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How Much Are You Worth?: A Statutory Alternative to the Unconstitutionality of Experts' Use of Minority-Based Statistics

Anne M. Anderson
Washington and Lee University School of Law

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Anne M. Anderson*

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* Candidate for Juris Doctor, May 2017, Washington and Lee University School of Law. I would like to thank Professor Doug Rendleman for introducing me to this topic and for assisting me in developing this Note along with Professor Margaret Hu. I would also like to thank Alexandra Klein for her invaluable time and guidance throughout the Note writing process. Finally, I would like to thank my family for their genuine interest and love, and especially my husband Brad for his unending encouragement, patience, and support.

I. Introduction

In 2011, an infant, whom I will call Gary,[1] was born in New York.[2] Gary was born in and lived in a rental apartment in New York with his mother and father for the first year of his life.[3] The

1. As the source for this introduction is a civil action on behalf of an anonymous child, a name has been given for narrative clarity.

2. *See* G.M.M. v. Kimpson, 92 F. Supp. 3d 53, 60 (E.D.N.Y. 2015) ("On August 1, 2011, Hernandez-Adams gave birth to plaintiff G.M.M. in her ground floor apartment.").

3. *See id.* at 56 ("Plaintiffs Niki Hernandez-Adams and her son G.M.M. ("plaintiffs") are both currently Texas residents and former tenants of 490 Macdonough Street, Brooklyn, New York 11233.").

young couple chose the apartment as a wonderful place to house themselves, their two dogs, and their expected child.[4] Gary was developing well and could be found crawling around the home that he shared with his parents and their two dogs.[5] During his first-year medical check-up, however, Gary's doctor discovered that he had an exceptionally high blood-lead level of nine grams/deciliter.[6] On the advice of Gary's doctor, Gary's mother had the apartment tested for lead paint.[7] The test revealed concerning levels of lead-contaminated dust throughout the unit.[8] Approximately one month after learning the results of the lead paint test, Gary and his parents moved out of the apartment; Gary, however, did not escape the effects of the contamination.[9] An evaluation of Gary when he was three years old revealed numerous behavioral and cognitive issues.[10] A licensed psychologist found "deficits in the areas of expressive language, attention and concentration, short-term memory and behavioral difficulties [that were] casually related to [Gary's] high lead levels between the critical ages of 1–2."[11] The evaluation revealed

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4. *See id.* at 59 ("We needed a yard. We needed a garden. So that was primarily why we looked at that apartment. . . . We have two dogs. So we needed a backyard for them. . . . We were very happy and we loved [the] apartment. We liked the layout. We liked the location." (citing Mendez June Dep. 15:3–5) (alterations in original)).

5. *See id.* at 59–60 (describing G.M.M.'s first year of life in the apartment).

6. *See id.* at 60 (noting G.M.M.'s blood-lead levels); CTRS. FOR DISEASE CONTROL & PREVENTION, BLOOD LEAD LEVELS IN CHILDREN 1–2 (2015) (explaining that parents must be notified if a child has blood-lead levels of 5 micrograms per deciliter, that 10 micrograms per deciliter is a level of concern, and that chelation therapy is recommended if the blood-lead levels are over 45 micrograms per deciliter).

7. *See Kimpson*, 92 F. Supp. 3d at 61 (describing the testing in G.M.M.'s apartment)).

8. *See id.* (explaining that half of the samples taken contained lead-contaminated dust above permissible levels).

9. *See id.* (noting that lead test results were given to Hernandez-Adams on September 12, 2012, and the family moved out of the apartment and to Texas in October 2012).

10. *See id.* at 61–62 (noting that a neuropsychological evaluation administered on April 24, 2014, revealed "impairments and cognitive limitations secondary to lead poisoning").

11. *Id.* at 62.

various enduring problems such as Expressive Language Disorder, Attention Deficit-Hyperactivity Disorder, and emotional, cognitive, and behavioral issues.[12] Gary's parents brought a civil suit against the landlord.[13] Gary was suing for direct medical damages from his ingestion of lead dust, as well as lost future earnings because of the reduction in his future prospects due to the cognitive and behavioral challenges the lead contamination caused.[14]

Cases like Gary's are common. The recent case of lead in the Flint, Michigan water supply serves as a stark reminder.[15] When an individual is injured, the plaintiff seeks damages in part to make herself whole, or to put her in a position as if the injury had not occurred.[16] Personal injury cases thus seek to fairly and accurately compensate a victim for the actual damages the tortfeasor caused.[17] In many cases, the actual damage caused is uncertain.[18] This is true, for example, where a child is injured and it is unclear where life would have taken her,[19] where a

12. *See id.* at 62 (describing G.M.M.'s difficulty communicating, focusing, learning, and functioning).

13. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015) (noting that G.M.M.'s mother filed the suit).

14. *See id.* ("A critical factor in determining damages required ascertaining the infant's prospects for obtaining postsecondary education degrees had he not suffered from lead poisoning.").

15. *See* Sara Ganim & Linh Tran, *How Tap Water Became Toxic in Flint, Michigan*, CNN (Jan. 13, 2016), http://www.cnn.com/2016/01/11/health/toxic-tap-water-flint-michigan/ (last visited June 5, 2016) (discussing the lead-poisoned tap water in Flint) (on file with the Washington and Lee Law Review); *see also infra* Part V.C (explaining the lead contaminated water situation in Flint, Michigan, and how a statute could help manage the various claims).

16. *See* United States v. Denver, 547 F.2d 1101, 1105 (10th Cir. 1977) ("[T]he fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party." (citation omitted)).

17. *See* Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 16 (2d Cir. 1996) (noting that a tortfeasor's misconduct is irrelevant for calculating compensatory damages because such damages are meant only to compensate the plaintiff).

18. *See* Clinchfield R.R. Co. v. Forbes, 417 S.W.2d 210, 215 (Tenn. Ct. App. 1966) ("[I]t has been said that testimony tending to establish the future earning capacity of any person is necessarily speculative.").

19. *See, e.g.*, Childs v. United States, 923 F. Supp. 1570, 1572–73 (S.D. Ga. 1996) (calculating damages to be paid to the estate a six-year-old child who was

plaintiff was in college at the time of injury,[20] or where an employed plaintiff may or may not be promoted in the future.[21] Injuries often deprive individuals of future earning potential.[22] When there is a lack of evidence regarding current earnings, courts cannot be certain about future earnings.[23] Even when an individual introduces evidence of current earnings, courts must make educated guesses about potential promotions, work-life expectancy, and other unknowns.[24]

To assist in these projected future earnings, courts use U.S. Department of Labor lifetime earnings studies, Census Bureau statistics, and mortality and work-life expectancy tables.[25] The

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killed in an automobile accident by examining the likelihood the child would attend college and speculating on life expectancy).

20. *See, e.g.*, Complete Auto Transit, Inc. v. Reese, 425 P.2d 465, 467 (Okla. 1967) (examining how damages should be calculated for a woman who "had been unable to return to school and complete her course of study in the operation of business machines").

21. *See, e.g.*, *Childs*, 923 F. Supp. at 1574, 1576 (finding that a woman killed in a car accident "could have advanced into upper management in [her] company," and that her damages should account for regular raises at her job).

22. *See* Hilliard v. A.H. Robins Co., 196 Cal. Rptr. 117, 143 (Cal. Ct. App. 1983) ("Impairment of the capacity or power to work is an injury separate from the actual loss of earnings. . . . The plaintiff may recover even where she was not working and earned nothing.").

23. *See* Oliveri v. Delta S.S. Lines, Inc., 849 F.2d 742, 745 (2d Cir. 1988) ("The admissibility of evidence regarding future earning capacity is within the wide discretion of the trial judge.").

24. *See, e.g.*, Giza v. BNSF Ry. Co., 843 N.W.2d 713, 722–23 (Iowa 2014) (finding that generalized tables and evidence of typical retirement age can be presented to a jury).

25. *See, e.g.*, Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 23 (2d Cir. 1996) (finding that an expert's testimony was properly admitted where it was based on "accepted work-life tables published by the Department of Labor" for use in work-life expectancy calculation); Greyhound Lines, Inc. v. Sutton, 765 So. 2d 1269, 1276–77 (Miss. 2000) ("[W]e hold . . . where there is no past income upon which to base a calculation of projected future income, there is a rebuttable presumption that the deceased child's income would have been the equivalent of the national average as set forth by the United States Department of Labor."); Jones v. Eppler, 266 P.2d 451, 456 (Okla. 1953) ("[T]he weight of authority is that standard life and annuity tables . . . are admissible in evidence in personal injury cases . . . of the earning capacity of the person negligently injured."); Niles v. City of San Rafael, 116 Cal. Rptr. 733, 739 (Cal. App. 1974) (relying on a study of national average lifetime income the Department of Labor compiled in a case involving an eleven-year-old who was paralyzed).

Department of Labor lifetime earnings studies and Census Bureau statistics use factors such as race, ethnicity, and gender.[26] Economists and other experts often rely on such race-, ethnicity-, and gender-based statistics (minority-based statistics) in calculations of lost earning capacity.[27] As one expert noted, experts are meant to assist a factfinder, and despite performing "thousands of lost income analyses . . . no one had ever asked him to provide race- and sex-neutral calculations in wrongful death cases."[28] In recent years, however, courts have provided minority-neutral jury instructions and required experts to utilize minority-neutral factors for determinations of lost future earnings.[29] Scholarship has also examined whether courts should consider race, ethnicity, or gender for individual tort cases,

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26. *See Race*, U.S. CENSUS BUREAU, http://www.census.gov/topics/population/race.html (last visited June 5, 2016) ("The Census Bureau collects race data according to U.S. Office of Management and Budget guidelines, and these data are based on self-identification.") (on file with the Washington and Lee Law Review).

27. *See, e.g.*, O'Connor v. United States, 269 F.2d 578, 584 (2d Cir. 1959) (explaining that a white male was entitled to have his life expectancy based on the average for white males, rather than life expectancy based on the general populace); *In re* Air Crash Near Nantucket Island, 462 F. Supp. 2d 360, 362–63 (E.D.N.Y. 2006) (explaining that the victim would have provided monetary support to his parents for the remainder of their lives with a longer life expectancy for the mother based gender-based life expectancy tables); Athridge v. Iglesias, 950 F. Supp. 1187, 1192–93 (D.D.C. 1996) (relying on statistical earnings of an average white male who attended college to determine the lost future earnings of a white high school male injured in a car accident).

28. United States v. Bedonie, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004), *aff'd sub nom.* United States v. Serawop, 410 F.3d 656 (10th Cir. 2005).

29. *See* United States v. Serawop, 505 F.3d 1112, 1126–27 (10th Cir. 2007) (finding that the lower court acted correctly in eliminating minority-based statistics from consideration for restitution out of concern of fairness when the expert wished to utilize race- and gender-based statistics); Childs v. United States, 923 F. Supp. 1570, 1580 (S.D. Ga. 1996) (explaining that race-dependent statistical tables are less reliable and ignore individuals' "respective backgrounds" and that race-neutral factors are a more reliable source for lost future income calculations); Wheeler Tarpey-Doe v. United States, 771 F. Supp. 427, 455 (D.D.C. 1991) (rejecting the argument that income statistics for black men should be used for a half-black, half-white child, as "it would be inappropriate to incorporate current discrimination" into lost future earnings and instead using average earnings of all individuals), *rev'd*, 28 F.3d 120 (D.C. Cir. 1994).

regardless of their reliability.[30] One scholar has even argued that the use of minority-based statistics violates the Equal Protection Clause of the Fourteenth Amendment.[31] This trend recently culminated in a federal court decision that found that the use of race- and ethnicity-based statistics is unconstitutional.[32]

This Note examines the arguments for and against the use of minority-based statistics in future lost earnings determinations. The trend in recent years has been against the use of such statistics.[33] While this Note opposes using minority-based statistics to calculate damages, it contends that their use is constitutional. In contrast to other scholarship on the issue, this Note argues that the Equal Protection Clause of the Fourteenth Amendment does not apply because experts' use of minority-based statistics does not constitute state action. Although a better argument arises under the Due Process Clause of the Fourteenth Amendment, the use of minority-based statistics[34] does not

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30. *See* Laura Greenberg, Comment, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 430 (2001) (arguing against "dependence on race-based statistics" because they "assume[] that race is and should be the primary determinant of individual achievement," and arguing that courts should use race-neutral statistics and consider factors that "increase the likelihood of [children] overcoming adverse situations"); Sherri R. Lamb, Note, *Toward Gender-Neutral Data for Adjudicating Lost Future Earning Damages: An Evidentiary Perspective*, 72 CHI.-KENT L. REV. 299, 299 (1996) (arguing for gender-neutral statistics where "there is no earning pattern on which to base as individualized determination of lost future earning potential").

