"Tort Reform" and Racial Prejudice: A Troublesome Connection

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EXECUTIVE SUMMARY

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. "Tort reform" proponents have masked an agenda that is, without question, racially discriminatory:

- **Medical Malpractice Legislation.** Racial and ethnic minorities receive inferior medical treatment by the health care industry and are being subjected to high rates of preventable medical errors. As a result, limits on the rights of patients who have been killed or injured due to medical malpractice will disproportionately hurt racial and ethnic minorities. 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 care and poor health consequences. What's more, specific limits on non-economic damages, such as "caps," have a disproportionate impact on low wage-earners who are more likely to receive a greater percentage of their compensation in the form of non-economic damages if they are injured.

- **Class Action Legislation.** Class actions are a critical tool used by individuals in this country to deter violations of individual rights and corporate misconduct. As a mechanism for the preservation and enforcement of civil rights, it is fundamental. Federal class action legislation would severely overburden the federal courts where most civil rights class actions are brought, create new procedural class action hurdles and result in new and substantial limitations on access to the courts for victims of discrimination.

- **Attacks on Civil Juries.** In 2003, the American Tort Reform Association, whose members come from major industries and Fortune 500 companies, released a report entitled, *Bringing Justice to Judicial Hellholes 2003*. In it, ATRA identifies 12 jurisdictions that a survey of its members identified as too "plaintiff-friendly." Minorities make up most of the population in nine of these jurisdictions and all but one has a larger minority population than the state it is in. Moreover, in March 2004, the U.S. Chamber of Commerce released its annual survey of corporate counsels' views of state litigation environments. For the first time, the 2004 survey asked about which local jurisdictions the corporate attorneys felt were the "least fair and reasonable." Out of 18 jurisdictions identified, minorities make up most of the population in 15. In fact, throughout recent history, business groups have specifically targeted juries in minority jurisdictions for relentless attacks, implying that juries in these jurisdictions are rendering unfair verdicts against undeserving corporations *not* because jurors have listened to the evidence in a case, but for other reasons – they are too poor, too uneducated, too "sympathetic" to the injured victim – even though the facts prove otherwise.

- **Weakening Civil Rights Remedies.** Successful civil lawsuits against hate groups 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 dangerous entities out of business. "Tort reform" laws, which reduce the power and authority of civil juries, weaken the only available forum in some cases for holding perpetrators of hate crimes

and hate groups accountable. Moreover, in 1997, Congress refused to correct a loophole in the federal "Volunteer Protection Act" that allows state volunteer immunity laws to protect from negligence lawsuits volunteers for hate groups, such as the Ku Klux Klan.

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, others not so apparent. But one thing is clear. As pervasive as these connections are, they are often obscured by less offensive arguments that allow some "tort reform" proponents to mask an agenda that is racially discriminatory.

This report examines some of the ways that racial issues have been used and often concealed by the rhetoric of the "tort reform" movement and how "tort reform" proposals will have a disparate impact on racial and ethnic minorities.

THE IMPACT OF SO-CALLED "MEDICAL MALPRACTICE REFORM"

Today, the property/casualty insurance industry, with the help of organized medicine, is driving a nationwide campaign to limit the rights of patients killed or injured due to medical malpractice. In Congress, proposals advocated by the Bush administration and U.S. Senate Majority Leader Bill Frist (R-TN), as well as by insurance and health care lobbyists at the federal and state levels, would increase the obstacles that sick and injured patients face in the already difficult process of prevailing in court.

Limits on the rights of patients who have been killed or injured due to medical malpractice will disproportionately hurt racial and ethnic minorities, who are more likely than non-Hispanic white Americans to receive lower quality health care and experience negligent care.

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 AE's [adverse events] and higher rates of negligence."[1]

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 Disparities in Health Care*, which was conducted at the request of Congress. According to Dr. Brian Smedley, director and co-editor of the report:

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[*] For consistency purposes, this report uses the term "tort reform" throughout. However, its use here in no way implies the authors' acceptance that such laws represent positive "reforms." In fact, "tort reforms" are extremely damaging laws that make it more difficult or impossible for injured people to sue or collect adequate compensation. The use of quotation marks around the term is meant to emphasize that point.

