

2016

# Response to Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law

Jennifer Wriggins

University of Maine School of Law, wriggins@maine.edu

Follow this and additional works at: <https://digitalcommons.maine.law.maine.edu/faculty-publications>



Part of the [Civil Rights and Discrimination Commons](#), [Law and Race Commons](#), and the [Torts Commons](#)

---

## Suggested Bluebook Citation

Jennifer Wriggins, *Response to Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 401 (2016).

Available at: <https://digitalcommons.maine.law.maine.edu/faculty-publications/104>

This Article is brought to you for free and open access by the Faculty Scholarship at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# Response to *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*

Jennifer Wriggins\*

## Abstract

*Issues of race and racism in the U.S. torts system continue to deserve much more attention from legal scholarship than they receive, and Keeping Cases from Black Juries is a valuable contribution. Studying racism as it infects the torts system is difficult because explicit de jure exclusions of black jurors are in the past; race is no longer on the surface of tort opinions; and court records do not reveal the race of tort plaintiffs, defendants, or jurors. Yet it is essential to try and understand the workings of race and racism in the torts system. The authors pose a question that is probably impossible to definitively answer but that is very important to explore: where state legislatures and courts continue to retain outmoded tort doctrines like contributory negligence, which tend to limit plaintiffs' access to juries, is this because state legislatures and judges believe juries with large concentrations of African-Americans and low-income people will unacceptably distribute wealth to plaintiffs? The term "Bronx effect" alludes to this alleged phenomenon. No other article has rigorously tried to link the so-called Bronx effect with the perpetuation of outmoded tort doctrines. The authors use a complex interdisciplinary approach to rank states in terms of the degree to which their tort doctrines deny plaintiffs' access to juries. Digging deep into factors that might affect a state's ranking, they then find strong correlations between a state's law making it difficult for plaintiffs to reach a jury, and a state's having a large African-American*

---

\* Sumner T. Bernstein Professor of Law, Associate Dean for Academic Affairs, University of Maine School of Law.

*population and/or being part of the South. This and other findings in the article are significant, bringing to light a race-based exclusionary pattern in the legal system. The pattern of keeping cases from black buries also likely leads to undercompensation of African-American plaintiffs, my response explains. The article deserves a place in torts scholarship generally, in critical race scholarship, and in empirical legal scholarship. While it is not surprising that definitive causal conclusions are lacking, implicit bias may shed light on the mechanisms by which these outmoded doctrines endure. The article's calls for reform are reasonable in light of the evidence of the study and other torts scholarship.*

### *Table of Contents*

I. Introduction .....	402
II. The Approach.....	404
III. Why This Matters So Much.....	408
A. Exclusion of Urban African-American Jurors.....	409
B. Exclusion Leading to Undercompensation of African-American Plaintiffs. ....	410
IV. Conclusion.....	411

### *I. Introduction*

*Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality and Regional History Affect Tort Law*,<sup>1</sup> by Donald G. Gifford and Brian Jones, is one of a small number of works that explore torts, race, and racism.<sup>2</sup> Racism

---

1. 73 WASH & LEE L. REV. 557 (2016).

2. For other works discussing this nexus of issues, see generally MARTHA CHAMALLAS & JENNIFER WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* (2010); Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996); Jennifer B. Wriggins, *Torts, Race, and the Value of Injury 1900-1949*, 49 HOW. L. J. 99 (2005) [hereinafter Wriggins, *Torts and Race*]; Jennifer B. Wriggins, *Constitution Day Lecture: Constitutional Law and Tort Law: Injury, Race, Gender, and Equal Protection*, 63 ME. L. REV. 263 (2010) [hereinafter Wriggins, *Constitutional Law*].

(blatant and subtle) in the U.S. remains a scourge despite all the progress that has been made. The torts system is the premier mechanism of compensation for personal injuries in the U.S. and is an important part of all law schools' educational programs. Studying any aspect of the torts system is methodologically challenging. Some of the challenges include that tort law doctrine varies from state to state, operates in a decentralized way, features many unreported judicial decisions, and operates with a large majority of cases settling without a public record of the settlement amount.<sup>3</sup> Interdisciplinary, empirical approaches are indispensable in understanding how the torts system works. Studying racism as it affects and infuses the torts system is particularly difficult. Explicit *de jure* exclusions of black jurors are in the past and race<sup>4</sup> is not on the surface of tort opinions any more.<sup>5</sup> Further, court records now do not reveal the race of tort plaintiffs, defendants, or jurors, making it daunting for researchers to explore issues of tort liability or damages as they relate to race.<sup>6</sup> Historically, there has not been much race-specific torts doctrine.<sup>7</sup> Black plaintiffs have sued and won under the

---

3. Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies 1867-2007*, 27 REV. OF LIT. 37, 38–39 (2007) [hereinafter Wriggins, *Thoughts on Race and Remedies*].

