

**PUTTING A PRICE ON YOUR CHILD:  
PROMOTING RESILIENCY AND EQUALITY IN  
DAMAGE AWARDS FOR CHILDREN**

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#### ABSTRACT

Could you calculate the monetary value you would accept in lieu of your child or the value of their loss after suffering a permanently disabling injury? In tort, this is the precise function of a damage award—to monetarily compensate the child for the value of their loss. Would you consider the child’s race or gender when calculating their worth? Assigning a value to the loss suffered by a child is a fundamentally difficult task that often relies heavily on statistical averages associated with similarly situated children. This data is often stratified by race and gender, and inherent in racial and gender stratification is the perpetuation of discriminatory stereotypes.

Hypothetically, the value associated with one child’s losses—virtually identical to another but for race or gender—may be assessed as less because of these factors. A child has yet to charter their future course and make decisions that may affect their health, longevity, and income-earning capacity. While some arguments may exist for using race and gender-stratified data as applied to adults, they are rendered moot when applied to children. Children are inherently resilient and have the greatest potential to succeed beyond the capacity of a statistical class. A child’s damage award should not be limited by their statistical class but compensate them for this resilient future capacity.

Enacting state legislation—that recognizes this capacity in children—is the most expedient and efficient way to reduce the discriminatory effects of race and gender on a child’s damage award.

#### INTRODUCTION

Assume Kourtney is a ten-year-old girl traveling on a road trip with her family. Her large family from rural Mississippi lives barely above the poverty line. No one in her family has gone to college, her father is a maintenance worker, and her mother is an aide at the local nursing home. Kourtney knows that she wants to grow up and “help people” like her mother because she sees how much her mother enjoys caring for the nursing home residents.

Next, assume Ryan is a ten-year-old boy traveling with his family in a nearby car. They are from California, where his father is a surgeon, and his mother is an advertising agency executive in a large city. Ryan excels in academics and attends a private preparatory school. He too wants to grow up and “help people” like his father, the surgeon.

Now, assume a drunk driver causes a multiple-car collision, and both children become permanently and severely disabled. How are the children compensated for their losses? In a claim against the driver, Ryan’s counsel might seek to introduce evidence that Ryan was likely to earn a college degree and become a surgeon like his father. Likely, the drunk driver’s counsel might seek to reduce any damages awarded to Kourtney by pointing to her family’s demographics and the likelihood that her future earning capacity would be similar. Should their gender make a difference in how the children are compensated? Would the racial identity of the children—intentionally omitted from the hypothetical—factor into a damage calculation? What about geography? What if both children tragically died from their injuries?

Finally, rewind and assume that the accident did not occur when the children were ten but when twenty-two-year-old Kourtney and Ryan were on their way home from college. Kourtney internalized her desire to “help people” and just got accepted to a top medical school. Ryan also internalized his desire to “help people” but applied himself differently. After partying his way through the first year of college, he found that he could make significant sums of money selling recreational drugs on campus instead of working as hard as his father did during medical school. Would this scenario turn out any differently than the first?

The answer to all the questions posed above is, likely yes. As this Note demonstrates, courts generally permit experts to consider factors such as age, race, gender, socioeconomic status, and other

individualized circumstances when they give testimony as to the value of each child's losses.<sup>1</sup> Further, the opposing party's expert may weigh these factors differently to reduce the potential value of any damages paid.<sup>2</sup>

Depending on the circumstances of the case, factors such as life expectancy, work-life expectancy, or future wage potential for the children may need to be evaluated.<sup>3</sup> These calculations are largely based on actuarial tables using statistical averages because children lack earning history or other objective representations of their future capacity as adults.<sup>4</sup> However, statistical averages do not always represent the individuality of a child and can reinforce discrimination based on stereotypes, primarily when statistical generalizations are based on race and gender.<sup>5</sup>

Additional problems arise when the ten-year-old Kourtney and Ryan are juxtaposed with their twenty-two-year-old selves. Kourtney at ten seems undervalued when compared to her future self, while the opposite may be true for Ryan. Once racial and gendered data are interjected into the opening hypothetical, their disparity in "value" is further highlighted.

There has been significant scholarship concerning race and gender discrimination that results from using actuarial data when calculating civil damage awards.<sup>6</sup> Proposed solutions to this discrimination have ranged from constitutional prohibition, using data based on white males when valuing all persons, statutory reform, or creating fixed formulas to compensate for unknown future loss.<sup>7</sup> Some scholars have

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1. *See infra* Part I.B.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See infra* Part III.B.

6. *See infra* Parts II & III.

7. *See infra* Part II; *see, e.g.*, MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 13–14 (NYU Press, 1st ed. 2010) (discussing the pathways by which race and gender are interjected in tort law and prescribing methods of systemic change by drawing on constitutional law civil rights principles); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 123 (1994) (discussing the use of a standard based on white males as applied to all persons); Anne M. Anderson, *How Much Are You Worth?: A Statutory Alternative to the Unconstitutionality of Experts' Use of Minority-Based Statistics*, 73 *WASH. & LEE L. REV. ONLINE* 206, 254 (2016) (proposing a statute to ensure fair evaluation by all expert witnesses); Loren D. Goodman, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 *VAND. L. REV.* 1353, 1387 (2017) (discussing setting fixed measures for assessing future damages that do not account for race or gender).

even proposed their solution be first implemented by the courts with children.<sup>8</sup> However, with very few exceptions, these proposals have failed to achieve widespread adoption.<sup>9</sup>

Building on successful attempts to eliminate race and gender discrimination in tort damage awards, this Note proposes a statutory solution that combines key elements of these past successes. This approach joins a mandatory blended life table with a statutory prohibition in order to eliminate the use of race or gender at any point to devalue a child's damages. Further, this approach is designed to be implemented swiftly and efficiently, is based on known data, and limits its application to damage awards for children. By limiting its application to children's damages, this approach can overcome many of the criticisms faced when trying to eliminate racially and gender-based statistics from all damage awards in tort.

This Note proceeds in four major sections. Part I provides an overview of tort theory and damage calculation and then focuses on the use of actuarial tables in expert witness testimony regarding damages for permanent disability and wrongful death. Part II highlights challenges to current damage calculation models and attempts at reform. Part III discusses compensating children for their unrealized future potential and how to accurately make them "whole." Finally, Part IV proposes an efficient statutory solution to reduce the effects of racial and gender discrimination and promote the resiliency of children.

#### I. TORTS & DAMAGES: FOUNDATIONAL THEORIES & CALCULATIONS IN PRACTICE

A damage award in tort can serve a variety of functions and purposes.<sup>10</sup> Understanding the interplay between foundational tort theories and how damages are awarded in practice offers valuable insight as to how problems associated with these damage calculations may be reformed. Section A explores some of the main functions and purposes of tort law, while Section B surveys the practical application of damage calculations and the use of actuarial tables in a cause of action premised on permanent disability or wrongful death.

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8. See Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78(3) OHIO ST. L. J. 661, 727 (2017) [hereinafter Avraham & Yuracko, TORTS].

9. *Id.*

10. See *infra* Part I.A.

*A. Foundational Theories of Tort Law*

Tort law offers a way to account for losses due to an injury—resulting from an interaction between parties—and to provide compensation for the losses of one party at the hands of another.<sup>11</sup> The ability of tort law to serve a compensatory purpose is predicated on the ability to accurately make a party “whole,” considering their individual circumstances, and providing a monetary damage award for the value of the harm caused under those circumstances.<sup>12</sup>

Tort law also serves other notable purposes. Proponents of distributive justice theory focus on loss distribution, fairness, and egalitarianism.<sup>13</sup> This distribution of loss is supported by general economic principles that can give rise to a greater social good, whereas fairness and egalitarianism function to distribute the risks and burdens to the party most able to bear the loss.<sup>14</sup> In modern society, this distribution of loss is most commonly covered by liability insurance that pays the plaintiff on behalf of a policyholder when an injury occurs.<sup>15</sup> While focusing on the social good that can arise from tort law’s distributive capacity, distributive justice proponents often recognize some compensatory elements, as well as elements of the economic rationales and the corrective justice function that follows.<sup>16</sup>

Much of the modern discussion involving the function and purpose of tort law has focused on an economic analysis and its ability to serve a deterrent function.<sup>17</sup> Proponents of a deterrence theory focus less on individual compensation for a loss and more on “creat[ing] incentives for parties to behave efficiently” using the tort system.<sup>18</sup> “By imposing the threat of liability on tortious conduct, the law can

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11. W. PAGE KEETON, PROSSER AND KEETON ON TORTS §1 6 (W. Page Keeton et al. eds., 5th ed. 1984).

