



## 2026 WRITTEN TESTIMONY SB474/HB476: FAVORABLE

### CIVIL ACTIONS – NONECONOMIC DAMAGES PERSONAL INJURY AND WRONGFUL DEATH

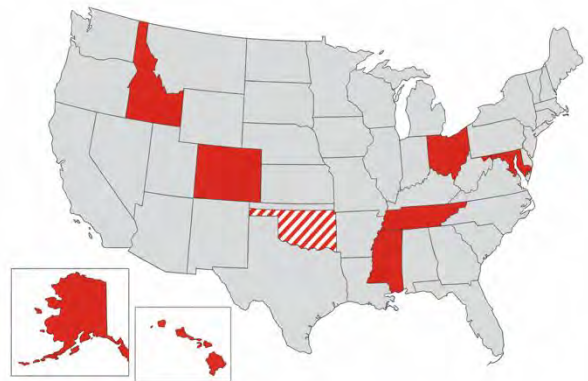
A Maryland law enacted in 1986 arbitrarily restricts the ability of Maryland juries to decide the full and fair outcome in court cases when unreasonably unsafe conduct causes injury or death. This law caps and limits the recovery of “noneconomic damages” (pain and suffering damages, including every kind of physical and emotional suffering and loss of quality of life, other than wages or medical expenses).

**Let Maryland Citizen Juries Decide.**

#### Maryland is an Outlier

Enacted 40 years ago, Maryland’s cap on pain and suffering damages in all personal injury cases was the first of its kind in the nation. Although some other states followed suit, many caps have been struck down as unconstitutional by courts.

Today, only **eight** states continue to have a limit on noneconomic damages in all personal injury cases (and one, Colorado, just increased its cap significantly). The ninth, Oklahoma, has no cap on “permanent and severe physical injury.” No neighboring state, nor any other state on the Eastern Seaboard, places the same limitations on citizens’ rights to fair compensation as does Maryland.



As can be seen in more detail on the following pages, caps on damages disparately affect minorities, women, children, and the elderly. Their physical injuries are minimized by implicit bias, and these groups generally have lower lost wage claims, thus creating a “ceiling” on their recovery when compared to their working white male counterparts, even when they have suffered life-altering physical harm or even death.

As can also be seen on the pages to follow, for over four decades, “the cap” has failed to lower insurance costs or improve the economic well-being of Marylanders. The reality is that empirical data has long established that tort laws – including caps – have little to no impact on insurance rates, or where businesses choose to operate.

The value of a person’s injury and life should not be determined by an arbitrary number chosen by elected officials. Citizen juries spent hours, days, and sometimes weeks of their lives considering evidence and making an informed decision about these questions. This is what our civil justice system provides, and what fundamental fairness demands.

**It is time to repeal Maryland’s arbitrary and outdated limit on justice.**

#### About Maryland Association for Justice

The Maryland Association for Justice (MAJ) represents over 1,250 trial attorneys throughout the state of Maryland. MAJ advocates for the preservation of the civil justice system, the protection of the rights of consumers and the education and professional development of its members.

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## Caps Discriminate Against Minorities, Women, the Elderly, and Children

- **Women's** tort suits often involve different injuries than those brought by men, and which can only be compensated through noneconomic damages. These include injuries to sexual function, incontinence, reproductive harm, miscarriage, trauma from sexual assault, and scarring and disfigurement. Proving that juries give higher damage awards for these types of injuries – **including analyzing jury verdicts subject to Maryland's cap** – scholars have concluded that “[n]on-economic loss damage caps amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.” Finley, L., *The Hidden Victims of Tort Reform*, 53 Emory L.J., 1263, 1266, 1307-1312 (2004).
- Caps can “deprive women of from a third to over half of the compensation deemed by a jury to be necessary, fair and reasonable.” Finley at 1312.
- Caps also disparately impact **the elderly and children**, who are not wage-earners, and thus cannot claim economic damages. Particularly in cases involving the death of an elderly person or child, where the *only* available recoverable damages are noneconomic, caps serve “**as a ceiling on recovery,**” leaving the families of dead babies and the elderly “shut off from seeking redress.” Finley at 1313.

**“The most profound loss of all will be to the fairness and equality of our civil justice system, as the effects of cap laws send the message that women, the elderly, and the parents of dead children should not bother to apply.”<sup>1</sup>**

- For women and minorities who do not earn as much in wages as their white counterparts, limits on non-economic damages are disproportionately unfair because they preclude such individuals from achieving full compensation for their loss. Doroshov, J. & Widman, A., *The Racial Implications of Tort Reform*, 25 Wash. U. J. L. & Pol’y 161, 169 (2007).
- Non-economic damage awards are extremely susceptible to **implicit racial bias**, because research indicates both that *juries* underestimate the severity of Black people’s injuries, as do *health care providers* who treat them and thus provide evidence supporting a damage award. Gilboa, M., *The Color of Pain*, 56 Georgia L. Rev. 2, 657 (2022).

**“Recent findings revealing significant racial discrepancies in pain and suffering damages between Black and White plaintiffs are especially alarming.”<sup>2</sup> ... “Pain and suffering damages are possibly the purest indicator of the influence of racial bias in tort law.”<sup>3</sup>**

“Noneconomic damage caps make it particularly problematic to move forward in a legitimate case for those who are unlikely to have significant lost wages or income that might ameliorate a cap’s effect. As a result, retirees, children, full-time caregivers, and those living in poverty may be unable to seek compensation in states with capped damages because the litigation’s costs will often exceed the potential recovery. The cap also discriminates against groups that have historically received lesser wages because of their gender or minority status, rendering their noneconomic damages a larger proportion of their compensatory damages. The simple solution to these problems is to repeal the caps and thereby restore the civil jury’s constitutional authority over factfinding.”<sup>4</sup>

<sup>1</sup> Finley at 1313.

<sup>2</sup> Gilboa at 697.

<sup>3</sup> Gilboa at 660.

<sup>4</sup> Jolly, R., et al., “Democratic Renewal and the Civil Jury,” 57 Georgia L. Rev. 1, 143-144 (2022).

## Caps Do Not Reduce Insurance Rates, But Rather, Increase Corporate Profits

In recent years, the insurance industry has recorded billions of dollars in annual profit<sup>5</sup>, demonstrating that caps on damages are helping companies that do not need help:

2022	\$39 BILLION
2023	\$89 BILLION
2024	\$144 BILLION

Meanwhile, insurance premiums in Maryland, and nationwide, have **increased** over the same time period, even though the cap on non-economic damages has remained in place. 2023-2024 saw the largest increases in auto insurance rates in 45 years.<sup>6</sup>

The Property and Casualty Insurance Industry has recorded a profit for **23 consecutive years**, according to the National Association of Insurance Commissioners.

Numerous studies by third parties, not affiliated with either the proponents or opponents to this bill, demonstrate that **caps do not reduce insurance premiums**:

“Empirical studies reveal **premium increases after states enact damages caps**.” Avraham, R. “The Dark Side of Insurance,” *Rev. Law Econ.* 2023; 19(1): 13-45, 38.

“**In Maryland, Missouri, and other states, insurers lobbied for damage caps claiming that they would reduce premiums. Ultimately, rates increased after the legislature enacted reforms.**” *Id.*

**“Tort laws do not lower insurance premiums.”<sup>7</sup>**

“States with little or no tort law restrictions experience **the same level of insurance rates** as those states that enact severe restrictions on victims’ rights.” “Limiting Lawsuits Will Not Lower Insurance Premiums,” Centers for Justice and Democracy, 2024 Update Report.