4. The Article and my response are not adding to the extensive legal literature on the social construction of and indeterminacy of race, *see, e.g.*, Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV 1, 21 (1994) (discussing the argument that “race [is] but one component in the formation of ethnic groups”), but are looking at the ways race and perceptions of race may operate in the legal system and society. In these comments, I am using “African-American” and “black” interchangeably. Of course, there are many issues of race, ethnicity, and juries that neither these brief comments nor the Article deal with.

5. *See* Wriggins, *Thoughts on Race and Remedies*, *supra* note 3, at 60–61 (“New attention to race and damages, particularly from Emancipation to 1950, paints a complex picture showing that race and racism are not extrinsic to torts but are as surely a part of it as is industrial development.”).

6. For example, researchers trying to determine how jury composition affects damages have to use census data that includes racial composition of populations to estimate racial composition of juries rather than actual jury composition. *See* Eric Hellan & Alexander Tabarrok, *Race, Poverty, & American Tort Awards: Evidence from Three Data Sets*, 32 J. LEGAL STUD. 26, 52 (2003) (“[W]e do not have data on the composition of the jury, and we must therefore infer jury characteristics from county characteristics.”).

7. *See* Wriggins, *Torts and Race*, *supra* note 2, at 105 n.26 (“I believe many structural factors, such as the all-white legal system, probably made it

torts system since the end of slavery, though the damages they have won have not been commensurate with the damages won by whites in many instances.<sup>8</sup> The use of explicitly race-based data in tort litigation for determining damages, long attacked by scholars, has been held unconstitutional on several occasions.<sup>9</sup> Yet, race matters in torts as in the rest of the U.S. legal system.<sup>10</sup> Given the current situation where race is no longer on the surface of judicial opinions, new approaches are needed to gain traction for understanding race and torts on the ground now. In this response, I will describe the authors' approach, the significance of their project, its place in the legal literature, and the meaning of their findings.

## II. The Approach

The authors develop an interdisciplinary approach to exploring the questions they pose. Their hypothesis is

that judges and state legislators often believe that juries with a substantial percentage of African-American or low-income jurors are more inclined to find for personal injury victims and award higher damages and that these perceptions have led them to adopt rules making it more difficult for plaintiffs to have their cases decided by juries.<sup>11</sup>

Of necessity, this hypothesis has several steps and interlocking aspects. The authors begin by describing the assumption, held by many vocal critics of the torts system, that predominately African-American and poor urban juries redistribute wealth in tort cases to plaintiffs by ruling against defendants who should not be held liable given the evidence, and by awarding plaintiffs inordinately high damage awards.<sup>12</sup>

---

more difficult for black plaintiffs to win on liability, but clear doctrinal rules were not discernible.”).

8. See generally *id.* (discussing damages statistics across racial lines); Wriggins, *Thoughts on Race and Remedies*, *supra* note 3 (same).

9. *G.M.M. v. Kimpson*, 92 F. Supp. 3d 53, 76 (E.D.N.Y. 2015); *McMillan v. City of New York*, 253 F.R.D. 247, 255 (E.D.N.Y. 2008).

10. See Wriggins, *Thoughts on Race and Remedies*, *supra* note 3, at 60–61 (discussing the historical importance of race in torts cases).

11. Gifford & Jones, *supra* note 1, at 561.

12. See *id.* at 559 (“The image of the disproportionately African-American

Second, they turn to describe tort doctrines, enduring in some states, that would seem to keep plaintiffs' cases from getting to a jury by resulting in defendants' success in pretrial dismissal motions and in fewer plaintiffs' cases being brought in the first place.<sup>13</sup> An important example of this type of doctrine is traditional contributory negligence. This doctrine provides that if a plaintiff contributes even in small part to her injury, she is wholly barred from recovery. It has been abolished by court decision or statutes in all but a few states, but how do we know that these types of doctrines keep plaintiffs' cases from getting to a jury? Looking at the all-or-nothing nature of the doctrine itself, it seems inevitable that the existence of the doctrine in a state would indeed result in more defendants' success in pretrial dismissal motions and in fewer plaintiffs' cases being filed at all.

