Weinstein, who was the finder of fact, rejected the defendant’s statistical evidence that the plaintiff, an African-American man who incurred quadriplegia due to the defendant’s negligence, would have a shorter life expectancy than persons of other races with similar injuries.<sup>46</sup> Surveying U.S. Supreme Court decisions on equal protection, Judge Weinstein determined that: “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.”<sup>47</sup> Moreover, he found that due process would be offended by the use of race-based statistics on life expectancy because compensation for

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based and gender-based economic data to determine loss of earning capacity violates equal protection guarantees).

41. See Starr, *supra* note 36, at 603 (“Neither [the review of Yuracko & Avraham, *supra* note 4] nor my own search produced any examples of appellate decisions reversing a trial court’s decision to admit race- or sex-specific calculations, or otherwise identifying constitutional problems with this practice.”).

42. *Kimpson*, 116 F. Supp. 3d at 140; *McMillan v. City of New York*, 253 F.R.D. 247, 255–56 (E.D.N.Y. 2008).

43. *Kimpson*, 116 F. Supp. 3d at 154.

44. *Coleman v. City of Tempe*, No. CV-17-02570, 2021 U.S. Dist. LEXIS 182263, at \*3–4 (D. Ariz. Aug. 20, 2021) (citing *McMillan*, 253 F.R.D. at 255–56).

45. *McMillan*, 253 F.R.D. at 248.

46. *Id.*

47. *Id.* at 255.

negligence qualifies as a property right triggering due process protection; the use of race-based statistical data would create an “arbitrary and irrational state action,” violating plaintiff’s due process guarantees.<sup>48</sup>

Judge Weinstein next considered the constitutionality of ethnicity-segregated statistical data in *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, which involved the lost earning capacity of a Hispanic child who suffered severe mental development issues from exposure to lead paint as an infant.<sup>49</sup> The defendant’s forensic economist had produced a report projecting lower future loss of earnings than those projected by the plaintiff’s forensic economist; the defendant’s economist had relied on education statistics of Hispanic males rather than the U.S. population as a whole.<sup>50</sup> In a jury trial, Judge Weinstein ruled that it is “unconstitutional to base damages on the characteristics of a person injured as a [ ] Hispanic or a member of any other ethnic group.”<sup>51</sup> He instructed the jury that “as a matter of constitutional and federal law[,] it is inappropriate where there is a case involving an individual with a Hispanic background . . . to rely upon [a table which is undifferentiated as to Hispanic individuals]” and that “you cannot say that, for example, Hispanics generally go to college less than others and therefore use that statistic or that analysis or that chart.”<sup>52</sup> Judge Weinstein based his ruling with respect to ethnicity-based statistical evidence “on the same constitutional and other factors relied upon” in the *McMillan* decision.<sup>53</sup>

While reported decisions on constitutional barriers to the use of segregated statistics in determining compensation in personal injury and wrongful death cases are scarce, several decisions have relied on non-constitutional grounds, such as public policy, to reject the use of statistical evidence based on race, ethnicity, or sex to inform assessment of monetary awards for victims who have been

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48. *Id.* at 255–56.

49. *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015).

50. *Id.* at 129.

51. *Id.* at 135 (alteration in original).

52. *Id.* at 134 (emphasis omitted).

53. *Id.* at 129 (citing *McMillan v. City of New York*, 253 F.R.D. 247 (E.D.N.Y. 2008)).



significantly disabled or killed from a defendant's wrong.<sup>54</sup> Section II.C of this Article will discuss those decisions.

## II. SHIFTS ELSEWHERE TOWARDS PROHIBITING CONSIDERATIONS OF RACE, ETHNICITY, OR SEX IN DETERMINING COMPENSATION

Most courts seem to routinely allow segregated statistical data about life expectancy, work-life expectancy, and earnings expectancy into evidence in personal injury and wrongful death cases without considering the discriminatory nature of the practice.<sup>55</sup> Significantly, however, courts that seriously have considered the issue have ruled that such segregated statistical data should not be considered in making monetary awards to victims who were killed or disabled.<sup>56</sup>

While the use of race-, ethnicity- and sex-based statistical data to inform compensation in wrongful death and personal injury cases remains a common practice in many courts throughout the United States, increasing recognition of the systemic inequities has created shifts towards prohibiting the practice.<sup>57</sup> The American Law Institute, reported judicial decisions elsewhere, and legislatures in other states have led the way.