**“There is a lack of evidence for litigation having a material effect on rising premiums.”<sup>8</sup>**

Industry insiders have long admitted that “tort reform” (caps) will not bring down insurance rates:

“**We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.**” Sherman Joyce, President, American Tort Reform Association (see CJS 2024 Update Report).

“The insurance industry never promised that tort reform would achieve specific premium savings.” American Insurance Association (see CJS 2024 Update Report).

“[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and ‘I’ve never said that in 30 years.’” Victor Schwartz, General Counsel, American Tort Reform Association (see CJS 2024 Update Report).

<sup>5</sup> Market Segment Report: déjà vu all over again: more secondary events as US P/C industry marches toward rate adequacy, AM Best, February 20, 2025.

<sup>6</sup> U.S. Bureau of Labor Statistics; Inflation and Auto Insurance, Center for Economic and Policy Research, 2024; Car Insurance Rates Drove Inflation in U.S. Economy, Eno Center for Transportation, 2024.

<sup>7</sup> Centers for Justice and Democracy 2024 Update Report.

<sup>8</sup> Centers for Justice and Democracy 2024 Update Report (quoting National Association of Insurance Commissioners, 2022 presentation by law professor and former insurance lawyer).



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**SB 474 / HB 476 - FAVORABLE**

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## **BACKGROUND:**

### **CAPS ON DAMAGES AND WHO'S HURT MOST**

#### **WHAT KINDS OF DAMAGES (OR COMPENSATION) MIGHT A JUDGE OR JURY AWARD TO AN INJURED PERSON?**

Judges and juries award compensatory damages for injuries. Compensatory damages consist of economic damages, non-economic damages or both. Another type of damages – punitive damages – are extremely rare and only awarded in cases of egregious misconduct. This Background focuses on compensatory damages.

#### **WHAT ARE ECONOMIC DAMAGES?**

There are two types of economic damages: lost earnings and medical costs. In most cases, lost earnings make up the largest part of economic damages that goes directly to the injured victim. That's because when a jury awards compensation to cover a victim's medical expenses, the money does not go to the victim at all. Instead, it goes to health care providers to pay for the medical care the patient did not need until they were injured. In other words, paying for all medical care means compensating the medical industry for the treatment of injuries that sometimes, as in the case of medical malpractice, the industry itself has inflicted.

#### **WHAT ARE NON-ECONOMIC DAMAGES?**

Like lost earnings, non-economic damages go directly to the injured victim. Non-economic damages compensate for intangible but real "quality-of-life" injuries, like permanent disability, disfigurement, trauma, loss of a limb, harm to a reproductive system, blindness, suffering or pain. Underlying the purpose of non-economic damages is the understanding that there is more to a human being than the amount of a weekly paycheck.

#### **WHY ARE NON-ECONOMIC DAMAGES IMPORTANT?**

When a person is seriously injured, the greatest loss is the loss of the enjoyment of life, the pleasure, the satisfaction or the utility that human beings derive from life, separate and apart from earnings. These are non-economic injuries.

Put another way, non-economic damages compensate for losing what is truly valuable to us as human beings: our ability to live life on a daily basis free of any debilitating physical problems, pain or trauma. Those problems diminish our capacity to enjoy life and compromise our sense of self-worth, dignity and integrity. The pleasure of living lies in our ability to participate fully in the give and take of life. It lies in our experience of the ordinary day: waking up without pain;

drinking a cup of coffee without someone's help; dressing a child in mismatched clothes that she insists on wearing, rather than have that child dress you; walking to a bus stop rather than being wheeled to a lift van.

In addition to physical pain and suffering, seriously injured victims can suffer great mental anguish, anxiety and often shame at being transposed from an able-bodied working person to an individual who is dependent on others. These are sufferings which seriously injured people may encounter each time they attempt to perform any of the myriad tasks of daily life that the rest of us take for granted. This is the loss that the law describes as “non-economic” and which goes to the very essence of our quality of life.

## **WHAT IS A “CAP” ON DAMAGES?**

A “cap” on damages is law that puts an arbitrary “one-size-fits-all” limit on the amount an injured person can receive in compensation irrespective of what a judge or jury decides compensation should be. Therefore, caps not only hurt victims, they undermine our jury system. They take away the authority of judges and juries, who listen to evidence in a case, to decide compensation based on each specific fact situation. Instead, cap laws place these decisions in the hands of politicians. A cap is usually defined by a dollar figure (\$100,000, \$500,000, etc.). Caps only come into play after someone has already been found liable for causing harm. They have nothing to do with “frivolous” lawsuits. They apply no matter how much merit a case has, or the extent of misconduct or injury.

## **WHAT ARE CAPS ON NON-ECONOMIC DAMAGES?**

The most common type of law capping damages limits *non-economic* damages only. Economic damages, such as lost wages, are typically not capped. As a result, capping non-economic damages results in valuing the destruction of an individual's life based on what that person would have earned in the marketplace but for the injury. Therefore, they have a disproportionate impact on low wage earners, children, seniors and women who do not work outside the home. In addition, some data show that “while the [Texas medical malpractice] cap had a disparate impact across all demographic groups, the hardest hit appear to be unemployed patients and the elderly.” And because these two groups “are disproportionately female,” this disparate effect likely extends to women as well.<sup>1</sup>

## **HOW DO NON-ECONOMIC CAPS DISCRIMINATE AGAINST WOMEN?**

In a seminal study, Professor Lucinda Finley found “certain injuries that happen primarily to women are compensated predominantly or almost exclusively through non-economic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries.” She wrote, “[J]uries consistently award women more in non-economic loss damages than men...[A]ny cap on non-economic loss damages will deprive women of a much greater proportion and amount of a jury award than men. Non-economic loss damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.”<sup>2</sup>

## HOW DO NON-ECONOMIC CAPS DISCRIMINATE AGAINST SENIORS?

Basing the value of someone's life on what they can currently earn in the marketplace says to seniors that despite having spent their lives paying their dues and playing by the rules, now, due to the negligence of a wrongdoer, they have lost what their years have earned them: the prospect of an enjoyable, vigorous and happy old age. Data show that elderly patients "are more strongly affected by the [Texas] non-economic damages cap" as "only 25 percent of elderly payouts are attributable to economic damages, compared to 57 percent for the adult nonelderly."<sup>3</sup>

## HOW DO NON-ECONOMIC CAPS DISCRIMINATE AGAINST CHILDREN?

Basing the value of a child's life on what they can earn in the marketplace utterly cheapens their existence. Caps can also destroy an important safety net for vulnerable children and their families. In addition, caps only affect the most severely hurt, like a catastrophically-injured newborn, because only the most seriously injured child has damages that rise to the level of a cap. For example, in California – a state with a non-economic damages cap – plaintiffs less than one year of age had awards capped 71 percent of the time, compared with 41 percent for other plaintiffs. Injury cases with reductions of \$2.5 million or more usually involved newborns and young children with very critical injuries.<sup>4</sup>

## HOW DO NON-ECONOMIC CAPS MAKE IT DIFFICULT TO BRING CASES?

Caps on non-economic damages make cases economically impossible for contingency-fee attorneys to bring cases if there are significant non-economic injuries. That's because under a contingency fee arrangement, a lawyer must fund the case up front and in return is entitled to a percentage of the award if the case is successful – usually one-third. If the award is arbitrarily slashed by a cap law, the case becomes too expensive for them to bring. Insurance defense attorney Robert Baker, who defended malpractice suits for more than 20 years, told Congress in 1994, "As a result of [California's] caps on damages...[t]here are entire categories of cases that have been eliminated."