12. See RESTATEMENT (SECOND) OF TORTS §§ 903–06 (AM. L. INST. 1979) (discussing the nature of damages in tort); see Anderson, *supra* note 7, at 215.

13. Avraham & Yuracko, TORTS, *supra* note 8, at 693.

14. *Id.* at 693–94; Tsachi Keren-Paz, *Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?*, 4 THEORETICAL INQUIRIES L. 275, 277 (2003).

15. See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW, 20 (6th ed. 2017).

16. See GUIDO CALABRESI, THE COST OF ACCIDENTS 39–45 (1970) (discussing loss spreading in terms of “efficiency”); see also Avraham & Yuracko, TORTS, *supra* note 8, at 692–93.

17. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 378 (1994).

18. See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW, 312 (1987).

discourage parties from engaging in that conduct.”<sup>19</sup> It is this threat of liability that is said to encourage economically efficient behavior and reduce risky *ex ante* activity.<sup>20</sup>

In contrast, proponents of the corrective justice model see tort law’s purpose as providing a means of redress for the injury caused to a specific plaintiff.<sup>21</sup> Focusing less on the future deterrent effect, corrective justice seeks to rectify the “injustice inflicted” and restore the moral balance between the parties.<sup>22</sup> This function of tort law may be most significant when the cause of action arises not from their intentional acts—which could be more easily deterred—but from their negligence.<sup>23</sup> While a deterrence model can influence *ex ante* behaviors of a party, a corrective justice model is particularly effective at delivering “*ex post* justice” for plaintiffs.<sup>24</sup>

### B. The Practice of Calculating & Awarding Damages

While courts seldom expressly define their theory of tort law underlying each decision, it is often discerned from the reasoning used when assessing liability and awarding damages.<sup>25</sup> Generally, tort law provides compensatory damages to repay or compensate a plaintiff for their actual loss—either for pecuniary or non-pecuniary harm.<sup>26</sup> In addition to compensation for the actual loss—and of particular relevance to this note—tort law affords the injured party the ability to recover for “all harm, past, present, and prospective,” legally caused by the

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19. Schwartz, *supra* note 17, at 382.

20. *Id.* at 387; ABRAHAM, *supra* note 15, at 19; Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802 (1997).

21. Avraham & Yuracko, TORTS, *supra* note 8, at 695; see ABRAHAM, *supra* note 15, at 17; see also Eliezer Rivlin, *Thoughts on Referral to Foreign Law, Global Chain-novel and Novelty*, 21 FL. J. INT’L L. 1, 21 (2009).

22. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002); see ABRAHAM, *supra* note 15, at 17.

23. See ABRAHAM, *supra* note 15, at 17.

24. See Avraham & Yuracko, TORTS, *supra* note 8, at 695.

25. 1 DAMAGES IN TORT ACTIONS § 1.01 (MB rev. ed. 2023); see ABRAHAM, *supra* note 15, at 16; RESTATEMENT (SECOND) OF TORTS § 901 (the purposes of damages in a tort action are: 1) to give compensation, indemnity or restitution for harms; 2) to determine rights; 3) to punish wrongdoers and deter wrongful conduct; and 4) to vindicate parties and deter retaliation or violent and unlawful self-help).

26. 1 DAMAGES IN TORT ACTIONS § 1.01 (MB, rev. ed. 2023); see RESTATEMENT (SECOND) OF TORTS § 903; see RESTATEMENT (THIRD) OF TORTS: REMEDIES § 1, cmt. C (AM. L. INST., Tentative Draft No. 1, 2022); see also *Actual Damages*, BLACK’S LAW DICTIONARY (11th ed. 2019).

tort.<sup>27</sup> Victims are entitled to potentially recover for future losses proximately related to the injury they sustained.<sup>28</sup>

In order for a court to undertake the calculation and award of damages in a tort action, its process is two-fold. The standards of law and equity which govern in any given case are a matter of law for the court to determine.<sup>29</sup> In contrast, the application of these governing standards to the facts of record are matters of fact.<sup>30</sup> Ordinarily, it is the responsibility of the jury to serve as the finder of fact—weighing the evidence and credibility of witnesses to reach a verdict—however, when the right to a jury is waived, a trial court can serve this purpose.<sup>31</sup> Further, it is the exclusive province of the finder of fact to determine the measure of the plaintiff's actual damages.<sup>32</sup>

To assist the finder of fact in their determination, a plaintiff may testify, and both the plaintiff and defendant have an opportunity to introduce expert witness testimony demonstrating their independent and rebuttable calculations of the compensable loss.<sup>33</sup> When not serving as the finder of fact, the court's function is limited to that of a “gate-keeper” to ensure the relevance and reliability of the testimony before the jury and to ensure the testimony is grounded in scientific, technical, or other specialized knowledge.<sup>34</sup> It is not mandatory that the finder of fact accept any specific expert's testimony but rather use it as an evaluative tool to reach an informed decision.<sup>35</sup>

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27. See RESTATEMENT (SECOND) OF TORTS § 910 (AM. L. INST. 1979).

28. *Id.* at § 917.

29. *Calculation of Damages*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (Vol. II 2012).

30. *Id.*

31. See *id.*; 1 DAMAGES IN TORT ACTIONS § 1.04 (MB rev. ed. 2023).

32. See 4 MODERN FEDERAL JURY INSTRUCTIONS-CIV. P. 77.01 (MB rev. ed. 2023); *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 162 (2d Cir. 2014) (the “calculation of damages is the province of the jury” (quoting *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990)); see also *Sullivan v. U.S. Dep't of the Navy*, 365 F.3d 827, 834 (9th Cir. 2004) (“under the FTCA, the district judge, not a jury, is the trier of fact”).

33. See generally *Powers v. United States*, 589 F. Supp. 1084, 1102 (D. Conn. 1984) (noting that between the plaintiff's and defendant's counsel, the court heard eight separate witnesses testify as to their prediction for the plaintiff's life expectancy).

34. See FED. R. EVID. 702, Notes of Advisory Committee on Rules (experts are “person[s] qualified by ‘knowledge, skill, experience, training or education’”); see also *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999).

35. See *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1098 (E.D.N.Y. 2006).



### 1. Using Actuarial Tables

Expert witnesses facilitate the trier of fact calculation of a plaintiff's total loss by commonly using actuarial tables to set baseline values for life expectancy, work-life expectancy, and wage potential had the loss not occurred.<sup>36</sup> Data incorporated into these tables is collected and promulgated regularly by the Bureau of Labor Statistics, and is stratified by state, race, gender, and educational attainment.<sup>37</sup> When a plaintiff cannot demonstrate certain factors—such as educational attainment or work history due to their status as a minor—experts commonly substitute the socioeconomic and educational status of the parent(s) to add to the predictive values of the actuarial tables when presenting their opinion.<sup>38</sup>

Actuarial tables are helpful in that they provide an efficient means for expert witnesses to provide objective categories of data for the trier of fact to consider—accompanied by any other individual circumstances of the plaintiff that could enhance or reduce a damage award.<sup>39</sup> Courts generally accept expert witness testimony that uses Bureau of Labor Statistics or other highly regarded economic data “unless there

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36. See *Kinney v. IBM*, No. A-20-CV-00969-DAE, 2022 U.S. Dist. LEXIS 120500, at \*12 (W.D. Tex. July 8, 2022) (defendant arguing that the plaintiff's expert should not have relied on national data collected from the Bureau of Labor Statistics); *Noel v. Inland Dredging Co.*, No. 17-1989, 2018 U.S. Dist. LEXIS 67768, at \*9 (E.D. La. Apr. 23, 2018) (finding the Bureau of Labor Statistics data regarding work-life expectancy a reliable measure); *Families Advocate, LLC v. Sanford Clinic N.*, No. 3:16-cv-114, 2019 U.S. Dist. LEXIS 60438, at \*24 (D.N.D. Feb. 11, 2019) (finding the life expectancy estimate based on “well-established mortality tables” to be presumptively valid).