### A. *American Law Institute Stance that Courts Should Allow Only Population-Wide Statistical Data*

#### 1. *Future Lost Earnings or Impaired Earning Capacity*

The American Law Institute has recently taken the position in its ongoing project to produce a *Restatement (Third) Torts: Remedies* that when prediction based on statistics is necessary to determine future lost earnings or impaired earning capacity, it is “far better to use the average for all Americans than to use the average for a racial or sexual group (or a combined racial and sexual group,

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54. See *infra* Section II.C.

55. See RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023) (“Most courts routinely allow . . . race- or sex-based evidence without considering the issue [of whether the practice is unfairly discriminatory].”).

56. See *id.* (“[N]o opinion has been found that seriously considers the issue [of segregated statistical data] and allows such evidence.”).

57. See Avraham & Yuracko, *supra* note 1, at 669–70, 677–78.

such as black males).”<sup>58</sup> To allow segregated statistics violates an inherent principle in nondiscrimination law, that “no person should be treated as merely the average of a racial or sexual group.”<sup>59</sup> Moreover, the American Law Institute recognizes that work-life and average wage statistics differentiated according to race, ethnicity, or sex are often the product of past discrimination in hiring, education, and workplace compensation.<sup>60</sup> As such, allowing their use to inform the assessment of tort compensation only furthers the perpetuation of discrimination.<sup>61</sup> Thus, “[c]ourts should not allow expert testimony or other evidence or argument that a plaintiff’s earning capacity is higher or lower based on average earnings or average working-life expectancy for workers of the plaintiff’s race, ethnicity, or sex.”<sup>62</sup>

## 2. *Life Expectancy*

The American Law Institute urges that factfinders not make predictions of life expectancy on the basis of race- or sex-based data when assessing future medical expenses<sup>63</sup> or pain and suffering.<sup>64</sup> Similar to its reasoning regarding work-life and earnings expectancy, the American Law Institute asserts that using race or sex to

58. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* § 19 cmt. h (“As in the case of lost earnings . . . factfinders should not predict medical expenses on the basis of race- or sex-based data.”). For how Tentative Draft No. 2 represents the current position of the ALI and may be cited by courts and lawyers, see *supra* note 4.

64. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 20 cmt. k (AM. L. INST., Tentative Draft No. 2, 2023). Section 20 is entitled “Pain and Suffering, Including Emotional Harm Accompanied by Bodily Harm to the Plaintiff” and includes a comment that life expectancy should be predicted on the basis of only integrated data:

*k. Sex- and race-based data.* If a plaintiff will suffer pain or disability for the rest of the plaintiff’s life, then valuing pain and suffering requires an estimate of the plaintiff’s remaining life expectancy. As extensively discussed in § 19, Comment *h*, life expectancy should be determined on the basis of data for all Americans. Life expectancy should not be predicted on the basis of race or sex.

*Id.* For how Tentative Draft No. 2 represents the current position of the ALI and may be cited by courts and lawyers, see *supra* note 4.

predict a plaintiff's life expectancy violates nondiscrimination norms.<sup>65</sup> It reports that the Supreme Court has prohibited using sex in the employment context to predict life expectancy and that life-insurance regulation has long prohibited the use of race to predict life expectancy.<sup>66</sup> Moreover, the American Law Institute questions the reliability of using segregated statistics on life expectancy, observing that racial and sexual differences in life expectancy, as measured by statistical data, are “highly variable over time and space” and that “[s]uch variable data from the past cannot be used to make reliable long-term predictions.”<sup>67</sup> To predict life expectancy in personal injury cases, the American Law Institute advocates use of population-wide statistics, subject to modification based on the plaintiff's own health and the effects of the plaintiff's injury.<sup>68</sup>

*B. Judicial Decisions Rejecting Statistical Evidence Differentiated According to Race, Ethnicity, or Sex on Nonconstitutional Grounds*

This Article earlier discussed that a few reported judicial decisions have rejected as unconstitutional the use of segregated statistical evidence in assessing monetary awards. Additional reported decisions, including those by two federal appellate courts, have rejected such usage on the nonconstitutional grounds of fairness, avoiding the perpetuation of discrimination, or reliability. This section highlights a few of the reported decisions.