31. *See* Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 77 (1994) (arguing that the use of race- and gender-based data in tort cases constitutes state action that violates "the constitutional guarantee of equal protection"); *see generally* JENNIFER B. WRIGGENS & MARTHA CHAMALLAS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 155–82 (2010) (discussing the impact that race, gender, and ethnicity have had on tort law generally and on damage determinations).

32. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015) ("The use of race-based statistics to obtain a reduced damage award—which is now extended to the use of ethnicity-based statistics, to calculate future economic loss—is unconstitutional.").

33. *See infra* Part III (discussing emerging trends).

34. *See infra* Part IV.C.1 (arguing that procedural due process is not violated because the applicability of minority-based statistics is fully adjudicated in a trial).

violate procedural due process.[35] Their use does, however, deprive minorities and women of their autonomy and right to chart their own course in life, which arguably violates substantive due process.[36] Nonetheless, the due process argument does not apply to minority-based statistics because there is no state action and substantive due process is a questionable doctrine.[37] This Note proposes a federal statutory Fair Experts Act, similar to the Civil Rights Acts of 1964.[38] A statutory framework limiting the kind of information experts may use provides a better and more feasible solution for excluding minority-based statistics from court cases.[39] The Civil Rights Act of 1964 allowed courts to combat discrimination against private individuals and regulated private conduct.[40] This Note maintains that a Fair Experts Act will similarly combat problematic private conduct by experts in tort litigation.[41] Finally, this Note applies the proposed Fair Experts

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35. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

36. *See infra* Part IV.C.2 (arguing that minority-based statistics fail to account for individual autonomy and potentially violate substantive due process).

37. *See infra* Part IV.C.2 (explaining that the existence of substantive due process is questionable and due process is susceptible to state action concerns).

38. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

39. *See infra* Part V.B (arguing for a Fair Experts Act).

40. The Civil Rights Act of 1964:

> [E]nforced the constitutional right to vote, conferred jurisdiction upon the district courts of the United States, provided injunctive relief against discrimination in public accommodations, authorized the Attorney General to institute suits to protect constitutional rights in public facilities and public education, extended the Commission on Civil Rights, prevented discrimination in federally assisted programs, and established a Commission on Equal Employment Opportunity.

Civil Rights Act of 1964, THE NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/299891 (last visited June 5, 2016) (on file with the Washington and Lee Law Review).

41. *See infra* Part V.A (examining congressional power to regulate private conduct and its ability to enforce constitutional rights without depending on the Constitution).

Act to claims arising from tap water contamination in Flint, Michigan.[42]

Part II examines the argument in favor of using minority-based statistics to calculate future lost earnings, case law, and the underlying principles supporting their use.[43] Future earnings calculations are necessarily speculative—courts must help decide an unknown future, often with little information.[44] Allowing experts to use minority-based statistics allows a defendant to rebut the plaintiff's evidence.[45] Part III discusses emerging case law finding minority-based statistics unreliable.[46] This Part examines the arguments against minority-based statistics, including the effect of past inequality.[47] Part III also discusses the arguments surrounding claims that minority-based statistics often fail to account for an individual's ability to overcome and succeed past expectations.[48] Part IV examines the arguments for a constitutional bar on the use of minority-based statistics in tort cases under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[49] Part V offers a

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42. *See infra* Part V.C (applying Fair Experts Act to hypothetical plaintiff from Flint, Michigan, and explaining how traditional minority-based statistics would lead to unfair results).

43. *See infra* Part II (explaining that principles underlying tort law, such as making plaintiff whole and holding tortfeasors accountable only for damages they inflicted, has shaped the use of minority-based statistics).

44. *See* Bulala v. Boyd, 389 S.E.2d 670, 677 (Va. 1990) ("Estimates of damages based entirely upon statistics and assumptions are too remote and speculative . . . such evidence must be grounded upon facts specific to the individual whose loss is being calculated.").

45. *See* Giza v. BNSF Ry. Co., 843 N.W.2d 713, 732 (Iowa 2014) (explaining that a defendant would be "defenseless" if not allowed to present data based on typical retirement age).

46. *See infra* Part III (noting a trend in case law over the past few decades to limit or eliminate the use of minority-based statistics).

47. *See infra* Part III (explaining that minority-based statistics are often based on economic data that reflects biases and reinforce inequality).

48. *See* Greenberg, *supra* note 30, at 430–31 (arguing that "experts should start from the optimistic assumption that children are, in fact, able to overcome obstacles that confront them").

49. *See infra* Part IV (examining arguments that minority-based statistics are unconstitutional and arguing that such arguments fail to consider state action and the adversarial nature of expert testimony).

statutory alternative to the constitutional bar.[50] This Part argues that a federal statute limiting experts' use of minority-based statistics is within Congress's power and ensures fair and equal treatment of all individuals.[51]

II. Experts Typically Use Minority-Based Statistics and the Underlying Principles of Tort Law Arguably Support Such Use

Important and often conflicting goals govern tort law. On the one hand, a core purpose of tort law is to make a plaintiff whole by putting her in the same—or as close to the same—position as she was in before the injury, so far as money can.[52] On the other hand, tort law requires that defendants pay only for damages that they actually caused.[53]

One argument in favor of the use of minority-based statistics claims that these statistics ensure that a defendant compensates the plaintiff in the amount he would have actually earned absent the injury.[54] The problem is that injured individuals often lack any evidence relating to current earnings or actual losses, either

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50. *See infra* Part V (arguing for a Fair Experts Act).

51. *See infra* Part V (explaining that Congress has broad power under the Commerce Clause to regulate private individuals).

52. *See* Jill Weber Lens, *Honest Confusion: The Purpose of Compensatory Damages in Tort and Fraudulent Misrepresentation*, 59 U. KAN. L. REV. 231, 235 (2011) ("The aim of compensatory damages is to put the injured party 'in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed,' thus making the plaintiff whole." (citations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. LAW INST. 1979))).

53. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (explaining that, without damage limits, individuals may face liability for "an indeterminate amount for an indeterminate time to an indeterminate class").

54. *See, e.g.*, O'Connor v. United States, 269 F.2d 578, 584 (2d Cir. 1959) (explaining that, if the factfinder is using U.S. Life Tables to determine life expectancy for a white male, the life expectancy must be based on tables for white males only, rather than tables for the general population); *see also* August McCarthy, Note, *The Lost Futures of Lead-Poisoned Children: Race-Based Damage Awards and the Limits of Constitutionality*, 14 GEO. MASON U. CIV. RTS. L.J. 75, 101 (2004) ("If the races of two plaintiffs make it more likely . . . that one plaintiff will earn less money in her lifetime than the other plaintiff, then this evidence is relevant.").

because they have no work history, or because future prospects are uncertain.[55] In one stark example, a woman, her unborn child, and her six year-old goddaughter were killed in a car accident.[56] Whether the woman would have been promoted at her job,[57] whether the six year-old would have gone to college,[58] and virtually everything about the unborn child was unknown.[59] As the court noted, "virtually all hypothesis and projections relating to [a] decedents' [or injured individuals'] lives are necessarily speculative. No triers of fact, be they jurors or judges, can predict the future. The wisest of sages acknowledges this."[60]

To determine future lost earnings, courts sometimes depend on expert witnesses.[61] Many times, the expert witness relies on Department of Labor statistics and work-life expectancy tables to determine the likely earnings and probable number of years an individual would work but for the injury.[62] These statistics and tables often identify factors such as race, ethnicity, and gender, which experts may take into account.[63] For example, numerous

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55. *See* Murray v. Sanford, 487 S.E.2d 135, 136 (Ga. App. 1997) ("When a permanent injury affects the injured party's ability to work, only one compensation exists; but that compensation may involve three elements: the plaintiff's diminished ability to labor, diminished earning capacity, and future lost earnings.").

56. *See* Childs v. United States, 923 F. Supp. 1570, 1572–74 (S.D. Ga. 1996) (describing the facts that lead to litigation).

57. *See id.* at 1573–74 (examining Debra's current job and the potential future prospects she could face).

58. *See id.* at 1572–73 (noting that Ashleigh had some disadvantages but had shown aptitude in school).

59. *See id.* at 1574 (explaining that the only known information about General was his mother, his gender, and that he was a healthy fetus).

60. *Id.* at 1578.

61. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 131 (E.D.N.Y. 2015) (considering the testimony of three experts to determine future economic prospects).

62. *See, e.g.*, *id.* (noting that the defendant's attorney attempted to argue that the plaintiff was unlikely to obtain postsecondary education based on statistics showing that Hispanics make less money and attend college less often).

63. *See generally, e.g.*, BUREAU OF LAB. STATS., HIGHLIGHTS OF WOMEN'S EARNINGS IN 2014 (Nov. 2015) [hereinafter HIGHLIGHTS OF WOMEN'S EARNINGS], http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2014.pdf (examining wages for women and men and including race, ethnicity, education,

jurisdictions have repeatedly upheld the use of Department of Labor statistical tables to determine work-life expectancy and estimated retirement age.[64] Work-life expectancy concerns the amount of time a given individual is likely to have remained in the workforce.[65] Courts have stated that statistical tables are relevant and admissible as an accepted and authoritative basis for determining work-life expectancy.[66] The tort system therefore seeks to supplement the information about the plaintiff to ensure she is compensated for her loss through accurate data and realistic expectations.[67] The work-life expectancy tables, however,

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and other factors as part of the analysis); *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT., http://www.bls.gov/cps/tables.htm#charemp (last modified Mar. 24, 2016) (last visited June 5, 2016) (setting out monthly data on employment, including information about which race or ethnicity has employment) (on file with the Washington and Lee Law Review); BUREAU OF LAB. STATS., MEDIAN WEEKLY EARNINGS OF FULL-TIME WAGE AND SALARY WORKERS BY DETAILED OCCUPATION AND SEX (2015), http://www.bls.gov/cps/cpsaat39.pdf (setting out statistics of earnings by men and women in various jobs).

64. *See* Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 23 (2d Cir. 1996) (finding that an expert's testimony regarding work-life expectancy was properly admitted because it was based on "widely accepted work-life tables published by the Department of Labor"); Earl v. Bouchard Transp. Co., 735 F. Supp. 1167, 1175 (E.D.N.Y. 1990) ("Statistical charts, such as the mortality tables and work-life expectancy tables prepared by the United States Department of Labor, compile averages and are often deemed authoritative, particularly in the absence of contradictory particularized evidence."); Giza v. BNSF Ry. Co., 843 N.W.2d 713, 723 (Iowa 2014) ("When considering lost earning capacity claims in other contexts, courts have found average retirement ages to be relevant and admissible. . . . [T]o determine when someone is likely to retire, we would want to look at when other people retire."); Temple v. Murphy, 30 A.3d 992, 1003 (Md. Ct. Spec. App. 2011) (concluding that in determining damages, a jury should consider all circumstances including "general population statistics, i.e. life expectancy and work life expectancy").

65. *See* Chamallas, *supra* note 31, at 81 ("Worklife expectancy is distinct from life expectancy. Worklife expectancy is derived from the working experience of all persons in the plaintiff's gender or racial group; it incorporates rates of unemployment, both voluntary and involuntary, as well as expected retirement age.").

66. *See, e.g.*, CSX Transp., Inc. v. Pitts, 61 A.3d 767, 791 (Md. 2013) ("[S]tatistics discussing an individual's projected date of retirement, or worklife expectancy, have been widely held to be relevant when future wage loss is at issue.").

67. *See* Weil v. Seltzer, 873 F.2d 1453, 1465 (D.C. Cir. 1989) ("[I]n a sense statistics are an attempt to take the speculation and conjecture out of the

result in disparate numbers based on race, ethnicity, and gender.[68]

Because experts use the statistics for damage calculation, and courts admit the expert calculations based on the statistics, similarly situated individuals of different races or genders may face widely disparate damage awards.[69] Work-life expectancy tables from 2011 found that an eighteen-year-old female with a high school diploma would have lifetime work experience 85% the amount of lifetime work experience of an eighteen-year-old male with a high school diploma.[70] The argument for using these statistics—despite disparate numbers that do not account for an individual's ability to overcome adversity—is that women typically do work fewer traditional hours and earn less than men.[71] Further, the argument for using these statistics depends on the fact that Hispanics and African-Americans statistically do earn less than whites and Asians.[72] In cases with no work history on which to rely, experts depend on statistics to supplement any

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damages equation.").

68. *See, e.g.*, Caron v. United States, 410 F. Supp. 378, 385 (D.R.I. 1975) (awarding lower awards to a woman based on fewer years in the work force to account for child-rearing years); Morrison v. Alaska, 516 P.2d 402, 404 (Alaska 1973) (concluding that an injured woman was likely to work for only five years and then marry and therefore was entitled to only nominal damages); *see also* Powell v. Parker, 303 S.E.2d 225, 228 (N.C. Ct. App. 1983) (using race-based statistics along with individualized factors to determine lost earning capacity for a wrongful death action of a seventeen-year-old male).

