

Opinion: The use of race- and sex-based data to calculate damages is a stain on our legal system

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In 2011, a young couple expecting the birth of their first child moved into an apartment in Brooklyn. Their son was born healthy, but one year later a routine medical exam detected lead in his blood. It turned out that dust from lead paint in the apartment had been quietly poisoning their baby. Over the next several years, he suffered significant cognitive delays as well as severe social and emotional impairments. The child's mother brought a tort action against the landlord, who was found negligent.

In calculating damages, a critical question for the jury was how much this child would have earned over the course of his life had he not been injured. Experts for both the plaintiff and the defendant took into consideration the fact that the baby was Hispanic. As a result, their damage estimates were significantly lower than would have been the case had the baby been White.

That reliance on race- and sex-based data to calculate tort damages has been standard practice for more than a century. The only thing unusual about this [case](#) was that the federal judge, Jack B. Weinstein of the Eastern District of New York, [refused to allow it](#).

The use of data that explicitly distinguishes and defines people based on race and sex ensures that victims who are female, Black or from other marginalized communities receive lower damage awards than do victims who are White men. The effects are significant, as was demonstrated in a 2004 [case](#) involving the death of a 3-month-old Native American girl. In an unusual move, the court ordered its own expert to estimate damages in the standard way — taking into account the plaintiff's race and sex — as well as using tables that blended rather than differentiated the race and sex factors. Using the standard data, the expert calculated projected earnings for the baby girl of \$171,366. The blended data provided a result of \$308,633, approximately 80 percent higher.

Certainly, forensic economists need to rely on statistical tables and data — often created by the federal government and reflecting aggregate economic realities — to estimate for a courthouse how much money it would take to make a victim whole. But the use of race- and sex-based tables means that past levels of discrimination are embedded in predictions of the future. Imagine a 3-year-old Blackgirl seriously injured in a car accident. Even though this child has not herself suffered discrimination in the workplace, and even though

discrimination may be expected to diminish over the course of her life, projections about her future earnings will incorporate the levels of race and sex discrimination suffered by Black women who came of age generations before her. The result is that the girl's compensation will be tainted not only by discrimination but also by a level of race and sex discrimination that she is unlikely to face.

In a broader societal context, the problem is not just one of fair compensation after the fact but also of fair distribution of risks beforehand. Imagine a waste-management company is looking for a site for disposal of hazardous material. The company and local government officials must evaluate the risk an accident could pose to the surrounding community — and consider their potential liability. If race-based tables are used to estimate liability, there is a financial incentive to locate the facility among residents who would likely be awarded lower damages. Although such targeting is rarely explicit, there is a history of legislative bodies disproportionately siting hazardous waste dumps in minority communities.

We have argued in a series of articles that the use of race-based data in calculating tort damages is not just wrong but unconstitutional. A couple of judges have agreed, and a few states have recently enacted legislation prohibiting its use. It is time, however, for a more sweeping and consistent approach. We cannot recall a moment in U.S. history when the nation was as ready for such a change. We urge the Biden administration to support federal legislation that would bar the use of race- and sex-based data in the calculation of tort damages.

This single stroke will not result in damage awards that are entirely free of the taint of discrimination. Generational disparities in health care, education and wealth will still influence the calculations. Yet the gesture would not be merely symbolic: It would disrupt the perpetuation of past discrimination and loosen its hold on victims' futures. The use of data based on race and sex is a stain on our legal system, and it must end.