37. See Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2020*, 71(1) NAT'L VITAL STAT. REPS., Aug 8, 2022; U.S. Dep't. of Lab. Bureau of Lab. Stat., *Worklife Estimates: Effects of Race and Education* (1986), tbl.4, <https://www.bls.gov/opub/reports/worklife-estimates/archive/worklife-estimates-1986.pdf> (notably relying on data that has not been updated since the 1980s).

38. See *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 131–32 (E.D.N.Y. 2015) (discussing the parental backgrounds of the child plaintiff); see also *Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.C. Cir. 1991) (noting the defendant's expert sought to introduce evidence that the plaintiff's future damages should be reduced on the likelihood that the plaintiff would likely work for less wages in a foreign country and that earnings should be based on that of the “average black male”); cf. MO. ANN. STAT. § 537.090 (Lexis 2023) (codifying the parental income of the deceased child as a standard to measure future earning capacity).

39. See generally 9 DAMAGES IN TORT ACTIONS § 100.01(2) (MB rev. ed. 2023) (discussing how an economist establishes a baseline of life expectancy and current wage potential that is then adjusted for annual growth rate and adjusted back to present value).

is evidence supporting a variation from the average.”<sup>40</sup> For example, a life table may be used to determine the statistically average remaining years in a plaintiff’s life, which could then be multiplied by the cost of estimated annual pecuniary loss.<sup>41</sup> Further, a plaintiff’s lost future wages could be calculated by establishing a base earnings level from current employment—or consulting an average wage table based on educational achievement when current employment is lacking—then multiplying that by the remainder of the average work-life for statistically similar individuals.<sup>42</sup> Actuarial tables for life expectancy, work-life expectancy, and wage potential are subdivided into racial and gendered categories in order to define who are statistically similar individuals for making these calculations.<sup>43</sup>

## 2. Future Damages Related to Permanent Loss or Disability

The value of permanent loss or disability resulting from an injury is recoverable by a plaintiff in a tort action.<sup>44</sup> In cases involving harm to a minor, a parent may also be able to recover for loss of companionship or future pecuniary support under certain circumstances—minus the cost of child-rearing.<sup>45</sup> Further, a child can generally recover

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40. See *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 361 (5th Cir. 2016); see also Frank L. Slesnick et al., *A 2012 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 24 J. FORENSIC ECON. 67, 87 (2013) (discussing the use of Skoog, Ciecka, and Krueger Tables for similar data).

41. See *Mansil v. Midwest Emergency Med. Servs., P.C.*, 554 S.W.3d 471, 477 (Mo. Ct. App. 2018) (discussing the multiplication of pecuniary loss projected throughout life expectancy).

42. Of note, damage calculations are multiplied into the future, then reduced back to present-day cost, and finally, taxes are subtracted so that the outcome is net rather than gross income. See *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984); See also 9 DAMAGES IN TORT ACTIONS § 100.01 (MB rev. ed. 2023).

43. See sources cited *supra* note 34. Being defined as “statistically similar” can also be used to devalue an individual plaintiff. See *Childs v. United States*, 923 F. Supp. 1570, 1579 (S.D. Ga. 1996) (defendant’s experts valued the lives of the decedents up to 1.5 million dollars less than plaintiffs’ experts simply by changing the methodology and statistical reference points); *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004) (the court requested the lost income expert provide race and sex-neutral calculations out of concern for the inherent devaluing of the victim’s life); *Tarpeh-Doe*, 771 F. Supp. at 455 (defendant’s expert attempted to devalue the plaintiff’s future earning potential by using data based on the “average earnings of black men” versus the average earning of all men).

44. See generally RESTATEMENT (SECOND) OF TORTS § 902–04 (AM. L. INST. 1975) (discussing compensatory damages and further subdividing compensatory damages into general and special damages in a tort action).

45. See *id.*; see also EILEEN SWARBRICK, DAMAGES IN TORT ACTIONS, Chap. 24 (MB rev. ed. 2023); cf. *Colon v. BIC USA, Inc.*, 199 F. Supp. 2d 53, 100 (S.D.N.Y. 2001) (discussing that while New York recognizes a parent’s right to recovery for

for lost future earning capacity they would have realized after achieving the age of majority.<sup>46</sup> In these cases, actuarial tables provide experts with important data points regarding the average wage of a similarly situated person, attaining different education levels, and for how many years the plaintiff would be statistically likely to earn that wage.<sup>47</sup> While additional testimony regarding a plaintiff's individual propensities would be combined with this data, experts undertake a certain amount of speculation that the finder of fact must interpret to place a determinative value on the loss.<sup>48</sup> Difficulties arise for the finder of fact—encouraging further speculation—when a plaintiff's individual characteristics or circumstances are not in congruence with their statistical class represented on an actuarial table.<sup>49</sup>

### 3. Damages in Wrongful Death Actions

Every state in the United States has codified its own version of a wrongful death statute.<sup>50</sup> Under a wrongful death statute, a cause of action is created to provide compensation to the decedent's survivors, and the recoverable loss is largely defined by statutory limitations.<sup>51</sup> While recoverable losses vary in measure and procedural calculation by state, damages for tangible pecuniary loss are generally permitted;

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the loss of a child's pecuniary support, they must also make a showing that the child had a legal duty or had undertaken an obligation to do so).

46. See PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 28.16 (MB rev. ed. 2023); see also *Chapple v. Gangar*, 851 F. Supp. 1481, 1498 (E.D. Wash. 1994) (while the plaintiff attempted to show that their future earning capacity would be diminished after the injury, the court found that extensive rehabilitation during adolescence would likely remedy any deficit the plaintiff currently displayed).

47. See *Families Advocate, LLC v. Sanford Clinic N.*, No. 3:16-cv-114, 2019 U.S. Dist. LEXIS 60438, at \*24 (D.N.D. Feb. 11, 2019) (accepting “well established mortality tables” as the baseline for life expectancy); see also *Deperrodil v. Bozovic Marine, Inc.*, 842 F.3d 352, 361 (5th Cir. 2016) (noting that courts regularly consider Bureau of Labor Statistics Data to calculate work-life expectancy “unless there is evidence supporting a variation from the average”); Bureau of Labor Statistics, *supra* note 37, tbl.4.

48. See *Chamallas*, *supra* note 7, at 78–79.

49. See *id.*; see also *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 135 (E.D.N.Y. 2015); cf. *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 478 (5th Cir. 1984) (finding that absent evidence to the contrary, a statistically average work-life estimate should be used).

50. *KEETON ET AL.*, *supra* note 11, §127, at 945.

51. See DAMAGES IN TORT ACTIONS § 111.01 (MB rev. ed. 2023). The definition of a “survivor” is statutorily defined and can severely limit the categories of persons able to recover in the plaintiff's stead; *KEETON ET AL.*, *supra* note 11, §127, at 947.

however, some states restrict recovery for intangible losses such as pain, suffering, grief, or consortium.<sup>52</sup>

In the event of a wrongful death, statistical data is important evidence of the plaintiff's future capacity—in addition to an individual's health, habits, skills, and experience—and helps ensure accurate compensation by a trier of fact.<sup>53</sup> Without such data, an expert's ability to establish the full extent of the plaintiff's loss over their life expectancy or work-life expectancy would be severely hampered and likely attacked as conjecture.<sup>54</sup> Here, difficulties arise when a plaintiff has no established record of earnings, nor built a discernable reputation for their habits or character to be extrapolated toward future capacity.<sup>55</sup> Absent known characteristics of the individual, valuation invites greater reliance on statistical data—data that is stratified by race and gender.<sup>56</sup>

## II. CHALLENGING THE USE OF RACE & GENDER IN DAMAGE CALCULATIONS

This Note limits its scope to damage calculations for children and is not intended to argue the merits—or lack thereof—of using racially and gender-stratified actuarial tables in adult populations.<sup>57</sup> Notable scholars, legislators, and jurists have argued against the general use of race and gender-stratified actuarial data, and attempts have been made to codify measures that remove race and gender as a factor when calculating damages.<sup>58</sup> A brief survey of these theoretical arguments,

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52. See 9 DAMAGES IN TORTS ACTIONS, *supra* note 39, at § 111.01; *cf.* MO. ANN. STAT. § 537.090 (West 2020) (allowing recovery for economic loss in addition to loss of “consortium, companionship, comfort, instruction, [and] guidance . . .” but limiting any recovery for personal grief or bereavement caused by the death).