69. *See* Chamallas, *supra* note 31, at 83–84 (noting an anecdote Chamallas heard from a colleague in which the projected lifetime income for a female college graduate was almost $600,000 less than that of her male counterpart).

70. *See* Kurt V. Krueger & Frank Slesnick, *Total Worklife Expectancy*, 25 J. FORENSIC ECON. 51, 52 (2014) (explaining that the "current standard in determining worklife expectancy" shows an average worklife expectancy of 38.72 years for an eighteen-year-old male and 32.91 years for an eighteen-year-old female).

71. *See generally* HIGHLIGHTS OF WOMEN'S EARNINGS, *supra* note 63, at 3–4 (noting that women earn less than men in all racial categories and age categories, and that women tend to work fewer hours compared to their male counterparts).

72. *See id.* at 4 (listing 2014 annual average weekly earnings based on race and gender, where Asians earn the most followed by whites, African Americans, and Hispanics/Latinos, and women of every race earn less than their male counterparts).

individualized information.[73] Statistics can be particularly helpful in child injury cases when the child was injured or killed before he could establish aptitude or interests.[74] Experts therefore use such statistics to help determine the actual amount needed to compensate the plaintiff—to the extent that money can compensate for a lost family member or grievous injury.[75]

Second, tort law seeks to ensure that defendants are liable and pay for only the damage they actually cause and for the lost income the plaintiff could have actually received.[76] There is a well-known tort doctrine known as the "thin skull rule."[77] This rule basically states that you must "take your victim as you find him," regardless of what the average situation calls for.[78] The inverse of the thin skull rule has neither a name nor a doctrine. It seems apparent, however, that a defendant would not be liable for damages that did not occur to an individual, regardless of

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73. *See* Temple v. Murphy, 30 A.3d 992, 1003 (Md. Ct. Spec. App. 2011) (noting that general population statistics is one piece of evidence a jury could consider to determine damages).

74. *See, e.g.*, Childs v. United States, 923 F. Supp. 1570, 1580 (S.D. Ga. 1996) (noting the difficulty in determining earnings "in light of the fact that absolutely nothing is even known about [the unborn child's] basic personal attributes, not to mention . . . academic capabilities, work ethic, ability to get along and gain rapport with people, etc.").

75. *See* McCarthy, *supra* note 54, at 93 ("The economist is trained to make such conclusions [about the likely future of a human being], to make sense out of the uncertainty of future earnings, and the discipline that trained her accepts race as an important indicator of future earnings.").

76. *See* RESTATEMENT (SECOND) OF TORTS ch. 47, topic 3, cmt. (b) (AM. LAW INST. 1979) ("It is not essential to recovery that the plaintiff should have been employed at the time of the accident, but his opportunities for employment are relevant in determining the amount that he probably could have earned.").

77. *See* Poole v. Copland, Inc., 498 S.E.2d 602, 604 (N.C. 1998) ("This rule provides that if the defendant's misconduct amounts to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered by the plaintiff notwithstanding the fact that these damages were unusually extensive because of a peculiar susceptibility of the plaintiff.").

78. *See* Fleckner v. Fleckner, 895 N.E.2d 896, 712, 715 (Ohio Ct. App. 2008) ("[A] defendant who negligently inflicts injury on another takes the injured party as he finds her, which means it is not a defense that some other person of greater strength, constitution, or makeup might have been less injured, or differently injured, or quicker to recover." (alteration in original) (citation omitted)).

what would happen to an "average individual."[79] As stated above, minority-based statistics attempt to refine and set a more accurate number for damages.[80]

Both of these goals arguably support the use of minority-based statistics.[81] Both rely on the fundamental preference of individualized determinations or, as one scholar describes, liberty over equality.[82] Adjudication judges and determines individual outcomes rather than equivalent outcomes.[83] The Supreme Court has expressed a desire for liberty over equality in adjudication.[84] While equality may be a valid goal, the Court has expressed the opinion that individual adjudication is preferable, even where nearly identical facts could lead to different outcomes and duplicative litigation.[85]

Alexandra Lahav examined the struggle between liberty and equality in the context of mass tort actions and argued that

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79. This principle follows from a similar general principle that tort liability must be limited and cannot be infinite. *See* Right v. Breen, 890 A.2d 1287, 1290 (Conn. 2006) (explaining that a plaintiff must show defendant caused actual harm to recover damages).

80. *See supra* notes 73–75 and accompanying text (noting the uncertainty inherent in determining lost future earnings for an injured child, and that experts use minority-based statistics to supplement limited facts).

81. *See infra* notes 94–97 and accompanying text (explaining the argument that minority-based statistics represent actual people and encourage accurate data, compensating the plaintiff for actual damage, and holding the defendant responsible for the harm actually caused).

82. *See* Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 572–73 (2012) ("Liberty in civil litigation is summed up as deep rooted historic tradition that everyone should have his own day in court. Equality is embodied in the common law principle that like cases should be treated alike." (citations omitted)).

83. *See id.* at 572–73 ("[O]ur criminal justice system tolerates a great deal of inconsistency in outcomes. Study after study has shown that both jurors and legal professionals assess damages inconsistently in tort cases.").

84. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2561 (2011) (finding that rights cannot be abridged, modified, or enlarged, and so a class could not be certified because individualized determinations and defenses to individual claims require individualized proceedings, regardless of how presumptively valid claims were).

85. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 902–04 (2008) (rejecting the defendant's theory that the public at large was represented in the suit despite potential "limitless" or repetitive litigation because relief is meant to benefit individuals).

consistency of results is a beneficial goal.[86] Lahav explains that inconsistency of results in tort cases is hard to examine because of the lack of empirical evidence and how the method of valuation is neither agreed upon nor disclosed.[87] The method of valuation is difficult to fully ascertain in future lost earning calculations because experts have discretion, so long as their methods meet evidentiary requirements.[88] Lahav also noted that attempting to attain equality in damage calculations begs the question of what makes different cases different, but did not examine how the use of minority-based statistics affects liberty and equality.[89] For lost future earnings calculations in cases like Gary's, where there is little current evidence on which to base damages, it can be difficult to ascertain what differences matter.[90] If the goal of equality is to treat like cases alike, courts should arguably use differences such as race, gender, or socioeconomic categories. As Lahav notes, "[t]he adjudicator ought to use only legally relevant variables to determine which members of the plaintiff population are alike."[91]

Minority-based tables are arguably legally relevant.[92] The idea that liberty is preferred over equality thus offers an

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86. *See generally* Lahav, *supra* note 82 (examining how the traditional preference for individual adjudication is losing traction in lower courts in favor of equal outcomes for mass court cases through trial by formula).

87. *See id.* at 589

> First, there is no agreed-upon metric for measuring or monetizing injury in cases. Second, the tort system is a complex, private, and largely hidden system of compensation. . . . The third problem . . . is a result of the interaction of the first two problems. . . . Monetizing injuries based on past outcome also produces a static value.

88. *See* Phillips v. Indus. Mach., 597 N.W.2d 377, 392–93 (Neb. 1999) (explaining that an expert can use external data so long as it is accepted and "meets minimum standards of reliability").

89. *See* Lahav, *supra* note 82, at 594–95 ("Some formal philosophers argue that formal equality—the principle that like cases be treated alike—is really an empty concept because it begs the key question of which cases are alike.").

90. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 133 (E.D.N.Y. 2015) (discussing expert methodology and reliance on family history and neighborhood and ethnicity).

91. Lahav, *supra* note 82, at 595.

92. *See* Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 23 (2d Cir. 1996) (allowing expert testimony based on Department of Labor work-life tables as based on a "properly laid foundation").

argument for the use of minority-based statistics by encouraging damage determinations based on a plaintiff's personal characteristics.[93] Minority-based statistics can potentially help an expert determine more accurate figures for damages.[94] As one author points out, "[i]f non-white workers tend to earn less than white workers, then this problem extends far beyond the scope of a trial court."[95] Although utilizing statistics based on race, ethnicity, and gender can cause unfairly disparate amounts, experts are meant to assist factfinders in deciding uncertain damages.[96] Because damage awards are meant to compensate the plaintiff in a close approximation of actual damages on an individual basis, experts must be able to utilize relevant available data.[97]

In recent years, the use of minority-based statistics has come under attack as both unreliable and, in one case, unconstitutional.[98] Despite the recent attacks, experts and courts continue to use them to determine lost future earnings.[99] The vocational tables experts use to determine worklife expectancy for disabled persons "produce worklife expectancy values for men and women at various levels of education from the ages of sixteen

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93. *See* McCarthy, *supra* note 54, at 94–95 ("The very uncertainty of future earning the critics of race-based damage awards decry actually weighs in favor of admitting expert testimony concerning every available indicator, including race.").

94. *See id.* at 95 ("We are after the truth, yes, but it is a judicial truth, tempered by the hard realities of the world in which we live.").

95. *Id.*

96. *See* Ewing v. Esterholt, 684 P.2d 1053, 1060 (Mont. 1984) ("To reduce the inherent uncertainty of future damages, this Court has allowed testimony from various economic experts and the use of mortality and actuarial tables to aid jury determinations." (citing Krohmer v. Dahl, 402 P.2d 979, 981 (Mont. 1965))).

97. *See* McCarthy, *supra* note 54, at 94 (arguing that the independence of the jury is served through allowing experts to offer evidence with any and all relevant data).

98. *See infra* Part III (discussing the constitutional argument set forth by the Eastern District of New York).

99. *See* McMillan v. City of New York, 253 F.R.D. 247, 251 (E.D.N.Y. 2008) ("Despite the 2000 census' more detailed self-categorization system, demographic studies that use pre-2000 census data continue to define 'race' by using the 1977 [Office of Management and Budget] directive.").

through seventy-five."[100] As long as the Department of Labor and Census Bureau statistics rely on race and ethnicity as factors, experts who rely on them will be using minority-based statistics.[101] Thus, experts continue to rely on explicitly gender- and race-based tables.[102]

III. Emerging Case Law Against Minority-Based Statistical Tables

In recent years, many courts have found minority-based statistics unreliable but declined to consider the constitutionality question.[103] Some courts have found that worklife and lifetime earning determinations based on minority-based tables fails to meet standards of evidence.[104] The argument is that statistical tables do not provide "sufficient facts or data" upon which to determine damages.[105] Other courts have found that

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100. ANDREW SUM, ISHWAR KHATIWADA & JOSEPH MCLAUGHLIN, CTR. FOR LABOR MKT. STUDIES, REPLICATING THE GAMBOA GIBSON WORKLIFE TABLES 2 (2010). *But see* James W. Bryan & E. Taylor Stukes, *Debunking Lost Future Earnings Damages*, THE TRANSP. LAWYER, Feb. 2011, at 25 (noting that Gamboa tables have been found unreliable and urging lawyers to be on the lookout for an expert's use of such tables).

101. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BULBICK, THE LAW OF TORTS § 479 (2d ed. 2015) (explaining that projections often use minority-based statistics, and despite concerns the use of the tables can ensure accuracy).

102. *See* Sara A. Ford, *Trial Talk: The Myth of Flawed "Methodology"*, GREATER LOUISVILLE METRO ATT'Y AT L. MAG., July/Aug. 2011, at 14 ("The role of an expert in the courtroom is to aid the trier of fact in decision-making. Demographic data that describes a particular population are helpful in the decision-making process.").

103. *See, e.g.*, Reilly v. United States, 863 F.2d 149, 167 (1st Cir. 1988) (finding that using sex-based work-life tables is suspect and there is no requirement to use them); *see also supra* note 29 (listing cases that have refused to use minority-based statistics because of concerns about fairness and unreliability).

104. *See, e.g.*, Rebelwood Apartments RP, LP v. English, 48 So. 3d 483, 494 (Miss. 2010) (arguing that using national-average and statistical data for earnings calculations fails the *Daubert* standard by not being based on sufficient facts or data).

105. *See id.* at 496 (concluding that testimony of an expert relying on statistical tables "fails the requirement that it be based on sufficient facts or data"); *see also* FED. R. EVID. 702 ("A witness who is qualified as an expert . . . may testify in the form of an opinion or otherwise if: . . . the testimony is based

minority-based statistics are unreliable because they fail to account for individual potential.[106] One scholar has argued for adoption of "resiliency theory," which embraces the idea that "children living under extreme conditions (such as poverty) can rise far beyond what is expected of them."[107] Finally, some scholars have noted that minority-based statistics are both unreliable and inadvisable because using such statistics reinforces current discrimination and disparity.[108]

A. Judge Weinstein and the Eastern District of New York's Constitutional Argument

In the past few years, these findings have culminated in the work of the well-respected Judge Weinstein[109] in the U.S. District for the Eastern District of New York.[110] Judge Weinstein took claims of unreliability one step further and concluded that the use of minority-based statistics violates the Constitution.[111] This

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on sufficient facts or data.").