But proving that contributory negligence or other seemingly pro-defendant doctrines actually cause more dismissals or fewer cases to be brought is challenging to say the least. To respond to this challenge, the authors creatively developed a quantitative Jury Access Denial Index (JADI), which analyzed the tort doctrine in each state and the extent to which it prevented plaintiffs' cases from getting to a jury.<sup>14</sup> First, they looked at tort doctrines such as contributory negligence in the substantive law of each state.<sup>15</sup> Recognizing that endurance of old-fashioned doctrines alone is not sufficient even to provide any estimate as to how much each doctrine contributes to failures of plaintiffs' cases to reach a jury, they assembled a panel of twelve expert judges and practitioners to assess the relative significance of each of the doctrines in order to give each doctrine appropriate weight in the index.<sup>16</sup> Then, using the law of seventeen states chosen for meeting certain criteria (such as whether it retained contributory negligence, geographic diversity and other factors)<sup>17</sup>, and the relative weight of the various doctrines as determined by the

---

and poor urban jury redistributing wealth has dominated the political debate surrounding the tort system for the past generation.”).

13. *See id.* at 571 (discussing “substantive legal principles that play important roles in dismissing tort cases”).

14. *See id.* at 611–27 (providing the index and discussing its results).

15. *Id.* at 614.

16. *Id.* at 613.

17. *Id.* at 614.

panel of experts, they assigned a Jury Access Denial Index (JADI) score to each of the seventeen states. At the end of this part of the analysis, the authors ranked each state in terms of the degree to which the state's tort doctrines make a plaintiff's access to a jury determination more difficult.<sup>18</sup>

Does the first aspect, the assumption that predominately poor and urban African-American juries are "too" pro-plaintiff, relate in some causal fashion to the second aspect, the jury-access-denying nature of a state's substantive tort law? Even to articulate the question of this relationship shows both how difficult it is to resolve and how important this question and whole area of inquiry are.

It is worth stepping back for a moment and considering some of the dimensions of the authors' hypothesis that there is a link between jury denial and low-income and African-American populations (and thus jurors) and the implications if it is correct. First, doctrines and rules that deny plaintiffs' access to jury trials will apply to all plaintiffs regardless of race (at least in theory). In addition, one important yet implicit aspect of this hypothesis has to do with the perceived race of the plaintiffs. Part of the perception that urban, predominately African-American juries are "out-of-control" stems from the notion that these juries are awarding "excessive" damages for the injuries of poor African-Americans. This aspect of the perception is not made explicit but is a subtext. In the urban, predominately poor, largely African-American areas from which these allegedly "out-of-control" juries are drawn it is likely that at least a significant fraction of the plaintiffs will be African-American.<sup>19</sup> And these purportedly "out-of-control" urban, predominately African-American juries are presumably awarding excessive damages to victims whose injuries do not "deserve" such compensation. Scholarship has traced the enduring "race-based discount" of the torts system applied to African-Americans' injuries.<sup>20</sup> Gifford and Jones do not

---

18. *Id.* at 616.

19. Contingency fee agreements provide a widespread funding mechanism for funding personal injury litigation. See Wriggins, *Torts and Race*, *supra* note 2, at 106–07.

20. See, e.g., *id.* at 105, 138 (discussing cases treating black plaintiffs differently from white plaintiffs); Wriggins, *Constitutional Law*, *supra* note 2, at 271 n.40 (describing "race-based discount"); Wriggins, *Thoughts on Race and*

directly focus on the “race-based discount,” but give additional resonance to the questions posed. If we consider this aspect more explicitly, we see that the broad questions posed by their Article are both about access to jury service for African-Americans in poor urban areas and, as important, access to tort remedies by African-Americans in these areas. Framed as such, this piece resonates with current activism concerning racial justice in the criminal justice system; for example, the Black Lives Matter movement.