53. See 9 PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 43.08(4)(a) (MB rev. ed. 2022).

54. See generally 9 DAMAGES IN TORTS ACTIONS, *supra* note 39, at § 111.02(1) – (4) (discussing the economist's role in calculations of loss in wrongful death suits by first establishing a time frame to apply their estimates to).

55. See Chamallas, *supra* note 7, at 78; see generally KEETON ET AL., *supra* note 11, § 127, at 952 (discussing problems calculating pecuniary loss with persons not in the labor market).

56. See *Childs v. United States*, 923 F. Supp. 1570, 1578 (S.D. Ga. 1996); *Compare G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 135 (E.D.N.Y. 2015), with *Tarpeh-Doe v. United States*, 771 F. Supp. 427, 455 (D.C. Cir. 1991).

57. Specifically, this Note is intended to highlight the problems with using this data when calculating damages for children and provide a reasonable solution based on existing data that can be adopted with immediacy.

58. See Chamallas, *supra* note 7, at 122–23; see also Anderson, *supra* note 7, at 254–57.

significant judicial rulings, and statutory solutions are presented in Sections A–D that follow.

### A. Theoretical Constitutional Challenges

Since the 1990's, scholars have argued the use of race and gender-stratified actuarial data by experts testifying in regard to life expectancy, work-life expectancy, and wage potential violate the Fourteenth Amendment's Due Process and Equal Protection Clauses.<sup>59</sup> However, because the protections under the Fourteenth Amendment apply only to "state actions," these arguments have had difficulty gaining traction when the experts using this data are private individuals offering testimony before the court.<sup>60</sup> Notably, Jennifer Wriggins and Martha Chamallas have long argued that admitting expert testimony based on tables subdivided by race constitutes state action because the court is then endorsing the use of those statistics.<sup>61</sup> Critics of the theory that expert witnesses are endorsed as state actors point to the fact that experts' independent knowledge is not derived from the court—but rather from their expertise in a field of study—and that their private party testimony can be disregarded by the finder of fact.<sup>62</sup> Further, while the court controls the admission of the expert testimony as a gatekeeper, they do not control the extent of the testimony.<sup>63</sup> Last, critics of the state actor theory—proposed by Wriggins and Chamallas—

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59. See Chamallas, *supra* note 7, 104–22; Anderson, *supra* note 7, at 229–50.

60. U.S. CONST. amend. XIV, § 1; see *Shelly v. Kraemer*, 334 U.S. 1, 13 (1948) (noting "the 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"); see also Anderson, *supra* note 7, at 231.

61. Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263, 272 (2010); see Chamallas, *supra* note 7, at 105. While not intended to be an exhaustive list of the many scholars who have contributed to this area of law, Wriggins and Chamallas are highlighted for their long-standing dedication to the study of race, gender, and their impact on tort damage awards. See Avraham & Yuracko, TORTS, *supra* note 8, at 683; see also Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 348 (2018).

62. See Anderson, *supra* note 7, at 234–35 (citing *Tempel v. Murphy*, 30 A.3d 992, 1003 (Md. Ct. Spec. App. 2011) (finding the jury was able to consider the "totality of the evidence" including the "general population statistics" when determining the damage award)); FED. R. EVID. 702 advisory committee's note to 1972 proposed rule (expert testimony is only to assist the trier of fact in applying their knowledge to the facts of the case).

63. Anderson, *supra* note 7, at 238; see FED. R. EVID. 702; see generally *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149 (1999) (discussing expert witness' increased "latitude" to offer testimony given their experience in the discipline).

suggest that the adversarial process itself is a mechanism for fairness where opposing parties are free to proffer their own expert witnesses and let the finder of fact decide the fair allocation of damages.<sup>64</sup>

*B. Judicial Rulings Challenging the Use of Race & Gender Statistics*

In 2008, U.S. District Judge Jack Weinstein in *McMillan v. City of New York* found that “race-based statistics in estimating life expectancy for purposes of calculating damages” was impermissible.<sup>65</sup> Judge Weinstein felt that “[j]udicial reliance on ‘racial’ classifications constitutes state action” and thus was constitutionally questionable.<sup>66</sup> Seven years later, in *G.M.M. v Kimpson*, he expanded *McMillan*’s holding further to find “[t]he 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.”<sup>67</sup> Here, Judge Weinstein reinforced 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.”<sup>68</sup> Despite these holdings—and no expansion of this precedent—courts have continued to allow expert testimony permitting the use of race and gender-based statistics.<sup>69</sup> However, at least some courts are beginning to find this practice suspect.<sup>70</sup>

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64. See *Reilly v. United States*, 863 F.2d 149, 167 (1st Cir. 1988) (stating the district court was bound to hear testimony regarding work-life but not bound to accept it); see also *Polk Cnty. v. Dodson*, 454 U.S. 312, 318 (1981) (“The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.”).

65. *McMillan v. City of New York*, 253 F.R.D. 247, 255–56 (E.D.N.Y. 2008) (internal quotation marks omitted). The plaintiff—an African American male—was rendered a quadriplegic after a ferryboat crash. *Id.* at 248. To calculate damages based on life expectancy, the court refused to adopt race-based data to fix this value. *Id.* at 256.

66. *Id.* at 255.

67. *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015). Here, the plaintiff was a lead-poisoned child. *Id.* at 129. Both of his parents had bachelor’s degrees and the plaintiff’s mother had acquired a Master of Fine Arts degree. *Id.* The defendant’s expert attempted to show that because the plaintiff was Hispanic, he had a statistically lower chance of earning a postsecondary degree like his parents, thus substantially lowering his future earning potential. *Id.* at 135.

68. *Id.* at 149.

69. See Anderson, *supra* note 7, at 223.

70. See, e.g. *Reilly v. United States*, 863 F.2d 149, 167 (1st Cir. 1988) (“Death and taxes, arguably, may be certain; statistics, though often a valuable predictive aid, usually are not.”).

### C. Federal Attempts at Statutory Change

Since Judge Weinstein's ruling in *Kimpson*, three separate attempts have been made to introduce legislation at a federal level that would prohibit a court from awarding damages based on race, ethnicity, gender, religion, or actual or perceived sexual orientation—the last attempt being in 2023.<sup>71</sup> All four iterations of the Fair Calculations in Civil Damages Act required the Department of Labor to develop guidance for economists to develop future earnings tables that do not rely on legally protected classes from discrimination, and in conjunction with the Department of Justice, develop guidance for states on how to calculate future earnings in tort proceedings free from the aforementioned biases.<sup>72</sup> While none of these bills have made it out of their committee assignments, their continued reintroduction illustrates the need for attention to this area of tort damage calculation and its importance as a matter of public policy.<sup>73</sup>

### D. State Attempts at Statutory Change

Because tort law is state law, state legislatures are free to pass statutes reforming tort law within the state.<sup>74</sup> The oft-cited example of state legislatures overriding the common law of tort is the enactment in all fifty states of statutes capping specific damage categories in

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71. See Fair Calculations in Civil Damages Act of 2016, H.R. 6417, 114th Cong. (2016) (failed after being referred to Judiciary Subcommittee on the Constitution and Civil Justice); Fair Calculations in Civil Damages Act of 2016, S. 3489, 114th Cong. (2016) (as introduced in the Senate which failed to pass the Judiciary Committee); Fair Calculations in Civil Damages Act of 2019, 116 H.R. 4418, 116th Cong. (2019) (the 2016 Bill as reintroduced in the House but failing to pass the Judiciary Committee); Fair Calculations in Civil Damages Act of 2019, 116 S. 2512, 116th Cong. (2019) (the 2016 Bill as reintroduced in the Senate which failed to pass the Judiciary Committee); Fair Calculations in Civil Damages Act of 2022, H.R. 6758, 117th Cong. (2022) (as reintroduced in the House and failed to pass the Judiciary Committee); Fair Calculations in Civil Damages Act of 2023, H.R. 4980, 118th Cong. (2023) (as reintroduced and referred to the Judiciary Committee); Fair Calculations in Civil Damages Act of 2023, S. 2658, 118th Cong. (2023) (as reintroduced and referred to the Judiciary Committee).