*1. Future Lost Earnings or Impaired Earning Capacity*

The U.S. Court of Appeals for the Tenth Circuit, in *United States v. Serawop*, upheld a trial court's refusal to consider segregated statistical evidence in assessing a criminal restitution award

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65. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 reporters' note cmt. e (AM. L. INST., Tentative Draft No. 2, 2023).

66. *Id.* § 19 cmt. h. *See generally* Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073 (1983) (declaring that it is illegal to consider sex to predict life expectancy for employee benefits); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (same).

67. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 19 cmt. h (AM. L. INST., Tentative Draft No. 2, 2023).

68. *Id.*

for a homicide victim's lost earning capacity.<sup>69</sup> The appellate court stated that "[t]he district court's decision to reject an arguably regressive gender- or race-based approach was within its discretion."<sup>70</sup> Although the context was a criminal proceeding rather than a tort suit, the facts and rationale are instructive.

In *Serawop*, a jury convicted the defendant of manslaughter in the death of his infant daughter, an American Indian.<sup>71</sup> Prior to sentencing, the district court appointed an economist to prepare a report regarding the victim's lost income for purposes of calculating a criminal restitution award.<sup>72</sup> The economist offered two different reports, one taking into account the victim's sex and American Indian identity and the other not taking into account the victim's sex, and, as the Tenth Circuit phrased it, her "race."<sup>73</sup>

When taking into account the victim's identity as a female American Indian in one of the reports, the economist projected that without a high school diploma, the victim would have lost income of \$171,366.<sup>74</sup> With a high school diploma, the projection increased to \$251,148, and with some college, the projection further increased to \$273,000.<sup>75</sup> In the economist's other report, which did not consider the victim's sex or American Indian identity, the victim's projected lost income with no high school diploma was \$308,633.<sup>76</sup> With a high school diploma, the projection increased to \$511,623, and with some college, the projection increased to \$576,106.<sup>77</sup> According to the economist's reports, the victim's sex and American Indian identity reduced the statistical projections of her lost earning capacity by roughly \$130,000 to \$300,000. The district court judge chose to rely on the projections based on the blended statistics, reasoning that "[a]s a matter of fairness, the court should exercise its

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69. *United States v. Serawop*, 505 F.3d 1112, 1126 (10th Cir. 2007).

70. *Id.*

71. *Id.* at 1114.

72. *Id.*

73. *Id.* at 1115.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

discretion in favor of victims of violent crime and against the possible perpetuation of inappropriate stereotypes.”<sup>78</sup>

Using similar reasoning, a federal district court in a case involving a biracial child rejected the defendant’s argument that the child’s future earning capacity should be assessed based on the average earnings for Black men rather than white men.<sup>79</sup> The court remarked that “it would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races” into the assessment of compensation for loss of earning capacity.<sup>80</sup>

With respect to work-life expectancy in particular, some courts have rejected segregated statistics.<sup>81</sup> A frequently cited case is *Reilly v. United States*, a decision of the U.S. Court of Appeals for the First Circuit on appeal from the District of Rhode Island.<sup>82</sup> In *Reilly*, a baby suffered severe brain damage from the negligence of doctors in treating her mother during birth.<sup>83</sup> The trial judge awarded compensation of \$1,104,641 for lost earning capacity.<sup>84</sup> The defendant appealed, arguing in part that the district court erred in its assessment of lost earning capacity by not considering

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78. *Id.* at 1126 (quoting *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1319 (D. Utah 2004)).