## ARE CAPS CONSTITUTIONAL?

It depends on the state. However, many states have found them unconstitutional, including Alabama, Florida, Illinois, Kansas, New Hampshire, Oklahoma, Oregon and Washington State.<sup>5</sup>

## NOTES

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<sup>1</sup> Bernard S. Black et al., *Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped*, Cato Institute (2021).

<sup>2</sup> Lucinda M. Finley, "The Hidden Victims of Tort Reform: Women, Children, and the Elderly," 53 *Emory L.J.* 1263 (2004), [https://digitalcommons.law.buffalo.edu/journal\\_articles/198](https://digitalcommons.law.buffalo.edu/journal_articles/198)

<sup>3</sup> Bernard S. Black et al., *Medical Malpractice Litigation: How It Works, Why Tort Reform Hasn't Helped*, Cato Institute (2021).

<sup>4</sup> Nicholas M. Pace, Laura Zakaras and Daniela Golinelli "Capping Non-Economic Awards in Medical Malpractice Trials, California Jury Verdicts Under MICRA," RAND Institute for Civil Justice (2004), <https://www.rand.org/pubs/monographs/MG234.html>

<sup>5</sup> See Center for Justice & Democracy Fact Sheet, "Caps On Compensatory Damages: A State Law Summary" (August 2020), <https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary>



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## Limits on Non-Economic Damages are Racially Discriminatory

Among the “tort reform” measures that the insurance industry, big business and organized medicine most desire is an arbitrary ceiling, or cap, on the amount an injured person could receive for non-economic injuries.

These are injuries that cause one to lose their quality of life – thousands of everyday things typically taken for granted like waking up without pain, eating food without someone’s help, dressing a child or even having children at all.

- **Economic vs. Non-Economic Damages.** If an individual is injured, the calculation of their “economic” loss includes consideration of wages or lost salary. Therefore, those with low or no wages – such as children, senior citizens, and women who do not work outside the home - are more likely to receive a greater percentage of their compensation in the form of non-economic payments. Limits on non-economic damages are disproportionately unfair to minorities.<sup>1</sup>
- **John Conyers (D-MI), Chairman of the U.S. House Judiciary Committee,** said in 2004, “The restrictions on non-economic damages ... will have a severe and disproportionate impact on minorities.”<sup>2</sup>
- **U.S. Senator Edward Kennedy (D-MA), Chairman of the U.S. Senate Labor Committee,** noted in a 2002 letter to President Bush, “Caps on non-economic damages discriminate against women, children, minorities, and low income workers. These groups do not receive large economic damages attributable to lost earning capacity. Thus, non-economic damages are particularly important to these vulnerable populations.”<sup>3</sup>

*From: “The Racial Implications of Tort Reform” by Joanne Doroshow and Amy Widman, 25 WASH. U. J.L. & POL’Y 161 (2007), is part of a volume entitled, “ACCESS TO JUSTICE: THE SOCIAL RESPONSIBILITY OF LAWYER.” <http://law.wustl.edu/Journal/index.asp?ID=6718>. The full article is here: <http://law.wustl.edu/Journal/25/DoroshowWidman.pdf>*

### NOTES

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<sup>1</sup> See, e.g., Amanda Edwards, “Medical Malpractice Non-Economic Damages Caps: Recent Developments, 43 Harv. J. on Legis. 219-221 (examining how such caps affect minority populations, and explaining how the data tables used to calculate economic damages project lower earnings for nonwhite workers, and this results in lower economic damages and more harm from non-economic damage caps.).

<sup>2</sup> Congressman John Conyers, Press Release, “Conyers says: ‘Tort Reform Movement Has a Massively Disproportionate Impact on Minorities’” March 11, 2004.

<sup>3</sup> Letter from Senator Ted Kennedy to President Bush, July 2002.



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## LIMITING LAWSUITS (“TORT REFORM”) WILL NOT LOWER INSURANCE PREMIUMS

### 2024 UPDATE

Four decades of data and experience show that when states try to solve insurance problems on the backs of harmed victims, stripping away their legal rights and blocking legitimate lawsuits, insurance premiums do not drop.

**Studies of insurance data have long shown that litigation does not drive insurance rate hikes. As a result, limiting lawsuits will not stop them.**

- Decades of studies examining insurance data from Americans for Insurance Reform (a project of the Center for Justice & Democracy) and the Consumer Federation of America show that tort law limits do not lower insurance premiums; states with little or no tort law restrictions experience the same level of insurance rates as those states that enact severe restrictions on victims’ rights; and liability insurance crises are driven by factors other than “tort law cost explosions” as insurance companies claim, so their “tort reform” remedy always fails.<sup>1</sup>
- A recent study of the insurance industry’s failure to use its economic clout to reduce harm (loss prevention) found that while “one would expect that caps [on damages] would reduce premiums for doctors-insureds as a consequence ... this did not happen. ...Indeed, empirical studies reveal premium increases after states enact damage caps.”<sup>2</sup>
- A 2022 study found that the insurance market “seems, in important ways, to defy economic logic” because while caps “drive down insurance costs,” insurance premiums “do not fall in parallel with costs.” Instead, caps lead to “sustained supranormal profits.”<sup>3</sup>
- As recently reported in the *Tampa Bay Times*, “Kenneth Klein, a former defense lawyer and professor at California Western School of Law, gave a presentation to the National Association of Insurance Commissioners [in 2022] about how there was a lack of evidence for litigation having a material effect on rising premiums.”<sup>4</sup>

**Industry insiders have long admitted that “tort reform” will not bring down insurance rates.**

For example:<sup>5</sup>

- American Insurance Association says, “[T]he insurance industry never promised that tort reform would achieve specific premium savings.”
- Sherman Joyce, President, American Tort Reform Association says, “We wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.”
- Victor Schwartz, General Counsel, American Tort Reform Association says, “[M]any tort reform advocates do not contend that restricting litigation will lower insurance rates, and ‘I’ve never said that in 30 years.’”<sup>6</sup>

**Lawsuits against insurance companies are not frivolous; policyholders are forced to go to court against insurers because they fail to pay legitimate claims.**

- According to the *Tampa Bay Times*, in Florida, for example, “insurers who dominate the market receive an outsize percentage of the nation’s complaints, and one company has been accused by its own adjusters of manipulating reports to lowball or deny homeowners’ claims.” Said former state senator and now insurer Locke Burt, “I believe that an insurance company’s litigation rate is directly related to how it handles its customers.”<sup>7</sup>
- “In 2020, Florida Insurance Consumer Advocate Tasha Carter surveyed 7,000 people whose claims were represented by a lawyer. The survey found that 78% of them said they hired a lawyer because of a poor claims experience, either from their insurer delaying payments, denying payments or not offering enough money. Another 20% said they hired a lawyer based on advice from a contractor, a consultant or an insurance adjuster.”<sup>8</sup>

**Insurers hide data which could disprove their position yet lawmakers never demand to see these data before stripping away victims’ rights.**

It is unforgivable for public officials to strip away the legal rights of harmed individuals without obtaining basic insurance data, which can be opened up to public inspection. Yet that is exactly what is happening. Lawmakers considering whether to take away legal rights must first demand the following:

- Full “closed claims” studies for each insurer for at least a 10-year period, and continuing on an ongoing basis. The public must have access to this information.
- Frequency and severity trends for the industry and for each company, going back at least six years.
- Careful studies of reserves (including “Incurred But Not Reported” claims or IBNR) of all insurers within the state.<sup>9</sup>

- All recent rate filings, with full information, unrestricted by overbroad “trade secret” assertions.