72. See *id.*

73. *Id.*

74. See U.S. CHAMBER OF COM. INST. FOR LEGAL REFORM: HISTORY OF TORT REFORM, <https://institutelegalreform.com/history-of-tort-reform/> (last visited Feb. 18, 2023).

tort.<sup>75</sup> The states discussed below have adopted statutory measures in an attempt to reduce race and gender discrimination in civil damage awards.

In 1997, North Carolina codified a life table in its evidence statutes that eliminated racially and gender-stratified data—now a blended average of all persons—to establish life expectancy.<sup>76</sup> The blended North Carolina table is admissible when there is a need to estimate life expectancy and is to be considered alongside other factors such as the “health, constitution, and habits” of the injured party.<sup>77</sup> States such as South Carolina and Virginia codified tables that eliminate race but still use gender-stratified data to establish life and work-life expectancy.<sup>78</sup>

California and New Jersey have taken a different statutory approach. In 2020, California enacted a new law that stated, “[e]stimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender.”<sup>79</sup> The California Legislature expressly recognized that experts’ reliance on the Bureau of Labor Statistics data can undervalue women and minorities, “including children who have not yet had the opportunity to work or identify career options” [emphasis added].<sup>80</sup>

New Jersey passed a similar law in January 2022 but also included language prohibiting the use of statistical tables alone in calculating damages in a civil action unless agreed upon by all parties to the action.<sup>81</sup> In 2021, New York had an analogous bill introduced in the Senate; however, it did not make it past a chamber vote.<sup>82</sup> Like

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75. See Ronen Avraham, *Database of State Tort Law Reforms* (7.1), Univ. of Tex. L., L. & Econ. Rsch. Paper No. e555, <https://ssrn.com/abstract=902711> (last revised Oct. 27, 2021).

76. N.C. GEN. STAT. § 8-46.

77. *Wachovia Bank & Tr. Co. v. Atl. Greyhound Lines*, 186 S.E. 320, 321 (1936); see also N.C. GEN. STAT. § 8-46.

78. S.C. CODE ANN. § 19-1-150; VA. CODE ANN. § 8.01-419.

79. CAL. CIV. CODE § 3361.

80. *Id.* at ch. 136, § 1.

81. N.J. STAT. ANN. § 2A:53A-5.1.

82. AN ACT TO AMEND THE CIVIL PRACTICE LAW AND RULES, IN RELATION TO JUDGMENTS, S. 1068 (N.Y. 2021). In addition, the Pennsylvania House of Representatives had a similar bill introduced in 2019, however, it did not make it out of the Judiciary Committee. AN ACT AMENDING TITLE 42 (JUDICIARY AND JUDICIAL PROCEDURE) OF THE PENNSYLVANIA CONSOLIDATED STATUTES, IN PRELIMINARY



California, the New York Legislature cited to a survey by the National Association of Forensic Economics where approximately half the respondents said that they consider race, and over 90% would consider gender when providing expert testimony for a damages calculation.<sup>83</sup>

### III. ACCURATELY MAKING A CHILD “WHOLE” THROUGH TORT DAMAGES

The following sections detail why a child can never be made fully “whole” after an injury resulting in their permanent loss, disability, or wrongful death without compensating them for their unrealized future capacity. Section A expands on this statement and is followed by Section B that details how psychological resiliency theory offers a way to capture this unrealized future capacity and incorporate it in a child’s compensatory award. Section C then demonstrates how the foundational purposes and functions of tort law embrace including this unrealized future potential in a child’s damage calculations.

#### A. *What Makes a Child “Whole”?*

Generally, the younger the child, the greater their unrealized potential.<sup>84</sup> As they gain maturity, their growing knowledge of the world begins to shape their desires, interests, and path into adulthood.<sup>85</sup> The question becomes, what factors should be considered about a child in order to assign a value for the purposes of compensation in tort? In the opening hypothetical, are ten-year-old Kourtney or Ryan a statistical representation of their future capacity based on their race, gender, and current circumstances in life?<sup>86</sup> Likely, one might feel more comfortable providing an answer the closer Kourtney or Ryan are to the age of majority and less comfortable providing an answer the closer they are to infancy. Therein lies the problem with using statistical data based on race and gender. Blending all racial and gendered data or

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PROVISIONS, PROVIDING FOR PROHIBITION ON REDUCTION OF DAMAGES, H.B. 2726 (PA 2019).

83. *Id.*; see also Michael L. Brookshire et al., *A 2009 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, 21(1) J. FORENSIC ECON. 5, 11 (2009).

84. See Avshalom Caspi et al., *Children’s Behavior Styles at Age 3 Are Linked to Their Adult Personality Traits at Age 26*, 71(4) J. PERSONALITY 495, 511–12 (2003) (linking certain early behavioral traits exhibited by toddlers to personality traits still persistent as an adult).

85. *Id.* at 496.

86. *See id.*

prohibiting its use—when calculating damage awards for children—is the best way to encompass their undetermined future capacity in any compensation awarded. As U.S. District Judge John F. Nagle stated in *Childs v. United States*:

Valuing the life of a human being is . . . a profoundly difficult task and is made all the more difficult in these cases by the fact that there is no clear economic loss associated with the deaths of [children] . . . Thus, the mathematical precision by which all [the] experts value the economic loss associated with [children's] deaths is illusory . . . .<sup>87</sup>

*B. Reflecting the Resiliency of Children as a Matter of Policy*

Some modern psychologists have adopted Dr. Norman Garmezy's resiliency theory to establish a predictable baseline for a child's future behavior as an alternative to the use of statistics based on race and gender.<sup>88</sup> Resiliency theory can be distinguished from the traditional use of statistical analysis to establish the baseline for a child's damages in that "it starts from the proposition and expectation that there are kids in families from very adverse situations who really[sic] do beautifully, and seem to rise to the top of their potential . . . ."<sup>89</sup> Essentially, the value of other sources of data about a specific child is prioritized over a statistical prediction based on race and gender.<sup>90</sup>

As Judge Weinstein stated in *Kimpson*, resiliency theory is a useful framework on three levels:

First, it identifies concrete factors—other than race—that indicate a likelihood of success despite adverse conditions. Second, the multitude of resiliency literature confirms that predictions about what a child is likely to become are enormously

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

88. See Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENV'T. AFF. L. REV. 429, 453–54 (2001); Jon E. Rolf, *Resilience: An Interview with Norman Garmezy*, in RESILIENCE AND DEVELOPMENT: POSITIVE LIFE ADAPTATIONS 5 (Meyer D. Glantz & Jeannette L. Johnson eds., 1999).

89. Greenberg, *supra* note 88, at 454 (internal quotation marks omitted); see generally Howard B. Kaplan, *Toward an Understanding of Resilience: A Critical Review of Definitions and Models*, in RESILIENCE AND DEVELOPMENT: POSITIVE LIFE ADAPTATIONS 17, 19 (Meyer D. Glantz & Jeannette L. Johnson eds., 1999) (noting that resiliency and ability to overcome stressors are diametrically opposed to vulnerability and one's tendency to succumb to stressors).