> 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 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.[2]

In its earlier 1999 report, *To Err is Human: Building a Safer Health System,* IOM reported on one study which found that "[m]ore than two-thirds (70 percent) of adverse events…were thought to be preventable, with the most common types of preventable errors being technical errors (44 percent), diagnosis (17 percent), failure to prevent injury (12 percent) and errors in the use of a drug (10 percent)."[3] Highly technical surgical specialties, such as cardiac surgery, contributed to higher rates of medical errors.[4]

In *Unequal Treatment,* after reviewing the most recent data available, IOM researchers found racial and ethnic differences in cardiovascular care and significant racial differences in the receipt of appropriate cancer diagnostic tests, treatments and analgesics, all of which led to higher death rates among minorities.[5] Racial and ethnic disparities 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] In some cases, minorities were more likely to receive less desirable procedures, such as amputation, than non-Hispanic whites.[7]

Other credible studies have uncovered evidence that race and ethnicity influence a patient's chance of receiving specific procedures and treatments. For example, according to the Agency for Healthcare Research and Quality (AHRQ), a division of the U.S. Department of Health and Human Services, the length of time between an abnormal screening mammogram and the follow-up diagnostic test to determine whether a woman has breast cancer is more than twice as long for Asian-American, African-American and Hispanic women as it is for white women.[8]

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.[9] 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."[10] In other words, white patients are more likely to be treated in hospitals with experienced surgeons who are less likely to commit errors.

Racial prejudice may influence how minorities are treated by the health care industry. IOM researchers discovered that stereotyping, biases and uncertainty might play a role in medical disparities. Data showed 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.[11] "In the United States, because of shared socialization influences," says the IOM, "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."[12] (This

group of "well-meaning whites" necessarily includes white healthcare providers, who, according to the IOM, may fail to recognize manifestations of prejudice in their own behavior.[13])

It is clear that whatever the cause, racial and ethnic minorities are receiving inferior medical treatment by the health care industry and are being subjected to high rates of preventable medical errors.

The Health Insurance Factor

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 care and poor health consequences.[14] The Robert Wood Johnson Foundation reports that over 52 percent of Hispanics and more than 39 percent of African-Americans have no health insurance.[15] 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.[16] In addition, these researchers discovered that the uninsured rate for African-Americans is more than 50 percent higher compared to non-Hispanic whites.[17] Similarly, AHRQ found that nearly one-third of all Hispanics and one-fifth of all African Americans were without health insurance in early 1998, compared with 12.2 percent of non-Hispanic whites that same year.[18]

Minorities without health insurance are far more likely than are white Americans to rely on hospitals for their usual source of care, where medical errors are substantial.[19] 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 die from car accidents, breast cancer or AIDS.[20] And according to a 1990 Harvard Medical Practice study, medical negligence in New York State hospitals results in 27,000 injuries and 7,000 deaths every year.[21]

Another study cited by IOM found that the hospital location with the highest proportion of negligent adverse events (52.6 percent) was the emergency department, where people without health insurance may go for primary care.[22] 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 and are more likely to die.[23] 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.[24]

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.[25] 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 minorities.[26]

Limits on Non-Economic Damages

Among the "tort reform" measures that the insurance industry and organized medicine most desire is an arbitrary ceiling, or cap, on the amount a patient injured by medical negligence could receive for non-economic damages, no matter how devastating the injury or egregious the malpractice.

Non-economic damages compensate for intangible but real injuries like infertility, permanent disability, disfigurement, blindness, pain and suffering, loss of a limb or other physical impairment. Any limit on non-economic damages has a disproportionate impact on low wage-earners who are more likely to receive a greater percentage of their compensation in the form of non-economic damages if they are injured. This message was made clear by President Clinton in 1996 as he vetoed products liability legislation on the grounds that any limit on a victim's ability to recover non-economic damages would unfairly impact women, children, the elderly and the poor.