## NOTES

<sup>1</sup> See, e.g., J. Robert Hunter, Joanne Doroshow and Douglas Heller, Consumer Federation of America and Center for Justice & Democracy, *Inventing Social Inflation 2023* (2023), <https://centerjd.org/content/inventing-social-inflation-2023>; J. Robert Hunter, Joanne Doroshow and Douglas Heller, Consumer Federation of America and Center for Justice & Democracy, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation* (2020), <https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation>; J. Robert Hunter and Joanne Doroshow, Americans for Insurance Reform, *Premium Deceit 2016: The Failure of “Tort Reform” to Cut Insurance Prices* (2016), <https://www.centerjd.org/content/premium-deceit-2016-failure-tort-reform-cut-insurance-prices>; J. Robert Hunter and Joanne Doroshow, Center for Justice & Democracy, *Premium Deceit: The Failure of “Tort Reform” to Cut Insurance Prices* (1999, 2002), <http://centerjd.org/system/files/PremiumDeceit.pdf>

<sup>2</sup> Ronen Avraham and Ariel Porat, “The Dark Side of Insurance,” 19 *Review of Law & Economics* 13 (February 2023), <https://www.degruyter.com/document/doi/10.1515/rle-2022-0054/html> (“For instance, after Oklahoma passed insurer-supported damages caps, medical malpractice premium rates increased by 83 percent. Likewise, in Maryland, Missouri, and other states, insurers lobbied for damage caps claiming that they would reduce premiums. Ultimately, rates increased after legislature enacted reforms.” [Although omitted here, citations for these facts can be found in many publications written by the Center for Justice & Democracy, such as “Caps Do *Not* Lower Insurance Premiums for Doctors,” [https://www.centerjd.org/sites/default/files/ckfinder/userfiles/files/CapsDontWorkF\(1\).pdf](https://www.centerjd.org/sites/default/files/ckfinder/userfiles/files/CapsDontWorkF(1).pdf) “Other studies support this conclusion, finding that caps above \$750,000 increase premiums substantially (Nelson et al. 2007).”)

<sup>3</sup> Bernard S. Black, Jeffrey Traczynski and Victoria Udalova, “How Do Insurers Price Medical Malpractice Insurance?”, IZA Institute of Labor Economics, Discussion Paper No. 15392 (June 2022), <https://ssrn.com/abstract=4151271>

<sup>4</sup> Lawrence Mower, “Florida leaders blame insurance crisis on lawsuits, but evidence is thin; Fighting lawsuits was Florida’s response to the insurance crisis, but evidence hasn’t materialized,” *Tampa Bay Times*, October 19, 2023, <https://www.tampabay.com/news/florida-politics/2023/10/19/florida-leaders-blame-insurance-crisis-lawsuits-evidence-is-thin/>. See Ken Klein, “Unpacking ‘Social Inflation,’” August 12, 2022, [https://content.naic.org/sites/default/files/national\\_meeting/AttmtFive\\_Consumer\\_Social%20Inflation\\_kenklein.pdf](https://content.naic.org/sites/default/files/national_meeting/AttmtFive_Consumer_Social%20Inflation_kenklein.pdf) (presentation during National Association of Insurance Commissioners Summer 2022 National Meeting).

<sup>5</sup> See Americans for Insurance Reform, “Industry Insiders Admit – And History Shows: Tort Reform Will Not Lower Insurance Rates” (2003), <https://centerjd.org/air/pr/Quotes.pdf>

<sup>6</sup> Ibid.

<sup>7</sup> Lawrence Mower, “Florida leaders blame insurance crisis on lawsuits, but evidence is thin; Fighting lawsuits was Florida’s response to the insurance crisis, but evidence hasn’t materialized,” *Tampa Bay Times*, October 19, 2023, <https://www.tampabay.com/news/florida-politics/2023/10/19/florida-leaders-blame-insurance-crisis-lawsuits-evidence-is-thin/>

<sup>8</sup> Ibid.

<sup>9</sup> To understand IBNR and other insurance industry accounting tricks, see Center for Justice & Democracy, *Insurance: The Essential Guide to a Bewildering Industry* (2021), <https://www.insurancefatcat.com/>

Ronen Avraham and Ariel Porat\*

# The Dark Side of Insurance

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**Abstract:** When insurance works properly it provides insureds with optimal incentives to prevent losses, alongside coverage for losses that could not be prevented efficiently. But insurance has an overlooked dark side to it as well. Insurers employ various tactics to shift losses to their insureds or to their victims in order to minimize their own costs instead of reducing their insureds' losses. Worse, insurers might also act to increase or maintain long term risks, ensuring the future of the insurance business that can't exist without risks. We focus on the incentives of insurers to engage in anti-competitive practices and trigger harmful behaviors of their insureds or third parties, in order to increase demand for insurance coverage. Policymakers should be aware and critical of insurers' perverse incentives that counteract the interests of the insureds and society.

**Keywords:** insurance, regulation, risk

**JEL Classification:** G22, G28

## 1 Introduction

What do we think when we think about insurance? Many people think about protecting their family, about peace of mind in hard times, about financial security, defending against catastrophic loss, and other similarly bright features that insurance provides. This is all true. When insurance works properly it provides insureds with optimal incentives to prevent losses, alongside coverage for losses that could not be prevented efficiently.

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But insurance has an overlooked dark side to it as well. Insurers employ various tactics to shift losses to their insureds or to their victims. More troubling, however, is insurers' potential motivation, as a group, to increase or maintain long term risks in society in order to increase demand for their services. Whether insurers *intentionally* increase or maintain risks is not for us to judge. The goal of this article is to expose insurers' *potential* interest in increasing risks in society and point out some tactics employed by them which *could* serve this interest.

As mentioned in the article, over the years there were a few references to the idea that insurance companies profit from risks. Syverud, for example, suggested that both plaintiffs and insurers benefit from the expansion of liability insurance, and have a mutual interest in increasing it. Therefore, an increase in liability insurance gives rise to an increase in lawsuits. In fact, insurers need to keep the threat from lawsuits at a certain level, in order to keep selling liability insurance policies (Syverud 1994). In a more recent article, Hinloopen argues that insurers benefit from expensive damages, because it encourages people to buy policies and allows insurers to increase premium rates. Thus, they tend to turn to more expensive repair services—not in a collusive manner, but as a result of market reasoning (Hinloopen 2010). Hinloopen's approach received some media attention in the Netherlands.<sup>1</sup> It was even examined by the government Authority for Consumers and Markets, which eventually reached the conclusion that there was no violation of competition law.<sup>2</sup>

This Article is the first to focus on the dark side of insurance, put it in a theoretical framework and provide multiple examples for its existence. Let us begin by illustrating insurers' practices which result in increasing risks in society. Consider first Kidnap and Ransom (K&R) insurance. K&R is an insurance coverage plan that covers ransom payments for those who travel frequently and are thus at risk of getting kidnapped. But K&R insurance also has a dark side to it. Indeed, some commentators believe that the reason the market for K&R insurance has been increasing so vastly is because the mere existence of insurance fuels more kidnapping (as getting ransom money is easier when there is insurance in place), and more kidnapping increases the demand for insurance. The resulting 'collusive' cycle never ends; kidnappers profit from insurance and insurers profit from kidnapping. Consequently, as we later explain, there is also the risk that insurers employ tactics which increase, or at least maintain, K&R's risks in society.

