

April 26, 2019

National Association of Forensic Economics
Board of Directors
P.O. Box 394
Mount Union, PA 17066

Attn: President Kevin E. Cahill, Executive Director Marc A. Weinstein, Vice President Christopher Young, Vice President Michele Angerstein-Gaines, Vice President William H. Rogers, Vice President Christina P. Tapia, Vice President Jerome S. Paige, Vice President David Tucek

Re: Use of Damages Tables that Discriminate Against Women and People of Color

The signatories to this letter are deeply concerned about the unfair consideration of race, ethnicity, and gender by forensic economists in future earnings modeling. The use of statistics based on race and gender can produce substantially smaller damages awards for plaintiffs who are women and people of color. We respectfully submit this letter to urge the National Association of Forensic Economics (“NAFE”) to take an official position against the use of race- or gender-based statistics that result in awards below what a similarly situated white man would receive. We urge NAFE to reject the egregiously flawed premise that the lives of people of color and women are worth less than those of white men. While forensic economists may not intend to use race- or gender-based statistics to perpetuate overt bias, the use of these statistics reinforces structural inequalities and perpetuates discrimination. It is imperative for the Association to firmly oppose the perpetuation of these inequalities and discrimination, and to ensure that its members do not devalue the lives of women and people of color simply due to their gender and/or race.

In wrongful death and disability cases (among many others), parties often rely on forensic economists to determine damages by modeling a victim’s expected life earnings. In these cases, forensic economists frequently and explicitly consider the race and gender of the victim when creating the models. The models’ use of historical data often results in lifetime earnings projections for women and people of color that are significantly lower than those for white men, largely due to pervasive race- and gender-discrimination in housing, employment, healthcare, and myriad other factors. As a direct result of this type of modeling, people of color and women receive smaller damages awards and settlements solely *because of* their race and/or gender. Perversely, this problem is exacerbated when the person injured or killed is a child. When adult workers are killed or injured, courts can incorporate facts about those individuals’ work and education history in calculating awards. But because children have not yet entered the workplace, courts tend to rely heavily on economists’ projections of future earnings, and those projections are necessarily more heavily focused on demographic features than on non-existent earnings history. As a consequence, damages are smaller for girls and children of color, as compared to white boys.

The practice of considering race and gender when modeling future earnings is contrary to the tenets of equality that are embedded in our Constitution. As the Supreme Court noted, “[a]t the heart of the Constitution’s guarantee of equal protection lies the simple command that the

Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Relying on expert opinions that use race or gender to calculate lower damages amounts violates this guarantee because those opinions treat plaintiffs as simply members of a racial or gender class, rather than as individuals. Many older court cases,¹ and indeed, every court to consider this issue over the past two decades, has denounced the practice.² Moreover, public opinion is squarely against this practice: a 2016 Washington Post article criticized the improper use of race and gender in forensic damage calculations,³ and the 9/11 Victim Compensation Fund drew public outcry when it initially proposed to consider gender in calculating awards.⁴ More recently, in 2018, the Lawyers’ Committee for Civil Rights Under Law published a comprehensive report shedding light on this discriminatory practice.⁵

Despite these court rulings and this public sentiment, the discriminatory practice of considering race and gender in future earnings calculations remains prevalent. According to NAFE’s 2009 triennial Survey of Forensic Economists in the *Journal of Forensic Economics*, 44% of responding economists used race and 90% used gender when calculating lost wages for purposes of litigation.⁶ In NAFE’s 2014 journal, Drs. Krueger and Slesnick wrote a paper showing that the estimated total working years for the lifetimes of both men and women are nearly equal when accounting for non-market work, thus proving the inaccuracy—as well as the

¹ *Reilly v. U.S.*, 863 F.2d 149, 167 (1st Cir. 1988) (upholding district court’s decision in a bench trial not to follow tables that discriminate based on race); *Drayton v. Jiffee Chem. Corp.*, 591 F.2d 352, 368 (6th Cir. 1978) (acknowledging defendant’s statistics showing lower earnings for women and black people, but determining that those disadvantages will have considerably less impact in the future); *Caron v. U.S.*, 548 F.2d 366, 371 (1st Cir. 1976) (refusing to distinguish between genders for damages award); *Childers v. Sec. of Health & Human Servs.*, No. 96-194V, 1999 WL 218893, at *17-18 (Fed. Cl. Mar. 26, 1999) (concluding that some women’s historical choice to spend several years out of the workforce to raise children is “irrelevant” to a particular victim’s future damages calculation); *Wheeler Tarpeh-Doe v. U.S.*, 771 F. Supp. 427, 455-56 (D.D.C. 1991) (“[I]t would be inappropriate to incorporate current discrimination resulting in wage differences between the sexes or races or the potential for any future such discrimination into a calculation for damages resulting from lost wages.”); *Reilly v. U.S.*, 665 F. Supp. 976, 997 (D.R.I. 1987) (refusing to apply expert’s proposed 40% reduction to estimate of woman’s work life based on gender, because statistics from 1978-80 on women’s employment patterns were inaccurate in the 21st century).

