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The Racial Implications of Tort Reform

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INTRODUCTION

Whether discussing the impact of typical tort reform proposals or the broad rhetoric used to support restrictions on legal rights, racial prejudice lurks behind the tort reform movement. Some connections to race appear to be part of a deliberate public relations effort, while others are not so apparent. However, it is clear that these pervasive connections are often obscured by less offensive arguments that allow some tort reform proponents to mask a racially discriminatory agenda.

This Article examines some of the ways racial issues have been deliberately concealed by the rhetoric of the “tort reform” movement, and how tort reform proposals will have a disparate impact on racial and ethnic minorities. In particular, it analyzes some of the pillars of the tort reform movement: attacks on the medical malpractice system, limits on non-economic damages, class actions, and political attacks against the jury system. It also examines specific cases involving hate crimes and environmental justice, illustrating the importance of the tort system in furthering racial justice.

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I. THE RACIAL DISPARITY LURKING BEHIND MEDICAL MALPRACTICE TORT RESTRICTIONS

For the past twenty-five years, there has been a nation-wide campaign to limit the rights of patients killed or injured due to medical malpractice.¹ This campaign, driven by the property casualty insurance industry and organized medicine, has been a significant part of the tort reform movement. Although the focus of tort reform rhetoric tends to villainize lawyers and juries, the policies disproportionately harm racial and ethnic minorities.

Policies and proposals such as monetary caps on damages, limiting or removing access to juries in medical malpractice cases, and other tort restrictions in medical malpractice cases make it harder for people who have been harmed by negligent medical care to be compensated. Due to racial and ethnic disparities in access to facilities and technologies, health care treatment, and health insurance, such limits on compensation or access to juries inevitably have a greater effect on minority communities.

A. Treatment and Access

Over a decade ago, the Harvard Medical Practice Study found that “there were significant differences between hospitals that serve a predominantly minority population and other hospitals. That is, blacks were more likely to be hospitalized at institutions with more AEs [adverse events] and higher rates of negligence.”² Apparently, not much has changed since then. In 2002, the National Academy of Sciences Institute of Medicine (IOM) published a landmark study, entitled *Unequal Treatment: Confronting Racial and Ethnic*

1. Typical “tort reforms” include: caps on damages (economic, non-economic and/or punitive damages), modifications to joint and several liability, modifications to the collateral source rule, structured settlements, limits on prejudgment interest, shortening the statute of limitations, limits on contingency fees for plaintiffs’ attorneys, and certain unique state statutes, such as Virginia’s Birth-Related Neurological Injury Compensation Act, an injury compensation fund for catastrophically injured newborns that precludes non-economic and punitive damages.

2. HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 6-2 (1990).

Disparities in Health Care, which was conducted at the request of Congress.³ This report found that

... a consistent body of research demonstrates significant variation in the rates of medical procedures by race, even when insurance status, income, age, and severity of conditions are comparable. This research indicates that U.S. racial and ethnic minorities are less likely to receive even routine medical procedures and experience a lower quality of health services.⁴

More specifically, the Institute of Medicine found significant racial and ethnic differences in cardiovascular care and in appropriate cancer diagnostic tests, treatments and analgesics, all of which led to higher death rates among minorities.⁵ Differences were also evident in diabetes care, end-stage renal disease and kidney transplantation, pediatric care, maternal and child health services, and many surgical procedures.⁶ For example, minorities were less likely than non-Hispanic whites to be offered cardiac medications, bypass surgery, kidney dialysis, and transplants.⁷ In some cases, minorities were more likely to receive less desirable procedures, such as limb amputation as a result of diabetes, than non-Hispanic whites.⁸ According to Dr. Brian Smedley, director and co-editor of the report:

Importantly and perhaps foremost, we found that the health care playing field is not level. It is not level for minorities, many populations of color who, on average, receive a lower

3. INSTITUTE OF MEDICINE, *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley, Adrienne Y. Stith and Alan R. Nelson, eds., 2002).

4. Press Release, Institute of Medicine, *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (Mar. 20, 2002), available at <http://www.iom.edu/?id=4475&redirect=0> (last visited Apr. 4, 2007).

5. INSTITUTE OF MEDICINE, *supra* note 3, at 5.

6. *Id.* at 5–6.

7. See Press Release, Institute of Medicine, *supra* note 4; see also Carolyn Clancy, M.D., Dir. of Agency for Healthcare Research and Quality, Remarks at the Office of Minority Health National Leadership Summit on Eliminating Racial and Ethnic Disparities in Health (Jan. 9, 2006), available at <http://www.ahrq.gov/nes/sp010906.htm> (noting results of a 1999 Georgetown study in which “physicians watched videos of white and minority actors portrayed [sic] patients with identical symptoms for a heart problem. They were less likely to prescribe evidence-based diagnostic procedures for older African American women.”).

8. See Press Release, Institute of Medicine, *supra* note 4.

quality and intensity of health care. These disparities are found with consistency across disease areas, clinical services and settings. . . . Importantly, these disparities are associated with higher mortality among racial and ethnic minorities.⁹

Racial prejudice may influence minority treatment by the health care industry. Institute of Health researchers discovered that stereotyping, biases, and uncertainty might also play a role in medical disparities. Data shows that one-half to three-quarters of white Americans believe that minorities—particularly African-Americans—“are less intelligent, more prone to violence and prefer to live off welfare compared to whites.”¹⁰ Moreover, the Institute of Medicine study found that “[i]n the United States, because of shared socialization influences, there is considerable empirical evidence that even well-meaning whites who are not overtly biased and who do not believe that they are prejudiced typically demonstrate unconscious implicit negative racial attitudes and stereotypes.”¹¹ This group of “well-meaning whites” includes white healthcare providers, who, according to the studies, may fail to recognize manifestations of prejudice in their own behavior.¹²

Other credible studies have also uncovered evidence that race and ethnicity influence a patient’s chance of receiving specific procedures and treatments. According to the Agency for Healthcare Research and Quality (AHRQ), a division of the U.S. Department of Health and Human Services, “significant disparities between whites and minorities continue.”¹³ According to the AHRQ’s 2005 Disparities Report, “blacks received poorer quality of care than whites in 43 percent of the core measures, and American Indians and Alaska Natives received poorer quality of care than whites in 38 percent of measures.”¹⁴ Moreover, disparities in quality and access to care are

9. Testimony of Dr. Brian Smedley during hearing with U.S. Representative Eddie Bernice Johnson (D-TX.) and the Asian-Pacific-American and Hispanic Caucuses on Health Disparities, April 12, 2002 (on file with CJ&D).

10. INSTITUTE OF MEDICINE, *supra* note 3, at 10.

11. *Id.*

12. *Id.* at 10–11.

13. Clancy, *supra* note 7.

14. *Id.*

growing wider in the Hispanic population.¹⁵ “[T]he quality of patient-provider communication declined from among Hispanic adults as it improved among white adults.”¹⁶ This may be due in part to language barriers, as a recent *New England Journal of Medicine* analysis concludes.¹⁷

Moreover, as discovered by AHRQ, relative to non-Hispanic whites, racial and ethnic minorities are less likely to receive appropriate cancer care, cardiac care, diabetes care, pediatric care, and many surgical procedures.¹⁸ In one AHRQ study, “white patients were more likely than Hispanic and African-American patients to receive invasive cardiac procedures in hospitals performing a high volume of such procedures, a factor strongly associated with the quality of cardiac care.”¹⁹ In other words, white patients are more likely to be treated in hospitals with experienced surgeons who are less likely to commit errors.

