Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*

THOMAS H. KOENIG and MICHAEL L. RUSTAD

The borderline between criminal and tort law has been increasingly blurred over the past quarter century by the emergence of new “crimtort” remedies which have evolved to deter and punish corporate polluters. Punitive damages, multiple damages, and other “crimtort” remedies are under unrelenting assault by neo-conservatives principally because, under this paradigm, the punishment for wrongdoing can be calibrated to the wealth of the polluter. If wealth-based punishment is eliminated by the “tort reformers,” plaintiffs’ victories in crimtort actions such as those portrayed in the movies Silkwood, A Class Action, and Erin Brockovich will become an endangered species.

I. THE SOCIAL FUNCTIONS OF TOXIC TORTS

A. INTRODUCTION

The degradation of the environment caused by the unsafe storing, transmitting, and disposing of toxic substances has precipitated a nationwide crisis. The American Cancer Society (2003: 1) estimates “that between 50,000 and 100,000 Americans die each year from the effects of outdoor particulate air pollution.” Cancer rates in the United States have risen every year since 1970, which suggests that growing levels of environmental toxins are undermining America’s health.¹ Acute lymphocytic leukemia in children, for example, has increased over 60 percent since 1971.² While the precise relationship between pollution levels and the incidence of cancer in the general population cannot be pinpointed, few doubt that a cleaner environment would improve the well-being of all Americans. The rigorous enforcement of federal and state environmental statutes would be particularly beneficial

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Address correspondence to Thomas Koenig, 500 Holmes Hall, Northeastern University, Boston, MA 02115; e-mail: T.Koenig@neu.edu.
to America’s poor and minorities, who are disproportionately affected by multiple exposures to toxic substances (U.S. Environmental Protection Agency 2003a).

This article argues that neither the criminal law nor the civil law alone can adequately punish and deter polluters who threaten the purity of the air we breathe, the water we drink, and the foods we eat. Toxic torts, which combine deterrent elements from both criminal and civil law, provide the first line of defense against the threats to the common welfare caused by chemical, biological, biochemical, and radioactive exposures. Words such as “asbestos, Agent Orange and Agent White, Three-Mile Island, dioxin, and a string of acronyms – DES, PCB, PBB, and IUD” – are testaments to the effectiveness of private litigation in protecting the public’s health and safety though the tort system (Rosenberg 1984: 853).

Criminal law and tort law, in their pure forms, utilize very different mechanisms to deal with harmful conduct. In criminal law, government attorneys prosecute wrongdoers for their illegal acts, employing the sanctions of imprisonment and criminal fines. Tort lawsuits, in contrast, are initiated by private parties as civil actions in order to obtain redress through compensation for the damages that they have suffered. Tort remedies generally take the form of monetary damages, though equitable remedies such as injunctive relief are ordered in some environmental cases. Under tort law, defendants can generally be found liable for harms caused either intentionally or through negligence under a “preponderance of the evidence” standard. In criminal cases, the state must prove every element of the crime “beyond a reasonable doubt” in order to obtain a conviction. Environmental law is under sustained attack by conservatives for illegitimately blurring these two distinct bodies of law. We maintain, however, that the sharp theoretical demarcation between criminal and tort law must be transcended if environmental misdeeds by major corporations are to be adequately punished and deterred.

We have coined the term “crimtorts” to describe the emergence of a legal hybrid that blends elements from the civil and criminal sides of law. Crimtort remedies serve as powerful weapons against defendants who threaten the environment through irresponsible disposal of toxic substances (Koenig & Rustad 1998). The distinctive feature of crimtorts is that private litigants contribute to the societal goal of protecting the public interest while, at the same time, receiving compensation for their own personal injury or property damage.

Crimtort penalties are feared by giant corporations because the magnitude of the award can be directly calibrated to the wealth of the polluter. The principle of wealth-based punishment means that the more well-heeled the corporation, the greater the punitive damages or civil penalty. A $10,000 fine may be a significant penalty for an individual, but it is merely the functional equivalent of a parking ticket for a major corporation. Table 1 illustrates the major distinctions between criminal law and tort law, highlighting the
ways that the public and private laws overlap through the legal hybrid of crimtorts.

Crimtorts blend the private and public branches of law primarily by utilizing private individuals to vindicate the public interest, a practice that commonly is referred to as the use of the “private attorney general.” Federal and state environmental statutes such as the Clean Air Act, Clean Water Act, and the Endangered Species Act combine elements of private and public law by deputizing private citizens to act as private attorneys general. As Zinn (2002: 84) notes, “[c]itizen suit provisions are included in all of the major pollution control statutes and have successfully encouraged vigorous citizen enforcement of environmental laws.” Trial lawyers are private attorneys general to the extent that they advance the public interest by punishing and deterring reckless polluters. Private attorneys general may
file lawsuits directly against polluters or seek injunctive relief against government agencies that fail to adequately implement environmental regulations.