106. *See, e.g.*, Greyhound Lines, Inc. v. Sutton, 765 So. 2d 1269, 1276–77 (Miss. 2000) ("Who is to say that a child from the most impoverished part of the state or with extremely poor parents has less of a future earnings potential than a child from the wealthiest part of the state with wealthy parents?").

107. Greenberg, *supra* note 30, at 456.

108. *See* Elizabeth Adjin-Tettey, *Replicating and Perpetuating Inequalities in Personal Injury Claims Through Female-Specific Contingencies*, 49 MCGILL L.J. 309, 314 (2004) (explaining that the use of gender-based statistics "perpetuates historical inequities" by reinforcing past and current discrimination); *see also* WRIGGENS & CHAMALLAS, *supra* note 31, at 159 (noting that past discrimination can result in lower damage determinations, for example, "[i]f black men have been incarcerated at a much higher rate than white men, resulting in lower labor-force participation rates for black men, race-based worklife estimates predict that they will continue to work fewer years than whites").

109. *See* Deirdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 821 (2010) (noting that Judge Weinstein is "unquestionably the most respected contemporary jurist on the law of evidence").

110. *See infra* notes 115–126 and accompanying text (discussing McMillan v. City of New York 253 F.R.D. 247 (E.D.N.Y. 2008)), *and infra* notes 133–142 and accompanying text (discussing G.M.M. v. Kimpson, 116 F. Supp. 3d 126 (E.D.N.Y. 2015)).

111. *See Kimpson*, 116 F. Supp. 3d at 129 ("[T]he specific characteristics of

conclusion has led to some excitement over the potential ramifications.[112] The Eastern District of New York first found that the use of race-based life expectancy tables is unconstitutional.[113] Later, the court extended this finding to gender- and ethnicity-based statistics of lifetime earnings.[114]

1. McMillan v. City of New York

In 2008, *McMillan v. City of New York*[115] concluded that it is impermissible to utilize race-based statistics because race is an illusory statistic for life expectancy determinations.[116] *McMillan* concerned a male African-American plaintiff who was injured in a ferryboat crash.[117] To calculate the plaintiff's damages, the court had to determine his expected life expectancy.[118] The court found that life expectancy rates based on race were unreliable and

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the child and his family, rather than the characterization of the child as a member of a particular ethnic group must be used in determining damages. The ruling [is] based on the same constitutional and other factors relied upon in [*McMillan*, 253 F.R.D. 247].").

112. Christopher D. Barraza, *Recent Decision Rejects Ethnicity as a Factor for Determining Future Lost Earning*, LEXOLOGY: PROD. LIAB. MONITOR (Aug. 12, 2015), http://www.lexology.com/library/detail.aspx?g=b5be833c-5de4-4196-ad4c-e191043d0ee9 (last visited June 5, 2016) ("[G]iven the prominence of Judge Weinstein . . . it is conceivable that other courts may follow *Kimpson* in instances where ethnicity is used to challenge calculations of future lost earnings in tort cases.") (on file with the Washington and Lee Law Review).

113. *See McMillan*, 253 F.R.D. at 255–56 (finding experts' use of race-based life expectancy table is state action that violates the plaintiff's equal protection and due process rights)

114. *See Kimpson*, 116 F. Supp. 3d at 129 (finding experts' use of ethnicity-based statistics to determine future earnings is state action that violates the plaintiff's equal protection and due process rights).

115. 253 F.R.D. 247 (E.D.N.Y. 2008).

116. *See id.* at 250 (explaining that race is a socially constructed designation, and the main predictor of life expectancy is socioeconomic status).

117. *See id.* at 248 ("James McMillan, the claimant, was rendered a quadriplegic in the crash of a ferryboat operated negligently by the City of New York.").

118. *See id.* at 248–49 (noting that the "critical factor" of life expectancy needed to be put before the jury, and there was a dispute on whether experts could use life expectancy tables based on race).

raised constitutional issues.[119] *McMillan* based this finding in large part on the argument that race is an illusory statistic—meaning that race is socially constructed and not a biological characteristic.[120] The argument noted that "the reality [is] that the diversity of human biology has little in common with socially constructed 'racial' categories."[121] Further, life expectancy rates typically attributable to race are actually based on socioeconomic status.[122] Thus, Judge Weinstein concluded that race-based statistics are inherently unreliable.[123]

The court also argued that the use of race-based statistics was discriminatory and constitutionally questionable.[124] It noted that "[b]y allowing use of 'race'-based statistics, a court would be creating arbitrary and irrational state action."[125] *McMillan* found that "[j]udicial reliance on 'racial' classifications constitutes state action."[126] The court argued that the admission of expert testimony that relies on race-based life expectancy tables constitutes state action by the judge who failed to give equal protection to the plaintiff.[127] In doing so, Judge Weinstein relied heavily on the burdens that these "arbitrary" statistics place on

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119. *See id.* at 248 (finding that "the unreliability of 'race' as a predictor of life expectancy as well as normative constitutional requirements of equal treatment and due process support" using race neutral life expectancy tables).

120. *See id.* at 249–50 ("DNA technology finds little variation among 'races' (humans are genetically 99.9% identical), and it is difficult to pinpoint any 'racial identity' of an individual through his or her genes.").

121. *Id.* at 250.

122. *See id.* at 252 (noting that, in controlled studies that account only for socioeconomic status, life expectancy rates for African-Americans are similar or identical to Caucasians).

123. *See id.* at 251 ("[T]he tables frequently employed by courts in determining tort damages fail to account for the nuanced reality of 'racial' heritage in the United States today.").

124. *See id.* at 255–56 (arguing that using race-based statistics classifies individuals according to "suspect categories," and that a court is, in essence, endorsing their use constituting arbitrary state action).

125. *Id.* at 256.

126. *Id.* at 255.

127. *See id.* ("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.").

minorities.[128] These burdens, the argument goes, are the result of arbitrary discriminatory state action based on a racial classification and their admission fails strict scrutiny.[129]

Further, the court also argued that compensation in a tort case is "in effect a property right" that requires due process.[130] When the government takes property, an individual is entitled to due process of the law.[131] Because a court's admission of evidence based on minority-based tables is arbitrary state action, Judge Weinstein argued it is a due process violation.[132] *McMillan* laid the groundwork for the finding of a constitutional violation whenever a judge admits expert testimony relying on any minority-based statistics in its later case *G.M.M. v. Kimpson*.[133]

2. G.M.M. v. Kimpson

G.M.M. v. Kimpson involved a lead poisoned child—referred to in the introduction as Gary.[134] Gary's mother brought suit and

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128. *See id.* at 256 ("The legal system does not work fairly and with due process if one class of litigants is unduly burdened in litigation through the application of inappropriate 'race'-based statistics.").

129. *See id.* at 255 (explaining that, where state action is based upon racial classifications, the suspect nature of the racial class triggers strict scrutiny, which is not met in this case).

130. *Id.*; *see also infra* Part IV.C.1 (exploring the argument that an individual has a property interest in tort compensation)

131. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

132. *See* McMillan v. City of New York, 253 F.R.D. 247, 255 (E.D.N.Y. 2008) ("Were the court to apply an ill-founded assumption, automatically burdening on 'racial' grounds a class of litigants who seek compensation, there would be a denial of due process.").

133. *See* 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015) (finding that relying on illusory minority-based statistics results in "arbitrary and irrational state action" which constitutes a "denial of due process"); *see also* Chamallas, *supra* note 31, at 77 ("A finding of sufficient state action is required . . . before any constitutional challenge can be made to the use of race-based or gender-based data in tort litigation.").

134. *See Kimpson*, 116 F. Supp. 3d, at 131 *(*describing plaintiff's claims); *see also supra* notes 1–14 and accompanying text (discussing the facts of *Kimpson*).

won a claim for damages in a jury trial.[135] In his opinion discussing the admissibility of the expert testimony, Judge Weinstein built on *McMillan* and concluded that the use of all minority-based statistics is unconstitutional under the Fourteenth Amendment.[136]

At the time of trial, the court identified Gary as a Hispanic male.[137] The defendant's expert, Dr. Lentz, relied on ethnicity-based statistics to claim future economic loss of earnings that were lower than the plaintiffs' expert's estimation.[138] Dr. Lentz argued that, because Hispanics are statistically less likely to earn postsecondary degrees, it was improbable that Gary would do so.[139] The plaintiffs pointed out that Gary's mother held a Master of Fine Arts, and Gary's father had a baccalaureate degree, and so he would have been likely to obtain a postsecondary degree.[140] The court rejected the defendant expert's testimony, concluding that it is unconstitutional to consider ethnicity-based statistics rather than the individual characteristics of the plaintiff.[141] In reaching this conclusion, the court rejected "a principle in awarding damages 'that reflect subtle but pervasive racism and classism.'"[142]

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135. *See id.* at 130–31 ("After a two-week trial with extensive expert testimony, the jury returned a verdict in favor of plaintiffs on three theories . . . .").

136. *See id.* at 152 (finding that judicial reliance on minority-based statistics results in discrimination under the Equal Protection Clause and constitutes "arbitrary and irrational state action" in violation of the Due Process Clause).

137. *Id.* at 128–29.

138. *See id.* at 135 (noting that the defendant's expert Dr. Lentz is a forensic economist who based his calculations on G.M.M.'s status as Hispanic).

139. *See id.* at 129 ("[D]efendant's attorney attempted to show, through the use of expert economic testimony, statistics and cross-examination of the plaintiffs' experts, that because the child was 'Hispanic,' his likelihood of obtaining a Bachelor, Master, or Doctoral degree, and any corresponding elevated income, was improbable.").

140. *See id.* at 129 (finding that given G.M.M.'s "specific family background," there was a very high probability he would have earned a secondary degree regardless of statistics based on ethnicity).

141. *See id.* at 132–33 (quoting the court's instruction to the defendant's expert witness that the expert cannot use general ethnicity-based statistics to calculate lost future earnings).

142. *Id.* at 154 (quoting Greenberg, *supra* note 30, at 457).

Kimpson expanded *McMillan* by concluding that ethnicity-based statistics, as well as race-based statistics, violate the Constitution.[143] Even under *Kimpson*'s broad constitutional argument, questions remain on whether gender- or other minority-based statistics besides race or ethnicity also would be found unconstitutional.[144] Judge Weinstein nonetheless expressed strongly that "[t]he state itself discriminates by enforcing a substantive rule of discrimination—damages—based on race or ethnicity in reducing damages in tort cases. Such an illegal standard cannot be enforced by the courts."[145]

IV. The Constitutional Argument

The Fourteenth Amendment of the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state in which they reside. No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[146]

This section contains guarantees of procedural due process,[147] substantive due process,[148] and equal protection.[149] Together

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143. *See id.* at 148–49 ("It is unconstitutional in a tort trial to premise projected societal and educational achievements on race or ethnicity to reduce tort damages.").

144. *See, e.g.*, Adjin-Tettey, *supra* note 108, at 311 (arguing that using gender-based statistics in awards for tort damages reinforces the marginalization of women by returning female plaintiffs to the "status quo ante").

145. G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 149 (E.D.N.Y. 2015).

146. U.S. CONST. amend. XIV, § 1.

147. *See* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) ("Procedural due process imposes certain constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.").

148. *See* Washington v. Glucksberg, 521 U.S. 702, 719 (1997) ("The Due Process clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint.").

149. *See* Loving v. Virginia, 388 U.S. 1, 10 (1967) (explaining that the Equal

these sections protect individual rights.[150] The Fourteenth Amendment, however, "erects no shield against merely private conduct,"[151] but only against state action.[152]

A. State Action and the Use of Minority-Based Statistics

The Supreme Court has found that before any action may be brought or rights may be protected, the Fourteenth Amendment—like other constitutional amendments—has the "threshold requirement" of state action.[153] As one scholar noted: "The text of the original Constitution unambiguously establishes that it is a law governing government, not individuals."[154] Such a restriction serves various purposes. One argument is that the state action doctrine not only protects a zone of private autonomy, but also protects state sovereignty.[155] Another argument is that the state action doctrine does not protect individuals' zones of interest, but is necessary for a democracy as a limitation on the Fourteenth Amendment.[156] The Supreme Court has sometimes

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Protection clause requires equal treatment under the law and no "arbitrary and invidious discrimination").

150. *See* Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) ("[T]he guarantees of due process, though having their roots in Magna Carta's '*per legem terrae*' and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'" (quoting Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting))).

151. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

152. *See id.* ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.").

153. *See* United States v. Morrison, 529 U.S. 598, 621 (2000) ("Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its terms, prohibits only state action.").

154. Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1387 (2006).

155. *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 936 (1982) ("Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State . . . responsibility for which they cannot fairly be blamed.").

156. *See* Huhn, *supra* note 153, at 1381–82 (arguing that the Supreme Court has misconstrued the doctrine because individuals have no constitutional right to violate others' fundamental rights).

expanded the definition of what constitutes a state act or actor—there is a public function exception[157] and an entanglement exception.[158] Despite debates over the purpose of the state action doctrine and its exceptions, the doctrine continues to be invoked and has been reaffirmed in recent years.[159] Experts' and courts' use of minority-based statistics must, therefore, constitute state action to violate the Fourteenth Amendment.[160]

Kimpson found that using ethnicity-based tables violated the Equal Protection and Due Process Clauses under the Fourteenth Amendment.[161] The court argued that the use of minority-based statistics constitutes "arbitrary and irrational state action" but did not provide a solid basis for that finding.[162] The court stated that "[t]he state itself discriminates by enforcing a substantive rule of discrimination—damages—based on race or ethnicity in reducing damages in tort cases."[163] This claim was supported only by an article by Martha Chamallas,[164] which reasoned that a

157. *See, e.g.*, Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980) (concluding that a shopping center could not prevent individuals from passing out pamphlets and seeking signatures because the public nature of the shopping center prevents it from being considered private in the sense that most private businesses are).

158. *See Lugar*, 457 U.S. at 937 (noting that claims are not barred where private and government actors and acts are entangled, which can be shown if: (1) the deprivation is caused by a "right or privilege created by the state;" and (2) the individual causing the deprivation can be said to be a state actor).

159. *See, e.g.*, Perry v. New Hampshire, 132 S. Ct. 716, 721, 730 (2012) (upholding state action requirement in pretrial screening of eyewitness statements, and holding that the due process clause does not require such screening where there is no police—and no state—action); *see also* Christopher W. Schmidt, *The Sit-Ins and the State Action Doctrine*, 18 WM. & MARY BILL RTS. J. 767, 770 (2010) (explaining that even during the civil rights era, neither the Supreme Court nor Congress redefined the Fourteenth Amendment by removing the state action doctrine).

160. *See, e.g.*, Freeman v. Pitts, 503 U.S. 467, 495 (1992) ("Where resegregation is a product not of state action but of private choices, it does not have constitutional implications.").

161. *See supra* notes 140–145 and accompanying text (discussing *Kimpson*).

162. G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015).

163. *Id.* at 149.

164. Unsupported opinions do not necessarily translate to incorrect opinions. Ours is a system of common law, however, and as such courts should be hesitant to adopt rules with little or no support.

court admitting expert testimony based on minority-based tables constitutes state action by endorsing the use of minority-based statistics.[165] Chamallas relied on *Edmonson v. Leesville Concrete Company*[166] to contend that use of race-based classifications in civil litigation constitutes state action.[167] Chamallas argued that the use of expert testimony rises to the level of state action by providing a means for the jury to determine the outcome.[168]

In *Edmonson*, the plaintiff was injured while working construction when the defendant's truck rolled into him.[169] After bringing suit, "Edmonson invoked his Sixth Amendment right to a trial by jury."[170] Edmonson (the plaintiff) was a black man, and during voir dire the defendant company used peremptory strikes to remove the two black veniremen.[171] Edmonson sought to challenge the peremptory strikes on the ground that they were based on race, but the district court denied his request.[172] A divided panel of the Fifth Circuit Court of Appeals reversed, but then subsequently affirmed en banc.[173]

On appeal from the Fifth Circuit, the Supreme Court held that "the exercise of peremptory challenges by the defendant in

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165. *See* Chamallas, *supra* note 31, at 105 ("My principal argument for finding state action is that it is impossible to separate the use of the statistics from the underlying legal standard in the case.").

166. *See* 500 U.S. 614, 628–29 (1991) (finding that private litigants' use of peremptory challenges to exclude jurors on account of race violates the Equal Protection Clause of the Fourteenth Amendment).

167. *See* Chamallas, *supra* note 31, at 106–11 (arguing that using of race-based statistics in tort actions is factually similar to using peremptory challenges in civil cases).

168. *See id.* at 109 ("[T]he objective of expert testimony is to help the jury apply the law to the facts, a process that is intricately connected to choice of the governing legal standard.").

169. *See Edmonson*, 500 U.S. at 616 (describing plaintiff's injuries).

170. *Id.*

171. *See id.* at 616–17 (noting that Leesville used "two of its three peremptory challenges to remove black persons from the prospective jury").

172. *See id.* at 617 (explaining that Edmonson requested a race-neutral explanation according to *Batson v. Kentucky*, 476 U.S. 79 (1986), but district court denied the request, stating that *Batson* does not apply to civil proceedings).

173. *See id.* ("A divided en banc panel affirmed . . . holding that a private litigant in a civil case can exercise peremptory challenges without accountability for alleged racial classifications.").

the District Court was pursuant to a course of state action."[174] Justice Kennedy, writing for the majority, noted that the state action doctrine consists of two questions: "first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority . . . and second whether the private party charged with the deprivation could be described in all fairness as a state actor."[175]

1. Experts' Use of Minority-Based Statistics Is Not Sourced from State Authority Because Experts Are Independent and Jurors Are Not Required to Accept the Testimony.

Kennedy wrote that the first question was obvious—peremptory strikes exist only in a court of law and arise only under statutory and court authority.[176] Chamallas noted that this question is not so clearly answered when experts use minority-based statistics given the numerous uses of economic projections outside the courtroom, for example, negotiations or other financial transactions.[177] She argued, however, that experts' testimony "refin[es] the legal standard for damages" and thus "has its source in state authority."[178] While this argument has some merit, it ignores the true nature of the *Edmonson* inquiry. As *Edmonson* notes, "[w]ithout its authorization, granted by an Act of Congress itself, [the defendant] would not have been able to engage in the alleged discriminatory acts."[179] The court emphasized the express authorization required by the government inherent in peremptory strikes, as well as the

174. *Id.* at 622.

175. *Id.* at 620 (citing Lugar v. Edmonson Oil Co., 457 U.S. 922, 939–42 (1982)).

176. *See id.* at 620–21 (finding that peremptory challenges do not arise because of the Constitution, but because of common law tradition and statutory authority, and that the defendants would not be able to exercise peremptory challenges if not for a statute).

177. *See* Chamallas, *supra* note 31, at 107 (explaining that the first Edmonson inquiry is more difficult when considering an expert's testimony).

178. *Id.*

179. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621 (1991).

historical nature of governmental endorsement.[180] Expert opinions have neither exclusive nor historic government endorsement.[181]

Chamallas also argued that admission of expert testimony "is accomplished through state authorization of courtroom procedures and direct involvement of the trial judge. Once so treated, the testimony should no longer be regarded as private, simply because the state did not dictate the content of the testimony nor pay the witness the expenses . . ."[182] Through sanctioning the testimony and admitting the witness as an expert, so the argument goes, the court is turning the private witness into a state actor.[183]

Expert testimony, however, does not have to be considered by the state because the jury can disregard what an expert offers.[184] While the objective of expert testimony is to assist the jury, it is quite different to say this testimony constitutes state action. Further, outlandish consequences can result if state action arises because the judge allowed an expert to use minority-based statistics, for example, "to declare the practice of admitting expert testimony unconstitutional solely on the basis that the judge does not approve of the content of the testimony would in

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180. *See id.* at 620–21 (explaining that peremptory challenges only exist when the government allows them, and there is a long history of "legislative authorizations, as well as limitations . . . [that] date back as far as the founding of the Republic").

181. For example, Chamallas conceded that experts are often used for purposes completely separate from the courtroom. *See* Chamallas, *supra* note 31, at 107 (noting that experts are used for settlement and financial transactions); *see also* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40–41 (1901) (explaining that courts historically used experts in a variety of ways: by selecting jurors "especially fitted" to the issues; by calling individuals with "skilled knowledge" and adopting the findings; and finally more recently calling individuals directly before the jury).

182. Chamallas, *supra* note 31, at 107–08.

183. *See id.* (arguing that the "special status" the court gives the expert "carries unusual weight" that private actors do not possess).

184. *See* Temple v. Murphy, 30 A.3d 992, 1003 (Ct. Spec. App. Md. 2011) ("The jury could consider the totality of the evidence, including Mr. Murphy's age, health, employment, financial situation, and general population statistics, i.e., life expectancy and work life expectancy, to determine amount of lost support.").

effect overrule *Daubert* and the substantial line of cases that have developed the Court's expert testimony doctrine."[185] The idea that an expert is a state actor simply because a judge allows the testimony is hard to fathom.[186] The expert's authority also is not derived from the judge's endorsement but from her knowledge of the relevant field and her ability to meet evidentiary requirements.[187] Although a court must qualify an expert, "a witness does not qualify as an expert if [her] background is so limited that there is no reasonable expectation the witness can assist the trier of fact."[188] Because the knowledge required to be an expert is not derived from the court, the expert does not have "its source in state authority."[189]

2. Experts Are Not State Actors

Under the second question—whether the private actor can fairly be considered a state actor—the *Edmonson* Court noted three factors: (1) how much the actor "relies on governmental assistance"; (2) is the actor "performing a traditional governmental function; and (3) is the injury uniquely aggravated by the "governmental authority."[190]

a. Governmental Assistance Is Not Necessary for Experts

In examining the amount of governmental assistance, the Court explained that the system of juror selection—which

185. McCarthy, *supra* note 54, at 101.

186. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) ("[Holding] that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service from the State . . . would utterly emasculate the distinction between private as distinguished from state conduct.").

187. Under the Federal Rules of Evidence, for example, an expert witness must be qualified "by knowledge, skill, experience, training, or education." FED. R. EVID. 702.

188. 29 WRIGHT & GOLD, FED. PRAC. & PROCEDURE: EVID. § 6265 (1997).

189. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).

190. *See id.* at 621–22 (noting that the second *Lugar* prong is a fact-bound inquiry that contains "certain principles of general application").

includes peremptory strikes—depends extensively upon the state and "could not exist" without the governments' participation.[191] As the Court noted:

> [E]ach district court in the federal system must adopt a plan for locating and summoning to the court eligible prospective jurors. . . . This plan, as with all other trial court procedures, must implement statutory policies of random juror selection from a fair cross section of the community, . . . and non-exclusion on account of race, color, religion, sex, national origin, or economic status. . . . Statutes prescribe many of the details of the jury plan . . . .[192]

The Court also explained that a court tightly controls the entire voir dire process.[193] *Edmonson* emphasized that a court participates directly in "enforcing a discriminatory peremptory challenge" by rejecting the opposing counsel's challenge.[194] Chamallas argues that this finding could apply with equal force to the admission of minority-based expert testimony.[195] She claims that when the court admits minority-based expert testimony, "it tells the jury that race or sex is a legally permissible criterion."[196]

Chamallas's argument ignores the fact-intensive nature of the state action determination and the heavy emphasis the *Edmonson* Court placed on the procedural control a court has over the entire jury selection process.[197] In *Edmonson*, the Court spent four long paragraphs discussing the extent to which the

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191. *See id.* (explaining that the peremptory challenges and juror selection in a civil trial would not be possible without assistance from the court).

192. *Id.* at 622–23.

193. *See id.* at 623 ("The trial judge exercises substantial control over voir dire in the federal system. . . . In some cases, judges may even conduct the entire voir dire by themselves.").

194. *See id.* at 624 (explaining that participation by the judge in peremptory challenges is "direct and indispensable" and thus "involve[s] itself with invidious discrimination" when it allows a discriminatory peremptory strike to occur).

195. *See* Chamallas, *supra* note 31, at 108 (premising the argument on the fact the "state creates the evidentiary rules" and so becomes a "party to the act" of using minority-based statistics).

196. *Id.*

197. *See supra* notes 191–194 and accompanying text (examining the state's indispensability to juror selection as discussed in *Edmonson*).

entire juror selection process depends on the court system.[198] The procedural power the court has over the jury is immense and courts have both a right and a duty to manage jury procedure.[199] Given this codependent relationship between the jury and the court, it is not surprising that the court would find private actors participating in jury selection constitutes state action.[200] An expert's testimony is extremely different from peremptory strikes in this way. Peremptory strikes are meant to "assist the government in the selection of an impartial trier of fact."[201] Peremptory strikes are essential to a procedure over which the state has absolute control, and thus, the private actor exercising the peremptory strikes is subject to control as well.[202]

Expert testimony, on the other hand, merely sets forth one piece of evidence from which the jury—the "quintessential governmental body"[203]—may consider.[204] Chamallas argues that, when a judge admits expert testimony based on minority-based statistics, they are clearly a participant in the discriminatory action.[205] She contends that the judge is "placing its power,

198. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622–24 (1991) (laying out the various procedures over which the court controls the jury selection process).