B. Health Insurance

Complicating these issues is the fact that racial and ethnic minorities are uninsured more often than non-Hispanic whites, a status that frequently results in less than adequate healthcare and poor health consequences, and, consequently, a greater likelihood of needing access to courts to redress adverse events caused by health system errors.²⁰ “While racial and ethnic minorities make up about

15. *Id.*

16. *Id.*

17. See Elizabeth Weise, *Language Barriers Plague Hospitals*, USA TODAY, July 20, 2006, at 1A (“Many hospital patients who have a limited ability to speak English and who need a translator don’t get one, which puts them at risk for poor and sometimes life-threatening medical care . . .”).

18. AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, FISCAL YEAR 2003: RESEARCH ON HEALTH CARE COSTS, QUALITY OF OUTCOMES (HCQO) (2003), <http://www.ahrq.gov/about/cj2003/hcqo03d.htm>; AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, AHRQ FOCUS ON RESEARCH: DISPARITIES IN HEALTH CARE (2002), <http://www.ahrq.gov/news/focus/disparhc.htm>; AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, ADDRESSING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (2000), <http://www.ahrq.gov/research/disparit.htm>.

19. AGENCY FOR HEALTHCARE RESEARCH QUALITY, ADDRESSING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (2000), <http://www.ahrq.gov/research/disparit.htm>.

20. FAMILIES USA FOUNDATION, GOING WITHOUT HEALTH INSURANCE: NEARLY ONE IN THREE NON-ELDERLY AMERICANS (2003), http://www.families.org/assets/pdfs/Going_

one-third of the U.S. population, they comprise over half of the 45.8 million uninsured.”²¹ The UCLA Center for Health Policy Research and the Kaiser Family Foundation recently found that over one-third of Latinos are uninsured, while nearly a quarter of African-Americans and about one fifth of Asian-Americans and Pacific Islanders have no health coverage.²² In addition, these researchers discovered that the uninsured rate for African-Americans is 50% higher than for non-Hispanic whites.²³ Similarly, according to the U.S. Census Bureau, over one-third of all Hispanics and one-fifth of all African Americans were without health insurance in 2004, compared with 13.1% of non-Hispanic whites that same year.²⁴

Those without health insurance are far more likely than others to rely on hospitals, where medical errors are substantial, for their usual source of care.²⁵ In its 1999 study, IOM made some striking findings about the poor safety record of U.S. hospitals due to preventable medical errors. For example, the report discovered that up to 98,000 people are killed each year by medical errors in hospitals—far more than those who die from car accidents, breast cancer or AIDS.²⁶ And according to a 1990 Harvard Medical Practice study, medical

without_report3b26.pdf; CENTER FOR DISEASE CONTROL, HEALTH, UNITED STATES, 2002, <http://www.cdc.gov/nchs/data/hus/02.pdf>; U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 1999 (2000), <http://www.census.gov/prod/2000pubs/p60-211.pdf>; AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, HISPANICS AND BLACK AMERICANS STILL MORE LIKELY THAN WHITES TO BE UNINSURED (2000), <http://www.ahrq.gov/news/press/pr2000/meps98pr.htm>; HENRY J. KAISER FAMILY FOUNDATION & UCLA CENTER FOR HEALTH POLICY RESEARCH, RACIAL AND ETHNIC DISPARITIES IN ACCESS TO HEALTH INSURANCE AND HEALTH CARE (2000), <http://www.kff.org/content/2000/1525/UCLAReport.pdf>.

21. FAMILIES USA FOUNDATION, MINORITY HEALTH BACKGROUND AND OVERVIEW, <http://www.familiesusa.org/issues/minority-health/>.

22. Press Release, Henry J. Kaiser Family Foundation, New Report Provides Critical Information About Health Insurance Coverage and Access for Racial and Ethnic Minority Groups (Aug. 1, 2000), *available at* <http://www.kff.org/content/2000/1525/UCLARelease.pdf>.

23. *Id.*

24. FAMILIES USA FOUNDATION, QUICK FACTS: DISPARITIES IN ACCESS 1–2 (2006), <http://www.familiesusa.org/assets/pdfs/minority-health-tool-kit/Quick-Facts-Access.pdf>; *see also* U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004 (U.S. Government Printing Office 2005), <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

25. Sidney D. Watson, *Race, Ethnicity and Quality of Care: Inequalities and Incentives*, 27 AM. J. L. & MED. 203, 205–06 (2001); *see also* AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, *supra* note 18.

26. Linda T. Kohn et al., INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 26 (1999).

negligence in New York hospitals results in 27,000 injuries and 7,000 deaths every year.²⁷

Perhaps more significantly, the hospital location with the highest proportion of negligent adverse events (52.6%) was the emergency department, where people without health insurance may go for primary care.²⁸ In addition, uninsured persons with traumatic injuries are less likely than those with insurance to be admitted to the hospital, receive fewer services if they are admitted, and are more likely to die.²⁹ A study released by the Robert Wood Johnson Foundation in March 2003 reached similar conclusions, namely that, compared with the insured, those without health coverage who are hospitalized are more likely to receive fewer services, experience second-rate care, and die in the hospital.³⁰

Even when they do have health insurance, racial and ethnic minorities tend to be enrolled in “lower-end” health plans more often than non-Hispanic whites, a fact that often translates into substandard care since such plans have higher per capita resource constraints and stricter limits on covered services.³¹ Lack of financial incentives for healthcare providers also plays a role, with low payment rates limiting the supply of providers to low-income groups and fostering an unwillingness to spend adequate time with patients, disproportionately affecting ethnic minorities.³²

In sum, minorities receive inferior medical treatment by the health care industry and are subject to high rates of preventable medical errors. Moreover, racial and ethnic minorities are uninsured more often than non-Hispanic whites, a status that frequently results in less than adequate care and poor health consequences. As a result, tort reforms that limit the rights of patients who have been killed or

27. HARVARD MEDICAL PRACTICE STUDY, *supra* note 2, at 11-1.

28. INSTITUTE OF MEDICINE, *supra* note 26, at 36-37.

29. INSTITUTE OF MEDICINE, CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE 12 (2002).

30. FAMILIES USA FOUNDATION, *Supra* note 20, at 15.

31. INSTITUTE OF MEDICINE, *supra* note 3, at 13; *see also* Amal N. Trivedi et al., *Relationship Between Quality of Care and Racial Disparities in Medicare Health Plans*, 296 JAMA 1998 (2006).

32. Trivedi et al., *supra* note 31.

injured due to medical malpractice disproportionately hurt racial and ethnic minorities.

C. Limits on Non-Economic Damages

Among the tort reform measures that the insurance industry, big business, and organized medicine most desire is an arbitrary ceiling on the monetary amount an injured person can receive for non-economic injuries, no matter how devastating the injury or egregious the wrongdoing. Indeed, since the 1970s, thirty-one states have imposed some form of monetary cap on non-economic damages.³³ Monetary caps are not the only limits on non-economic damages sought by tort reformers: nine states also have limited joint and several liability for non-economic damages;³⁴ over the last twenty-five years, Congress has repeatedly considered bills that would limit non-economic damages in some way;³⁵ and in 1996, President