79. *Wheeler Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.D.C. 1991) (“[D]efendants’ argument that average black male earnings are an appropriate measure of [the child’s] future earnings cannot be accepted, since [the child] is half [B]lack and half white.”), *rev’d on other grounds*, 28 F.3d 120 (D.C. Cir. 1994).

80. *Id.*

81. *See, e.g.*, *Reilly v. United States*, 863 F.2d 149, 167 (1st Cir. 1988); *B.A. v. Sec’y of Health & Hum. Servs.*, No. 11-51V, 2021 U.S. Claims LEXIS 2164, at \*42 (Fed. Cl. Sept. 7, 2021) (“I agree . . . that work-life expectancy should not be reduced based on the petitioner’s protected characteristics such as race and gender.”); *Theodile v. Delmar Sys., Inc.*, No. 03-1844, 2007 WL 2491808, at \*8 (W.D. La. Aug. 31, 2007) (entering judgment on jury verdict that was consistent with testimony of plaintiff’s expert on work-life expectancy and rejecting defendant’s argument that exclusion of race and educational factors by plaintiff’s expert resulted in an inaccurate calculation of work-life expectancy); *Childers v. Sec’y of Health & Hum. Servs.*, No. 96-194V, 1999 WL 218893, at \*17 (Fed. Cl. Mar. 26, 1999) (rejecting, in a case involving brain damage of a female child, sex-differentiated evidence of work-life expectancy).

82. 863 F.2d 149.

83. *Id.* at 153.

84. *Id.* at 154. The plaintiff brought suit against the United States under the Federal Tort Claims Act and thus no entitlement to a jury trial existed. *Id.* at 152.

the child's sex.<sup>85</sup> Relying on the Bureau of Labor Statistics sex-differentiated tables, the defendant asserted that because the plaintiff was female and might take time off to raise children, she would spend fewer active years in the workforce; accordingly, the defendant asserted that the plaintiff's award for loss of earning capacity should be reduced by forty percent.<sup>86</sup> The appellate court rejected defendant's argument, opining that the Bureau of Labor Statistics tables were not controlling.<sup>87</sup> The court also signified that the defendant's argument was premised on antiquated and sexist views, with Judge Bruce Selya writing: "In 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."<sup>88</sup>

## 2. *Life Expectancy*

As mentioned previously, Judge Weinstein declared unconstitutional the use of race-based statistics on life expectancy. As an independent ground for his disregard of the segregated statistics introduced in *McMillan*, Judge Weinstein characterized race-based statistics as "factual[ly] unrelia[bl]e" because they are "not scientifically acceptable in our current heterogeneous population"<sup>89</sup> and because the "simple characterization of individuals as 'Black' or 'White' is not only misleading, it risks masking the complex interactions between a host of genetic and socio-economic factors."<sup>90</sup>

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85. *Id.* at 167.

86. *Id.*

87. *Id.*

88. *Id.*

89. *McMillan v. City of New York*, 253 F.R.D. 247, 249 (E.D.N.Y. 2008). Judge Weinstein reviewed scholarly and scientific literature to reach this conclusion. *Id.* at 249–53.

90. *Id.* at 253; *see also* *Cedeno v. Broan-Nutone, LLC*, No. 16 CV 796, 2019 U.S. Dist. LEXIS 169027, at \*30 n. 15 (E.D.N.Y. Sept. 30, 2019) (commenting that federal magistrate judge had not considered plaintiff's race or ethnicity in calculating life expectancy for a claimant in computing tort damages); *Hwang v. Grace Rd. Church*, No. 14 CV 7187, 2018 U.S. Dist. LEXIS 164450, at \*23 n. 9 (E.D.N.Y. Aug. 10, 2018) (same).