90. Greenberg, *supra* note 88, at 442–45.

speculative. And third, resiliency theory provides a theoretical alternative to the devaluation of racial minorities by starting with the optimistic assumption that children are very much capable of succeeding beyond the averages and against the odds.<sup>91</sup>

By identifying factors that pose “risk” and factors that are “protective” for a child’s development, resiliency theorists focus on individual characteristics, attributes, and the facts that exist under a set of specific conditions when assessing a child’s potential.<sup>92</sup> Further, by beginning with the premise that children are not mere statistical representations of all members of a class based on their racial and gender profiles, resiliency theory avoids fatalistic assumptions in assigning a determinate future to a child that has unrealized potential.<sup>93</sup> While it is critical for experts to base testimony regarding life expectancy, work-life expectancy, and wage potential on a subset of objective data, resiliency theory expands an expert’s ability to consider more than a statistical average based on race and gender; *the circumstances in which the child resides have a profound impact on their ability to succumb, or to adapt and overcome.*<sup>94</sup>

Some may argue that incorporating this data is speculative at best; however, courts often recognize that a child’s undeveloped potential—given their surrounding circumstances—is a valuable consideration when determining their ultimate future damages calculation.<sup>95</sup> Using resiliency theory offers a way for child plaintiffs to avoid being valued by their stereotypical actuarial class—and the past achievements of their family members—but offers an opportunity to be valued based on who they may become as developing humans.<sup>96</sup>

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91. *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 153 (E.D.N.Y. 2015) (quoting Greenberg, *supra* note 88, 453–54).

92. *See* Greenberg, *supra* note 88, at 455. Factors associated with “risk:” individual attributes, individual characteristics, situational condition, environmental context. *Id.* Factors associated with “protective:” individual characteristics, environmental characteristics, intelligence, social skills, disposition, personality, parental attachment, educational opportunities. *Id.*

93. *See id.* at 457.

94. *See generally id.* at 456–57 (emphasis added) (noting that full reliance on statistical data is unreliably discriminatory and resiliency theory offers a way to incorporate other factors into the baseline calculation).

95. *See id.* at 457; *see also* *Bulala v. Boyd*, 389 S.E.2d 670, 670 (Va. 1990) (finding that “statistical averages are too remote from the plaintiff’s personal situation” to provide an accurate base to estimate damages from).

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

### *C. Foundational Tort Theories Support Resilient Policy*

In order to substitute resilient factors over actuarial data when calculating a child's damages, it must be supported by the major foundational theories that drive the function and purpose of tort law.<sup>97</sup> Of those outlined in Part I, Section A, all would seem to favor a policy of eliminating racial and gendered factors when calculating a child's damage award.<sup>98</sup> While there may be some merit to the inclusion of this data in adult populations, the inclusion of these factors when calculating a child's damage award is socially unreasonable. In subsections 1–4 that follow, each is considered in turn and likely criticisms addressed. Even if the initial argument is facially unpersuasive, promoting a policy that values the resiliency of a child to overcome racial and gender factors outweighs any negative burden placed on the tort system in return.

#### *1. Resiliency & the Compensatory Purpose of Tort*

Tort law's compensatory purpose is best served when considering the individual and their circumstances, then providing a monetary calculation representing the accurate value of the harm caused to that individual.<sup>99</sup> Yet, due to the unknown nature of a child's future capacity, making this calculation for them is largely speculative and its methods illusory.<sup>100</sup> If data stratified by race and gender is the statistical cornerstone of a calculation that grounds a child in their current reality, a damage award cannot be said to encompass their resilient capacity to change future circumstances.<sup>101</sup> While opposition may come in the form of challenging the accuracy of determining the resilient capacity of a child, it may be considered equally as inaccurate to dismiss this capacity when looking to make a child "whole." If neither approach can be deemed 100% accurate, the compensatory purpose may best be fulfilled by accurately recognizing a child's potential for future capacity development that is unburdened by retrospective statistics.

#### *2. Resiliency & the Distributive Function of Tort*

Likewise, proponents of the distributive justice theory in tort would seem to favor the blending or removal of race and gender-based

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97. See generally Greenberg, *supra* note 88 (discussing substituting resilient factors for actuarial data).

98. See *supra* Part I.A.

99. See *supra* note 11, 12.

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

101. See *supra* Part III.B.

data when considering a child's damage award.<sup>102</sup> Once a blended average is used, the future risk in predicting a child's potential is spread amongst all children of the same age.<sup>103</sup> This promotes fairness and not only reduces the primary cost of injuries, but also mitigates the secondary impacts that may be higher for parties in different racial and gender stratifications.<sup>104</sup> Equally, the egalitarian goal aligns with the elimination of race and gender factors being associated with a child's damage calculation because it would reduce the chances that statistically disadvantaged groups receive decreased compensation for equal harm.<sup>105</sup> Critics may suggest that the blending or removal of racial and gendered data may disproportionately burden one class of individuals at the expense of another, such as reducing the statistical life expectancy of one racial and gendered group to that of the blended average.<sup>106</sup> However, recognizing a policy of resiliency would remove this stereotypical categorization in favor of considering each child's individual propensities.<sup>107</sup> The individual characteristics of a child and other relevant circumstances could always be introduced to show a positive or negative deviation away from any blended norm.

### 3. Resiliency & the Deterrent Function of Tort

The overall deterrent function of tort is improved by removing factors associated with race and gender when calculating damage awards for children. While economically efficient behavior discourages unwanted risky behaviors, it can also encourage perverse *ex ante* behaviors—associated with private liability—that are economically

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102. Avraham & Yuracko, TORTS, *supra* note 8, at 695; *cf.* Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 215 (2000) (discussing the use of liability insurance as spreading of loss throughout a community of actuarially similar victims may not shift the balance for fair apportionment of risk to individual members).

103. Keren-Paz, *supra* note 14, at 277.

104. Avraham & Yuracko, TORTS, *supra* note 8, at 693 (discussing “secondary accident costs” as a burden that is higher for “disadvantaged groups”).

105. *Id.* at 694; *see also* Keren-Paz, *supra* note 14, at 288 (outlining the basic justifications for the application of egalitarian principles in tort).

106. *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 153 (E.D.N.Y. 2015) (positing that in the case of damages “[i]ndividuals in [racial and ethnic] group[s] would do better if they were treated as individuals on the basis of their individual characteristics”).

107. *See supra* Part III.B.

efficient as well.<sup>108</sup> As Judge Weinstein discussed in *Kimpson*, “because it is *cheaper* to injure poor minority children [given their lower damage awards]” the economic incentive to place the risk on this population is high—thus deterring risk from one group causes the targeting of another.<sup>109</sup> By eliminating the use of racial and gendered statistics in tort damage awards, states can promote optimal deterrence *for harm caused to all children* and eliminate economic targeting behaviors.

The now infamous PCB (polychlorinated biphenyls- a known carcinogen) toxic dumping site located in Warren County, North Carolina is an example of how economic efficiency associated with private liability can encourage the targeting of already marginalized groups.<sup>110</sup> In 1978, the state of North Carolina announced—without prior notice to citizens—its decision to bury soil contaminated with PCB in a newly constructed toxic waste dump in Warren County.<sup>111</sup> The State’s decision to bury the soil was the most cost-effective method of disposal the Environmental Protection Agency (EPA) would allow.<sup>112</sup> After examining ninety potential landfill sites—none of which were environmentally suitable—the EPA waived two safety regulations and allowed the dump to be constructed in Warren [where the water table was only five to ten feet below the dump’s soil].<sup>113</sup> Of note, Warren County was majority black, significantly poorer per capita than the rest of the state, the township near the landfill was unincorporated [without a mayor or city council], and had no interstate connectivity to promote economic development.<sup>114</sup> Warren County was economically targeted as the most efficient means for PCB disposal because its residents were “mostly black, poor, rural, and

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108. See CALABRESI, *supra* note 16, at 245 (discussing that companies are economically incentivized to target the “cheapest” populations in the event of private liability).

109. See *Kimpson*, 116 F. Supp. 3d, at 143. (emphasis added) (quoting Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1441 (2005)).