33. ALASKA STAT. §§ 09.55.549, 17.010 (2006); CAL. CIV. CODE § 3333.2 (West 1982); COLO. REV. STAT. §§ 13-64-302(1), 102.5(3); FLA. STAT. §§ 766.118, 207(7)(b), 209 (2005); GA. CODE ANN. § 51-13-1 (2000); HAW. REV. STAT. §§ 663-8.7, 10.9(2) (2006); IDAHO CODE ANN. § 6-1603 (2004); 735 ILL. COMP. STAT. ANN. 5/2-1706.5 (2003); IND. CODE ANN. § 34-18-14-3 (West 1999); KAN. STAT. ANN. §§ 60-19a02, 1903(a) (2004); ME. REV. STAT. ANN. tit. 18-A, § 2-804 (1998); MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b), MD. CODE ANN. § 3-2A-09(B) (West 2002); MASS. GEN. LAWS ch. 231, § 60H (1998); MICH. COMP. LAWS ANN. § 600.1483 (1996); MISS. CODE ANN. § 11-1-60 (2002); MO. REV. STAT. § 538.210 (2000); MONT. CODE ANN. § 25-9-411 (2000); NEB. REV. STAT. § 44-2825 (2002); NEV. REV. STAT. § 41A.035 (2002); N.J. STAT. ANN. § 2A:31-5 (West 1998); N.M. STAT. ANN. § 41-5-6 (1978); N.D. CENT. CODE § 32-42-02 (1996); OHIO REV. CODE ANN. §§ 2323.43, 2315.18 (West 2005); OKLA. STAT. tit. 63, § 1-1708.1F (2004); S.C. CODE ANN. § 15-32-320 (2005); S.D. CODIFIED LAWS § 21-3-11 (2006); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2006); UTAH CODE ANN. § 78-14-7.1 (2002); VA. CODE ANN. §§ 38.2-5000 to -5021, 8.01-581.15 (2000); W. VA. CODE § 55-7B-8 (2000); WIS. STAT. §§ 895.04(4), 893.55(4)(f) (2006).

34. CAL. CIV. CODE § 1431.2 (West 1982); FLA. STAT. § 768.81 (2005); HAW. REV. STAT. § 663-10.9(3) (2006); IOWA CODE ANN. § 668.4 (West 1998); MISS. CODE ANN. § 85-5-7(8) (2002); NEB. REV. STAT. § 44-2825 (2002); NEV. REV. STAT. § 41A.045 (2002); N.Y.C.P.L.R. 1601 (McKinney 2001); OHIO REV. CODE ANN. § 2307.22(c) (2005).

35. Product Liability Reform Act, S. 648, 105th Cong. (1997). Civil Justice Fairness Act, S. 79, 105th Cong. (1997). Common Sense Medical Malpractice Reform Act, H.R. 5344, 106th Cong. (2000). Teacher Liability Protection Act, S. 316, 107th Cong. (2001). HEALTH Act of 2005, S. 354, 109th Cong. (2005). The Healthy America Act of 2005, S. 4, 109th Cong. (2005). The Medical Care Access Protection Act of 2006, S. 22, 109th Cong. (2006). Healthy Mothers and Healthy Babies Access to Care Act, S. 23, 109th Cong. (2006). The Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501-14505 (2000).

Clinton vetoed products liability legislation because, among other things, it limited non-economic damages.³⁶

Non-economic damages compensate for the loss of quality of life: waking up without pain, eating food without someone's help, dressing a child or even having children at all, walking rather than being wheeled to a lift van, and thousands of other everyday things typically taken for granted. Types of injuries that rob quality of life include blindness, permanent disability, disfigurement, infertility, pain, trauma, loss of a limb, and other physical impairment.

If an individual is injured, the calculation of his or her "economic" loss includes consideration of wages or lost salary. Therefore, those with low or no wages are more likely to receive a greater percentage of their compensation in the form of non-economic payments. This includes children, senior citizens, and women who do not work outside the home, as well as low wage earners. A wealth of evidence indicates that certain minorities do not earn as much in wages as their white counterparts.³⁷ Therefore, limits on non-economic damages particularly hurt these lower earning groups.

According to many in academia, limits on non-economic damages are disproportionately unfair to minorities.³⁸ Political leaders also

36. Message to the House of Representatives Returning Without Approval Product Liability Legislation, 1 PUB. PAPERS 681 (May 2, 1996) ("This provision is all the more troubling because it unfairly discriminates against the most vulnerable members of our society—the elderly, the poor, children, and nonworking women—whose injuries often involve mostly noneconomic losses. There is no reason for this kind of discrimination. Noneconomic damages are as real and as important to victims as economic damages. We should not create a tort system in which people with the greatest need of protection stand the least chance of receiving it.").

37. *Id.*; Press Release, Columbia Univ. Mailman Sch. of Pub. Health, New York City's Costs for Providing Healthcare Exceed \$600 Million Annually, According to Study Conducted by Columbia University's Mailman School of Public Health (Jan. 6, 2005), available at http://www.mailman.hs.columbia.edu/news/healthcare_costs_study.html. See also BRUCE NISSEN & JEN W. BORUM, RESEARCH INSTITUTE ON SOCIAL & ECONOMIC POLICY, WORKING POVERTY: LOW WAGE WORKERS IN FLORIDA (2005), <http://www.risep-fiu.org/reports/WorkingPovertyLowWageWorkersInFlorida.pdf> ("A significantly higher percentage of working minorities in Florida are making a very low wage in comparison to white non-Hispanic workers."); FAIRNESS INITIATIVE ON LOW-WAGE WORK, WHO ARE WORKERS IN LOW-WAGE JOBS?, <http://www.lowwagework.org/facts.htm#Statistics> (last visited Apr. 2, 2007) ("the proportion of minority workers in 2001 earning a low wage is substantial: 31.2 percent of African Americans and 40.4 percent of Latinos in contrast to 20 percent of white workers.").

38. See, e.g., Amanda Edwards, *Medical Malpractice Non-Economic Damages Caps: Recent Developments*, 43 HARV. J. ON LEGIS. 219, 219–21 (2006) (examining how such caps

have observed this problem, and have rejected legislation that would limit non-economic damages. U.S. Senator Edward Kennedy from Massachusetts stated in a 2006 floor debate regarding tort reform that “[c]aps on noneconomic damages discriminate against women, children, minorities, and low income workers. These groups do not receive large economic damages attributable to lost earning capacity. . . . Noneconomic damages—compensation for lost quality of life—are particularly important to these vulnerable populations.”³⁹ In a similar 2004 statement, ranking Democrat on the U.S. House Judiciary Committee, John Conyers, said, “[t]he restrictions on non-economic damages included in the Republican medical malpractice and product liability bills will also have a severe and disproportionate impact on minorities.”⁴⁰

In January 2003, Senator Bill Frist assumed the position of Senate Majority Leader. In an address outlining his priorities as the new Senate Majority Leader, Frist said:

For reasons we don’t fully understand, but we’ve got to face and to elevate, we know that African-Americans today do not live as long They don’t have the same access, and the doctor-patient relationship in some way is colored by medical training Health care disparities, minority versus non-minority populations, is something I feel strongly about.⁴¹

Yet Frist then began pushing for severe tort restrictions, including a \$250,000 cap on non-economic damages for those injured by medical malpractice.⁴² As discussed above, the impact of these proposals on ethnic and racial minority patients would be severe.

affect minority populations, and explaining how the data tables used to calculate economic damages project lower earnings for nonwhite worker, and this results in lower economic damages and more harm from non-economic damage caps).

39. 152 Cong. Rec. S4133 (daily ed. May 8, 2006) (statement of Sen. Kennedy).

40. Press Release, Congressman John Conyers, Jr., Conyers says: “Tort Reform Movement Has a Massively Disproportionate Impact on Minorities” (Mar. 11, 2004) (see chart).

41. David Firestone, *Frist Points to Racial Inequities in Health Care*, N.Y. TIMES, Jan. 9, 2003, at A23.

42. Patients First Act of 2003, S. 11, 108th Cong. (2003). Healthy America Act of 2005, S. 4, 109th Cong. (2005). Healthy America Act of 2005, S. 1503, 109th Cong. (2005).