Federal and state environmental statutes reward litigants chiefly through the assessment of multiple civil penalties or by the awarding of attorneys’ fees and costs. In contrast, the remedy of punitive damages is the key incentive for toxic tort claimants who bring lawsuits against corporate polluters. The threat of punitive damages in a toxic torts case transmits the deterrent message that if companies are recklessly indifferent to the public’s well-being, they risk being stung by a substantial financial sanction. Corporate polluters also may be stigmatized by the adverse publicity that often accompanies a high profile punitive damages award in environmental litigation (Curcio 1998).

The famous case of *Silkwood v Kerr-McGee* (1984) provides an example of how a toxic torts lawsuit can benefit the larger community by uncovering hidden environmental dangers. Karen Silkwood was a laboratory analyst for Kerr-McGee at its Cimarron plant near Crescent, Oklahoma. Kerr-McGee’s plant fabricated plutonium fuel pins for use as reactor fuel in nuclear power plants. Silkwood’s left hand, right wrist, upper arm, neck, hair, and nostrils were contaminated with plutonium. The radiation level in Silkwood’s apartment was so high that many of her personal belongings had to be destroyed. Silkwood was referred to the Los Alamos Scientific Laboratory for testing to determine the extent of contamination in her vital body organs. On the first night back on the job after these tests, she died in a mysterious automobile accident.

After Silkwood’s death, representatives of her estate filed a common law tort action seeking punitive damages. During the trial, a government safety expert testified that he did not feel that Kerr-McGee’s conduct met the “as low as reasonably achievable” safety standard. Discovery uncovered a pattern of spills, leaks, and missing plutonium at Kerr-McGee’s Cimarron plant that threatened the larger public. An Oklahoma jury awarded $10 million in punitive damages based upon evidence that Kerr-McGee produced faulty plutonium fuel rods, falsified product inspection records, and exposed workers to radiation because of faulty workplace practices. The Silkwood estate ultimately settled the case for $1.38 million after a federal circuit court ordered a new trial. Kerr-McGee settled the case without an admission of liability but it closed down its plutonium processing plant.

The U.S. Supreme Court in the *Silkwood* case established an important precedent that compliance with federal safety standards may not be enough where there is proof of a pattern of reckless indifference to the public’s safety. The Court ruled that a state-authorized award of punitive damages arising out of the escape of plutonium from a federally licensed nuclear facility was not pre-empted by the Atomic Energy Act. A state court could assess punitive damages even if the nuclear plant substantially complied with all applicable government safety regulations. Under the Court’s ruling, nuclear regulatory commission safety standards were defined as the floor rather than the ceiling of reasonable care.
Such “regulation through litigation” is characterized by tort reformers as an illegitimate misuse of the civil justice system to undermine democracy (Manhattan Institute 2002; Viscusi, Litan & Hahn 2002). This article will rebut this corporate spin on litigation by documenting the ways in which crimtort remedies advance justice through the jury system. The economically disadvantaged have a particularly large stake in environmental litigation because toxic hazards tend to be disproportionately externalized onto communities populated principally by impoverished minority groups. The health and safety of disadvantaged communities will be significantly decreased if the current tort “reform” campaign succeeds in eviscerating crimtort remedies such as punitive damages that punish corporate environmental misdeeds.

The anti-regulatory policies of the George W. Bush administration and the decisions of a growing number of neo-conservative judges are severely undermining civil and criminal sanctions against environmental despoilment. The weakening of state and federal agencies charged with enforcing environmental statutes makes vigorous private civil litigation increasingly crucial. The neo-conservatives’ sustained political attack on crimtorts is depriving environmentalists of key legal remedies necessary to protect the public interest.

B. ENVIRONMENTAL JUSTICE AND GOVERNMENT REGULATION

The environmental justice movement arises out of the experience of low-income and minority communities that have historically suffered disparate harmful impacts from environmental pollution and degradation. The U.S. Environmental Protection Agency (EPA) endorses the core principles of environmental justice, calling for the even-handed treatment of all citizens, regardless of race or income level, in “the development, implementation, and enforcement of environmental laws, regulations, and policies” (U.S. EPA 2003b: 1). However, even critics of the environmental justice movement acknowledge that the EPA lacks the resources to carry out even a fraction of this colossal mission. Phillip Howard (1994: 57–8), a strong proponent of limiting government intervention into the private sector, nevertheless observes:

In 1972, Congress required the newly created Environmental Protection Agency to review all pesticides and decide which should be removed from the market . . . It turns out that EPA has only gotten around to judging the safety of about thirty pesticides. Hundreds of others, including ones on which there are data of significant risk, have continued to be marketed without a decision. “At this rate,” said Jim Aidala, an expert on pesticides who worked for Congress, “the review of existing pesticides will be completed in the year 15000 A.D.” (Howard 1994: 57–8)

Critics are skeptical of the EPA’s ability to advance the goal of environmental justice, particularly now that the executive and legislative branches are both controlled by free-market Republicans (Krugman 2003). While former President Bill Clinton (1994: 1) called on each federal agency to “make achieving environmental justice part of its mission,” the Bush
administration has a de facto policy of “weakening of every aspect of the environmental law that protects our air, water, forests, wetlands, public health, wildlife and pristine wild areas” (National Resources Defense Council 2001: 1). The Bush administration, for example, has sought to undermine environmental protection through deep cuts in the EPA’s enforcement arm. Davidson (2003: 1) reports that, “fines assessed for environmental violations dropped by nearly two-thirds in the administration’s first two years; and criminal prosecutions . . . are down by nearly one-third.”