In January 2003, Senator Bill Frist (R-TN) assumed his position as Senate Majority Leader after his predecessor, Trent Lott (R-MS), was ousted due to his racially explosive remarks. 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 nonminority populations, is something I feel strongly about."[27]

Yet Frist is pushing for severe tort restrictions, including a cruel $250,000 cap on non-economic damages, which will disproportionately affect minorities, children, the elderly and spouses who do not work outside the home. These measures will only reduce the financial incentive of institutions like hospitals and HMOs to operate safely. His objectives should be deterring unsafe and substandard medical practices while safeguarding patients' rights. In the case of ethnic and racial minority patients, the impact of these proposals will be devastating.

WEAKENING CLASS ACTIONS AS A CIVIL RIGHTS ENFORCEMENT TOOL

Class actions are a critical tool used by individuals in this country to deter violations of individual rights and corporate misconduct. As a mechanism for the preservation and enforcement of civil rights, it is fundamental. Thomas Henderson, Chief Counsel and Senior Deputy for the Lawyers' Committee for Civil Rights, explained in congressional testimony, "Class actions are essential to the enforcement of the nation's civil rights laws. They are a vitally important and are often the only means by which persons can challenge and obtain relief from systemic discrimination."[28]

In Congress and in states around the country, the business community has been on an unyielding mission to change this country's class action laws, making it more difficult to bring them. In Congress, a bill called the "Class Action Fairness Act" that would toss into federal court virtually

all consumer class actions, where most civil rights class actions are now brought, is under serious consideration. This has brought forth an outcry from the civil rights community. As Henderson put it, this legislation:

> 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.[29]

On March 20, 2002, ten civil rights groups, including the Lawyers' Committee for Civil Rights Under Law, the Leadership Conference on Civil Rights, the Mexican American Legal Defense and Education Fund, the National Asian Pacific Legal Consortium, and the National Women's Law Center, wrote to U.S. Senators urging them to reject the federal class action bill on the basis of several concerns. The groups agreed with Henderson, stating, "This bill will amend federal law to extend federal jurisdiction to most state class actions, overloading federal courts and delaying the resolution of all cases in federal court, including a majority of civil rights claims."

The civil rights organizations also addressed other concerns with this legislation, some hidden in the bill's language. For example, the legislation would discourage people from bringing class actions by prohibiting settlements that provide named plaintiffs full relief for their claims. "Now," explained the groups, "a named plaintiff who sues an employer can receive a full award of back pay, and in a proper case, obtain an order placing him or her in the job denied because of discrimination, while also affording all members of the class the opportunity to share in available relief." This bill would eliminate that opportunity. It would prohibit allowing named plaintiffs to receive more relief than others in the class, eliminating any incentive for them to endure the intimidating, onerous and personally risky process of challenging prejudice in an anti-discrimination lawsuit.