II. WEAKENING CLASS ACTIONS AND MASS TORTS AS CIVIL RIGHTS ENFORCEMENT TOOLS

In 1977, the Supreme Court recognized that “suits alleging racial or ethnic discrimination are often by their nature class suits, involving classwide wrongs.”⁴³ And certainly class actions have been used in a variety of cases alleging discrimination, most commonly in areas of education, employment, racial profiling, and environmental health. When the Federal Rules of Civil Procedure were amended in 1966, the “advisory committee observed that civil rights actions were particularly appropriate for resolution under one of its provisions.”⁴⁴ Tort reformers, on the other hand, decry class action litigation and have waged a relentless campaign against class suits. Most recently, the Class Action Fairness Act of 2005 (CAFA) placed nationwide restrictions on litigants who claim class-wide discrimination.⁴⁵ This law is one factor making it easier for many state class actions to be removed to the much smaller federal court system.⁴⁶

According to then ranking Democrat on the U.S. Senate Judiciary Committee, Senator Patrick Leahy, CAFA “make[s] it harder for American citizens to protect themselves against violations of state civil rights, and consumer, health, and environmental protection laws by forcing these cases out of their local state courts.”⁴⁷ He particularly noted the potential impact on education discrimination cases. Citing the very well-known class action suit, *Brown v. Board of Education*,⁴⁸ which was brought in state court over racism in public schools, Senator Leahy observed:

The landmark Supreme Court decision in *Brown v. Board of Education* was the culmination of appeals from four class

43. E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977).

44. Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 813 (2005).

45. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 4–5 (2005).

46. *Id.*

47. *Exempt Civil Rights and Wage and Hour Cases From S. 5: Hearing on Class Action Fairness Act*, 109th Cong. (2005) (statement of Sen. Patrick Leahy, S. Judiciary Comm.), available at <http://leahy.senate.gov/press/200502/020705a.html>; Letter from leading consumer, labor and civil rights groups, available at <http://www.aapd-dc.org/policies/exemptcivilrights.html> (“state laws increasingly provide greater civil rights protection than federal law.”).

48. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

action cases, three from Federal court decisions in Kansas, South Carolina, and Virginia and one from a decision by the Supreme Court of Delaware. Only the Supreme Court of Delaware, the state court, got the case right by deciding for the African American plaintiffs. The Supreme Court of Delaware, a state court, understood before any federal court that “separate but equal is inherently unequal.”⁴⁹

Another important category of discrimination cases that are typically brought in state court and therefore could be affected by CAFA’s provisions is racial profiling. A recent Federal Bureau of Justice Statistics report showed that Blacks and Hispanics were more likely to be ticketed for speeding than whites and more likely to be searched at a traffic stop than whites.⁵⁰ Class actions have been an invaluable tool for minority communities to challenge such behavior.⁵¹ Settlement agreements that create mandatory data collection, race training and accountability for police departments, and other innovative means of curbing racial profiling have become more common through the use of class action litigation.⁵²

49. *Hearing on Class Action Fairness Act, S. 353*, 106th Cong. (2000) (Statement of Sen. Patrick Leahy, S. Judiciary Comm.), available at <http://leahy.senate.gov/press/200502/020705a.html>. More recently, but before enactment of CAFA, minority plaintiffs filed class actions in state courts to demand equitable conditions for all students. *Williams v. California*, No. 312-236 (Cal. Super. Ct. filed 2000) (accusing California of not fulfilling its constitutional mandate to provide all students with adequate learning facilities, teachers, and materials). Plaintiffs, led by the American Civil Liberties Union, stated in their complaint that 42 of the 46 schools charged with substandard conditions contained a great majority of minority children. Compl. ¶ 2, available at http://www.decentschools.org/court_papers.php; Press Release, American Civil Liberties Union, California Judge Finalizes Historic Education Settlement in ACLU Lawsuit (Mar. 23, 2005). According to education advocates, such lawsuits are a “critical first step” to providing access to education for all students. The ability to bring such suits in state courts is important because education is generally a state regulated area. Similar suits have been filed in New York, Florida, Alabama, North Carolina, and Connecticut. Todd S. Purdum, *Rights Groups Sue California Public Schools*, N.Y. TIMES, May 18, 2000, at A16.

50. U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT, FEDERAL BUREAU OF JUSTICE STATISTICS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002 (2006).

51. See *Arnold v. Arizona Dep’t. of Pub. Safety*, 2006 WL 2168637 (D. Ariz. July 31, 2006). Arizona case filed by black and Hispanic motorists alleging stops, searches and detentions based on race resulted in a settlement agreement providing access to police records, requiring detentions be for “reasonable” lengths, encouraging video cameras in police cars and written consent before searches can commence, and requires the state to create a Board that will review police policies and track data to assess the status of racial profiling in the state.

52. See Paul Gottbrath, *Racial Lawsuits Prompt Change*, THE CINCINNATI POST, Feb. 26,

Civil rights groups fought CAFA because, among other things, the law would cause federal courts to be overburdened with consumer class actions normally brought in the larger state court system, inevitably pushing out federal civil rights cases that should be heard in federal courts. Thomas Henderson, Chief Counsel and Senior Deputy for the Lawyers' Committee for Civil Rights, testified against CAFA, noting it:

. . . would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively tiny federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation.⁵³

Senator Edward Kennedy offered an amendment to this legislation that would have exempted discrimination cases from CAFA's procedural and substantive hurdles.⁵⁴ The amendment was rejected and CAFA was signed into law on February 18, 2005.⁵⁵

In little more than a year since CAFA's enactment, evidence suggests that these grim predictions have already started to materialize. A recent Interim Report tracking case filings before and after the passage of CAFA shows that before CAFA, civil rights cases represented 13% of all class actions, and just a year after CAFA, civil rights cases dropped to 11% of class action filings.⁵⁶

2001. *In re Cincinnati Policing*, 209 F.R.D. 395, 403 (S.D. Ohio 2002) (citing *Berry v. Sch. Dist. of the City of Benton Harbor*, 184 F.R.D. 93, 97 (W.D. Mich. 1998)) (Cincinnati district judge strongly supported settlement agreement, stating that "[s]ettlements may be particularly desirable in cases such as this one, where remedial measures must be implemented over extended periods of time and where public support is essential to successful programs.").

53. *Class Action Litigation*, 107th Cong. (2002) (testimony of Thomas Henderson, Chief Counsel and Senior Deputy, Lawyers' Comm. for Civil Rights Testimony, *Class Action Litigation*, U.S. S. Comm. on the Judiciary).

54. S. Amendt. 2 to S. 5 ("to amend the definition of class action in title 28, United States Code, to exclude class actions relating to civil rights or the payment of wages").

55. William Branigan, *Congress Changes Class Action Rules*, THE WASH. POST, Feb. 17, 2005, available at <http://www.washingtonpost.com/wp-dyn/articles/A32674-2005Feb17.html>.

56. *The Impact of the Class Action Fairness Act of 2005: Second Interim Report to the*

A similar result may be occurring in workplace discrimination cases. Although many employment discrimination lawsuits are filed under Title VII, and therefore already in federal court, filings of federal employment discrimination cases dropped by 14.3% between 2004 and 2005.⁵⁷ It is entirely possible that this decline is attributable to circumstances other than CAFA, but it must be noted that since the passage of CAFA, filings of these types of cases has noticeably decreased.⁵⁸

One reason may be that some types of employment discrimination class actions, like wage and hour cases, rely principally on state law and thus were filed in state courts pre-CAFA. Because federal courts are sometimes bound by precedent to apply a limiting liability approach to novel questions of state law, these courts operate under a pro-defendant presumption.⁵⁹

III. HELLHOLES AND OTHER ATTACKS ON THE JURY SYSTEM

A major tactic of the tort reform movement is to attack juries in civil cases. Businesses seek to limit their liability exposure by proposing to take compensation judgments away from juries. They seek to limit the power and authority of the civil jury and, in some cases, to replace the civil jury system with a statutory structure over which their political action committee money can have more control. The attacks have strengthened in recent years, with a slew of proposals to statutorily limit the power of juries, such as limits on non-economic damages, or to entirely override the right to a jury of one's peers.⁶⁰

Judicial Conference Advisory Committee on Civil Rules, Federal Judicial Center (2006) (report of Thomas E. Willging), available at http://www.fjc.gov/library/fjc_catalog.nsf.

57. UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS (2005), available at <http://www.uscourts.gov/judbus2005/contents.html>.

58. See, e.g., David Wessel, *Racial Discrimination is Still at Work in U.S.*, WALL ST. J., Sept., 2003.

59. *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002); *Trimple v. Asaco*, 232 F.3d 946 963 (8th Cir. 2000).

60. See *supra* note 35 (discussing Congressional proposals to limit noneconomic damages). See Amy Widman, *Why Health Courts are Unconstitutional*, 27 PACE L. REV. 55, 55-88 (2006). ALLIANCE FOR JUSTICE, HEALTH COURTS UNDER THE MICROSCOPE, available at <http://www.legalreforminthenews.com/Reports/Hellholes-2005.pdf>.

In 2005, the American Tort Reform Association (ATRA), supported by major industries and Fortune 500 companies, released its most recent annual report entitled, (*Bringing Justice to Judicial Hellholes*).⁶¹ In it, ATRA identified thirteen jurisdictions that a survey of its members identified as too “plaintiff-friendly.” The ATRA report is not supported by any actual data. Rather, it is based on “anecdotal information and stories reported in the media to provide examples of the litigation abuses that occur in hellholes.”⁶² The report then makes “recommendations” intended to restrict the ability of injured consumers to sue in those jurisdictions, including limits on class action lawsuits.⁶³

The 2005 “hellholes” identified by ATRA are: Cook County, Illinois; St. Clair County, Illinois; Madison County, Illinois; the state of West Virginia; Miami-Dade County, Florida; Palm Beach County, Florida; Broward County, Florida; Jefferson County, Texas; Brazoria County, Texas; Cameron County, Texas; Hidalgo County, Texas; Nueces County, Texas; and Starr County, Texas.⁶⁴ A demographic analysis of these jurisdictions, based on 2004 census data, illustrates that in more than half (seven out of thirteen) of the communities identified as “hellholes,” minorities make up most of the population, even in states where a majority of citizens are white.⁶⁵ The following chart shows these results, including a comparison of each state’s

61. AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES (2005), *available at* <http://www.atra.org/reports/hellholes>.

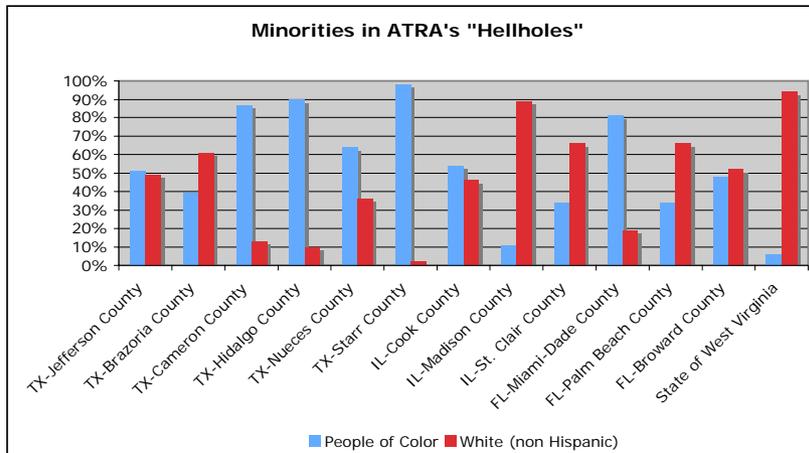
62. *Id.*

63. *Id.*

64. *Id.*

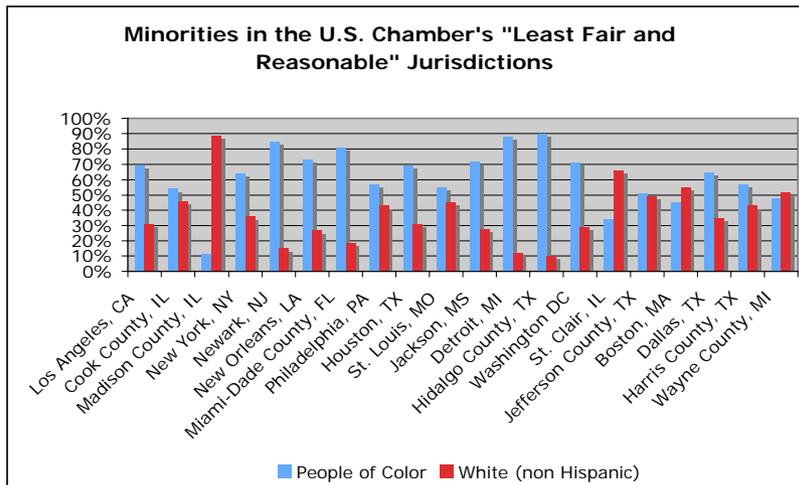
65. It should be noted that ATRA’s earlier “hellhole” reports attacked juries quite specifically, in addition to judges from these communities. *See, e.g.*, AMERICAN TORT REFORM ASSOCIATION, BRINGING JUSTICE TO JUDICIAL HELLHOLES 8 (2002), *available at* http://www.atra.org/reports/hellholes/2002/hellholes_report_2002.pdf. “Orleans Parish was described by one counsel with whom we spoke as an area where the majority of judges and many juries are pro-plaintiff.” *Id.* at 13. “An attorney who litigates in south Texas described the problem in these counties as a combination of juries who tend to be persuaded by emotion rather than the facts, plaintiff-oriented judges, and a local environment in which everybody knows everybody.” *Id.* at 16. “[J]uries[] is St. Louis tend to disfavor large corporations.” *Id.* at 17. “The judges who will allow even a weak case to the jury and juries who are willing to grant high verdicts suggests to some that this county should be designated a judicial hellhole.” *Id.* *See* Mark A. Hofmann, *Illinois County Once Again Leads List of ‘Hellholes,’* BUSINESS INSURANCE, Dec. 20, 2004, at 2; AMERICAN TORT REFORM ASSOCIATION, *supra* note 61 (quotations preceding Table of Contents).

demographic data as well (top line represents Black/Latino/Asian populations).



Similarly, in 2006, the U.S. Chamber of Commerce's "tort reform" division, Institute for Legal Reform, released its list of what it called "Least Fair and Reasonable" Jurisdictions based on the views of corporate lawyers who defend corporate wrongdoers.⁶⁶ These jurisdictions include: Los Angeles, California; Cook County, Illinois; Madison County, Illinois; New York, New York; Newark, New Jersey; New Orleans, Louisiana; Miami-Dade County, Florida; Philadelphia, Pennsylvania; Houston, Texas; St. Louis, Missouri; Jackson, Mississippi; Detroit, Michigan; Hidalgo County, Texas; Washington D.C.; St. Clair, Illinois; Jefferson County, Texas; Boston, Massachusetts; Dallas, Texas; Harris County, Texas; Wayne County, Michigan. As the following chart illustrates, in sixteen of the twenty jurisdictions targeted by the Chamber, the majority population is people of color.