*C. Legislative Action Elsewhere Prohibiting Considerations of Race, Ethnicity, or Sex in Determining Compensation*

Legislatures play a critical role in addressing the inequitable practice of using statistical evidence differentiated according to race, ethnicity, or sex. As one commentator has asserted:

We must consider the socio-economic barriers preventing people of color and women from receiving parity in civil damage awards. That starts by states prioritizing commonsense legislative reforms that prohibit the discriminatory calculation of future income earnings in tort damages awards on the basis of a person's race, ethnicity- and/or gender.<sup>91</sup>

In recent years, some state legislatures have prohibited courts from considering race, ethnicity, or gender in making monetary awards. With respect to assessment of lost earnings or impairment of earning capacity, New Jersey has the most expansive statute in terms of demographic characteristics, stating that in personal injury or wrongful death cases, “any estimations, measures, or calculations of damages for lost earnings or impaired earning capacity shall not be reduced because of race, ethnicity, gender, gender identity or expression, or affectional or sexual orientation.”<sup>92</sup> Statutes in California and Maryland specify that race, ethnicity, or gender may not be used to reduce damages for lost earnings or earning capacity in personal injury or wrongful death cases.<sup>93</sup> Oregon has

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91. Press Release, Stanley Augustin, Laws’ Comm. for C.R. Under L., Lawyers’ Committee for Civil Rights Under Law & Silicon Valley Community Foundation Release Report Highlighting Discrimination in Civil Damage Awards (July 26, 2018), <https://www.lawyerscommittee.org/lawyers-committee-for-civil-rights-under-law-silicon-valley-community-foundation-release-report-highlighting> [<https://perma.cc/2S8J-E2D9>] (quoting Dariely Rodriguez, Director of the Economic Justice Project at the Lawyers’ Committee for Civil Rights under Law).

92. N.J. STAT. ANN. § 2A:53A-5.1 (West 2023).

93. CAL. CIV. CODE § 3361 (West 2023); MD. CODE ANN., CTS. & JUD. PROC. § 11-109.1 (LexisNexis 2023). The California statute states that “[e]stimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.” CIV. § 3361. The Maryland statute states that “damages for loss of earnings resulting from personal injury or wrongful death may not be reduced based on race, ethnicity, or gender.” CTS. & JUD. PROC. § 11-109.1.

enacted a statute that makes inadmissible in any civil action “[a] calculation of the projected future earning potential of the plaintiff that takes into account the race or ethnicity of the plaintiff” and requires instruction to the jury that it may not take race or ethnicity into account in computing future earnings.<sup>94</sup>

At the federal level, a bill titled the Fair Calculations in Civil Damages Act, which has been introduced in the United States House of Representatives multiple time since 2016, would prohibit any “court of the United States” from awarding “damages to a plaintiff in a civil action using a calculation for the projected future earning potential of that plaintiff that takes into account the race, ethnicity, gender, religion, or actual or perceived sexual orientation of the plaintiff.”<sup>95</sup> Congressman Sean Casten, who is one of the cosponsors of the bill, commented that “it is unacceptable that our courts often award less in damages to women and people of color than white men in comparable civil cases . . . . In doing so, our courts are declaring that some Americans’ lives are worth less based on lifetime earning potential statistics borne of racism and sexism.”<sup>96</sup> The bill has yet to proceed to a vote in committee.<sup>97</sup>

With respect to statistical data of life expectancy, a few states have enacted statutes or court rules that include life expectancy tables that are fully or partially blended. North Carolina’s statute allows into evidence in any civil case a fully blended life expectancy

94. OR. REV. STAT. § 31.770 (2023). The statute states:

(1) A calculation of the projected future earning potential of the plaintiff that takes into account the race or ethnicity of the plaintiff is inadmissible in any civil action.

(2) The court shall instruct the jury in a civil action involving a claim for projected future earnings that the jury may not consider the race or ethnicity of the plaintiff in determining whether to award damages for projected future earnings or the amount of damages for projected future earnings.

*Id.*

95. H.R. 4980, 118th Cong. (2023).

96. Press Release, Sean Casten, Congressman, U.S. House of Representatives, Casten, Booker Introduce Legislation Banning Inequitable Calculations of Civil Damages (July 27, 2023), <https://casten.house.gov/media/press-releases/casten-booker-introduce-legislation-banning-inequitable-calculations-of-civil-damages> [<https://perma.cc/3G4J-8Y9G>].