President George W. Bush’s recent nomination of three-time Republican governor of Utah, Michael O. Leavitt, to head the EPA has drawn widespread criticism from environmentalists because Leavitt has consistently “supported development over conservation and was a friend of the oil and gas industries” (Seelye 2003: 1). The Leavitt nomination lends credence to the theory of “agency capture,” which posits that the power of economic elites is so vast that, over time, government agencies are transformed from aggressive industry watchdogs to corporate-friendly lapdogs (Buzbee 1997: 27–8). Large corporations are well-heeled fountains of employment, patronage, expertise and politically connected lobbyists, providing industry with many extralegal avenues through which to undermine aggressive environmental law enforcement. Industry representatives, for example, draft comments on proposed environmental statutes and regulations and employ armies of lobbyists to influence government officials.

The EPA has mounted criminal enforcement actions against corporations that indiscriminately dump wastes, but the agency lacks sufficient resources to investigate adequately, much less prosecute, the vast majority of corporate polluters. Safety regulators tend to be highly idealistic, making agency capture difficult (Zinn 2002: 123). However, even the most independent-minded government official is at a significant disadvantage when litigating against the vastly superior arsenal possessed by the national law firms employed by corporate defendants. Few public prosecutors can afford to hire the necessary research scientists to assist them in evaluating the physiology, pharmacology, genetics, chemistry, toxicology, and biology of an emergent environmental peril. In order to convict a corporate polluter, a prosecutor will typically need to retain expensive expert witnesses who understand the etiology of carcinogenic substances, the geology of leaching chemicals, or the diffusion of air pollutants. In short, criminal prosecution of corporate polluters is stymied by political, economic, social, and technological barriers as well as the rigorous due process requirements that govern criminal law and procedure. Private litigation, backed by the deterrent power of punitive sanctions, bridges the enforcement gap left by the inadequacies of criminal prosecution.

C. THE UNDERMINING OF THE PRIVATE ATTORNEYS GENERAL

An increasingly conservative federal judiciary is undermining the role of private attorneys general in bringing lawsuits to defend the public interest.
A key weapon of the environmental justice movement has been community-based lawsuits challenging state and federal environmental agencies that issue permits or formulate regulatory policies that have a disparate negative impact on minority neighborhoods. In 2001, the U.S. Supreme Court weakened this mechanism by ruling that plaintiffs’ attorneys who prevailed in a pre-trial settlement rather than a court decision were not entitled to reimbursement of attorneys’ fees and costs.

Groups cannot even file, let alone win, environmental justice lawsuits unless a court recognizes their legal standing to file a complaint. The liberal standing rules of the 1970s and 1980s have been eroded significantly in recent years by a series of seismic court decisions. In *Steel Company v Citizens for a Better Environment* (1998), for example, the U.S. Supreme Court ruled that a community group lacked standing to pursue its environmental lawsuit because the plaintiffs were unable to pinpoint any precise compensable injuries that they had suffered from the agency’s discretionary policy decisions.

Environmental justice is increasingly difficult to achieve through the courts even when this rigorous standing hurdle is cleared. In *South Camden Citizens in Action v New Jersey Department of Environmental Protection Agency* (2001) minority group members filed a disparate impact lawsuit to challenge an agency’s granting of a permit that allowed a cement manufacturer to discharge air pollutants into their community, an area that already contained one-fifth of the city’s contaminated sites. The Third Circuit rejected claims that the disparate impact of this air pollution permit violated Title VI of the Civil Rights Act of 1964 on the grounds that there was no proof that the agency had intentionally discriminated against the minority community. This litigation has continued for years, at great financial and emotional cost to the plaintiffs, and has little likelihood of success. As the courts weaken the rights of environmentalists to challenge injustices on statutory, standing, or constitutional grounds, toxic torts increasingly come to play a primary role in protecting the public from environmental hazards.