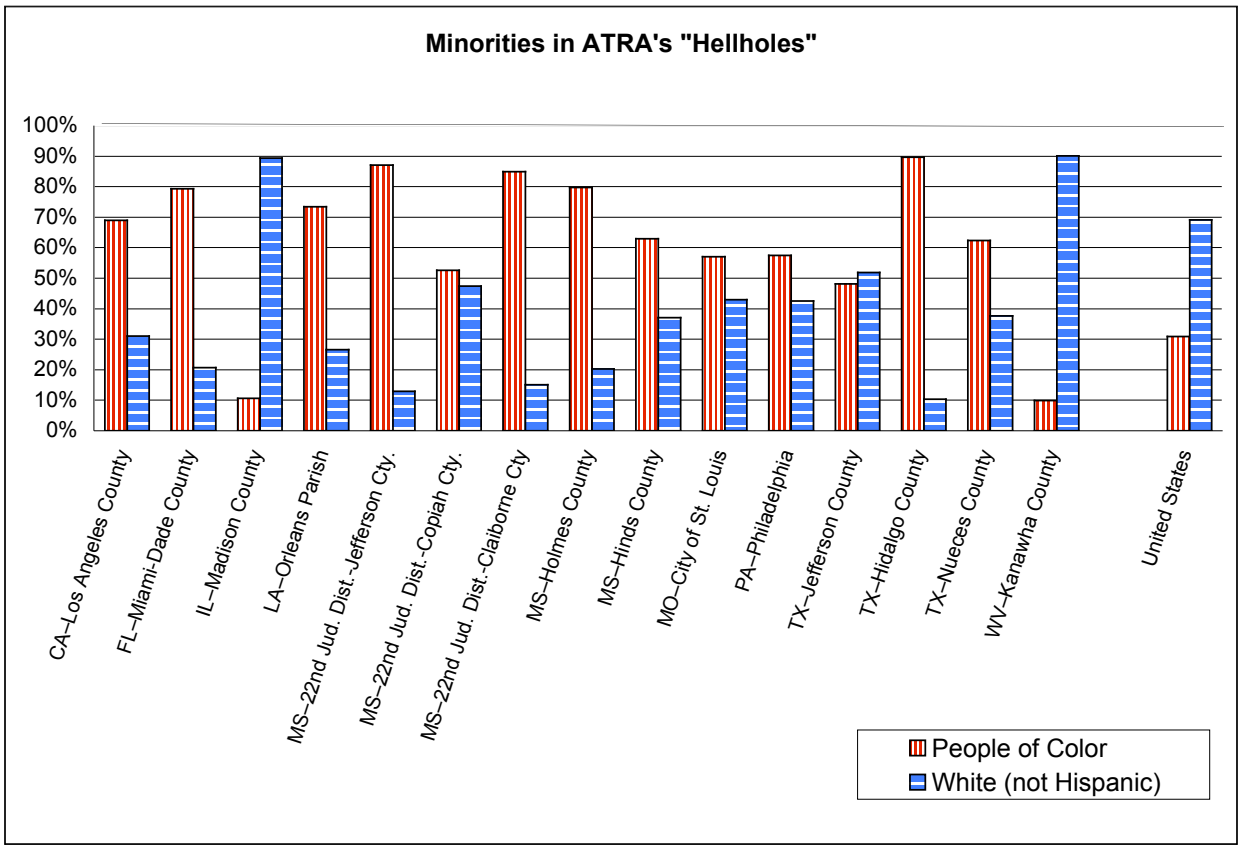
Moreover, the groups explained, the bill "will impose new, burdensome and unnecessary requirements on litigants and the federal courts" by imposing "inordinately difficult and costly notice requirements, which will drastically complicate and delay the settlement of class actions.… In short, we believe the impact [of] this legislation would be profound, and would result in new and substantial limitations on access to the courts for victims of discrimination."

RACE AND ATTACKS ON JURIES

In 2003, the American Tort Reform Association (ATRA), supported by major industries and Fortune 500 companies, released a report entitled *Bringing Justice to Judicial Hellholes 2003*.[30] In it, ATRA identifies 12 jurisdictions that a survey of its members identified as too "plaintiff-friendly."[31] The ATRA report is not supported by any actual or scientific 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."[32] The report then suggests ways to restrict the ability of injured consumers to sue in those jurisdictions, including limits on class action lawsuits.[33]

The "hellholes" identified by ATRA are: Los Angeles County, California (particularly the Central Civil West Division); Miami-Dade County, Florida; Madison County, Illinois; Orleans Parish, Louisiana; Mississippi's 22nd Judicial District; Holmes and Hinds Counties, Mississippi; the City of St. Louis, Missouri; Philadelphia, Pennsylvania; Jefferson County, Texas; Hidalgo County, Texas; Nueces County, Texas; and Kanawha County, West Virginia.[34]