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<sup>1</sup> *Schadesturing om Tarieven Hoog te Houden*, AUTOMOTIVE, <https://automotive-online.nl/management/laatste-nieuws/schade/7395-lsquot-schadesturing-om-tarieven-hoog-te-houdenrsquo> (Last visited 07/25/2022).

<sup>2</sup> *NMa: Carglass<sup>®</sup> Houdt Zich Aan Mededingingswet*, CARGLASS, <https://www.carglass.nl/over-ons/persberichten/p/r/nma-carglassr-houdt-zich-aan-mededingingswet/> (LAST VISITED 07/25/2022).

And if K&R insurance seems like an esoteric insurance field consider cyber insurance, the ‘new kid in the block’ of insurance coverage. The U.S. cyber insurance market was \$3.15 billion in 2019 and it is estimated to exceed \$20 billion by 2025 (and these numbers understate coverage of cyber risk, because many cyber claims are filed under other policies) (Zhang 2021). One of the main losses cyber insurance covers is ransomware. Ransomware is a malicious software that locks and encrypts users’ data until the user pays ransom to restore access. Ransomware attacks come in various forms, including encryption, spreading viruses, and presenting attackers as law enforcement, among others. Common to all is a ransom demand associated with the data takeover. Ransomware attacks surged 300% in 2020 alone, with the sums demanded in these attacks increasing by over 170% in just one year.

Like other types of insurance, cyber insurance has bright sides to it. Because ransomware is such a disruptive cybercrime that creates costly and unpredictable financial outcomes for companies, having insurance on your side can be very helpful. Insurers have special teams that negotiate and buy more time from the attackers while cyber experts try to neutralize the attack. Of course, insurers provide financial coverage in case these experts fail, covering loss of revenue, reputational loss, and more.

But cyber insurance also has dark sides to it. Ransom payments made by insurance companies fuel the vicious hacking cycle and help hackers fund more frequent and more sophisticated cyberattacks. This of course increases the demand for insurance so the result is that hackers profit from insurance and insurers profit from hacking. Again, this raises the concern that insurers might even take steps that increase, rather than decrease cyber risks in society.

The dark side of insurance goes even deeper than that. Insurance companies have incentives to collaborate in order to increase the level of harm and the probability of risks, so as to maximize profits Avraham and Gilo (2022). For example, insurance companies can use their lobbying power to block technological progress that threatens their bottom line. Consider the car insurance industry’s reaction to autonomous cars. As is now well known, autonomous cars are expected to reduce fatal traffic accidents by 90 percent, causing the insurance industry’s largest segment of coverage to shrink by an estimated 60% by 2050. Not surprisingly, commentators have observed that insurers have tried to slow down (if not completely stop) the progress. They have done so in various ways, from attempting to convince the public that autonomous cars are dangerous, to lobbying for more regulations that raise the barriers for entry to the industry.

These three examples belong to a list of phenomena that characterize what we call the “dark side of insurance.” Indeed, we hold this truth to be self-evident that all insurers depend on the existence of risk to stay in businesses. In this Article, we

show how insurers act on and protect their intrinsic interest to maintain or increase risk in the world.

Notably, insurers have an individual short-term interest in providing their insureds with incentives to reduce risks. But all insurers as a group have a long-term interest to provide all insureds with incentives *not* to reduce risks and sometimes even to increase them. In short, if we imagine that insurers could collectively control a knob that sets the level of risks in society, we claim that they have an interest to turn it a few notches above the socially optimal level, or at least to make sure it is turned to that point or merely not prevent it from being turned to that level. Bluntly put: a private, profit-driven industry has incentives to maximize its profits, even if that means externalizing costs onto others.

Indeed, we are concerned that insurers find ways to serve their long-term interests in increasing risks even though they have no direct access to a knob. For example, insurers have significant influence over directing laws and regulations that affect the industry, allowing their risk-prone attitude to have broader impact. Thus, insurers can collaborate through the National Association of Insurance Commissioners (NAIC),<sup>3</sup> advocating for the adoption of laws and regulations drafted by its subcommittees as proposals to legislators. Such activism raises concerns that insurers, through NAIC, would increase statewide risk if it serves their long-term interest. Metaphorically speaking, they might have access to the knob that affects the level of long-term risks in society and set it above the optimal point.

These issues comprise the first focus of this Article: insurers' long-term interest in increasing rather than reducing risks in society. The second issue of focus in the Article is insurers' interest in *shifting* rather than *reducing* short-term risks in society. While shifting risks typically results also in increasing risks in the long run, this latter effect is indirect and possibly unintentional.

The conventional wisdom is that insurers serve as private regulators of societal risks.<sup>4</sup> The baseline argument is that in order to reduce the insurers' liability, each insurer monitors its insureds' behavior to reduce the insureds' own losses, such as by providing them with a discounted premium in exchange for installing

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<sup>3</sup> The NAIC is defined as a voluntary organization of insurance commissioners that “ensure[s] the solvency of insurers, protect[s] policyholders, and preserve[s] state regulation.” (Talesh 2015).

<sup>4</sup> This has not always been the conventional wisdom. In the early days of modern insurance, the conventional wisdom among commentators was that insurance was problematic because it might facilitate insureds' moral hazard (Baker 1996).

smoke alarms.<sup>5</sup> And if all companies incentivize their insureds to reduce fire risk, the world becomes a safer place.

However, we argue that at least some of the time, the conventional wisdom confounds *loss-shifting* with *loss reduction*. In other words, while we agree that insurers exert effort to reduce their own *liability under the policy*, we notice that this reduction is not always done through real *reduction of losses* in the world. Rather, often insurers simply escape paying under the policy by *shifting losses* from themselves to their insureds, or to the insureds' victims, such as when they unjustifiably deny coverage. Both loss-reduction and loss-shifting ultimately reduce insurers' liability under the policy; however, loss-reduction reduces accident frequency or magnitude—leading to a safer world—while loss-shifting only reduces the *insurers' liability* under a policy for the accident without concern for accident frequency or magnitude. The difference is crucial, as loss-shifting does not decrease risk in the world and may instead create more risk. Note the difference between the former and the latter focus or argument of the Article: while the former argument is that insurers intentionally increase long-term risks in society in order to increase demand for insurance, the latter argument is that in the short-term they do not care whether they affect the level of risks or not; they just care about reducing their immediate costs, even if this is accomplished through risk shifting to others rather than risk reduction.