97. *See Actions - H.R.4980 - 118th Congress (2023-2024)*, CONGRESS.GOV, <https://www.congress.gov/bill/118th-congress/house-bill/4980/all-actions> (last visited Mar. 6, 2024).



table that lists “completed age” from ages zero to eighty-five and above and a corresponding life expectancy for each completed age.<sup>98</sup> New Jersey court rules similarly include a fully blended life expectancy table.<sup>99</sup> South Carolina and Virginia statutes make admissible partially blended life expectancy tables—the tables do not differentiate as to race or ethnicity, but they do distinguish between males and females.<sup>100</sup>

### III. RECOMMENDATIONS FOR THE RHODE ISLAND GENERAL ASSEMBLY AND COURTS IN RHODE ISLAND

#### A. *Legislative Action*

The Rhode Island General Assembly should take legislative action to prohibit statistical discrimination regarding life expectancy and future lost earnings or impaired earning capacity in personal injury and wrongful death cases. Beginning with Rhode Island General Law § 9-19-38 regarding proof of life expectancy and work-life expectancy, substantial amendment or even outright repeal is warranted.

With respect to proof of work-life expectancy, the portions of the statute endorsing the outdated BLS work-life expectancy tables should be repealed. As noted earlier, the BLS publication endorsed in the statute has not been updated since 1986 and contains only segregated tables.<sup>101</sup>

With respect to proof of life expectancy, if compelling reasons exist for why segregated life expectancy tables are appropriate in proceedings other than personal injury and wrongful death

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98. N.C. GEN. STAT. § 8-46 (2022) (“Whenever it is necessary to establish the expectancy of continued life of any person from any period of the person’s life, whether the person is living at the time or not, the table hereto appended shall be received in all courts.”).

99. N.J. CT. R. 1:13-5 (“The tables of mortality and life expectancy printed as an Appendix to these rules shall be admissible in evidence as prima facie proof of the facts therein contained.”).

100. S.C. CODE ANN. § 19-1-150 (2022) (“When necessary, in a civil action or other litigation, to establish the life expectancy of a person from any period in his life, whether he is living at the time or not, the table below must be received in all courts . . . .”); VA. CODE ANN. § 8.01-419 (2023). The Virginia statute, in addition to specifying life expectancy of males and females according to different current ages, includes a blended column of “both sexes.” *Id.*

101. *See supra* Section I A.2.

cases,<sup>102</sup> then perhaps outright repeal of the statutory provisions endorsing the CDC life expectancy tables is not warranted. At a minimum, however, section 9-19-38 should be amended to specify that in personal injury and wrongful death cases, only the population-wide data in the CDC life expectancy tables is admissible in evidence.

Rhode Island should enact new legislation that prohibits statistical discrimination in the proof of future lost earnings or impaired earning capacity in personal injury or wrongful death cases. Rhode Island should follow the lead of California, Maryland, and New Jersey but go a bit further.<sup>103</sup> Those states enacted legislation that prohibits the *reduction* of awards based on race, ethnicity, or gender; that language might allow individual plaintiffs to use segregated statistical tables on work-life expectancy or average wages that favor them.<sup>104</sup> Systemic inequities across cases, however, are enabled by that possibility. Rhode Island should thus prohibit any use of segregated statistics on work-life expectancy or average wages. In this regard, we follow the lead of the American Law Institute in its assertion that: “Courts should not allow expert testimony or other evidence or argument that a plaintiff’s earning capacity is *higher or lower* based on average earnings or average

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102. For example, Judge Weinstein in *Kimpson* asserted: “There are instances where statistical life-expectancy tables based on race and ethnicity may be utilized. An obvious instance is in applying them to the rule that juveniles cannot be kept in prison for a non-homicide offense for their full life without parole.” G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 158 (E.D.N.Y. 2015).

103. Oregon’s statute extends beyond personal injury and wrongful death cases to “any civil cases.” OR. REV. STAT. § 31.770 (2023). We think it appropriate to confine our proposal on lost earnings or earning capacity to personal injury and wrongful death cases at this time based on the legislative, judicial, and scholarly advances that we have described; however, the experience in Oregon with its statute over time might suggest that a broader statute in Rhode Island might be warranted in the future.