A demographic analysis of these jurisdictions, based on 2000 census data, illustrates that in nine of the twelve ATRA "hellholes," minorities make up most of the population, even in states where a majority of citizens are white; and all but one "hellhole" (Madison County, Illinois) has a larger minority population than the state it is in, as shown in the following chart:[35]



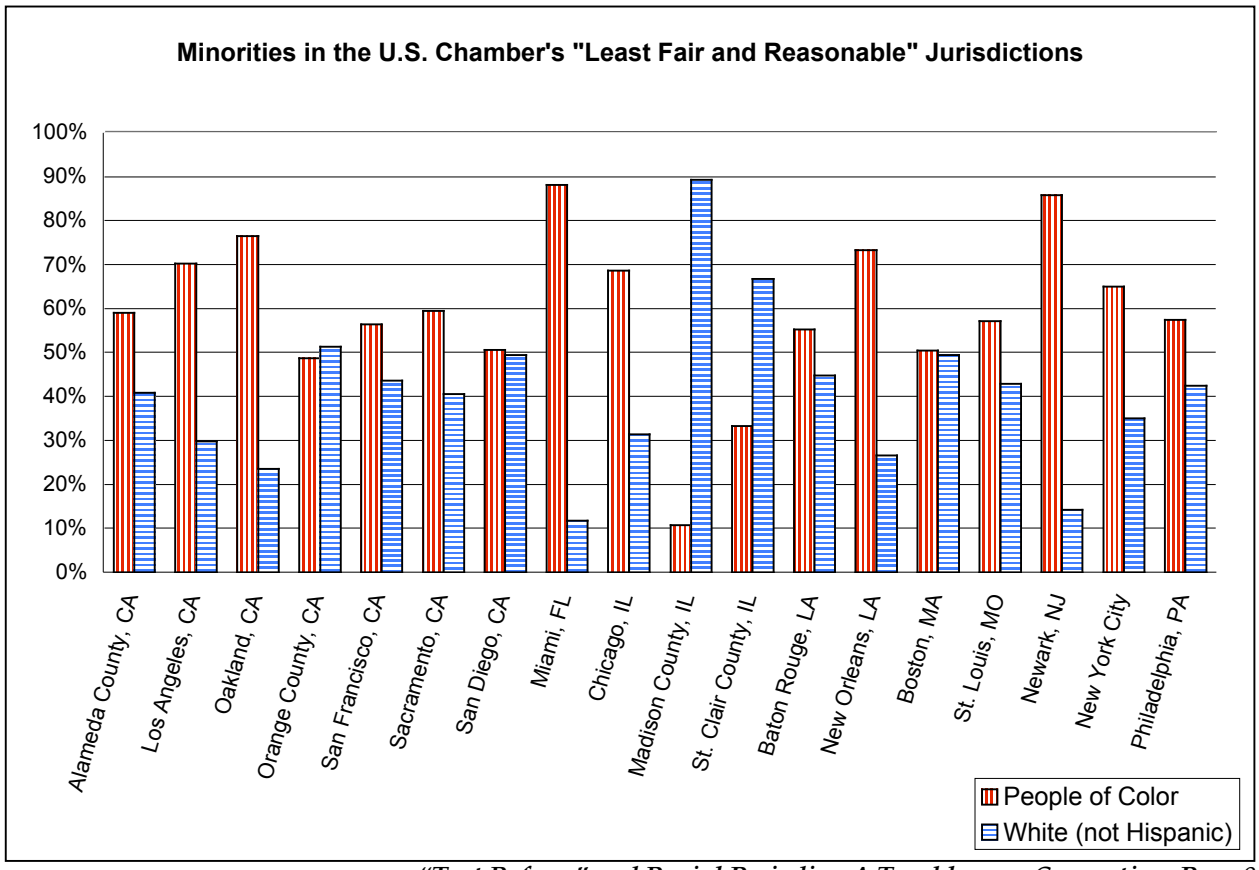
It is not surprising that the business community seeks to attack civil juries. The U.S. civil jury system is the one arena where average citizens can participate directly in government, where they can have a direct impact on events and ultimately the state of their own lives. Jurors — representative members of the community randomly chosen to sit in judgment of others, deliberate, render verdicts and then fade anonymously back into society — have often been called the conscience of the community. They stand as indispensable watchdogs over corporate negligence and corruption.