110. See e.g. Robert D. Bullard & Beverly Wright, *Disastrous Response to Natural and Man-Made Disasters: An Environmental Justice Analysis Twenty-Five Years after Warren County*, 26 UCLA J. ENVTL. L. & POL’Y 217, 223–24 (2008).

111. Jenny Labalme, *From the Archives: Dumping on Warren County*, FACING SOUTH (Sept. 30, 2022), <https://www.facingsouth.org/2022/09/archives-dumping-warren-county>.

112. See *id.*

113. *Id.*; see Bullard & Wright, *supra* note 110, at 223.

114. See Labalme, *supra* note 111; Bullard & Wright, *supra* note 110, at 223.

politically powerless.”<sup>115</sup> Specifically, Warren County’s racial and economic makeup were factors that caused them to be targeted because it was not only the cheapest place to bury the soil, but also the “cheapest” place in terms of political capital and ability to effectuate resistance to the disposal site.<sup>116</sup> Eliminating race as a factor that could decrease private liability would improve the deterrent function of tort.

#### 4. Resiliency & the Corrective Justice Function of Tort

While corrective justice theorists may argue that the use of race and gender-stratified statistics are necessary to ensure accurate redress of the injustices inflicted on adults, their argument becomes weaker when applied to children.<sup>117</sup> A child cannot be accurately compensated for their loss when their future capacity for earned income, health, and ambition is uncertain.<sup>118</sup> Factors such as race and gender are not as statistically influential when a child is given an equal chance to determine their future and not held to the standard of their actuarially similar “forefathers.”<sup>119</sup> In *Migdal Ins. v. Rim Abu Hanna*, the Israeli Supreme Court held that damages for an injured child’s loss of earning capacity should be computed by looking at the national average regardless of the child’s race, gender, or ethnicity.<sup>120</sup> They found that to make a child “whole,” the child should not be returned to the circumstances in which they were found, but they should be restored “to a place destined for [them] in the future.”<sup>121</sup>

In *Childs v. U.S.*, a postal truck struck and killed a young girl (passenger), a woman, and that woman’s unborn child.<sup>122</sup> Witnesses for the young girl testified that she was an “excellent” first-grade student, exhibited a level of intellect beyond that of her peers, and was mature and respectful for her age.<sup>123</sup> The unborn child—a male—would have been born to a mother who had attended some college,

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115. Bullard & Wright, *supra* note 110, at 224.

116. *See id.* at 223; *see also* Labalme, *supra* note 111 (noting a 1982 report by the U.S. General Accounting Office that the majority of landfills in the southeastern United States are located in below poverty level, black communities)

117. *See* Avraham & Yuracko, TORTS, *supra* note 8, at 693.

118. *See id.* at 693–96.

119. *See id.*; *see also* Rivlin, *supra* note 21, at 22; *Migdal Ins. v. Rim Abu Hanna*, (2005) CA 10064/02 (IsrSC).

120. *Migdal Ins. v. Rim Abu Hanna*, (2005) CA 10064/02 (IsrSC).

121. Rivlin, *supra* note 21, at 22 (quoting *Migdal Ins. v. Rim Abu Hanna*, (2005) CA 10064/02 (IsrSC)).

122. *Childs v. United States*, 923 F. Supp. 1570, 1572 (S.D. Ga. 1996)

123. *Id.* at 1573.

was a successful manager at a large grocery chain, and was active in her local church.<sup>124</sup> In valuing the losses suffered by the young girl and unborn male child, the government's expert attempted to devalue the decedents' damages based on historical averages associated with the decedents being black and characteristics associated with their actuarial propensities.<sup>125</sup> The court rejected this argument, stating that not only was it profoundly difficult to value a human life, but this difficulty is magnified in determining a child's losses when they have not established their potential, nor a standard by which to measure economic loss.<sup>126</sup> Embracing the principle of corrective justice, the court found the children's individual, parental, and developmental characteristics were a more accurate representation of their future capacity than statistical averages associated with their race.<sup>127</sup>

#### IV. FINDING THE RIGHT LEGAL SOLUTION TO MAKE A CHILD "WHOLE"

Ultimately, tort damage calculations for children that involve factors such as life expectancy, work-life expectancy, and wage potential should be centered on a policy that recognizes resiliency theory and a child's unrealized future potential. The correct tool must be utilized in order to effect wide-sweeping and immediate change within the American legal system. Section A outlines why a constitutional ban on the use of race and gender in damage calculations seems unlikely, and Section B provides a statutory mechanism for states that would reduce the discriminatory effect of race and gender in a child's damage calculation.

##### *A. Further Constitutional Prohibition Appears Unlikely*

Widespread adoption of the aforementioned constitutional arguments against the use of racially and gender-stratified actuarial data has gained little traction nationwide outside the theoretical sphere.<sup>128</sup> Judge Weinstein's profound ruling in *Kimpson* has not been directly followed by other courts, with the exception of some courts concurring in the practical outcome.<sup>129</sup> Further, when the application of race-

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124. *Id.* at 1573–74.

125. *Id.* at 1578.

126. *Id.* at 1579.

127. *Childs*, 923 F. Supp. at 1584–85.

128. *See supra* Part II.A.

129. *See e.g.* B.A. v. Sec'y of HHS, No. 11-51V, 2021 U.S. Claims LEXIS 2164, at \*42 (Fed. Ct. Cl. Sept. 7, 2021) (citing *Kimpson* and agreeing that work-



based statistics was ruled unconstitutional in *Kimpson*, it involved the application of those statistics to the damage award of a four-year-old child.<sup>130</sup> Perhaps, the argument for removing this statistical data from an adult's damage calculation is less compelling given that the data may accurately represent an average adult in certain actuarial categories.<sup>131</sup> Accurate compensation is dependent upon not over or undervaluing the victim.<sup>132</sup>

For example, in 2020 the average remaining life expectancy for a fifty-year-old black man was 24.3 years, whereas the average remaining life expectancy for a white man of the same age was 28.8 years.<sup>133</sup> If the average life expectancy for all fifty-year-old men were considered—without subdividing by race or ethnicity—the number would be 28.4 years.<sup>134</sup> Further, considering the average life span for all individuals aged fifty in the United States, this number increases to 30.4 years.<sup>135</sup> The problems with over or undervaluation become quickly apparent and run counter to the basic premise of a compensatory damage award in tort.<sup>136</sup> Additionally, constitutional solutions may be impaired by factors such as socioeconomic status which has been shown to be confounded by race.<sup>137</sup> If the reduction in a damage award based on race is declared unconstitutional, likely challenges will surface against the inclusion of socioeconomic data as well. Across all racial and gendered categories, the affluent may be undervalued while the indigent may unduly benefit. Even recognizing the inherent resiliency of children to overcome these statistically predictive values, the problems associated with accuracy in valuation serve as a likely barrier to a constitutional prohibition against the use of race and gender-based statistics in tort damage calculations.

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life expectancy calculations should not be reduced based on protected characteristics such as race and gender).

130. *G.M.M. v. Kimpson*, 116 F. Supp. 3d 126, 129, 152 (E.D.N.Y. 2015)

131. *See supra* Part I.B.1.

132. *See supra* Part I.A.

133. *Arias & Xu*, *supra* note 37, at tbl. A. Notably, this hypothetical used for illustrative purposes controls for no other factors unique to an individual plaintiff's circumstances, but simply equivalates them based on life expectancy.

134. *Id.*

135. *Id.*

136. *See supra* Part I.A.

137. *See* David R. Williams et al., *Race, Socioeconomic Status and Health: Complexities, Ongoing Challenges, and Research Opportunities*, 1186 ANNALS N.Y. ACAD. SCI. 69, 74 (2010) (finding that socioeconomic indicators are “strongly patterned by race”).