### II. TOXIC TORTS AND NEO-CONSERVATISM

#### A. THE CONTINUING NEED FOR TOXIC TORTS

In contrast to community lawsuits designed to enjoin environmental agencies, toxic torts lawsuits provide private litigants with “compensation for harm allegedly caused by exposure to a substance that increases the risk of contracting a serious disease” (Black 1998: 602). Toxic torts plaintiffs and their lawyers serve as private attorneys general armed with quasi-criminal penalties such as punitive damages to punish environmental polluters. Punitive damages are the functional equivalent of David’s slingshot, a weapon that levels the playing field by allowing ordinary citizens to redress large-scale
risks to the community through private lawsuits. Few plaintiffs would be able to bring toxic torts actions without the prospect of being awarded punitive damages. It is not unusual for a high-profile toxic torts case to cost hundreds of thousands of dollars. These considerable litigation expenses can only be recouped through the awarding of attorneys’ fees or punitive damages.

Punitive damages deter even the most powerful corporations because the level of the award is often based upon a company’s net worth or earnings. In the vast majority of states, the wealth of the defendant is admissible to determine the amount of punitive damages necessary to deter the wrongdoer. In addition, a company may be forced to disgorge ill-gotten gains it received by illegal dumping or other bad acts. Wealth-sensitive punitive damages can teach even a Fortune 500 company that “tort does not pay” (Rookes v Barnard 1964 at 367). Fixed fines, in contrast, may allow an unscrupulous corporation to make a callous cost/benefit-based decision to pollute, treating the prescribed penalty as a simple cost of doing business. A major manufacturer, for example, may decide that it is cheaper to pay clean-up costs than to prevent future spills through vigilant oversight.

Wealth-calibrated punishment can produce very large awards when the defendant is a multinational corporation. The highest profile crime torts verdict in an environmental tort case arose out of the Exxon Valdez’s spilling of more than ten million gallons of oil into Prince William Sound, perhaps the most destructive environmental accident in world history. An Alaskan jury awarded $5.3 billion dollars in punitive damages partially because the jury perceived that Exxon, as one of America’s richest corporations, would not be deterred by a lesser amount. “While at first blush, $5 billion sounds extravagant, it actually represents less than three weeks of Exxon’s $111 billion gross revenues” (Pace 1996: 852). In 1999, the Ninth Circuit vacated the Exxon Valdez punitive damages award as being unconstitutionally excessive, which illustrates the extreme difficulty of collecting large environmental verdicts.

The toxic torts genre of Hollywood movies such as Silkwood, A Civil Action, and Erin Brockovich all portray romanticized versions of actual toxic tort lawsuits that exposed hidden environmental hazards that had not been detected by public authorities. In each real-life case, the plaintiff advanced the public interest at a substantial personal cost. It was Karen Silkwood, not the Atomic Energy Commission, who discovered the faulty fuel rods, falsified product inspection records, and other hazards to the larger community.

These three films illustrate the importance of wealth-calibrated punitive damages in countering the resource inequality that is typical in high stakes toxic torts litigation. Toxic torts litigants face tremendous odds when squaring off against corporate Goliaths. Without the possibility of recouping the substantial litigation costs through a punitive damages award, none of these cases would have been viable. In the real-life Brockovich case, for example, it was the possibility of a large punitive damages award against
Asbestos litigation provides the clearest example of the role of private attorneys general in exposing corporate wrongdoing through tort litigation. Asbestos exposure “already has killed an estimated 257,250 men, women and children since the mid-1960s with an additional 151,150 expected to perish before the national epidemic winds down in the year 2030” (Association of Trial Lawyers 2000: 1). Companies concealed the dangers of unprotected asbestos exposure from their workers for decades in a cold-blooded business decision. None of these corporations or their officers were criminally prosecuted but the firms were punished severely by large punitive damages awards (Rustad 1992: 1333).

The opponents of wealth-based punishment argue that runaway juries unfairly redistribute corporate assets to the plaintiff in disregard of the legitimate goals of civil punishment. Jurors are claimed to have a “Robin Hood mentality” in the courtroom that leads them to rob the corporate treasury in order to provide a generous nest egg for the plaintiff. Extensive empirical research on punitive damages has definitively refuted this baseless contention (Galanter 2002; Rustad 1998). Academic studies have consistently found that punitive damages verdicts are rare and generally proportional to the actual harm suffered. In any case, punitive damages are strictly controlled after the verdict by trial and appellate judges, who have shown little reluctance to reduce or vacate awards they perceive to be excessive (Rustad 1998).

B. THE U.S. SUPREME COURT’S ASSAULT ON CRIMTORT REMEDIES

Recent U.S. Supreme Court decisions are undermining the role that private attorneys general can play in protecting the environment by making wealth-based civil punishment an endangered species. In April 2003, the U.S. Supreme Court in State Farm Mutual Automobile Insurance Co. v Campbell reversed a $145 million punitive damages award in a bad-faith insurance settlement case. The Court, in a 6–3 decision, vacated the judgment of the Utah Supreme Court, reasoning that a punitive damages award that was fifty-six times the compensatory damages violated State Farm’s substantive due process rights (ibid. at 1521). Justice Anthony Kennedy, writing for the majority, observed that “few awards exceeding a single-digit ratio between punitive and compensatory damages . . . will satisfy due process” (ibid. at 1525). Justice Kennedy’s single-digit multiplier test comes perilously close to removing wealth from the punitive damages equation.