66. See Institute for Legal Reform, <http://www.instituteforlegalreform.com/harris>.



Throughout recent history, business groups have specifically complained about juries in minority jurisdictions. Because juries in the Bronx, New York were often the subject of attack for being too “pro-plaintiff,” for example, leading Cornell University professors Theodore Eisenberg and Martin T. Wells decided to examine whether there was any empirical basis for this allegation. In their 2002 study, “Trial Outcomes and Demographics: Is There a Bronx Effect?” they described the “theory” as follows:

Minorities favor injured plaintiffs and give them inflated awards. This folk wisdom in the legal community influences choice of trial locale and the screening of jurors. A Los Angeles court is said to be known by local lawyers as “the bank” because of the frequency and size of its anti-corporate awards. A newspaper article summarizing court results suggests, somewhat jokingly, that the “Bronx County Courthouse should post a warning: People who get sued here run an increased risk of suffering staggering losses.⁶⁷

67. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839 (2002); See Mary Rose & Neil Vidmar, *The Bronx 'Bronx Jury': A Profile of Civil Jury Awards in New York Counties*, 80 TEX. L. REV. 1889, 1889 (2002) (citing TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1987), as the origin of this belief).

When Eisenberg and Wells examined actual awards in many diverse urban counties, they discovered that the conventional wisdom was wrong. Specifically, they found:

Although award levels and win rates differ significantly across geographic areas, these differences often do not uniformly reflect the folk wisdom about demographic influences. In federal court trials, we find no robust evidence that award levels in cases won by plaintiffs correlate with population demographics in the expected direction. Indeed, one persistent result is a negative relation between award levels and black population percentages In state court trials, we again find no robust evidence (at traditional levels of statistical significance) that race, income, or urbanization substantially help explain award levels.⁶⁸

As for the Bronx itself, a companion study compared jury awards from the Bronx against those of other New York counties in the surrounding metropolitan area.⁶⁹ This Comment found no statistical difference between jury awards from the Bronx versus surrounding counties.⁷⁰

Professor Neil Vidmar of Duke University, one of the country's foremost jury experts, has done similar work dispelling myths about Mississippi juries in medical malpractice cases, finding "no evidence that Mississippi juries are out of control in medical malpractice cases or . . . that they are different from juries in other parts of the country."⁷¹

A significant body of empirical evidence supports the view that civil juries are competent, responsible, and rational, and that their decisions reflect continually changing community attitudes about corporate responsibility and government accountability.⁷² The

68. Eisenberg & Wells, *supra* note 67, at 1839–40.

69. Rose & Vidmar, *supra* note 67.

70. *Id.* Although the Bronx and Kings County had slightly higher win rates, the authors concluded that the study itself was limited in such a way as to not be indicative of a statistical difference, and they concluded that "the term 'Bronx jury' [w]as inapt" *Id.* at 1898.

71. Neil Vidmar & Leigh Anne Brown, *Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing A Remedy*, 22 MISS. C.L. REV. 9 (2002).

72. See generally VALERIE HANS, BUSINESS ON TRIAL: THE CIVIL JURY & CORPORATE

consensus among academics, judges, and jurors themselves has always been that the system works extremely well. The erosion of this system by consistent attacks on juries by ATRA, the Chamber of Commerce and other corporate special interest groups is especially tragic given the growing dominance of corporate America in our lives.

IV. THE IMPORTANCE OF A STRONG TORT SYSTEM TO PROTECT CIVIL RIGHTS

Civil jury trials historically have been an important tool for protecting civil rights in the United States. In a 1965 civil rights action, *Basista v. Weir*,⁷³ a federal court, citing a 1919 case in which the plaintiffs were denied their right to vote, said:

In the eyes of the law this right (to vote) is so valuable that damages are presumed from the wrongful deprivation of it . . . and the amount of the damages is a question peculiarly appropriate for the determination of the jury, because each member of the jury has personal knowledge of the value of the right⁷⁴

The court added that the same principles are “equally applicable in all civil rights cases.”⁷⁵

Civil juries are often asked to resolve problems with profound policy implications for this country. As the following examples will show, the civil justice system is sometimes the only means available to correct gross injustices. The civil justice system today serves crucial functions such that, if weakened in any significant respect by

RESPONSIBILITY (2000); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109 n.45 (1996) (citing Michael J. Saks, Small-Group Decision Making and Complex Information Tasks (1981)); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 137 (Robert E. Litan ed. 1993); Richard O. Lempert, *Civil Juries and Complex Cases: “Let’s Not Rush to Judgment,”* 80 MICH. L. REV. 68 (1981); Christy A. Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1 (1987).

73. *Basista v. Weir*, 340 F.2d 74, 88 (3d Cir. 1965).

74. *Id.* (citing *Wayne v. Venable*, 260 F. 64, 64, 66 (8th Cir. 1919)).

75. *Id.*

tort reform, it would devastate efforts to protect civil rights and rid the country of some of the worst civil rights offenders.

A. Hate Crimes

Civil jury cases are often the only available forum for enforcing civil rights and holding perpetrators of hate crimes or from hate groups accountable. For example, in separate prosecutions in the early 1980s, two juries—one of which was all white—acquitted Ku Klux Klan and Nazi party members for the murders of demonstrators in a 1979 Greensboro, North Carolina protest, after being charged by what some considered corrupt or indifferent prosecutors. It took years of discovery and a subsequent civil trial brought by the victims' families for a jury to conclude that five Klansmen and Nazis, with the cooperation of two Greensboro police officers and a police informer, were indeed responsible for murdering and seriously injuring three of the victims.⁷⁶

As exemplified by the above case, members of minority communities are all too often targets of violent bigotry. According to the most recent FBI data, over 9500 people reported being victims of violence based on racial, religious, sexual orientation, disability or ethnicity/national origin bias in 2004.⁷⁷ Approximately two-thirds of these violent attacks were motivated by race or ethnic bias.⁷⁸ Yet these figures represent only a small percentage of those emotionally, physically, and psychologically hurt by hate crimes each year. According to the Southern Poverty Law Center, the number of hate groups has risen drastically, over 33%, since 2000.⁷⁹ As of 2005,

76. *Fast-Forward Countdown to an 88-Second Disaster ... and a Slow, 20-Year Reckoning for Greensboro*, NEWS & RECORD (Greensboro, N.C.), Oct. 31, 1999, at A6; Michael Hirsley, *Klan-Nazi Shooting Cops' Fault, Suit Says*, CHI. TRIB., Mar. 7, 1985, at C14; David Treadwell, *Klan Collusion Issue Tested in Trial*, L. A. TIMES, Apr. 22, 1985, at 4; Ginny Carroll & Aric Press, *Greensboro Shoot-Out: Round 3*, NEWSWEEK, Apr. 8, 1985, at 87; *Legal Actions Continue in Deaths of Five at '79 Rally Against Klan*, N.Y. TIMES, Nov. 14, 1982, at 80.

77. FEDERAL BUREAU OF INVESTIGATION, FBI RELEASES HATE CRIME STATISTICS, 2004 (2005), <http://www.fbi.gov/pressrel/pressrel05/hatecrime111405.htm>.

78. *Id.*

79. MARK POTOK, SOUTHERN POVERTY LAW CENTER INTELLIGENCE REPORT, THE YEAR IN HATE, 2005, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=627>.

there were over 800 known hate groups operating in the United States.⁸⁰

Although Congress and state governments have enacted numerous criminal laws to combat violence stemming from intolerance, such measures do little to compensate hate crime victims, much less effectively deter many perpetrators and their supporters from engaging in hate-motivated violence.

On the other hand, the civil justice system can and often does both. Successful civil lawsuits against a hate group not only directly respond to the needs of those injured by providing financial compensation for losses, but also often provide the only effective means to put these entities out of business. Civil lawsuits are important to fight hate crimes, because, by providing damages to victims, these hate groups are held accountable for their members' violent actions.⁸¹

Given the impact of hate crimes on victims and communities and the absence of effective safeguards to address such bias-motivated incidents, the importance of civil lawsuits cannot be overstated. The following cases illustrate how litigation not only makes the injured whole, but also protects others from becoming targets of violence in the future.