104. In the Reporter’s Notes to RESTATEMENT (THIRD) OF TORTS: REMEDIES § 18 cmt. e (AM. L. INST., Tentative Draft No. 2, 2023), the reporters suggest that under the California and Maryland statutes, “if evidence used to increase damages for white males is inadmissible in cases with minority or female plaintiffs, those plaintiffs can argue that their damages have been reduced by comparison.” California and Maryland courts may or may not have adopted this interpretation of their respective statutes.

working-life expectancy for workers of the plaintiff's race, ethnicity, or sex."<sup>105</sup>

We suggest that new legislation include the following language: "In any civil action arising from personal injury or wrongful death, any estimations, measures, or calculations of compensation for lost earnings or impaired earning capacity shall not be based on race, ethnicity, or sex."<sup>106</sup> This language would mean that parties seeking to introduce statistical data or projections based on that data would need to use blended statistics on the population as a whole.

*B. Actions that Rhode Island Courts Might Take to Prohibit Statistical Discrimination in the Absence of Legislative Change*

If the Rhode Island General Assembly does not make legislative changes to prohibit statistical discrimination in proof of life expectancy and of future lost earnings or impaired earning capacity in personal injury and wrongful death cases, Rhode Island courts could consider whether the use of segregated statistics on life expectancy, work-life expectancy, or earnings expectancy in personal injury and wrongful death case is unconstitutional. Judge Weinstein in *McMillan* and several scholars have provided a roadmap for the constitutional analysis.<sup>107</sup> Short of deciding whether the use of segregated statistics is unconstitutional, Rhode Island courts could determine whether the rules of evidence or policy considerations allow exclusion of segregated statistics.

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105. *Id.* § 18 cmt. e (emphasis added).

106. Although New Jersey's statute is more expansive than our proposed language in terms of demographic identifiers, *see supra* note 92 and accompanying text, we are not aware of statistical data commonly used by experts or courts that segregates data of work-life expectancy or average wages according to "gender identity or expression, or affectional or sexual orientation." The common practice of statistical data being segregated according to race, ethnicity, or sex is likely why California and Maryland have statutes centered on those demographic identities, and it is also why our proposal is centered on those identities.

107. *See supra* Section I.C.

1. *Limiting the Discriminatory Effect of R.I. Gen. Law § 9-19-38*

If the Rhode Island General Assembly does not repeal or amend section 9-19-38 along the lines suggested here, courts might nonetheless be able to limit the discriminatory effect of the statute. The 1986 BLS work-life expectancy tables, being so outdated, are not likely to be introduced by parties; those tables seem to be a non-issue as a practical matter. However, the CDC life expectancy tables are regularly updated, and parties or their experts are likely to use them with some frequency. If a party seeks to introduce segregated data from those CDC tables as opposed to the population-wide data, a court might have different avenues for excluding the segregated data. The court might consider the segregated data on life expectancy as not relevant, or, similar to the American Law Institute's assertion, it might consider segregated data on life expectancy to be unreliable as a predictor of life expectancy for purposes of compensation. Another possibility would be to deem the probative value of the segregated data as substantially outweighed by the danger of unfair prejudice or misleading the jury. Support for this argument appears in the *Kimpson* case involving statistical prediction of life expectancy, in which Judge Weinstein opined:

Sometimes, as in the present case, exclusion of arguably relevant evidence will be required to protect against stereotyping that unfairly reduces damages to members of disadvantaged minority groups. . . .

Even when racially-, ethnically-, and gender-based tables have probative force and are therefore relevant, there are instances under Rule 403 of the Federal Rules of Evidence that they may be excluded.

There is another factor that may justify exclusion: constitutional and general policy considerations may warrant excluding relevant evidence, as in the instant case with respect to a specific child. In such cases, Rule 403 sometimes needs to be supplemented by exclusions based on policy.<sup>108</sup>

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108. G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 158 (E.D.N.Y. 2015) (citation omitted).