² *U.S. v. Serawop*, 505 F.3d 1112, 1125-26 (10th Cir. 2007) (upholding district court’s use of statistics that were not based on race or gender and quoting the district court’s observation that “[a]s a matter of fairness, the court should exercise its discretion in favor of victims of violent crime and against the possible perpetuation of inappropriate stereotypes”); *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 152-54 (E.D.N.Y. 2015) (holding race-based damages calculations unconstitutional); *McMillan v. City of New York*, 253 F.R.D. 247, 255-56 (E.D.N.Y. 2008) (same); *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1315-19 (D. Utah 2004) (rejecting the use of race- and sex-based tables on fairness grounds and discussing the case law at length).

³ <https://www.washingtonpost.com/graphics/business/wonk/settlements/>.

⁴ See Martha Chamallas, *The September 11th Victim Compensation Fund: Rethinking the Damages Element in Injury Law*, 71 TENN. L. REV. 51, 69-71 (2003) (discussing the special master’s decision not to distinguish 9/11 Fund compensation awards by gender).

⁵ Dariely Rodriguez & Hope Kwiatkowski, *How Race, Ethnicity, and Gender Impact Your Life’s Worth: Discrimination in Civil Damages Awards*, LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW (July 2018), available at https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf.

⁶ Michael L. Brookshire, Michael R. Luthy, and Frank L. Slesnick, “A 2009 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives,” *Journal of Forensic Economics*, 21(1), 2009, pp. 5-34. NAFE did not ask this question on its 2015 survey

unfairness—of gender-based tables for damages.⁷ The legal community has similarly criticized the practice for years.⁸

To be clear, the fact that white men have historically earned more than women or people of color is traceable to a history of discrimination, not to intrinsic characteristics. We have a collective responsibility to reduce these disparities to create a more fair and equal society for everyone. However, using race- and gender-based statistics to calculate damages works against these goals. By using historical data that reflect the harm to women and people of color in past years, economists perpetuate existing inequities and hinder progress towards a more just future.

Due to the inherent injustice of diminishing the lives of female victims and victims of color, we call upon the NAFE to take the following immediate steps to help eradicate the unconstitutional and unjust practice of using gender and race to calculate lower future earnings:

First, NAFE should make a public statement, distributed to its members, condemning the use of race- and gender-based tables to calculate lower expected life earnings for women and people of color, as compared to white men.

Second, NAFE should amend its eight principles of ethics,⁹ which currently include Engagement, Compensation, Diligence, Disclosure, Consistency, Knowledge, Discourse, and Responsibility, to add Equality as a ninth principle. This would ensure greater equality in the justice system and promote the advancement of forensic economics. Specifically, we ask NAFE to add the following rule:

9. Equality

To ensure the profession does not perpetuate the effect of historical biases and inequities, practitioners of forensic economics should refrain from using tables or adjustments that are based on race, religion, color, national origin, gender, sex, or sexual orientation in a manner that would compensate some people less than it would compensate others with different demographic characteristics when presenting an expert opinion for the purposes of apportioning compensation.

Thank you for your consideration of our request on this important issue. If you have any questions or require further information, please contact info@justicecatalyst.org.

⁷ Kurt V. Krueger and Frank Slesnick, “Total Worklife Expectancy,” *Journal of Forensic Economists* 25(1), 2014, pp. 51-70.

⁸ See, e.g., Avraham and Yuracko, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF L. REV. 325 (2018); Ronen Avraham and Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 3 (2017), 661-731; Martha Chamallas and Jennifer B. Wriggins, *The Measure of Injury: Race, Gender, and Tort Law* 169 (2010); Michael I. Meyerson, William Meyerson, *Significant Statistics: The Unwitting Policy Making of Mathematically Ignorant Judges*, 37 PEPP. L. REV. 771 (2010); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).

⁹ See NAFE Statement of Ethical Principles and Principles of Professional Practice (NAFE SEPPPP), available at <http://www.nafe.net/Ethics>.

Respectfully yours,

AMERICAN CIVIL LIBERTIES UNION

AMERICAN ASSOCIATION FOR JUSTICE

CENTER FOR JUSTICE & DEMOCRACY AT
NEW YORK LAW SCHOOL

DEMOS

IMPACT FUND

JUSTICE CATALYST LAW

LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW

NAACP LEGAL DEFENSE AND EDUCATION
FUND

NATIONAL CONSUMER LAW CENTER (on
behalf of our low-income clients)

NATIONAL EMPLOYMENT LAWYERS
ASSOCIATION

NATIONAL WOMEN'S LAW CENTER

PUBLIC CITIZEN

PUBLIC JUSTICE

SYSTEMIC JUSTICE PROJECT AT HARVARD
LAW SCHOOL

PEOPLE'S LAW PROJECT

THE WASHINGTON LAWYERS' COMMITTEE