199. *See supra* notes 191–194 and accompanying text (noting that a court controls the way jurors are selected, how questions are asked, and selects sanctions for individuals shirking jury duty).

200. *See Edmonson*, 500 U.S. at 620 ("Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act within the authority of the government and, as a result, be subject to constitutional constraints.").

201. *Id.* at 620.

202. *See id.* at 624 ("As we have outlined here, a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court.").

203. *Id.*

204. Experts are meant only to assist the factfinder in adjudication. *See* FED. R. EVID. 702 notes of advisory committee on proposed rules ("The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.").

205. *See* Chamallas, *supra* note 31, at 108–09 (arguing that a judge who overrules an objection to evidence based on minority-based statistics participates in discriminatory action).

property and prestige behind the alleged discrimination"[206] more overtly than a judge who allows discriminatory peremptory strikes.[207]

Chamallas's argument, however, misinterprets *Edmonson*'s mention of the judge's participation in "invidious discrimination."[208] *Edmonson* focused on the judge's action because the judge's act was indispensable to the private actor's use of the peremptory strike itself.[209] In such a case, the private actor—the defendant's attorney—had to extensively rely on the government to use discriminatory peremptory strikes.[210] Expert testimony does not rely on governmental assistance to the same extent that private parties exercising peremptory challenges do. The majority of the information that experts offer come from external sources,[211] and juries do not rely solely on the court to judge an expert witness.[212] Further, the court does not control the extent of the expert's testimony, and so the expert's action is not saddled with the absolute control that jury determination is.[213]

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206. *Id.* at 108 (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624 (1991)).

207. *See id.* ("[B]ecause the jury may well witness the exchange between the objecting counsel and the court when admission of expert testimony is challenged, this could be argued to present a stronger case than Edmonson for a finding of state action.")

208. *Edmonson*, 500 U.S. at 624.

209. *See id.* (explaining how the private actor "invokes the formal authority of the court" and would be unable to act at all without the "overt, significant assistance of the court").

210. *See id.* at 623 (emphasizing the requirement that a private party rely significantly on assistance from the court).

211. *See supra* notes 187–189 and accompanying text (explaining that an expert must bring external knowledge or experience independent of a court's endorsement).

212. *See* Caroline T. Parrott et al., *Differences in Expert Witness Knowledge: Do Mock Jurors Notice and Does It Matter?*, 43 J. AM. ACAD. PSYCHIATRY L. 69, 69 (2015) ("Contrary to the hypotheses that high knowledge would yield increased credibility and agreement, knowledge manipulations influenced only perceived expert likeability. The low-knowledge expert was perceived as more likeable than the high-knowledge counterpart, a paradoxical finding.").

213. While the court does serve as a "gatekeeper" of expert testimony, it does not dictate the content outside traditional admissibility determinations. *See* FED. R. EVID. 702 advisory committee's notes to 1972 proposed rules ("When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time.").

Experts also conduct minority-based determinations outside of the court setting in purely private matters.[214] This completely private nature distinguishes from *Edmonson*, where "peremptory challenges have no utility outside the jury system, a system which the government alone administers."[215]

b. In Testifying, Experts Are Not Performing a Function Traditionally in the Hands of the Government

These factors also come into play regarding the *Edmonson* Court's second consideration—whether the actor is performing a function traditionally in the hands of the government.[216] Chamallas maintains that expert testimony meets this consideration because "the court's acceptance of an expert's use of race-based or gender-based data is inseparable from its determination of substantive law and as such is appropriately viewed as a traditional governmental function."[217] Chamallas reframed the question by stating "the focus should be on whether judicial admission of discriminatory expert testimony constitutes state action."[218]

Chamallas appears, however, to be applying the doctrine to the wrong party. The question in *Edmonson* was whether, in issuing discriminatory strikes, the private litigant partook in discriminatory state action.[219] *Edmonson* focused on the fact that

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214. *See* Chamallas, *supra* note 31, at 107 (admitting that experts utilize "economic projections of future earning capacity" outside the courtroom "in settlement negotiations and in a wide variety of financial transactions").

215. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 624–26 (1991).

216. *See id.* at 624 (explaining that because the "jury exercises the power of the court," acts as "principal factfinder," weighs evidence, and reaches a verdict, the jury is performing a traditional government function, and choosing the jury is as well); *see also* Marsh v. Alabama, 323 U.S. 501, 506 (1946) ("[T]he owners of privately held bridges, ferries, turnpikes and railroads. . . . are built and operated primarily to benefit the public and since their operation is essentially a public function.").

217. Chamallas, *supra* note 31, at 109.

218. *Id.*

219. *See Edmonson*, 500 U.S. at 619 ("Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action. . . . Thus, the legality of the exclusion at issue here

the private actor was helping to select "a quintessential government body,"[220] explaining that where "a government confers on a private body the power to choose the government's employees or officials, the private body will be bound by the constitutional mandate of race neutrality."[221] The Court focused on the delegation of a traditionally government act—the "appointment" of a governmental body.[222] Thus, the private actor himself was performing a traditional government function.[223] Chamallas attempts to avoid this problem by explaining that the admission of expert testimony is "intricately connected to choice of the governing legal standard."[224] But providing evidence for a legal standard is not the same as appointing a government actor in a non-public election. Her analysis also impermissibly moves away from the action of the private actor—the expert—to that of the governmental actor—the judge.

c. The Adversarial Nature of Adjudication Ensures Mitigation of Potential Injury

The final factor is whether the injury is uniquely aggravated by government authority.[225] Chamallas makes the valid point, based on *Edmonson*, that discrimination in a courtroom is particularly harmful.[226] When a court admits minority-based expert evaluations, it can compound the injury that invidious

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turns on the extent to which a litigant in a civil case may be subject to the Constitution's restrictions.").

220. *Id.* at 624.

221. *Id.* at 625.

222. *See id.* at 626 (expanding on precedent to find that, except for public elections, appointment of a governmental body constitutes state action, even if delegated to private individuals).

223. *See id* ("Though the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation of a on a government body.").

224. Chamallas, *supra* note 31, at 109.

225. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) (noting the severe nature of racial discrimination in the courtroom setting).

226. *See* Chamallas, *supra* note 31, at 110 ("Few places are a more real expression of the constitutional authority of the government then a courtroom, where the law itself unfolds.").

discrimination causes.[227] Yet, as Chamallas herself admits, the private status of the expert protects against such an injury.[228] Juries know that experts are paid witnesses and "can be instructed that the substance of the expert's testimony does not represent the views of the court."[229] Further, the opposing side is free to counter the expert's findings and offer expert testimony of its own.[230] Chamallas admits that *Edmonson* is easy to implement while monitoring experts could be difficult.[231] She ultimately reasons, however, that such concerns are unfounded and that an expert's use of minority-based statistics is state action.[232] She argues that admitting minority-based statistics "is much more likely to affect the outcome of a case."[233] But this argument ignores the adversarial nature of civil cases.[234] While minority-based expert valuations can affect the outcome, the other party will offer alternatives and attempt to undermine those valuations.[235] Thus, the likelihood that the injury will be compounded because it is in court is actually lessened in the presence of the adversarial system.[236] Chamallas also contends that the symbolic value of minority-neutral is extremely

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227. *See id.* (explaining that race discrimination is particularly harmful).

228. *See id.* (noting the formal arguments against finding state action and distinguishing *Edmonson*).

229. *Id.*

230. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1120 (1991) ("[F]or over two-thirds of the appearances by expert witnesses, there were opposing experts in the same general area.").

231. *See* Chamallas, *supra* note 31, at 110 (finding prudential arguments could encourage a finding of no state action where experts use minority-based statistics).

232. *See id.* ("On both formal and prudential grounds, however, I believe the case for finding state action is strong.").

233. *Id.*

234. *See* Baker v. Carr, 369 U.S. 186, 204 (1962) (explaining the importance of adverseness "which sharpens the presentation of issues upon which the court so largely depends").

235. *See* Gross, *supra* note 230, at 1120 (explaining that, in a study about expert use in trials, "most expert witnesses were disputed by similar experts for the opposing side, and most juries had to resolve such disputes").

236. *See* Polk Cty. v. Dodson, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

important because otherwise "it inscribes a rule of decision that systematically undervalues the potential of women and minorities."[237] While there is some truth to that statement, the adversarial nature of adjudication and the jury's knowledge that the expert is a private, paid witness, balances out such systematic undervaluation.[238]

B. The Equal Protection Clause

The Equal Protection Clause prevents any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[239] It requires states to afford all individuals the same treatment under the law.[240] The Supreme Court has repeatedly found that race is a suspect class, and so race-based discrimination must pass strict scrutiny to be constitutional under the Equal Protection Clause.[241] Strict scrutiny requires that the race-based classification be narrowly tailored to serve a compelling government interest by the least restrictive means possible.[242] Gender is a quasi-suspect class, and so cases involving gender discrimination require the government action to pass intermediate scrutiny.[243] Intermediate scrutiny

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237. *Id.*

238. *See* Mackey v. Montrym, 443 U.S. 1, 13 (1979) ("[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing risk of error.").

239. U.S. CONST. amend. XIV, § 1.

240. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

241. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to . . . assur[e] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. . . . [and] ensures that the means chosen "fit" this compelling goal . . . ."); Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny.").

242. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[S]uch classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.").

243. *See* United States v. Virginia, 518 U.S. 515, 531–33 (1996) (finding that

requires the government action to be substantially related to important government interests.[244] The use of race- and ethnicity-based statistics will need to pass strict scrutiny, while gender-based statistics must pass intermediate scrutiny.[245]

Chamallas examines the equal protection claim and concludes that minority-based statistics would fail even intermediate scrutiny.[246] In determining whether government action violates equal protection under either strict scrutiny or immediate scrutiny, the governmental interest must be weighed against the level of discrimination imposed upon an individual.[247] The governmental interest is in properly adjudicating cases and ensuring realistic damage awards.[248] The state has an important interest in just and accurate adjudication.[249] Minority-based statistics can limit uncertainty and ensure that an accurate damage award is given.[250] The state also has an important interest in efficient resolution of cases, and statistics can help

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the government must show "exceedingly persuasive justification" for any gender-based action, but that strict scrutiny is not required).

244. *See id.* at 524 ("To succeed, the defender of the challenged action must show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982))).

245. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015) ("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.").

246. *See* Chamallas, *supra* note 31, at 117 (arguing that gender-based data should be considered the same as race-based data, but that the equal protection clause nonetheless prevents the use of either).

247. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (explaining that when the government acts by drawing distinctions, the interest individuals have in not being discriminated against must be weighed against the state's objective).

248. *See supra* notes 66–67 and accompanying discussion (discussing how statistics are important in removing uncertainty in future lost earning determinations).

249. *See* David Medine, *The Constitutional Right to Expert Assistance for Indigents in Civil Cases*, 41 HASTINGS L. J. 281, 337–38 (1990) ("[T]he government has an interest in just adjudication of its citizens' claims.").

250. *See supra* note 64 (noting cases that have used minority-based Department of Labor statistics).

limit the contours of damages.[251] This interest, however, is not extremely strong where the government seeks to draw distinctions based on race.[252] As Chamallas maintained:

> It is not possible to anticipate every possible argument the government may make to justify such classifications, but the Court's refusal (since the World War II Japanese internment cases) to uphold any racial classification which burdens minority members or appears to have a stigmatizing effect would lead one to believe that few governmental interests, other than a possible interest in protection of human life, could justify any use of such classifications.[253]

The Equal Protection Clause thus sets a high bar for any act that draws race-based distinctions.[254]

While the level of scrutiny is not as stringent for gender-based statistics, a similar argument can be made that the government interest is not strong enough to justify such discrimination.[255] As Chamallas states: "The use of gender-based projections are premised upon highly contested cultural assumptions. Imbedded in the projections of shorter worklife expectancy for women is the presumption that all women will interrupt their careers for a substantial period of time for the purpose of child-rearing."[256] This does not mean, however, that a court must automatically find an equal protection violation if

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251. *See* World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (noting the "judicial system's interest in obtaining the most efficient resolution of controversies").

252. *See Loving*, 388 U.S. at 11 ("Indeed, two members of this Court have already stated that they 'cannot conceive of a valid legislative purpose . . . which makes the color of a person's skin the test . . . .'" (citing McLaughlin v. Florida, 379 U.S. 184, 198 (1964))); *see also* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015) (explaining that relying on race- and ethnicity-based statistics "subjects the claimant to a 'disadvantageous estimate' of damages 'solely on the basis' or ethnic classification" (citing Chamallas, *supra* note 31, at 75)).