The Court opined that “the wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award” (ibid.). Toxic tort claimants may still be able to obtain high ratio punitive awards where there is truly reprehensible misconduct leading to physical harm, but most high ratio verdicts are constitutionally suspect. The Court’s frontal attack on the use of wealth
in calibrating punitive damages threatens the future of the crimtorts para-
digm as a fortification against unlawful activity by corporate actors who
recklessly threaten the community’s health and safety.

The Rehnquist Court has also watered down environmental justice by
placing stricter limits on the intervention rights of citizens’ groups such as
the Sierra Club, Friends of the Earth, and the National Wildlife Federa-
tion to file suit to compel government agencies to enforce Congressionally
mandated statutes. The Sierra Club, for example, challenged Walt Disney
Enterprise’s plan to build a mammoth resort in the Sierra Nevada Moun-
tains, arguing that the entertainment complex would violate federal environ-
mental statutes (Findley & Farber 2000: 2–3). This brand of public interest
lawsuit has been endangered by the U.S. Supreme Court’s recent downsizing
of the doctrine of standing. Justice Antonin Scalia authored a Supreme Court
opinion finding that the National Wildlife Federation, a group with a long-
standing interest in defending America’s environment, had no standing to
file a lawsuit challenging the opening up of public lands to mining (ibid.: 7).

The U.S. Supreme Court has also weakened the ability of private attorneys
general to advance environmental justice by placing new hurdles barring
the admissibility of plaintiffs’ expert testimony. In Daubert v Merrell Dow
Pharmaceuticals, Inc. (1993), the Court fashioned an entirely new institu-
tional role for judges by requiring them to screen out expert testimony
that is not predicated upon well-established scientific methodologies or
published in peer-reviewed journals. In Daubert, the parents of a child born
with limb reductions sued a pharmaceutical company, alleging that their
child’s birth defects had been caused by the mothers’ ingestion of Bendectin,
a prescription anti-nausea drug. The U.S. Supreme Court ruled that the
trial judge must ensure that an expert’s testimony both rests on a reliable
foundation and is relevant before allowing it to be presented to the jury.
Toxic tort plaintiffs are especially hard-hit by the rigors of the Daubert
screen because they frequently lack epidemiological evidence for emergent
threats. The courts’ greater scrutiny of plaintiffs’ experts make it less likely
that corporate executives will “deal candidly with information about current
risks, and to undertake research needed to clarify the likelihood of future
harm” (Berger 2003: 1).

By their very nature, toxic torts are frequently at the frontiers of medical
science and involve difficult issues of establishing a causal connection
between the toxic exposure and subsequent long-term illness. Plaintiffs in
toxic torts cases are “unlikely to have any direct explanation of the causal
process that allegedly led to the adverse health effects for which the plaintiff
is suing” (ibid.). Frequently, there are multiple interacting causes of environ-
mental injury. For example, the etiology of lung cancer is often a synergy
between asbestos exposure and smoking, creating complex causation issues
for those asbestos victims with a history of tobacco use.

Erin Brockovich’s most recent toxic torts lawsuit illustrates the difficulties
that plaintiffs face in producing expert testimony that meets the Daubert test.
Brockovich’s law firm contends that the school children at Beverly Hills High School have been harmed by toxic exposures to carcinogens released by active oil wells on the campus (Madigan 2003: 1). The plaintiffs contend that the City of Beverly Hills exposed its high school students to a known carcinogenic risk while the school district was collecting sizeable royalties from a major oil company. The long-term impact of this type of exposure is complex and not fully understood, raising the possibility that the plaintiffs’ expert testimony will be screened out by the trial judge. Whatever the final outcome of this litigation, it serves a public purpose by focusing attention on the latent long-term health hazards of allowing children to play near high concentrations of known carcinogens. This case illustrates the public’s stake in toxic torts lawsuits because only in the wake of the filing has this prospective danger begun to be systematically studied.

C. CORPORATE AMERICA’S CAMPAIGN AGAINST TOXIC TORT LITIGATION

Corporate America has launched an all-out offensive against the U.S. civil justice system under the misleading rubric of “tort reform.” Tort reformers have successfully conveyed the false impression to policymakers, to the press, and to the public that juries frequently victimize corporations by awarding unjustly large amounts of money to overly litigious plaintiffs and their greedy lawyers. This corporate crying game uses distorted tort horror stories such as the McDonalds’ hot coffee case as evidence that the civil litigation system is in need of radical reform.\(^{14}\)

Martha Minow labels such misleading portrayals of corporate vulnerability as “victim’s talk.” She argues that neo-conservatives employ the claim of victimization as an ideological tool to attack liberal perspectives in fields such as criminal law, civil rights litigation, and tort law (Minow 1993). The American Tort Reform Association’s “Lawsuit Abuse” campaign, for example, uses the rhetorical device of blaming the victim and frames its illustrative cases carefully in order to maximize both their entertainment and outrage value. Such tort tales twist real-life cases to create the ideological motif of unworthy claimants victimizing innocent corporations.