Returning to the hypothesis that the perception of overly redistributive urban poor African-American juries has led judges and legislators to restrict jury access, how does it fare in the actual analysis? The authors in Part IV, Table 1, include their JADI ranking of seventeen regionally disparate states which has five southern states (plus Texas) as the most jury-denying.<sup>21</sup> This is very interesting, but not definitive (and not intended to be). The authors go on to review their multiple regression analysis of income inequality in a state’s major cities (with the widely used ‘Gini’ coefficient measuring the degree of income inequality) to see if high income inequality in a state’s major cities correlates with a high JADI.<sup>22</sup> They find there is some, but not statistically significant, correlation.<sup>23</sup> They then explain that their analysis finds a statistically significant relationship between states where the largest cities include a higher percentage of African-American residents and a much higher JADI.<sup>24</sup> As they note, “a higher percentage of African-Americans in the population is likely to have a large or substantial effect on JADI scores.”<sup>25</sup> They also find an even stronger relationship between a state’s history as part of the South and a higher JADI score which is clearly statistically significant.<sup>26</sup> Then they go on to note the complexity

---

*Remedies*, *supra* note 3, at 37 (same).

21. Gifford & Jones, *supra* note 1, at 616.

22. *See id.* at 618 (“Publicity about “out-of-control juries” focuses on urban juries, not those in suburban and rural areas. In some states, a single city, such as Boston, dominates the images that judges and legislators have about urban juries.”).

23. *Id.* at 619.

24. *Id.* at 620.

25. *Id.* at 620 n.279.

26. *Id.* at 621.



of the relationships between the variables, finding, for example, that even in northern cities a higher percentage of African-Americans means a higher JADI.<sup>27</sup> In their conclusion, the authors note that because racial biases are often unexpressed in the twenty-first century, they can only prove “strong correlations between a state’s substantive law that makes it difficult for personal injury plaintiffs to have their cases decided by a jury and the factors of race and being part of the south, and not causation.”<sup>28</sup> However, they assert, “these strong correlations, particularly when coupled with the historical treatment of African-Americans, most egregiously in the South, suggest that these intertwined factors explain the continued observance of these doctrines discarded a generation ago by the overwhelming majority of other courts.”<sup>29</sup> In other words, they are suggesting that the strong correlations combined with regional history do demonstrate causation. They go on to question the legitimacy of *stare decisis* in this context<sup>30</sup> and to assert that the outmoded doctrines such as contributory negligence should be rejected as they are antiquated and “infused with the racial biases of a past era.”<sup>31</sup> The findings of the Article are not conclusive, but that is not surprising given the complexity of the torts system and the available (and unavailable) data. The lack of definitiveness, however, does not eviscerate the Article’s significance.

### *III. Why This Matters So Much*

The Article is important for several reasons outlined here. The policy reasons for changing torts doctrines as the authors advocate have been thoroughly explored elsewhere; this Article adds an essential dimension to the debates about reforming tort doctrines.

---

27. *Id.* at 622–23.

28. *Id.* at 628.

29. *Id.* at 623.

30. *Id.* at 621.

31. *Id.* at 631.

*A. Exclusion of Urban African-American Jurors.*

One focus of the Article is on the exclusion of urban African-American jurors from hearing tort cases. The Article aims to show how the retention of antiquated torts doctrines, particularly in southern states, prevents plaintiffs from getting to juries, resulting in predominately poor African-American juries being not allowed to decide plaintiffs' cases.

Exclusion of urban African-American jurors from hearing tort cases is wrong in many ways. The torts system is part of our legal system and jury participation in civil or criminal cases is an important aspect of civic engagement and citizenship. Exclusion of any group from participation in that responsibility is illegitimate in and of itself. Exclusion from jury service in tort cases on the basis of race violates potential jurors' equal protection rights.<sup>32</sup> As the Supreme Court wrote in *Edmonson v. Leesville Concrete*,<sup>33</sup> "to permit racial exclusion in this official forum compounds the racial insult in judging a person by the color of his or her skin."<sup>34</sup> Second, exclusion of any group from that responsibility is harmful and stigmatizing to the group, suggesting their contributions are worthless.<sup>35</sup> Third, denying the opportunity to serve on a jury to members of the group is damaging and insulting to each individual member of the group, reflecting a view that his or her contributions are valueless. The *Edmonson* court wrote that "racial discrimination in the quality or selection of jurors offends the dignity of persons."<sup>36</sup> Exclusion of a group and its members from making jury determinations is harmful to society as a whole. If we believe in juries as a way of resolving civil disputes (granted this is a contested way of resolving civil disputes), we must believe that the quality of decisionmaking will be degraded by excluding African-Americans.