253. Chamallas, *supra* note 31, at 112 (citing JOHN E. NOVAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 630 n.119 (4th ed. 1991)).

254. *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (explaining that equal protection requires scrutiny of governmental action because equal treatment is core feature of the United States).

255. *See* Chamallas, *supra* note 31, at 122 (arguing that gender-based statistics reinforce current biases).

256. *Id.*

expert testimony uses minority-based statistics.[257] The government is not creating the distinctions but merely reporting and allowing experts to utilize them.[258]

Chamallas argues that *Palmore v. Sidoti*[259] foreclosed any such argument "that reliance on race-based data is nondiscriminatory because it merely reflects the reality of a racially stratified workplace."[260] *Palmore* considered whether the lower court was justified when it removed a white mother's custody rights because of potential biases her child could face growing up with a black step-father.[261] The Court concluded that such action by the lower court was impermissible.[262] The individual interest at stake was the removal of an "infant child from the custody of its natural mother found to be an appropriate person to have such custody."[263] While not completely dispositive, the court did ask the question of whether the interest in racial harmony can possibly outweigh the interest a mother has in the custody of her child.[264] Unlike damages in a tort case, the deprivation of parental rights is one of the strongest private interests in this country.[265] Further, when minority-based statistics are used in a courtroom, the nature of the adversarial

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257. *See id.* at 118 (noting that biological differences between men and women often result in "relaxed scrutiny").

258. *See* DOBBS, HAYDEN & BULBICK, *supra* note 101, at § 479 ("Calculations traditionally take into account life expectancy and expected earnings. Mortality tables are often admitted for this purpose.").

259. *See generally* 466 U.S. 429 (1984) (examining whether a court could remove a white mother's custody rights given potential biases her child could face from growing up with a black step-father, and concluding that such action was impermissible).

260. Chamallas, *supra* note 31, at 114–15.

261. *See Palmore*, 466 U.S. at 430–31 (setting out the issue of the case).

262. *See id.* at 434 (concluding that, even if there were negative effects of growing up in a biracial home, a court cannot remove a child from a fit parent).

263. *Id*. at 434.

264. *See id.* at 433 ("The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother.").

265. *See* Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) ("[I]t [is] plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right." (citation omitted)).

process makes the interest at stake much less immediate and important.[266]

C. Due Process Clause

The Due Process Clause of the Fourteenth Amendment requires that "[n]o state shall . . . deprive any person of life, liberty or property, without due process of law."[267] This clause provides for both procedural and substantive due process.[268] These two separate doctrines vary considerably. Procedural due process is concerned with ensuring "a number of the procedural protections contained in the Bill of Rights."[269] Substantive due process is a doctrine that protects "liberty interests" from being infringed.[270] This doctrine, however, is extremely controversial.[271] The Supreme Court at one time included economic interests within substantive due process, but has since abandoned the doctrine.[272] In *Kimpson*, the court reasoned that the plaintiff's due process rights would be violated if the expert used minority-based statistics, but did not elaborate on the exact nature of the

266. *See* Lassiter v. Dep't of Soc. Servs. Durham Cty., 452 U.S. 18, 28 (1981) ("[O]ur adversary system presupposes, [that] accurate and just results are most likely to be obtained through the equal contest of opposed interests.").

267. U.S. CONST. amend. XIV, § 1.

268. *See* Albright v. Oliver, 510 U.S. 266, 272 (1994) (stating that "the Due Process clause of the Fourteenth Amendment confers both substantive and procedural rights").

269. *Id.*

270. *See id.* at 269–72 (noting that substantive due process typically has been used for "marriage, family, procreation, and the right to bodily integrity" and the "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))).

271. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 (2008) ("Substantive due process is one of the most confusing and most controversial areas of constitutional law.").

272. *See* Alexandra Klein, Note, *The Freedom to Pursue a Common Calling: Applying Intermediate Scrutiny to Occupational Licensing Statutes*, 73 WASH. & LEE L. REV. 411, 422–27 (2016) (explaining *Lochner* and the Supreme Court's abandonment of economic due process).

violation.[273] This Note therefore will examine justifications under both procedural and substantive due process.

1. Procedural Due Process

Kimpson put forth the argument that compensation in a tort case constitutes a property right.[274] It concluded that using minority-based statistics results in denial of a plaintiff's property right through "arbitrary and irrational state action."[275] Procedural due process, however, allows the state to remove property so long as proper procedures are met.[276] In *Mathews v. Eldridge*,[277] the Court explained that when property is taken, the court must weigh three factors: (1) the private interest; (2) the government's interest; and (3) the risk of property deprivation under the current procedure and the value of procedural safeguards.[278] Full adjudication, however, is the hearing which all others aspire to.[279] Minority-based statistics are offered to the factfinder, and the factfinder determines whether they should apply during a full trial.[280] During trial, the factfinder examines the varying interests at stake, and fully adjudicates the issue of damages.[281] Procedural due process does not guarantee a perfect

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273. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015) (noting that the use of minority-based statistics is "arbitrary and irrational state action" resulting in a "denial of due process").

274. *See id.* ("There is a right—in effect a property right—to compensation in cases of negligently caused damage to the person under state and federal law.").

275. *Id.*

276. *See* 424 U.S. 319, 333 (1976) (explaining that "some form of hearing is required before an individual is finally deprived of property").

277. *Id.* at 333.

278. *See id.* at 335 (setting out the three factors).

279. *Cf.* Goldberg v. Kelly, 397 U.S. 254, 266–67 (1970) (finding that although procedural due process is due before termination of welfare benefits, the hearing need not take the form of a judicial trial).

280. *See* FED. R. EVID. 702 notes of advisory committee on proposed rules (clarifying that experts are simply meant to assist the factfinder).

281. *See Goldberg*, 397 U.S. at 267, 270–71 (explaining that procedural due process requires the opportunity to be heard, the right to confront witnesses, and reasons for the ultimate determination).

result, but guarantees that an individual is not unjustly deprived of property without proper procedures.[282] Because the jury will fully examine the contested issue of damages, the ultimate adjudication is not arbitrary.[283] In cases like Gary's, where his parents both held higher degrees, it is unlikely that factfinders would consider the generic more likely than the individualized.[284] Where individual information is compelling, there is little need for generic statistics and judges can and have discounted them in such cases.[285] Thus, procedural due process is not implicated, because the process protects against "arbitrary and irrational state action."[286]

2. Substantive Due Process

Substantive due process is a questionable doctrine that "protects individual's liberty against 'certain government actions regardless of the fairness of the procedures used against

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282. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.").

283. Although jury determinations are kept secret, the fact that juries are presented with alternative amounts from both sides ensures that the ultimate result is not arbitrary. So long as we trust juries to weigh properly presented evidence in uncertain future damages they should be trusted to use statistics when the individualized information is lacking. *Cf.* United States v. Thomas, 116 F.3d 606, 619 (2d Cir. 1997) ("The jury system incorporated in our Constitution by the Framers was not intended to satisfy yearnings for perfect knowledge of how a verdict is reached, . . . The jury as we know it is *supposed* to reach its decisions in the mystery and security of secrecy." (emphasis in original)).

284. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015) ("[F]or the purposes of projecting damages, the specific characteristics of the child and his family, rather than the characterization of the child as a member of a particular ethnic group, must be used in determining damages.").

285. *See* Childs v. United States, 923 F. Supp. 1570, 1580, 1585 (S.D. Ga. 1996) (giving "limited credibility" to expert determinations based on "little more than speculation" and favoring the evidence of temperament and family bonds).

286. *See Arbitrary*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[F]ounded on prejudice or preference rather than on reason or fact."); *Irrational*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Not guided by reason or by a fair consideration of the facts.").

them.'"[287] To find a substantive due process violation, a fundamental liberty interest must be identified that is "deeply rooted in this Nation's history and tradition."[288] That does not mean, however, that the liberty interest must appear in the Bill or Rights or have been considered a liberty interest when the Fourteenth Amendment was ratified.[289]

When experts use minority-based statistics, it arguably robs individuals of their potential.[290] When a child like Gary is injured, minority-based statistics unfairly bind the child to a future that fails to account for his individual characteristics.[291] The argument could be made that individuals have a fundamental liberty interest in charting their own course in life and a fundamental liberty interest in future potential.[292] This route could potentially lead to a substantive due process violation, because minority-based statistics shackle the child to the future of his racial or ethnic group.[293]

This argument, however, ultimately falls short. As discussed above, the procedural protections in place help to ensure that the individual is not shackled to their racial or ethnic group.[294] The Supreme Court has also been hesitant to invoke substantive due

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287. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

288. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted).

289. *See* Planned Parenthood v. Casey, 505 U.S. 833, 847–48 (1992) (explaining that liberty interests arise out of a "realm of personal liberty" and certain liberty interests such as marriage do not have a textual or historical basis).

290. *See* Chamallas, *supra* note 31, at 115 ("Looked at from an individualistic perspective, the use of race-based data unfairly ties an individual to the track record of his or her racial group.").

291. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015) ("Economic data that is minority-specific saddles those who do not conform to the data with adverse generalizations about their group.").

292. *See* Greenberg, *supra* note 30, at 429 ("Using race-based statistics reinforces the current racial discrimination in the workforce, ignoring the possibility and the social value of upward mobility.").

293. *See id.* at 450 ("The subjective data relies on the assumption that an individual's achievement is limited by her genetic inheritance.").

294. *See supra* notes 283–286 and accompanying text (arguing that because factfinders consider individual factors as well as minority-based statistics the determination is not arbitrary).

process in recent years.[295] The Court has simply stated that "deprivation of the liberty of a person" is unconstitutional.[296] But liberty interests have traditionally been found in more concrete and clearly defined categories.[297] For example, the deprivation of the right to marry,[298] the right to control the upbringing of one's children,[299] and the right to procreate.[300] It is unlikely that such an amorphous liberty interest—the right to chart one's own course in life—is "deeply rooted in the Nation's history," given the inexact nature of such a concept.[301] Further, as stated above, future lost earning calculations are "necessarily speculative."[302] By using minority-based statistics, along with individual factors, the expert is attempting to approximate a course in life that will not be taken.[303] Because of this, the expert is arguably attempting to help navigate the injured person's future potential. Moreover, even if there is such an uncertain liberty interest, it is violated when the injury occurred, not during the damage determination.

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295. *See* United States v. Windsor, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("The majority never utters the dread words 'substantive due process,' perhaps sensing the disrepute into which the doctrine has fallen.").

296. *Id.* at 2695.

297. *See* Planned Parenthood v. Casey, 505 U.S. 833, 834 (1992) (noting that substantive due process, while not limited to these categories, has traditionally been found for marriage, procreation, child rearing and education, family relationships, and contraception).

298. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) ("[T]he right to marry is fundamental.").

299. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

300. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

301. Washington v. Glucksberg, 521 U.S. 702, 724 (1997) (explaining that broad right to personal autonomy is not a fundamental liberty interest and the Court must look at the exact asserted right).

302. Childs v. United States, 923 F. Supp. 1570, 1578, (S.D. Ga. 1996).

303. *See supra* Part II ("Because damage awards are meant to compensate the plaintiff in a close approximation of actual damages on an individual basis, experts must be able to utilize relevant available data.").

V. A Statutory Alternative to a Constitutional Bar Is Proper Under Congress's Commerce Power

Given the tenuous finding of state action when experts use minority-based statistics, the use of such statistics is constitutional.[304] Despite the lack of state action, the government could pass legislation prohibiting the use of minority-based statistics under Congress's commerce power.[305] The use is not limited to one expert in one case, but concerns influences across the entire United States and so arguably concerns interstate commerce.[306] If Congress could not proscribe individual experts' use of minority-based statistics, it would undermine the purpose of preventing experts from causing discriminatory affects across the country.[307]

A. Congress's Commerce Power is Broad Enough to Legislate Experts

The Commerce Clause[308] allows Congress to regulate commerce that affects interstate activities.[309] In *Heart of Atlanta Motel v. United States*,[310] the Supreme Court stated that Title II of the Civil Rights Act[311] was within Congress's commerce power

304. *See supra* Part IV.B (explaining that state action is unlikely in a case of private litigants hiring private experts to determine lost future earnings in civil proceedings).

305. *See* United States v. Lopez, 514 U.S. 549, 559 (1995) (concluding that Congress may regulate activity that "'substantially affects' interstate commerce").

306. *See infra* Part V.A (arguing that Supreme Court jurisprudence suggests damage awards has a substantial affect on interstate commerce within the modern restrictive framework).