Corporations and their insurers have been at the forefront of attacks on civil juries over the years. These business interests 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.

Consistent with ATRA's message, in May 2002, the U.S. Chamber of Commerce began an unprecedented advertising campaign in Mississippi aimed at taking power away from juries in that state.[36] Indeed, the U.S. Chamber has created an entire division devoted to obtaining immunity from lawsuits for businesses. The Chamber's "Institute for Legal Reform" is picking off states one by one, electing judges and influencing legislators to enact corporate immunity laws, including tactics like threatening to pull the rug out from under a state's economy until liability is capped. Their message is specifically focused on jury verdicts, which the Chamber calls "bad for business." In Mississippi, they have already succeeded in influencing state lawmakers to enact a cap on punitive damages awards against corporations as well as some additional "tort reform" measures.

In March 2004, the Chamber released its annual ranking of state liability systems, based on their survey of what corporate lawyers think of the U.S. "litigation environment." This year, for the first time, the Chamber asked the corporate attorneys about which cities and counties they would identify as having "the least fair and reasonable litigation environment" (even though the Chamber stated, in 2003, that "to explore the detailed nuances within states would have required extensive questioning for each state and was beyond the scope and purpose of this study"). The Chamber's list is different from ATRA's but they have one glaring similarity: in 15 of the 18 jurisdictions targeted by the Chamber, the majority population is people of color .



Throughout recent history, business groups have specifically targeted juries in minority jurisdictions for the most relentless attacks, implying that juries in these jurisdictions are rendering unfair verdicts against undeserving corporations *not* because jurors have listened to the evidence in a case, but for other reasons – they are too poor, too uneducated, too "sympathetic" to the injured victim.

For years, this kind of thing was spewed about jurors who serve in the Bronx, New York. In their 2002 study "Trial Outcomes and Demographics: Is There a Bronx Effect?" Cornell University professors Theodore Eisenberg and Martin T. Wells decided it was time to actually examine facts about this "theory," which they described 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."[37]

When Eisenberg and Wells examined actual awards, 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.[38]

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."[39]

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.[40] The 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 interests is especially tragic given the growing dominance of corporate America in our lives.

CIVIL RIGHTS, HATE GROUPS AND THE CIVIL JUSTICE SYSTEM

Jury trials have historically been an important tool for protecting civil rights in the United States. In a 1965 civil rights action, *Basista v. Weir*, 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 right.[41]

The court added that the same principles are "equally applicable in all Civil Rights cases."[42]

Civil jury cases are often the only available forum for not only enforcing civil rights but also specifically holding perpetrators of hate crimes and hate groups accountable. For example, in separate criminal 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. 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.[43]

As exemplified by the above case, all too often, members of minority communities are targets of violent bigotry. According to recent FBI data, over 12,000 people reported being victims of violence based on racial, religious, sexual orientation, disability or ethnicity/national origin bias in 2001.[44] Yet these figures represent only a small percentage of those emotionally, physically and psychologically hurt by hate crimes each year.

"Every hour, someone commits a hate crime," Richard Cohen told the Center for Justice & Democracy. Cohen, an attorney with the Southern Poverty Law Center (SPLC), a public interest law firm that has filed a series of successful cases against hate groups, said, "Although there are no reliable statistics from which one could chart hate crime trends with precision, the number of hate groups has been increasing in recent years. Today, there are approximately 600 hate groups."

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 dangerous entities out of business. Says SPLC's Cohen, "Civil lawsuits are a crucial tool in the fight against hate. They are often the only way to hold hate groups like the Klan and the Aryan Nations responsible for the violent actions of their members."