Tort reformers utilize sophisticated public relations techniques to cook up realistic sounding tort horror stories, but find this tactic more difficult to employ when it comes to toxic torts (Weinstein 1995). While plaintiffs in products liability lawsuits may be easily blamed for carelessly misusing the product that injured them, few victims of toxic torts know they are endangered by high-level exposures to mutagenic or carcinogenic chemicals and, therefore, cannot be convincingly accused of being responsible for their own misfortune. The inhabitants of Love Canal, for example, had no knowledge that their residential subdivision had been built in close proximity to a chemical dump site. Even the most creative corporate spin doctors are hard pressed to blame the victims of concealed toxic waste dumps for contributing to their environmental injury.
Tort reformers cleverly shift their argument against environmental litigation to the ungrounded assertion that most toxic torts lawsuits are based upon “phantom risk” (Foster, Bernstein & Huber 1993). Toxic exposure claimants are lampooned as fringe crazies who blame their psychosomatic illnesses on such unproven environmental “hazards” as weak magnetic fields produced by high power lines, radiation from unshielded cell phones, or toxic mold growing in the walls. This public relations stratagem focuses attention away from the devastating injuries that result from environmental injustices and toward the extreme difficulty of establishing the causal connection between an illness and a particular toxic exposure.

Toxic injury lawsuits are ridiculed as being based on “junk science” and attacked for causing beneficial products to be withdrawn from the market. For example, a recent editorial in the Wall Street Journal calls for diminishing California’s toxic exposure remedies, charging that:

> lawyers have sued manufacturers for failing to warn of the claimed toxic emissions given off by brass darts, Christmas lights, hammers, mineral oil, billiard cue chalk, and picture frames, not to mention French fries and chocolate (which are among many foods in which traces of cancer-causing substances naturally occur). (Olson 2003: A12)

If these purported frivolous lawsuits are not simply urban legends, they were undoubtedly quickly dismissed by trial judges. In any case, the litigation process is tempered by ample sanctions against frivolous discovery or lawsuits.

D. THE EXECUTIVE BRANCH’S ATTACK ON ENVIRONMENTAL JUSTICE

As Governor of Texas, George W. Bush’s highest priority was to enact tort “reforms” that undermined the ability of individuals to file lawsuits against corporate wrongdoing. He has continued to pursue this agenda as President of the United States. The November 2002 federal elections resulted in a Republican majority in both Houses of Congress, which permits President Bush to pursue more aggressively his anti-tort efforts.

Columnist Helen Thomas (2002: E2) argues that George W. Bush’s anti-tort policies please “those from the consumer-be-damned school of corporate wrongdoing.” She asks, “in President Bush’s ‘compassionate conservatism,’ just whom does he feel compassion for?” Compassionate conservatism in the field of civil justice takes the form of blaming the victim by labeling injured plaintiffs as irresponsible whiners and their lawyers as unethical manipulators of overly emotional juries. America’s prosperity is portrayed as being endangered by a “litigation crisis.” Some conservatives assert that criminal penalties backed up by regulatory agencies should replace private lawsuits. This argument is disingenuous. President George W. Bush’s Republican Party is gutting environmental regulation at the same time as it is advocating the weakening of toxic tort rights and remedies.

President Bush favors amending the Clean Air Act to allow “older power plants to avoid installing costly pollution controls that are mandatory for newer
ones” (McCarthy 2003: 48). This regressive policy would reverse long-standing EPA mandated uniform national emissions standards for new sources of air pollution. The National Environmental Policy Act (NEPA) requires all federal agencies to appraise the environmental impact of their policies and to administer their programs in the “most environmentally sound fashion” (Findley & Farber 2000: 24). President Bush proposes new limits on the need for environmental impact statements when undertaking projects such as energy exploration, highway creation and federal government construction.

The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA” or “Superfund”) and the Superfund Amendments and Reauthorization Act of 1986 (commonly known as “SARA”) are the two most important federal laws dealing with hazardous substance clean-up and liability. Section 109 of CERCLA identifies factors that the EPA will consider when deciding what penalties to impose against corporate polluters. In most serious cases, the EPA may seek statutory penalties of up to $27,500 for each day of noncompliance. The EPA has approved final clean-up plans for approximately 1,000 sites and the agency has taken more than 5,000 removal actions to deal with hazardous waste sites that threaten public health. The EPA has managed to make responsible parties pay for the clean-up of more than 30,900 sites (U.S. Congress 1999: 1).