307. *Cf.* Gonzales v. Raich, 545 U.S. 1, 22 (2005) (finding that it was within Congress's power to regulate marijuana across state lines, and Congress' purpose would be frustrated if it could not regulate marijuana grown by an individual person in one state).

308. U.S. CONST. art. 1, § 8, cl. 3.

309. *See id.* (giving Congress the power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes").

310. 379 U.S. 241 (1964).

311. 42 U.S.C. § 20000a (2012) ("All persons shall be entitled to the full and equal enjoyment of the . . . accommodations of any place of public

as applied to a single motel refusing to serve to African Americans.[312] "The only questions are (1) whether Congress had a rational basis for finding racial discrimination, . . . and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate."[313] If Congress were to pass legislation prohibiting the use of minority-based statistics, it would arguably be within the commerce power.[314] Not only are the minority-based statistics compiled nationally, but the effects of their use in individual tort cases have much broader impacts. Tort cases are brought throughout the country, and if some states allow minority-based statistics while others do not it could lead to widely disparate awards resulting in an effect on plaintiffs and defendants.[315] In lead-based paint cases, eliminating disparate awards based on race, ethnicity, and gender encourages removal of lead-based paint in houses.[316] It creates an incentive to achieve compliance.

All individual tort cases in the U.S. create an aggregate affect on interstate commerce.[317] In *Gonzales v. Raich*,[318] the Court examined the question of whether the federal government

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accommodation . . . without discrimination on the ground of race, color, religion, or national origin.").

312. *See Heart of Atlanta Motel*, 379 U.S. at 250 (finding the statute within commerce power).

313. *Id.* at 258.

314. *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (noting that regulations of interstate activities have come under the Commerce Clause when it involves "economic enterprise").

315. *Compare* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015) (removing ability of experts to use minority-based statistics), *with* Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 23 (2d Cir. 1996) (allowing expert to use minority-based tables).

316. *Cf.* McCarthy, *supra* note 54, at 81 ("Th[e] widespread social and economic disparity is perpetuated, perhaps widened, when these same children, who live among lead paint hazards largely as a result of the latent racism in American culture, are then denied full compensation when these hazards injure them.").

317. *See* Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (finding that when individual action could in the aggregate affect interstate commerce, Congress could regulate it). *But see Lopez*, 514 U.S. at 560 ("*Wickard* . . . is perhaps the most far reaching example of Commerce Clause authority over intrastate activity.").

318. Gonzales v. Raich, 545 U.S. 1 (2005).

could regulate purely local cultivation of medical marijuana pursuant the Commerce Clause.[319] The Court explained that the Commerce Clause test does not require a determination that an individual's "activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so finding."[320] Thus, if there is a rational basis for finding that experts' reliance on minority-based statistics affects interstate commerce, Congress may regulate or prohibit this reliance.[321] Rational basis is an extremely low bar, and courts are regularly deferential to legislative findings.[322] Because an expert's use of minority-based statistics affects damage calculations, the aggregate impact and national character of the statistics has a direct effect on interstate commerce.[323] Further, if their use results in lower damages for minorities and women, individuals—particularly children—"will continue to be inadequately compensated" for injuries.[324] Because minorities will be inadequately compensated, their valuation as "worth less" than their non-minority counterparts will continue to permeate the national economy.[325] These reasons serve as a "rational basis" for finding that an expert's use of minority-based statistics has an effect on interstate commerce.

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319. *See id.* at 5 (presenting the issue up for consideration).

320. *Id.* at 22.

321. *See id.* at 25–26 (distinguishing from *Lopez* because regulation of marijuana is "quintessentially economic").

322. *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (noting that courts can look to the rationale of a legislation, but, even if there is no rationale, "the existence of facts supporting the legislative judgment is to be presumed").

323. *See* United States v. Lopez, 514 U.S. 549, 561 (1995) (finding that the Commerce Clause was not implicated because the statute in question was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise").

324. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015) (explaining that, if alternatives are not used, lead-poisoned children will face unfair compensation purely based on their race or ethnicity).

325. *See* Chamallas, *supra* note 31, at 112 ("Racial classifications . . . produce harmful results, stigmatizing minorities as inferior and inflicting cumulative burdens on those groups in society who are subjected to pervasive patterns of discrimination.").

B. A Fair Experts Act Will Act to Prevent the Use of Minority-Based Statistics in Damage Calculations

Given these considerations, Congress could pass legislation, a Fair Experts Act, prohibiting experts from using minority-based statistics. This alternative would prevent the use of discriminatory statistics while avoiding state action problems that arise under the Constitution.[326] The best alternative is to require that experts use minority-neutral statistics.[327] Simply removing statistics from the equation or using geographical statistics can reinforce socioeconomic biases and fail to account for individual potential.[328] The statute should ensure that all expert witnesses disclose their methodology and use neutral data. A draft of a statute follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education to testify as to damages and lost future earnings must use minority-neutral statistics. Such statistics are to be used to supplement individual determinations. For the purpose of this section—"minority-neutral statistics" are statistics equivalent to the national average as set forth by the United States Department of Labor.[329]

This statute would give "a reasonable benchmark to follow in assessing damages."[330] While Congress could pass or alter legislation governing the statistics themselves to remove race,

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326. *See supra* Part IV.A (arguing that an expert's use of minority-based statistics is not state action).

327. *See* Lamb, *supra* note 30, at 329 (stating that gender-neutral statistics prevents recurring discrimination and "is more relevant to the determination of lost earning capacity").

328. *See* Greenberg, *supra* note 30, at 449 ("Reliance on the subjective data assumes that child-plaintiffs are restricted by the socio-economic, educational, and vocational status of their families.").

329. The language for this statute is derived from two sources. *See* FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise . . ."); Greyhound Lines, Inc. v. Sutton, 765 So. 2d 1269, 1277 (Miss. 2000) ("[T]here is a rebuttable presumption that the deceased child's income would have been the equivalent of the national average as set forth by the United States Department of Labor.").

330. *Greyhound Lines*, 765 So. 2d at 1277.

ethnicity, and gender from its findings, this alternative ignores the benefit statistics can offer outside of the courthouse.[331]

C. The Lead Contaminated Tap Water in Flint, Michigan, Offers a Strong Case for Statutory Limitations on Experts' Use of Minority-Based Statistics.

In 2014, Flint, Michigan, switched the water supply to residents from Lake Huron to the Flint River.[332] Strapped for cash, the city of Flint decided that it could save money by no longer paying Detroit for water.[333] Soon after the switch, however, the tap water began to change, exhibiting a brown color accompanying strange tastes and smells.[334] City officials assured residents that there was nothing to worry about, and for almost two years residents paid the city for the tap water from the Flint River.[335] In August of 2015, a group of researchers "came up and did in-home testing and found elevated levels of lead in the drinking water."[336] It turned out that the water from the Flint River was corrosive and was eating away at lead service pipes.[337] Despite the investigation, City officials continued denying any

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331. For example, *Kimpson* noted that such statistics can be used when determining life expectancy for juveniles facing long prison sentences. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 158 (E.D.N.Y. 2015) (explaining that Hispanics lower life expectancy should be considered when determining whether to put a cap on sentences for juveniles).

332. *See* Ganim & Tran, *supra* note 15 ("Nearly two years ago, the state decided to save money by switching Flint's water supply from Lake Huron (which they were paying Detroit for), to the Flint River, a notorious tributary known to locals for its filth.").

333. *See* Samantha Allen, *What Will Happen to Flint's Lead-Poisoned Children?*, THE DAILY BEAST (Jan. 14, 2016), http://www.thedailybeast.com/articles/2016/01/14/what-will-happen-to-flint-s-lead-poisoned-children.html (last visited June 5, 2016) (explaining why Flint switched water sources) (on file with the Washington and Lee Law Review).

334. *See id.* (noting that the tap water "looked like urine and smell[ed] like a sewer or fishy").

335. *See* Ganim & Tran, *supra* note 15 ("Former Flint Mayor Dayne Walling even drank [the water] on local TV to make the point [that the water was safe].").

336. *Id.*

337. *See id.* (explaining the source of lead in Flint tap water).

problems, until one pediatrician investigated and found extremely high levels of lead in the blood of toddlers.[338]

Several individuals have filed suit, claiming that Flint failed to follow federal law and that officials knew of the problem but failed to notify city residents.[339] Residents are suing because lead poisoned children "may have suffered irreversible damage to their developing brains and nervous systems."[340] The population of Flint is predominantly African-American; in 2010 56.6% of the population was Black, and 37.4% was white.[341] The population is also predominantly lower income with a median household income of $24,834.[342] If minority-based statistics are used, the children of Flint will receive disparate awards regardless of the fact that the injuries are identical and they all live in the same city.[343] If the proposed statute were applied, however, the individualized information would be supplemented by minority-neutral statistics based on the national average. This would ensure more equivalent outcomes. Applying the statute would also ensure that children born in Flint are not undervalued because of where they were born. Using statistics based on a national average avoids "the possible perpetuation of inappropriate stereotypes, especially where the defendants have deprived their victims of the chance to excel in life beyond predicted statistical averages."[344] If, instead of the proposed

338. *See id.* ("Lead levels doubled and even tripled in some cases.").

339. *See id.* (noting that federal law required water treatment with an "anti-corrosive agent" that was not used and that residents "were kept in the dark for 18 months").

340. Abby Goodnough, *Flint Weighs Scope of Harm to Children Caused by Lead in Water*, N.Y. TIMES (Jan 29, 2016), http://www.nytimes.com/2016/01/30/us/flint-weighs-scope-of-harm-to-children-caused-by-lead-in-water.html?_r=0 (last visited June 5, 2016) (on file with the Washington and Lee Law Review).

341. *Flint (City), Michigan, State & County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/26/2629000.html (last visited June 5, 2016) (on file with the Washington and Lee Law Review).

342. *Id.*; *see also* Ganim & Tran, *supra* note 15 ("According to local officials, about 40% of residents are below the poverty rate.").

343. Because more children in Flint are African-American, they would receive lower damages than the white children, which make up a smaller population.

344. G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 139 (E.D.N.Y. 2015).

statute, minority-based statistics were found unconstitutional, lower socioeconomic status would always result in lower damage awards. This is because "the United States Constitution includes no express protection of socioeconomic rights. Nor has the U.S. Supreme Court either deemed such rights fundamental for purposes of review under the Constitution nor found poverty to be a classification, like race, that deserves searching equal-protection analysis."[345] Yet just as race can "unfairly tie[] an individual to the track record of his or her racial group," so too can a socioeconomic group.[346] The proposed statute would eliminate minority-based statistics and attempt to compensate individuals for their lost potential—as far as money can.

VI. Conclusion

The use of minority-based statistics is unreliable and inherently problematic. When experts use such statistics, it is unlikely to result in accurate figures and fails to account for the uncertainties in life. As one court so aptly put it:

> Any one of us who has attended a 40th, or even 50th, reunion of a grade school or high school or college class can attest to the unpredictability of life. Some of the most charismatic and promising of our then colleagues died young, or suffered long illness or suffered through other unfortunate and unhappy events. Others, perhaps even those deemed least likely to succeed, have led rather successful, apparently useful lives. Very few members of the human race in our great country, whether male or female, white or black or yellow, of whatever ethnic composition, escape the unpredictable vagaries of life. Life's cup is both half empty and half full.[347]

Because of the uncertainty of life, many experts have relied on minority-based statistics as a way to ensure a more realistic and appropriate number. These statistics, however, fail to

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345. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L. & CONTEMP. PROBS. 109, 109 (Fall 2009).

346. Chamallas, *supra* note 31, at 115.

347. Childs v. United States, 923 F. Supp. 1570, 1579 (S.D. Ga. 1996).

account for the "unpredictable vagaries of life" and can lead to inadequate compensation by limiting individual potential.

Yet, the fact that these statistics are unreliable does not mean they are unconstitutional. Experts use these statistics on behalf of the plaintiff or the defendant, the other side is able to rebut the evidence, and it is up to the factfinder to decide if the numbers properly account for the uncertainty inherent in future predictions. The court need not endorse the expert's calculation so long as it is based on "sufficient facts or data."[348] The argument that this constitutes state action is questionable at best.

That does not mean, however, that experts should continue to use minority-based statistics. It is well within Congress's power to regulate private individuals when there are interstate effects. By passing a Fair Experts Act, Congress can ensure that experts do not use minority-based statistics. It will ensure that individuals are not bound by the effects of past discrimination while accounting for the potential children have to overcome the odds. Courts must be cautious about intruding on the domain of the political branches. While it is tempting for courts to "legislate from the bench," our country is a democracy, and lawmaking is more properly left to Congress. Through Congress, past injustice need not influence the recovery of individuals injured—often through no fault of their own—and can close the gap towards making them whole.

348. FED. R. EVID. 702.