2. *Excluding Evidence of Future Lost Earnings or Impaired Earning Capacity That Uses Segregated Statistical Data*

Rhode Island General Law section 9-19-38 has little force with respect to proof of lost future earnings or impaired earning capacity. As previously noted, the statute's endorsement of the BLS work-life expectancy tables likely has no practical effect today because those tables are significantly outdated; parties likely will rely on more current statistical data.<sup>109</sup> The statute does not address proof of average earnings. Thus, when a party seeks to introduce segregated statistical data of work-life expectancy or average wages, or expert opinion based on that segregated statistical data, a court might be able to exclude the evidence as not relevant or not reliable or to exclude the evidence because its probative value is outweighed by the danger of unfair prejudice or misleading the jury.

CONCLUSION

Following the lead of the American Law Institute and legislatures and courts elsewhere, we have argued that when measurement based on statistics of life expectancy, work-life expectancy, or average wages is necessary to determine compensation for personal injury or wrongful death, Rhode Island should allow only population-wide statistical data to be introduced into evidence and prohibit consideration of the race, ethnicity, or sex of the victim. We leave for future exploration whether only population-wide statistical data of life expectancy, work-life expectancy, or average wages should be admissible in other contexts, such as criminal restitution proceedings or civil cases generally.<sup>110</sup>

Our recommendation for Rhode Island to allow only population-wide statistical data in personal injury and wrongful death cases may encounter resistance from those who would like to continue to use statistics segregated by race, ethnicity, or sex when such statistics favor their aims in individual cases. Segregated statistics do advantage certain types of victims for certain types of losses. For example, a female who will likely incur medical expenses and pain and suffering for the remainder of her life due to

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109. *See supra* Part I.

110. *See supra* notes 69–70, 94–97 and accompanying text.

the defendant's wrong would benefit from predictions based on a statistical table of life expectancy for females only rather than under a statistical table of life expectancy for the U.S. population as a whole; females on average live longer than men and the projected duration of pain and suffering and medical care accordingly would be longer for that female under a sex-segregated table. As another example, a white male infant who was wrongfully killed would have higher projected lost earning capacity under a table of average wages for white males than under a blended, population-wide table of average wages. Nonetheless, statistical averages for the population as a whole, for the reasons set forth in this article, should be used rather than segregated statistics.

In terms of possible resistance from some Rhode Island lawyers to our recommendation, it is noteworthy that the American Law Institute, which comprises approximately 4,500 judges, lawyers, and law professors who were elected to membership in the American Law Institute based on their professional accomplishments,<sup>111</sup> has opined that as a matter of public policy, race- and sex-based statistical data should be excluded from a factfinder's consideration in determining life expectancy and future lost earnings or earning capacity.<sup>112</sup> The American Law Institute's position was taken in the interests of improving the law; elected American Law Institute members are expected to leave client interest and self-interest at the door when engaged in the work of the Institute.<sup>113</sup> We hope that the Rhode Island General Assembly would similarly elevate the interests of systemic justice over individual interests.

The Rhode Island General Assembly and Rhode Island courts should remove statistical discrimination from consideration in compensating personal injury and wrongful death. The legal system

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111. See *Frequently Asked Questions*, A.L.I., <https://www.ali.org/about-ali/faq/> (last visited Feb. 23, 2023).

112. See *supra* Section II.A.

113. AM. L. INST., RULES OF THE COUNCIL r. 4.03 (2024), [https://www.ali.org/media/filer\\_public/39/33/3933f7c5-3396-4a32-b590-5462c922ffe3/council-rules-01-2024.pdf](https://www.ali.org/media/filer_public/39/33/3933f7c5-3396-4a32-b590-5462c922ffe3/council-rules-01-2024.pdf) [<https://perma.cc/2A8T-RVM5>] (“To maintain the Institute’s reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. In communications made within the framework of Institute proceedings, members should speak, write, and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest.”).

should not countenance the valuation of a victim's losses based on that victim's race, ethnicity, or sex.