The Article proceeds as follows: Part I starts with the last point and explores the “myth of risk reduction.” This Part explores systematic examples of insurers reducing only their own liability under the policy and not losses in the world. We begin by disputing directly the notion that insurers often provide quality, risk-reducing private regulation – by noting instances in which insurers barely regulate or do so in a socially undesirable fashion. After discussing how insurers stand idly by while their insureds continue their socially inefficient risky behavior, we move on to examine other, more active practices insurers engage in, perhaps for the purpose of shifting loss. We show how insurers obscure contractual manipulations of the policies that help them deny coverage after the fact, without providing any incentives to their insureds to take due care in advance. Worse, we show how insurers instruct their insureds to escape compensating their victims after the fact, instead of how to prevent losses in advance.

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<sup>5</sup> Steven Shavell famously laid out the theoretical groundwork for this new conventional wisdom in the law. Shavell 1979. The origins can be found in Arrow 1971a; Pauly 1968. Various prominent scholars have since demonstrated the applicability of this argument in practice, claiming that insurers not only can but actually do serve as private regulators. See Baker and Silver (2019), Ben-Shahar and Logue (2012).

Part II, which is the more important and ambitious part of our project, discusses insurers' long-term interest in setting the societal risk level knob a few notches higher than optimal. To be sure, we do not mean to suggest that insurers always favor more risk.<sup>6</sup> Thus, insurers may want to reduce extreme risks to which even they are averse (Baker and Farrish 2005). Furthermore, it is not in the insurers' interest to increase risks infinitely. Very high risks would cause some insureds to prefer not to buy insurance at all, while others would refrain altogether from engaging in the underlying risky activity, such as driving. Rather, our argument is more nuanced and centers on the claim that insurers seek to self-interestedly set risk levels higher than what is socially desirable.

We then explain how insurers can coordinate in achieving their long-term interest despite federal antitrust laws that prohibit coordination. We start by exploring how the very nature of some insurance policies gives rise to third-party moral hazard. Third-party (as opposed to first-party) moral hazard happens when the mere existence of insurance encourages third parties to harm, or be harmed by, the insureds in order to collect on the policy. We show this phenomenon in the contexts of kidnapping and ransom insurance, cyber insurance, and health insurance. We show that not only are insurers aware of this phenomenon, they also actively fuel it in various ways. We then turn to discuss another example of how insurers utilize their collective power to increase risk directly by objecting to risk-decreasing technologies (such as autonomous cars, seatbelts and genetic testing).

Part III exhibits insurance practices that combine “the worst of both worlds” from Parts I and II. That is, we show practices that shift loss to the insureds (or their victims) and consequently make for a riskier world in the long term. Put differently, we argue that sometimes the mechanism by which insurers increase long-term risk is in fact by shifting loss onto others. Tort reform is our primary example. While in the cases discussed in Part I increasing risks for the long run is mostly a by-product of shifting losses, we suspect that in the cases discussed in Part III increasing risk is a major motivation of the insurers.

Table 1 below summarizes the structure of this Article. The top-left cell represents the baseline conventional wisdom, which assumes that insurers regulate insureds' behavior and therefore do not engage in loss-shifting in the short term or in risk increasing in the long term. The top-right cell represents the discussion in Part I, where we begin deconstructing the conventional wisdom first by contending that some insurers' practices aim at short-term *loss shifting*, rather than any *loss reduction*. The discussion in Part II is represented in the bottom-left cell, where

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<sup>6</sup> By risk we mean the multiplication of the probability of loss and the magnitude of loss. It can be shown that insurers have incentives to impact both the probability and the magnitude of loss to levels that are above the socially optimal ones (Avraham and Gilo 2022).

**Table 1:** Exploring short-and long-term interests of insurers' behavior.

Short term/Long term	No loss shifting	Loss shifting
Risk decreasing/maintaining	Conventional wisdom	Part I
Risk increasing	Part II	Part III

we further contest the conventional wisdom by highlighting insurers' behavior that has the potential to increase or maintain long-term risk levels. Lastly, the bottom-right cell—a mirror image of the conventional wisdom—represents the discussion in the last chapter of our Article and synthesizes the insights brought in the two preceding parts by presenting insurer practices that both shift loss and increase total risk levels. To be sure, there is some overlap between the cells; yet, each cell represents insurers' practices that best capture the relevant interplay between long- and short-term interests in that cell.

In the Conclusion, we recommend some policy reforms.

## 1.1 Shifting Losses: Rebutting the Myth of Loss Reduction

The conventional wisdom is that insurers instruct the insureds on how to decrease the risk or the level of harm. When insurers instruct insureds to install smoke alarms, the result is fewer fires; when they instruct them to install sprinklers the result is smaller damage. This led many scholars to view insurers as capable of serving as private risk regulators and insurance as a potential mechanism for creating a safer world (Arrow 1971b; Baker 1996; Ben-Shahar and Logue 2012, at 199; Hölmstrom 1979; Rappaport 2017; Shavell 1982; Talesh 2017).<sup>7</sup>

We begin this Article by outright disputing the prevalence of this common perception. We think it is a myth. We argue that often, insurers do not engage in active risk regulation; and even when they do, they do it inefficiently and not for the purpose of reducing risk. Instead, we claim that insurers focus on loss shifting: rather than aiming to reduce liability under the policy by preventing *losses*, insurers' primary goal is to reduce their *liability* by shifting these losses onto others; in this sense, insurers fail to live up to their socially desirable institutional role as private regulators.

<sup>7</sup> Ben-Shahar and Logue built upon Shavell and Baker's theories that insurers' relationship with tort liability induces optimal incentives to take care by exploring the means by which the insurance industry's distinctive methodology and business practice complement or even replace government regulation of risk.

In a recent article Abraham and Schwarcz also confront what they call the “Regulation Thesis”, the idea that insurance can be a replacement for, or a complement to, state regulation. Abraham and Schwarcz argue that evidence shows that insurers often fail to act as regulators and to reduce risk. That is because insurance is designed to incentive risk-taking by offering compensation for losses. This incentive results in moral hazard, when the insured’s cost of loss prevention is greater than the benefits. Abraham and Schwarcz present evidence that insurers have a “net-negative” effect on loss prevention (Abraham and Schwarcz 2022). Other scholars also reached the conclusion that the conventional wisdom is inaccurate, and that the reduction of risks is not always on the insurer’s agenda (Mendoza 2020; Schlesinger and Venezian 1990; Schwartz 1990).

While we join this literature and dispute the conventional wisdom claim that insurers generally focus on loss-reduction, we do identify a general exception where insurers indeed attempt to prevent losses on the ground. The exception is in the case of *extreme correlated losses*, because these are losses that risk insurers’ solvency if not significantly reduced. We start by describing insurers’ passive loss shifting and continue with demonstrating their active loss shifting.

### 1.1.1 Passive Loss Shifting

We are not the first to argue that insurers can do better in reducing risks. Prior scholars have also recognized that insurers are not “as rigorous in monitoring” insureds’ conduct as many presume (Abraham 2011; Logue 2015).

In this Section we proffer two arguments; first, that insurers barely engage in direct risk regulation; and second, that even when insurers do directly regulate, their regulation is focused on liability-reduction, not loss-reduction; hence effectively shifting loss onto others. Thus, we conclude that insurers fail to live up to their socially desirable institutional role as effective risk reducers.