In 2000, a jury found that Aryan Nation leader Richard Butler and his group were responsible for an attack on Victoria Keenan and her teenage son, who were chased and shot at by members of the Aryan Nation's security force while driving past the group's Idaho compound.⁸² When their car went into a ditch, the security chief assaulted Keenan and threatened to kill her while guards beat her son. As a result of a \$6.3 million verdict against Butler and the Aryan Nation, the twenty-acre Idaho complex was transferred to the Keenans, who are turning it into a human rights park.⁸³

Members of the Christian Knights burned down a black church in South Carolina in 1995.⁸⁴ Today, the Christian Knights can no longer

80. *Id.*

81. Amanda J. Holland, *Southern Poverty Law Center* (2007), <http://www.learningtogive.org/papers/index.asp?bpid=160>.

82. *Keenan v. Aryan Nations*, No. CV-99-441 (1st Jud. Dist. Idaho 2000).

83. Kim Murphy, *Jury Verdict Could Bankrupt Aryans*, L.A. TIMES, Sept. 8, 2000, at A1.

84. *Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan-Invisible*

function as a viable hate group after a multi-million-dollar verdict was levied against the “Grand Dragon” of the South Carolina Ku Klux Klan (“Klan”), as well as the Klan’s North and South Carolina organizations.⁸⁵

In November 1988, members of East Side White Pride, a skinhead gang organized by the White Aryan Resistance (WAR), killed Mulugeta Seraw, a twenty-six year-old Ethiopian student, as he approached his front door on his way home from work.⁸⁶ Trial evidence showed that the skinhead gang received WAR propaganda, which targeted blacks, Jews, and other “enemies” of the white race.⁸⁷ More important, a tape produced at trial contained a telephone message from one of WAR’s founders saying that it may have been the skinheads’ “civic duty” to kill Seraw.⁸⁸ After a jury awarded \$9 million, WAR was shut down.⁸⁹

The Invisible Empire Klan was disbanded after a \$1 million jury verdict against the Klan’s leader and his organization.⁹⁰ An interracial group had been attacked by Klansmen armed with rocks and bottles while marching in a Martin Luther King celebration in Georgia in January 1987.⁹¹ On May 26, 1979, over 100 members of the Invisible Empire Klan—armed with bats, ax handles, and guns—attacked and injured civil rights marchers in Alabama. In 1990, a civil settlement

Empire, Inc. et al., No. 96-CP-14-217 (S.C. Ct. Com. Pl. Clarendon County 1998).

85. Reductions: Verdicts Reduced After Trial, NATIONAL LAW JOURNAL (1999) (citing Macedonia Baptist Church v. Christian Knights of the Ku Klux Klan-Invisible Empire, Inc. et al., 96-CP-14-217 (S.C. Clarendon County Ct. Com. Pl. 1998)); TRIAL LAWYERS DOING PUBLIC JUSTICE, EXPOSING AND CORRECTING RACIAL VIOLENCE (1999), available at <http://www.tlpj.org/publications/tldpj.1999.pdf>; LAW CENTER CASES CRIPPLE WHITE SUPREMACIST GROUPS, <http://www.splcenter.org/legal/docket/files.jsp?cdrID=29>.

86. Berhanu v. Metzger et al., No. A8911-07007 (Or. Multnomah County Cir. Ct. 1990) (verdict October 1990).

87. *Id.*

88. *Id.*

89. *How Time Does Tell*, NAT’L L.J. (1994); TRIAL LAWYERS DOING PUBLIC JUSTICE, BATTLING RACIST VIOLENCE (1991) (citing Berhanu v. Metzger et al., No. A8911-07007 (Or. Multnomah County Cir. Ct. 1990) (verdict October 1990)).

90. McKinney v. Southern White Knights, No. 1:87-565-CAM, (N.D. Ga. 1988).

91. Bill Morlin, *Dee’s Center has Compiled Extensive Resume; Forced KKK To Turn Its Headquarters Over To Lynching Victim’s Mother*, SPOKANE REVIEW, Jan. 26, 1999, at A4; Bill Rankin, *Judge Rules KKK Faction Must Disband*, ATLANTA J. & CONST., May 20, 1993; LAW CENTER CASES CRIPPLE WHITE SUPREMACIST GROUPS, <http://www.splcenter.org/legalaction/la-2.html>.

was reached with the Klansmen, requiring them to pay damages, perform community service and halt all white supremacist activity. They were also required to attend a course on race relations and prejudice. Discovery evidence also led the FBI to pursue a criminal case against the Klansmen. Ten Klansmen were ultimately convicted of criminal charges related to the 1979 assault.⁹²

On March 20, 1981, nineteen year-old Michael Donald was abducted, beaten, stabbed and hanged by two men who had been encouraged to murder a black man while attending a United Klans of America (UKA) meeting days earlier. At trial, former Klan members testified about the Klan's violent history; UKA newsletters also revealed that the organization targeted blacks. After the jury awarded \$7 million, the group was forced to turn over its headquarters to Donald's mother, and two additional Klansmen were convicted on criminal charges stemming from the lynching.⁹³

On March 15, 1981, Texas fishermen associated with the Klan, wearing Klan robes and hoods and visibly armed, burned Vietnamese immigrants' boats and threatened their lives in an attempt to destroy their fishing businesses. The Southern Poverty Law Center filed suit against the Grand Dragon of the Texas Klan and the national organization, which not only halted the Knights' terror campaign, but also shut down its paramilitary training bases.⁹⁴

In 1997, Congress passed the so-called "Volunteer Protection Act of 1997."⁹⁵ This federal law, which Congress imposed on every state in the nation, immunizes (with a few exceptions) the negligent acts of anyone volunteering for a nonprofit organization, anywhere in the country. Even volunteers dealing with children can no longer be held responsible for their negligence, provided they meet certain criteria.

92. LAW CENTER CASES CRIPPLE WHITE SUPREMACIST GROUPS, *supra* note 91; TRIAL LAWYERS DOING PUBLIC JUSTICE, *BATTLING THE CORPORATE CLAN* (1987) (citing *Donald v. United Klans of America et al.* No. 84-0725-AH Civ. (S.D. Ala. 1987) (verdict February 12, 1987); Marlon Manuel, *Neo-Nazis next target of lawyer who broke Klan*, COX NEWS SERVICE, Mar. 4, 1999; LAW CENTER CASES CRIPPLE WHITE SUPREMACIST GROUPS, *supra* note 91.

93. *Donald v. United Klans of America et al.* No. 84-0725-AH Civ. (S.D. Ala., verdict February 12, 1987); Marlon Manuel, *Neo-Nazis next target of lawyer who broke Klan*, ATL. J. & ATL. CONST., Mar. 5, 1999, at C1.

94. *Vietnamese Fishermen's Assn. et al. v. Knights of the Ku Klux Klan et al.*, 518 F. Supp. 993 (S.D. Tex. 1981).

95. 42 U.S.C. §§ 14501-14505 (1997).

In passing the federal bill, Congress excluded volunteers of hate groups from the bill's immunity scope. But Congress also decided to preempt state law only to the extent the state provides "less" immunity for volunteers. If a state provides "additional protections," the state law prevails. As a result, any broad state volunteer immunity law could still protect those very hate group volunteers that Congress sought not to insulate from liability.