---

32. See *Edmonson v. Leesville Concrete, Inc.*, 500 U.S. 614, 618 (1991) (noting "that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service").

33. *Id.*

34. *Id.* at 620.

35. *Id.* at 628 ("To permit racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin.").

36. *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 402 (1991)).

*B. Exclusion Leading to Undercompensation of African-American Plaintiffs.*

Tort law and adjudication embody an inherent tension between the principles of equality (in this context, that like cases should be treated alike) and of individualized adjudication (the idea that cases should be decided in an individualized, decentralized way by decisionmakers who are not constrained by a requirement of uniform treatment). I have discussed this tension at length in the context of race, racism, and torts.<sup>37</sup> As noted above, one possible consequence of continuing past jury-access-denying doctrines in geographic areas with high concentrations of poor African-Americans is that the race-based discount applied to African-Americans' tort claims will continue (since in those areas a high concentration of plaintiffs will be African-American and their tort claims will be subject to jury-access-denying doctrines).<sup>38</sup>

Part of the subtext here and elsewhere is that injuries to members of this group do not "count" for as much as injuries to members of other groups, as my historical analysis of tort law and damage awards has shown.<sup>39</sup> This is another reason why the Article's inquiry is important. Even though there is no consensus in torts scholarship as to what the "correct" level of compensation for injuries should be, there must be consensus that like cases should be treated alike and that tort claims brought by African-Americans should not be undervalued relative to others' tort claims on the basis of race. The race-based discount applied to claims brought by poor, African-American plaintiffs, effectuated in part by the continuation of jury-access-denying doctrines, is a violation of basic equality and equal protection principles. While in the past some appellate judges in determining wrongful death damages actually grouped cases involving white decedents in different categories from cases involving black decedents, as if the

---

37. See, e.g., sources cited *supra* note 2 (citing sources discussing these issues).

38. See CHAMALLAS & WRIGGINS, *supra* note 2, at 52–62 (discussing cases where African-American plaintiffs' claims had been dismissed).

39. See sources cited *supra* note 2 (discussing why African-American plaintiffs are often awarded less damages than other plaintiffs).

injury was different in kind because of the decedents' race,<sup>40</sup> that and other race-based devaluation should be long gone. Reflecting a newer understanding, some courts recently have found that making damage determinations based on race-based earnings or life expectancy tables violates equality and equal protection principles.<sup>41</sup>

Devaluing claims brought by poor African-Americans has additional negative consequences. First, an inordinately low damage award denies victims and their families the possibility of a foundation for future financial stability, which has ripple effects for generations to come.<sup>42</sup> Second, the devaluation cannot help but have negative psychic consequences for the individuals involved and the group more broadly, contributing to demoralization and justifiable anger. Third, if members of a group are undercompensated, defendants determining the appropriate level of precautions can be expected to adjust down the level of precautions taken to prevent harm to residents in poor and African-American neighborhoods, applying Learned Hand's formula and other cost-benefit analysis. Last, whites benefit in a corrupt and corrupting way from the devaluation of injuries to poor, African-American people.

#### IV. Conclusion

Gifford and Jones' Article deserves a significant place in contemporary torts scholarship. The creation of the JADI index is a notable contribution and likely to be useful beyond this Article. Publishing the JADI index for all fifty states would be very

---

40. See Wriggins, *Torts and Race*, *supra* note 2, at 124–25 (“[T]o these courts, the principle of treating like cases alike meant comparing deaths of black people only with the deaths of other black people. Deaths of white people, because they were excluded from the analysis, seem to have been considered another kind of harm.”).