Since 1995, the EPA has made brownfields a top priority in order to revitalize polluted communities. “Brownfields are abandoned, idled, or under-used industrial and commercial properties where expansion or redevelopment is complicated by real or perceived contamination” (ibid.). The General Accounting Office estimates that there are still 450,000 brownfields requiring environmental clean-up and economic development (ibid.). The Small Business Liability Relief and Brownfields Revitalization Act, recently signed into law by President Bush, undermines CERCLA’s original intent by limiting the liability of owners of contaminated property provided they comply with state clean-up plans.

The Resource and Recovery Act of 1976 (RCRA) is a federal statute designed to regulate the generation, transportation, and disposal of hazardous and solid waste. RCRA authorizes private citizens to file lawsuits to force the clean-up of hazardous waste sites. The role of the private litigant was further extended when Congress permitted citizens to bring actions against the EPA to compel the clean-up of rivers and streams. The Bush administration has recently exempted the Air Force from complying with certain RCRA requirements.

Similarly, Congress has established a system of standards and permits to regulate water quality and eliminate pollutant discharges (Metropolitan Corporate Counsel 2002: 59). The Bush administration proposes weakening these requirements by allowing water polluters to meet the requirements of the Clean Water Act by purchasing “credits” from other polluters. This “pay to pollute” principle is far more industry-friendly than the “polluter pays” philosophy that characterized earlier environmental legislation. In
short, the Bush administration is eroding federal environmental statutes while simultaneously pressing for drastic limits on toxic tort remedies.

III. CONCLUSION

The weapons used by private attorneys general to battle environmental injustices are being steadily weakened across a broad front. Cases such as those portrayed in *Silkwood, A Civil Action*, and *Erin Brockovich* can take decades to litigate and generally require extensive and expensive scientific expertise. Environmental justice requires robust crimtort remedies that can force the polluter to bear the costs of toxic releases. Without wealth-calibrated punitive damages, it is far less likely that major polluters will be discovered and punished.

Further tort "reforms" will make it even more difficult for private attorneys general to play their crucial role in protecting the public from environmental hazards. As Mary Davis (1997: 914) charges, the federal “reform” of toxic tort litigation is “a purposeful effort to immunize from responsibility those who cause the greatest harm to the largest number of people.” In the absence of strong crimtort remedies, the costs of environmental degradation will be increasingly borne by the injured victims, the victims’ families, the larger community, and the taxpayer. An effective legal framework that empowers private attorneys general is the key to advancing environmental justice through the U.S. courts.

THOMAS H. KOENIG is Chair of the Department of Sociology and Anthropology, Northeastern University. Thomas Koenig and Michael Rustad are co-authors of *In Defense of Tort Law* (NYU Press, 2001) and more than thirty other joint and individual publications on tort law.


NOTES

1. The Environmental Protection Agency warns that more than two-thirds of all Americans currently live in “census tracts where the combined upper bound lifetime cancer risk from these [chemical] compounds exceeded a 10 in 1 million risk” (Phillips 2002: 234).

2. “Since passage of the 1971 National Cancer Act, launching the ‘War Against Cancer,’ the incidence of childhood cancer has steadily escalated to alarming levels. Childhood cancers have increased by 26 percent overall, while the incidence of particular cancers has increased still more: acute lymphocytic leukemia, 62 percent; brain cancer, 50 percent; and bone cancer, 40 percent” (U.S. Newswire 2002: 1).
3. The two O. J. Simpson trials provide a well-known illustration of the distinction between criminal law and civil law. Simpson was acquitted of murdering his ex-wife, Nicole Brown Simpson and Ronald Goldman in his criminal trial. He was later found liable in a separate tort action for willfully and wrongly causing the death of Ronald Goldman. Having been found “not guilty” in the criminal prosecution, Simpson was not subject to imprisonment. A Santa Monica jury held O. J. Simpson liable for $25 million in punitive damages and $8.5 million in compensatory damages in a separate wrongful death action.

4. Judge Jerome Frank coined the term “private attorney general” to refer to “any person, official or not,” who brings a legal proceeding “even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private attorney generals” (Associated Industries of New York State v Ickes 1943 at 704).

5. Davidson (2003: 1) reports that “The Bush administration has been gutting key sections of the Clean Water and Clean Air acts . . . It has crippled the Superfund program, which is charged with cleaning up millions of pounds of toxic industrial wastes such as arsenic, lead, mercury, and vinyl chloride in more than 1,000 neighborhoods in 48 states.”

6. In October 1998, Congress greatly weakened the EPA’s ability to advance environmental justice by suspending the agency’s authority to accept new Title VI complaints until new guidance rules were developed. This provision, “which effectively prevented EPA from investigating Title VI complaints received after October 21, 1998” was dropped in 2002 “due to [Congress’] confidence in President George W. Bush’s anticipated approach to environmental issues” (U.S. Commission on Civil Rights 2003: 40).