Congressman John Conyers (D-MI) and others tried to convince Congress to amend the "one-way preemption" provision of the law in order to preclude this possibility. Congress, however, refused. The dissenting remarks in the U.S. House of Representatives report on the bill, and the floor statement of Congressman Conyers, quoted directly from a letter by Morris Dees, Chief Trial Counsel of the Southern Poverty Law Center, explains the problem: "Under this legislation . . . a state could maintain or reinstate protections for volunteers of white supremacists, neo-Nazi and violent militia groups—the types of organizations the Southern Poverty Law Center has crippled over the past ten years through the use of both federal and state tort laws."⁹⁶

As Conyers put it,

the provision in the bill exempting members of hate groups from the liability limitations in the bill does nothing to insure that state law does not unnecessarily immunize such persons. Thus, if a particular state provides across the board immunity to volunteers, [the federal law] continues to allow a member of a militia or hate group who negligently entrusts a gun to a child (who in turn harms an innocent victim) to avoid responsibility for negligent entrustment. This is not appropriate.⁹⁷

In other words, as a result of the federal "Volunteer Protection Act of 1997," the principal impact of a broad state volunteer immunity law may be to protect volunteers for hate groups like the Klan from negligence lawsuits.

96. H.R. REP. NO. 105-101, at 19–20 (1997) (Part I).

97. *Id.*

B. Environmental Justice

Environmental justice is a small field of environmental law where plaintiffs, usually in groups, challenge an environmental decision on the grounds that the effects of that decision harm a certain group more than others. Environmental racism is another term used by advocates to refer more specifically to describe any “policy, practice or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color.”⁹⁸ Many environmental justice lawsuits argue that a particular minority is disadvantaged by the environmental action, be the location of a waste transfer station, a decision not to properly dispose of hazardous materials, or a contaminated site not being properly monitored and cleaned.⁹⁹

The first environmental justice case is widely considered to have been instituted by the Warren County activists who, in 1980, began to fight an EPA decision to locate a toxic chemical landfill in a poor, predominately black community in North Carolina.¹⁰⁰ The activists filed a lawsuit alleging discriminatory intent. The lawsuit was unsuccessful, however, a new term entered the lexicon—environmental racism. The events in Warren County also sparked several empirical studies providing evidence of racial inequalities in toxic waste disposal policies.¹⁰¹ Many of these studies concluded that minority communities bear a larger environmental burden than non-

98. Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism*, 2 CEB. LAND USE F. Winter 1993, at 6.

99. Some of the oft-cited environmental justice lawsuits are: *Bean v. Sw. Waste Mgmt.*, 482 F. Supp. 673 (1979); *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning & Zoning Comm’n*, 706 F. Supp. 880 (M.D. Ga. 1989), *aff’d* 896 F.2d 1264 (11th Cir. 1989); *El Pueblo Para el Aire y Agua Limpio v. County of Kings*, 22 Env’tl. L. Rep. 20357 (Cal. Super. Ct. 1991); *In re Shintech & its Affiliates*, 734 So. 2d 772 (La. Ct. App. 1999), *writ denied*, 746 So. 2d 601 (La. 1999); *S. Camden Citizens in Action v. N.J. Dept. of Env’tl. Protection*, 274 F.3d 771 (3d Cir. 2001), *cert. denied*, 122 S. Ct. 2621 (2002). These cases were mostly unsuccessful attempts to challenge permitting decisions under statutory, administrative, or Constitutional law.

100. *See, e.g., The Beginnings of a Movement: A Story of Hope*, http://www.sierraclub.org/environmental_justice/stories/northcarolina.asp; *See also* Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121(1994).

101. Bullard, 1990; Bullard & Wright, 1987; United Church of Christ Commission for Racial Justice, 1987; Lavelle & Coyle, 1992; U.S. General Accounting Office, 1983.

minority communities and that race was the best predictor of location decisions of hazardous waste facilities.¹⁰² Whether this is due to racial animus, political disenfranchisement or inequitable market dynamics is debated, but the outcome is clearly a disproportionate amount of hazardous waste sites in minority neighborhoods.¹⁰³

Minority communities left to shoulder such an environmental burden have very few remedies. Executive and legislative remedies have been weak and underutilized.¹⁰⁴ In fact, a recent report by the EPA inspector general charges that “senior EPA officials have not required regional offices and department heads to conduct environmental justice reviews despite a requirement for such reviews dating back to 1994.”¹⁰⁵ The civil justice system often provides the only available remedy and recently injured residents have turned to the tort system for redress. Tort reform, either by restricting class actions or by limiting access to mass tort remedies, adds further harm to these communities.

The residents of Anniston, Alabama recently won a series of lawsuits against Monsanto for years of knowingly polluting this small town with dangerous levels of Polychlorinated Biphenyls (PCBs). The residents surrounding the Monsanto plant were predominantly minorities. The first lawsuit, brought in state court, went to trial and the jury found Monsanto guilty of a variety of torts, including negligence, nuisance and trespass.¹⁰⁶ This case was eventually folded into a similar federal case,¹⁰⁷ concluding in a global settlement fining Monsanto 700 million dollars for its egregious behavior toward the Anniston residents.

102. Matthew B. Leveridge, *Should Environmental Justice be a National Concern? A Review and Analysis of Environmental Justice Theories and Remedies*, 15 J. NAT. RESOURCES & ENVTL. L. 107, 108–9 (1999–2000).

103. *Id.*; see also Willie G. Hernandez, Comment, *Environmental Justice: Looking Beyond Executive Order No. 12, 898*, 14 UCLA J. ENVTL. L. & POL’Y 181, 187 (1996); Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3, 13 (1995).

104. Executive Order 12, 898.

105. H. Josef Hebert, *EPA Inspector Criticizes Agency Reviews*, SEATTLE POST-INTELLIGENCER, Sept. 19, 2006, available at http://seattlepi.nwsource.com/national/1155AP_Environmental_Justice.html.

106. *Abernathy v. Monsanto*, No. CV-2001-832, verdict rendered (Ala. Cir. Ct., Etowah County Feb. 22, 2002); See also, Michael Grunwald, *Jury Finds Monsanto Liable for Releasing Tons of PCBs*, WASH. POST, Feb. 23, 2002, at A1.

107. *Owens v. Monsanto*, No. 96-CV-440, 2001 WL 420384 (N.D. Ala. 2001).

Another recent example of a mass toxic tort arguing racial animus is currently pending in New Jersey. Over 700 members of the Ramapough Indian Tribe are suing Ford Motor Company under state tort law claims, like negligence, for years of dumping toxic chemicals.¹⁰⁸ Plaintiffs claim that the contamination has sickened residents and they are asking for medical monitoring, compensatory and punitive damages, and attorney fees.¹⁰⁹ Residents had been fighting Ford to clean up the waste for many years through the Superfund system, yet after five clean-up attempts, contamination was still regularly apparent.¹¹⁰

CONCLUSION

Minorities are frequently forced to bear a disproportionately large share of this country's health and safety problems. Whether it is inferior medical care, infringed civil rights, environmental pollution or any number of other indignities and injuries that juries are asked to evaluate every day, our civil justice system provides an essential tool to combat injustice in America.

Tort reform has a troubling and disproportionate effect on racial and ethnic minorities who have been injured and seek justice through the civil courts. In some cases, Congress has gone out of its way to exacerbate these effects. The civil justice system has been a beacon of civil rights over the last half of the twentieth century and for that it deserves to be celebrated, not stripped of its power.

108. *Morgan v. Ford Motor Co.*, No. 06-CV-1080, 2007 WL 269806 (D. N.J. Jan. 25, 2007) (originally filed in Superior Court, Passaic County in January of 2006 as *Wayne Mann, et. al. v. Ford Motor Co. et. al.*, but subsequently removed to federal court and renamed).

109. Mary P. Gallagher, *Plaintiffs Seek \$2 Billion in Massive Toxic Tort Suit Against Ford*, N.J. LAW JOURNAL, June 1, 2006.

110. *Ramapough Mountain Indians Sue Ford Over Toxic Contamination*, ENVIRONMENTAL NEWS SERVICE, Jan. 21, 2006, available at <http://www.ens-newswire.com/ens/jan2006/2006-01-21-01.asp>.