#### 1.1.1.1 Why Insurers Fail to Engage in Direct Risk Regulation

We start by providing several theoretical explanations for why in contrast to the conventional wisdom, insurers do not directly regulate to reduce risks. First, as Kyle Logue identifies and illustrates through negligent inspection law, direct regulation may *increase* insurers’ liability. Under negligent undertaking law, if an accident occurs after the insurer has regulated enough to have legally “undertaken” the insured’s responsibility for safety incidents, the insurer has dramatically increased its liability for the incident (Logue 2015).

The second reason insurers do not engage in direct regulation is that in cases like Corporate Directors and Officers (“D&O”) insurance, if insurers engage in

direct regulation or even raise awareness of potential risks, they can increase their *insureds'* liability. Specifically, D&O insurers neither require insureds to adopt any practices nor monitor insureds' behavior; many such insurers do not advise insured on any loss-preventing practices, as a director's awareness of the risk in itself can give rise to liability down the line if a loss does occur (Heimer 2013). In D&O insurance, insurers notoriously "do almost nothing to monitor the behavior of the corporations that they insure." (Abraham 2011).

Finally, if insurers' regulation is effective, it creates two types of positive externalities; one for other insurers who now know how to improve their insureds' risks, and another one for insureds, since the safety regulation reduces their risk to the point that possessing any insurance at all may not be necessary (Cohen 1997). And, as is well known, whenever positive externalities are involved, under-provisions of safety regulation are likely unavoidable.

The next sections address the question of what can explain insurers' motivation to regulate insured's behavior in the occasions they do so. We stress that even in instances when insurers oversee their insured's behavior, they are likely to strictly adhere their advice to the rules set by preexisting—often outdated—legislation, thus failing to fully fulfil their potential to privately regulate.

#### **1.1.1.2 Self-Interested Interpretation of Existing Legislation**

We now turn to the argument that even when insurers directly instruct their insureds, often it is not for the purpose of getting them to *efficiently* invest in precautions. Quite the contrary, insurers may distort the interpretation of existing legislation they provide to their insureds, which in turn leads to suboptimal incentives to take care. Punitive damages serve as an excellent example. Although many states prohibit insurers from providing coverage for punitive damage, insurers often include venue clauses or jurisdictional clauses that ultimately enable such coverage to be provided (Talesh 2015). However, coverage for punitive damages may well decrease deterrence, and that, from insurers' perspective, may ultimately result in more demand for insurance coverage.

Insurers similarly frame their discussions of U.S. Supreme Court decisions "around shifting risk and avoiding liability." Consider insurers' recent focus on interpreting a Supreme Court decision, *Vance v. Ball State*, in which the Court narrowed the definition of "supervisor." In *Vance*, the question was whether a coworker who is vested with the authority to oversee the daily work of another worker is considered a "supervisor" for the purpose of determining employer liability for harassment under Title VII. Rather than developing an understanding of the supervisor's role under this new regime, insurers generally offer recommendations for employers that would better situate the insurer to avoid liability or defend a case should an incident arise. This type of interpretive discretion is concerning, as

insurers become chiefly focused on legal risk-management instead of loss prevention, providing a service that “leans more toward making claims defensible rather than fostering a discrimination-free workplace.” (Talesh 2017).

### 1.1.1.3 Other *Motives to Regulate (Inadequately)*

Omri Ben-Shahar and Kyle Logue explore the argument that insurers are motivated to reduce liability through loss-reduction by cataloging multiple real-world examples. These examples center on using premium reduction or other methods to regulate areas where the government has not intervened, such as through homeowner’s insurance. However, several of Ben-Shahar and Logue’s examples only reveal the *potential* for insurers to perform private regulation, without satisfactorily showing that insurers actually regulate insureds and prevent loss. For instance, their best example for loss-reduction is environmental liability insurance, which Ben-Shahar and Logue identify as a “striking example” of insurers reducing moral hazard and loss. They argue that insurers seek to reduce liability through loss-reduction by offering site-specific environmental coverage and ensuring licensing and regulation compliance, enforcing government regulation compliance, and even going beyond minimal government standards to promote stricter safety (Ben-Shahar and Logue 2012).

However, we note four problems with this view. First, if the environmental liability insurance example works as Ben-Shahar and Logue claim it does, it merely exemplifies our prior point that insurers pay significant attention to extreme correlated losses (indeed, the potential liability for an environmental harm can be enormous), but will not refrain from shifting medium and smaller losses to preserve the demand for insurance. Second, there is no broad consensus that insurers (at least those operating in the United States) always realize their full potential to mitigate environmental risk even when it relates to large correlated losses. Such is the case with climate change. In 2018, the Asset Owners Disclosure Project provided an analysis of the world’s eighty largest insurers rated on their approach to climate-related risks and opportunities. Twenty-four of the eighty were US insurers, and twenty-one of those insurers scored the lowest. They are viewed as “bystanders” for failing to consider the financial impact of climate change (Asset Owners Disclosure Project 2018).

Third, while insurers’ actions may incidentally result in loss-reduction, loss-reduction is not the motivating factor to enact such policies. While this reality may be convenient for now, it means that insurers have no reason to maintain this incidental loss-reduction and that these loss-reduction practices can disappear as soon as cheaper liability reduction measures emerge.

The fourth and greatest problem is that we have no reason to assume that the regulations or other metrics insurers use are optimal. The literature on regulation has made clear that government-provided regulation is problematic; among

other shortcomings, scholars have noted administrations' hostile agendas, regulatory capture, and the inability to update the regulation in a timely fashion (Avraham 2009).

Against all this, one might wonder whether firm competition would not eventually solve the current unsatisfactory condition of insurers' lax private regulation. After all, firms are known to operate in a cartel-like environment and might have inherent incentives to deviate from the rest of the pack and offer better, cheaper products to gain market power. Although it is possible that heightened competition would eventually ease the severity of the inefficiencies in the insurance market, notably, insurers have strong instruments in place – such as NAIC-to secure their long-term collective interest (Randall 1999). In Part II below we demonstrate how insurers accomplish this, for example by lobbying against risk-reducing technological progress.

In sum, in this section we rebutted the myth of risk reduction by focusing on ways insurers omit to take efficient actions that would reduce the risk generated by their insureds. The next section will focus on practices insurers *actively* engage in to prevent their own liability under the policy by shifting losses onto the insureds and third parties, further disproving the myth of effective loss reduction.

## 1.1.2 Active Loss Shifting

### 1.1.2.1 Contractual Manipulations

The most notorious example of how insurers shift loss onto the insured is through policy-term misdirection. The idea of contractual manipulations or deceptive contracting that violates consumer expectations was recognized at least since the case of C & J Fertilizer Inc. There the Supreme Court of Iowa ruled that a policy that violates the reasonable expectations of the policyholder is unconscionable, and should be interpreted from the viewpoint of an ordinary person (C&J Fertilizer Inc. v. Allied Mut. Ins. 1975).

Loss shifting occurs when insurers place liability-limiting terms into a policy without pointing those terms out to a potential insured, or in such a way that it is impracticable and unlikely for a potential insured to see the terms. Normally, these liability-limiting terms may be justifiable, for instance, in that they might reduce moral hazard. However, such a regulating effect is only realized when the insured knows about the term, and thus can make an informed decision to adjust future behavior in compliance (Schwarcz 2014). This means that as no precaution is being taken to limit the harm that the insurer has disclaimed liability for, the insurer is merely shifting the loss onto the insured, rather than actually reducing it (Schwarcz 2017).