7. Prior to the Court’s decision in Buckhannon Board and Care Home, Incorporated v West Virginia Department of Health and Human Resources (2001), “[U]nder some 100 federal statutes, defendants who lost civil rights and environmental lawsuits, and who were forced as a result to amend their policies or change their behavior could be ordered to pay any legal fees incurred by the plaintiffs who filed the case against them. The theory behind that rule was that such plaintiffs were like ‘private attorneys general’ who acted not only in their own interests, but in the interests of the public at large” (Facts on File World News Digest 2001: 410F2).

8. The New Jersey federal district court recently refused to enter summary judgment in favor of the N.J. Department of Environmental Protection in the latest procedural ruling in the South Camden case (South Camden Citizens in Action v New Jersey Department of Environmental Protection 2003).

9. Despite the increasing odds against success, these lawsuits are still common. The Mid-Atlantic Environmental Law Center (2003: 1) reports that, “[i]n 2002 alone, environmental and conservation groups, states, landowners, developers, and companies combined provided advance notice of intent to bring federal environmental citizen suits nearly 200 times.”

10. Most environmental citizen suit statues permit lawsuits both against regulators who fail to perform their duty by enforcing the law and directly against the polluters.

11. Karen Silkwood’s campaign to expose radioactive hazards became the basis for the Hollywood film. Trial lawyers on behalf of Silkwood’s estate convinced an Oklahoma jury to award $10 million in punitive damages to punish and deter the reckless handling of plutonium at Kerr-McGee’s plutonium processing plant.

12. The actual legal case that inspired the best-selling book and movie, A Civil Action, would not have been brought without the possibility of punitive damages because of the enormous expense and difficulty of proving a causal connection.
between toxic exposure and the onset of leukemia in children many decades later. In the toxic torts case against W. R. Grace and Beatrice Foods, eight Massachusetts families filed suit against the successor corporations of the polluters who they believed had contaminated the Woburn groundwater with toxic chemicals, including trichloroethylene and tetrachloroethylene. A cluster of child leukemia cases was found in close proximity to a field where animal-hide tanning chemicals were dumped. The contaminated area was eventually designated as a Superfund site in 1983. The grieving Woburn families had to endure mountains of discovery motions and years of costly litigation because of the difficulties of proving a causal connection and the nature of the scientific evidence.

Sixteen of the twenty-eight living plaintiffs were relatives of the children who died of cancer. Three of the other claimants were being treated for leukemia at the time of the litigation. The remaining plaintiffs alleged that the contaminated water caused a variety of other illnesses and damages. Testimony of several experts was necessary to establish that these illnesses were more likely than not to have resulted from drinking water tainted with hazardous chemicals. Financing research by hydrologists, geologists, and groundwater supply scientists in order to trace the probably migratory path of the pollutants stretched the plaintiffs’ attorneys’ budgets to their limits (Haar 1996).

The jury found W. R. Grace liable for environmental pollution and Beatrice Foods not liable for contaminating the water supply. W. R. Grace filed an appeal, challenging the jury’s finding of potential liability for toxic torts. Subsequently, the trial verdict was reversed and remanded. In 1986, the Woburn litigants agreed to settle the case against W. R. Grace for approximately $8 million rather than face a retrial on all the issues. While $8 million seems like a great deal of money, the litigation expenses were so high that the eight families received only a small fraction of the settlement. The plaintiffs’ attorneys ended up filing for bankruptcy. The message of *A Civil Action* is that toxic torts lawsuits are not a form of jackpot justice, but they can benefit the entire community. Grace’s website states that the company learned valuable lessons and that in the wake of the litigation they encouraged the EPA to conduct a more comprehensive clean up than the law requires (W. R. Grace 2003).

13. Erin Brockovich depicts the true story of a young woman who helped to launch a landmark toxic torts lawsuit that ultimately resulted in a $333 million class action settlement against a California utility for polluting the local water supply and then concealing this misdeed. Once again, private attorneys general discovered, publicized, and punished environmental wrongdoing in a case where government enforcement agencies failed adequately to protect the public interest. Today, the real-life Erin Brockovich is active in organizing a class action lawsuit, alleging that construction defects in buildings allowed the growth of molds that have damaged the health of large numbers of Americans.

14. In the famous McDonald’s coffee case, an elderly woman suffered severe burns and scarring after spilling a cup of hot coffee that she had purchased at a McDonald’s drive-through. Mrs Liebeck required a week of hospitalization while she endured painful debridement procedures to remove layers of dead skin and received several skin grafts. She received a multi-million dollar award including punitive damages predicated on evidence of more than 700 prior burns from McDonald’s unnecessarily hot coffee. Like the great majority of large punitive damages verdicts, this award was greatly diminished by post-trial developments. The trial judge reduced the punitive award to $480,000. Eventually the parties reached a confidential post-verdict settlement, presumably for a substantially smaller amount. After the New Mexico settlement, McDonald’s lowered the temperature of its coffee to a safer level (Koenig & Rustad 2001: 6–8).
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