Given the impact of hate crimes on victims and communities, and the absence of many safeguards to effectively address such bias-motivated incidents, the importance of civil lawsuits cannot be overstated. "Tort reform" laws, which reduce the power and authority of civil juries, weaken the only available forum in some cases for holding perpetrators of hate crimes and hate groups accountable.

The following cases illustrate how litigation not only makes the injured whole but also protects others from becoming targets of violence in the future.

Aryan Nations. In 2000, a jury found that Aryan Nations 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. 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 Nations, the 20-acre Idaho complex was transferred to the Keenans, who are turning it into a human rights park.[45]

Christian Knights of the Ku Klux Klan. The Christian Knights can no longer function as a viable hate group after a multi-million-dollar verdict was levied against the "Grand Dragon" of the South Carolina Klan, as well as the Klan's North and South Carolina organizations. Members of the Christian Knights had burned down a black church in South Carolina in 1995.[46]

White Aryan Resistance. In November 1988, members of East Side White Pride, a skinhead gang organized by the White Aryan Resistance (WAR), killed Mulugeta Seraw, a 26-year-old Ethiopian student, as he approached his front door on his way home from work. Trial evidence showed that the skinhead gang received WAR propaganda, which targeted blacks, Jews and other "enemies" of the white race. 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. After a jury awarded $12.5 million, WAR was shut down.[47]

Invisible Empire Klan. The Invisible Empire Klan was disbanded after a $1 million jury verdict against the Klan's leader and his organization. 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.[48]

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 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. Nine Klansmen were ultimately convicted of criminal charges related to the 1979 assault.[49]

United Klans of America. On March 20, 1981, 19-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.[50]

Knights of the Ku Klux Klan. On March 15, 1981, Texas fishermen associated with the Ku Klux Klan (KKK), 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 KKK and the KKK, which not only halted the Knights' terror campaign but also shut down its paramilitary training bases.[51]

Civil juries are often asked to resolve problems with profound policy implications for this country. As the above examples show, jury verdicts are sometimes the only means available to correct gross injustices. The civil justice system today serves crucial functions that, if weakened in any significant respect, would devastate efforts to protect civil rights and rid the country of hate groups.

Volunteer Immunity Laws

In 1997, Congress passed the so-called "Volunteer Protection Act of 1997."[52] 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.

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. This is known as "one-way preemption." As a result, any broad *state* volunteer immunity law that already exists, or is enacted in the future, 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. On the floor of the U.S. House of Representatives, Conyers quoted directly from a May 16, 1997, letter from Morris Dees, Chief Trial Counsel of the Southern Poverty Law Center: "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."[53] As Conyers put it himself:

> [T]he 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.[54]

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

CONCLUSION

It is a tragic and unfair fact of life that minorities are frequently forced to bear a disproportionately large share of America's health and safety problems. Whether it is inferior medical care, civil rights violations 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 the United States.

Unfortunately, so-called "tort reform" proposals that would provide wrongdoers greater immunity for their misconduct also have the impact of severely weakening the protections and rights afforded to racial and ethnic minorities in this country. Time after time, victims of civil and constitutional rights violations have won important verdicts before civil juries, often relying on the civil justice system to dispense justice where the criminal justice system could not.

Yet this country continues to suffer through a non-stop barrage of anti-jury advertising and legislative attempts to weaken civil justice remedies and to significantly weaken the civil jury, often by specifically targeting juries in minority communities. Juries in every community should be unencumbered by these attacks and by legislative efforts to restrict their power, authority and ability to do their job.

NOTES

[1] Harvard Medical Practice Study, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (1990).

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

[3] Kohn, Corrigan and Donaldson, eds., *To Err Is Human: Building a Safer Health System*, Institute of Medicine, National Academy Press: Washington, D.C. (1999), p. 30.

[4] *Ibid.*

[5] Smedley, Stith and Nelson, eds., *Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (2002), Institute of Medicine, National Academy Press: Washington, D.C. (2002), p. 5.

[6] *Ibid* at 5-6.

[7] *Ibid.*

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