*B. State Statutory Reform: Promoting Equality in Damage Awards for Children*

Given the successful enactment of state versus federal legislation to prohibit discrimination in the calculation of certain civil damages, state statutory reform is the most targeted and politically efficient means to promote equality in children's damage awards and recognize their resiliency.<sup>138</sup> Specifically, states should adopt a two-part Child Actuarial Resiliency and Equality Act (We CARE Act) that includes a state-specific codified life table—using race and gender-blended data—to be used by all expert witnesses in state court. This legislation would include language that would prevent a child's damage award from being reduced by factors such as race, ethnicity, or gender.<sup>139</sup>

*1. We CARE Act Part I: State-Specific Blended Life Table*

Mandating one blended state-specific life table would ensure that *all* damage calculations involving the life expectancy of a child begin with the same set of data. Individualized state data for life expectancy—regardless of race or gender—should reflect the average child represented in the state's population. Using data unique to an individual state's population reflects their demographic makeup and minimizes the disparities between life expectancies that could be attributed to climate, culture, general socioeconomic status, and majority urban versus rural populations.<sup>140</sup> This data regarding state-specific life expectancy is already collected and compiled by the U.S. Department of Health and Human Services (HHS) and published with decennial census data.<sup>141</sup> Thus, the information is readily accessible and already

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138. *Cf. supra* Part II.D; *supra* Part II.C.

139. Utilizing a state-specific blended life table—similar to North Carolina's approach—establishes a baseline number for a child's life expectancy independent of their race or gender. *See supra* text accompanying note 71. However, this does not stop race and gender-based actuarial data from *later* being used to devalue a damage award. The statutory language proposed below strengthens and clarifies the measure adopted in California, while specifically targeting its application to minors. *Cf. supra* text accompanying note 75. This effectively eliminates any other use of race and gender-based data from being used to devalue a child's damage award.

140. *See* Arias & Xu, *supra* note 37, at tbl. A. Hawaii is ranked first amongst the states (including the District of Columbia) with an average life expectancy of 80.7 years, while Mississippi is ranked last with an average life expectancy of 71.9 years.

141. *See* Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2020*, 71(2) NAT'L VITAL STAT. REPS., Aug 23, 2022.

computed. Similar to North Carolina's approach, mandating the use of this life table for children—by either adversarial party—shifts the focus off race and gender and onto the individual's characteristics.<sup>142</sup> By codifying this table for use with children, states promote a policy of resiliency that negates nationwide statistical differences in race and gender when a child has yet to embark on a more determinate future path. In doing so, all children are deemed equally worthy as a baseline measure by the state before their choices as an adult affect their health outcomes and lifespan.

Critics of using a blended life table when calculating children's damages would likely attack the accuracy of such a table to reflect an individual child.<sup>143</sup> Further, overvaluing or undervaluing an individual child could be said to go against the corrective justice function of tort law and base compensation on an inaccurate picture of the individual.<sup>144</sup> Additionally, critics may argue that the use of blended tables causes harm to classes of individuals whose calculated life expectancy may be lowered by the use of averaged data.<sup>145</sup> While these arguments have some merit, these criticisms are logically countered by questioning if race and gender are indeed determinate factors when evaluating a child's future capacity. Their argument negatively presupposes that because of a child's race or gender, there is little chance they would succeed beyond the averages associated with these characteristics. Benefits flowing from the use of a blended life table outweigh any negative impacts, and their use is supported by the foundational theories behind tort law.<sup>146</sup> The weight of the critic's arguments is rendered *de minimis* when one considers that a blended table only ensures that all expert witnesses start their valuation of life expectancy from the same point, but it does not prevent experts from considering other factors that might increase or decrease that value.<sup>147</sup>

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142. *See supra* Part II.D.

143. *See supra* Part IV.A (discussing the inherent problems with overvaluing and undervaluing adults when using blended statistics).

144. *See supra* Part I.A.

145. *See supra* Part IV.A (discussing the statistical differences in life expectancy amongst fifty-year-old men, which can be extrapolated to a much younger child); Arias & Xu, *supra* note 37, at tbl. A.

146. *See supra* Part III.C.

147. *See supra* Part I.B.

## 2. *We CARE Act Part II: Resilient Policy*

A state's Child Actuarial Resiliency and Equality Act should further include the following prohibition:

In a civil action in which damages are awarded to a minor for a physical injury or wrongful death, the following factors shall not be used to reduce any estimations, measures, or calculations involving the amount of damages awarded to a minor: race, ethnicity, or gender.

While still allowing for expert testimony on factors that might increase or reduce a child's damage award, states would be expressly disavowing the use of racial or gendered factors to diminish its value. Given their minority—and unknown future capabilities—evidence of a child's prospective capacity would then shift toward their resilient individual characteristics and focus less on the past achievements of actuarially similar individuals.<sup>148</sup> While some states may limit the future annual pecuniary loss, due to a child's death, to calculations based on the parent(s)' annual income, this legislation would effectively bar evidence that a child could not excel beyond this capacity based on racial or gendered factors.<sup>149</sup> Further, while some states may wish to add additional protected statuses to the statutory language, current data collected by HHS is only stratified by race, ethnicity, and gender.<sup>150</sup> Should HHS begin additional categorization of population data, further development may be warranted.

Again, critics of this component in the legislation will likely attack its accuracy to a specific plaintiff and its lack of economic efficiency for defendants. While the accuracy argument is addressed in Subsection 1 above, economically efficient activity is also said to deter unwanted *ex ante* behaviors.<sup>151</sup> If all defendants knew that racial or gendered factors could not be used to reduce a child's damage award

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148. See generally Greenberg, *supra* note 88, 457 (“Statistical averages and examinations of the plaintiff's family assume that the child will not succeed beyond the predicted averages for education, socioeconomic status, and vocational opportunities.”).

149. *E.g.* MO. REV. STAT. § 537.090 (West 2022) (“If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of death shall be calculated based on the annual income of the deceased's parent[s]...”) (HB 2573 pending a committee hearing: would modify the deceased future earning capacity to one hundred and ten percent of the state average weekly wage).

150. Arias & Xu, *supra* note 37, at tbl. A

151. See *supra* Part III.C.3.

in tort, it would improve the deterrence of any behavior targeting these statistically “cheaper” groups. While some may find this redistributive, this legislation would not limit a party’s expert from considering other factors that might reduce a child’s damage award—only those based on racial or gendered statistics. Promoting greater societal deterrence outweighs monetary burdens imposed on individual defendants.

Additionally, critics may oppose this measure because defendants will be disproportionately faced with higher costs in judgments. However, allowing a child’s damages to be devalued by racial or gendered factors only shifts the defendant’s monetary burden to other public or private services. It further promotes stereotypical racial and gendered roles.<sup>152</sup> Recognizing the resilient capacity of children, in turn, promotes their resilient capability to rise beyond these stereotypical roles.<sup>153</sup> Racial and gendered stereotypes “are not, *and should not*, be determinant” of a child’s future capacity.<sup>154</sup> For a child to accurately be made “whole,” states must adopt a policy that reflects the resiliency of a child and can compensate them for this capacity.

#### CONCLUSION

Returning to the opening hypothetical with ten-year-old Kourtney and Ryan, under the proposed legislation, experts evaluating their respective life expectancies would mandatorily use state-specific data based on their age-related peers—regardless of their race or gender. Any statistical data associated with race or gender could not be offered as evidence to potentially reduce their awarded damages. Regardless of how the variables in the hypothetical are manipulated, the impact of the proposed legislation is significant for both children. Their compensation would be less dependent on their statistical forefathers but more focused on their individual future potential.

While many solutions to using race and gender-based statistics in damage calculations have been proposed,<sup>155</sup> this model for legislation is unique in its two-part nature and exclusive focus on children. This approach combines a codified life table and statutory prohibition to ensure that race and gender are not used to devalue a child’s damage

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152. See generally Greenberg, *supra* note 88, at 456–57 (noting that full reliance on race-based statistical data remains unreliably discriminatory).

153. See *supra* Part III.B.

154. G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015) (emphasis added); see *supra* Part III.C.

155. See *supra* Part II; see also *supra* note 6, 7.

award at any point of calculus. While the continued use of race and gender-based statistics may be deemed suspect for all persons, states adopting We CARE legislation clearly demonstrate that all children are worthy of equal protection and compensation under their laws.