41. See cases cited *supra* note 9 (citing cases where the courts have made this determination).

42. See Wriggins, *Thoughts on Race and Remedies*, *supra* note 3, at 61 (noting that “the cumulative effect of even small differences in damage remedies may be great over time”); Wriggins, *Constitutional Law*, *supra* note 2, at 270 n.36 (“A \$2,500 award in 1909 might have enabled [an African-American plaintiff's] family to buy a house, pay for education, or take other steps that might build wealth for future generations.”).

interesting. There are additional paths for future inquiry to explore with the JADI index. One possible path is suggested in the question mentioned in the text about the role of the idea of individual responsibility in retention of certain tort doctrines.<sup>43</sup> It would be instructive to know if this idea relates to the JADI in all states, including predominately rural, white states. Do some rural, white states evince a powerful and widespread idea of individual responsibility that contributes to retention of certain doctrines? Also, where do other southern states fall in the JADI index—for example, Louisiana? Louisiana may be an outlier since it has had a different role for juries due to its justice system having originated with French law rather than English law.<sup>44</sup> Given my research on Louisiana's tort history and race, I wonder whether Louisiana has a lower JADI than other southern states.<sup>45</sup> Also, Louisiana's damage doctrines are different from those of common law states. Could damage doctrines (and damage caps) in different states be used to create other JADI indices that would also be illuminating? As race and racism are important parts of the torts system, mainstream contemporary torts scholarship should, as this Article does, recognize and grapple with their importance. The Article also deserves a place in critical race scholarship, which has not focused much on torts. As this Article looks at race and law in new and ground-breaking ways, delving far beneath and "beyond" the surface of legal doctrine, it is a critical race theory project. Moreover, it goes beyond stated formal equality and nondiscrimination principles to interrogate actual inequality on the ground. The Article also merits a place in empirical legal scholarship generally. It rigorously uses a mix of legal doctrine, qualitative analysis, and quantitative analysis, to shed genuine light on ways the legal system works. The way the authors combined their analytical

---

43. See Gifford & Jones, *supra* note 1, at 600 n.202 (discussing the role of individual responsibility in southern Protestant culture).

44. See William E. Crawford, *Life on a Federal Island in a Civilian Sea*, 15 MISS. C. L. REV. 1, 2 (1994) (explaining that Louisiana appellate courts have the authority to make their own findings of damages as long as there is record evidence to support them, can find a civil defendant guilty when a jury had exonerated the defendant, and can reverse jury findings on the facts and make a contrary decision).

45. For a discussion of torts and race in Louisiana Law at length, see Wiggins, *Torts and Race*, *supra* note 2, at 99.

methods is deft and perhaps could be replicated with other questions.

The authors note that they have found strong correlations but not definitive causation, which would be impossible to prove, particularly where their hypothesis involved so many different actors over a wide geographic area and a decades-long time period.<sup>46</sup> The torts system is complex. For example, even in the height of the Jim Crow era in the Deep South, some black plaintiffs won tort cases heard by all-white juries and all-white judges.<sup>47</sup> Further, as Professor Dayna Bowen Mathew has stated, “Americans now seldom espouse the overt racism, prejudice and bigotry that our laws prohibit.”<sup>48</sup> Leaving aside the challenges of finding motive, the finding of a statistically significant correlation between a high JADI index and cities with large African-American populations is powerful. At a minimum, this finding creates a disparate impact on black juries (and I argue black plaintiffs as well). In and of itself, and coupled with other analytical work recommending reform of doctrines such as contributory negligence, this disparity should be a catalyst for reform.

Research from the past several decades tells us that implicit bias gives a powerful way of thinking about the Article’s findings.<sup>49</sup> Implicit bias may be at work in most of the decisions to retain old tort doctrines made by judges and/or legislatures in the southern or northern states that retain some of these doctrines. But drawing tight conclusions as to causation is impossible.<sup>50</sup> As Professor Mathew has recently shown in her excellent recent book,<sup>51</sup> implicit bias research can usefully shed light on patterns of discrimination in decentralized, multi-actor decisions when

---

46. Recall that their hypothesis refers to decisions of “judges and state legislators” generally. Gifford & Jones, *supra* note 1, at 562.

47. Wriggins, *Torts and Race*, *supra* note 2, at 100 n.7, 110–36 (discussing cases of that era).

48. DAYNA BOWEN MATHEW, *JUST MEDICINE* 39–40 (2015).

49. See *generally id.* (explaining how implicit bias affects health disparities).

50. *Id.* For a more detailed discussion of implicit bias, see generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006).

51. *Id.*

explicit intent is not on the surface. The context she writes about is the U.S. health care system but many of her insights may apply here as well. The absence of tight, definitive “proof” of causation should not be fatal to the authors’ calls for reforms. As long as we have a jury system for civil cases, there is no excuse for keeping cases from black juries.