### 1.1.2.2 Apology Law and the Sorry Works! Coalition

Another example that highlights insurers' concern with reducing liability regardless of loss is the Sorry Works Coalition ("Sorry Works!"). Sorry Works! is a development of "apology law," which includes "laws designed to privilege apologies made by injurers" by making the apologies inadmissible at trial (Arbel and Kaplan 2016). In other words, these laws prohibit the use of physicians' apologies as a legal admission of fault. Moreover, as Baker and Silver note, some of the leading figures heading these programs and occupying their boards are (you guessed it ...) insurance executives (Baker and Silver 2019). Apology laws spurred a 60% reduction in hospital payments to victims, roughly \$32,000–\$73,000 per case. These astounding reductions are explained through victims' documented desire to receive an apology, leading to a greater willingness to settle once the apology is received. Moreover, apology laws and the resulting payout reductions prompted many commercial players to engage in a highly orchestrated, commercialized practice of apologizing complemented by apology training, psychological techniques, and professional guidance to create the most effective apology at the lowest cost. Apology law and Sorry Works! are often featured as positive methods to meet both patient and insurer interests—i.e., reducing insurer liability while satisfying patients' need for compensation through the apology. Observing the orchestrated system of apology law through Sorry Works! demonstrates that insurers are motivated and exert efforts to ultimately reduce liability only, making any consequential loss-reduction incidental and unrelated to insurers' primary interests. Although one might think that apologies really do mitigate emotional harm due to their therapeutic value—and as such, are an efficient loss-reduction tool—scholars argue that the real motives for victims' decision to settle are much less auspicious; indeed, several apology practices are meant to "create emotional pressure on victims to accept them, a decision that the victim will later come to regret." Apology programs not only fail to diminish loss, they might even increase risk. Specifically, as healthcare providers know they can easily escape liability by later generating an apology, their incentives to take care decrease. Thus, notably, even if apology programs actually do carry *some* potential to reduce emotional harm *ex-post*, they still distort doctors' incentives to take proper care *ex-ante*. This example shows that even if harm mitigation is an incidental benefit of apology programs, insurers are primarily focused on liability reduction through loss-shifting, in this case shifting loss onto the patient, and remain at best indifferent to actual loss-reduction practices for future patient safety events (Arbel and Kaplan 2016).

### 1.1.2.3 Dash Cameras

Consider an example recently analyzed by Yotam Kaplan and Yonathan Arbel (2016): dashboard cameras ("dash-cams"). Insurers encourage drivers to use

dash-cams, which sounds like a good policy to encourage safer driving, much like smoke alarms. However, at least until every car has them, dash-cams merely shift risks to the other drivers, thereby diluting the incentives of the insured drivers to take precautions. Why? Because insureds know that if the accident is their fault, they can argue that they did not have a camera or that it did not work, thus improving their chance to escape liability. On the other hand, if the accident is not their fault, then insureds can use the camera as proof, again improving their chance to escape liability.<sup>8</sup> The option for such a strategic use of the dash-cam might lead insured-drivers to drive less carefully. The important point is that insurers only care about the fact that their own insureds escape liability (losses were shifted to the other driver) and do not care that driving becomes more dangerous. In fact, they might benefit financially from it.

Our discussion so far has demonstrated that the myth contending that insurers habitually engage in risk reduction is not always true; many times, insurers do not reduce risk, but merely reduce the payouts they will owe for the materialization of such risk. Of course, in the long run such practices may indirectly increase risks in society. For example, instructing employers on how to escape liability by making sure their supervisors are not deemed legally as supervisors is problematic in the long term not just because the victims are left to bear the losses, but also because this practice leads to suboptimal behavior, to more harm, and (importantly from the insurers' perspective) to increased demand for insurance coverage. In the next Part we revisit this example and explore the more radical and concerning claim that insurers have an intrinsic, long-term interest in maintaining sufficient levels of risk within society. We demonstrate this claim through additional direct evidence.

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<sup>8</sup> Furthermore, dash-cams may also be in the best interest of those with prior accidents, as they know that they will be held suspect in any future claims they are involved in; dash-cams are a way for such drivers to protect their own interests by shifting the loss of any potential accident as they drive safely in the future (Lando 2006). Furthermore, insurers also seem to prefer that insureds have dash-cams, although this preference is not particularly intense; insurers in the US have yet to find a strong enough benefit to having dash-cams (Allan 2015). Insurers do find utility in cases that can otherwise be ambiguous, but where fault is obvious to a direct observer. In those cases, the harm either is not the insured's fault, so the insurer can loss-shift onto the other driver, or it is the insured's fault, and the insurer can loss-shift onto the insured directly by raising premiums in the future (Fereiro 2019). The dash-cam is particularly useful since 94% of crashes are caused by driver error (Singh 2015). Additionally, through a dash-cam, the insured gives huge amounts of data to the insurer, which is something insurers have demonstrated they find useful (Allen 2018). Still, in the US, most insurers do not offer an upfront discount for having a dash-cam (George 2019).

## 1.2 Increasing or Maintaining Risks

In this Part we switch to our more ambitious claim that insurers engage in creating, maintaining, or at least not preventing long-term risks. We commence with the observation that in a world with no accidents, no one will need insurance; there is no need for fire insurance without fires. Since the insurance business model depends on the existence of risk, the conclusion that insurers possess an intrinsic interest in having sufficient levels of risk in the world is quite sensible. This is worrisome because it means that insurers are intrinsically incentivized to act against society and insureds' best interests. It may be important to mention that scholars have identified a different set of incentives when it comes to mutual insurers as opposed to ordinary for-profit insurance. Mutual insurers are much more willing to promote loss (or risk) prevention efforts than for-profit insurers, who are naturally more likely to channel their efforts to maximize profits (Abraham and Schwarcz 2022). With that said, the reality for most policies is that insurers may be encouraged to maintain or even increase risks.

Much of what we argue below that insurers can do, requires cooperation between them. Indeed, insurers often collude by lobbying together in order to increase risks to gain profits (Avraham and Gilo 2022). But how can they do that? Don't antitrust rules prohibit anti-social cooperation? We begin this Part by discussing the history and present of collusive behavior within the insurance industry, not only in private agreement to increase rates but also in efforts to enable regulatory capture of insurance commissioners and legislation surrounding the industry. This overview provides the theoretical background for how insurers can possibly increase risk in the world.

We next turn to showing how this plays out in practice. We start by discussing the phenomenon of third-party moral hazard. Scholars have acknowledged for years that the very existence of insurance might dissuade insureds from behaving carefully; this is the "classic" problem of first-party moral hazard, to which insurers responded by introducing contractual tools aimed at mitigating the problem, such as a deductible or discounts for installing safety devices in one's home or car. The problem of third-party moral hazard differs from the "classic" moral hazard in that it describes how the existence of insurance incentivizes *third parties* to increase risk, rendering old contractual tools irrelevant to the solution of the problem. We start by discussing kidnapping and ransom insurance and show how the mere existence of coverage feeds the kidnapping industry. We then move on to cyber insurance and health insurance and show similar phenomena.

We continue Part II by turning to show how insurers advance their long-term interest in having, maintaining, and even increasing risk by objecting to risk-reducing technologies. We demonstrate this claim by describing the conflict regarding autonomous cars, passive restraints in cars, and the genetic testing.

### 1.2.1 Anti-competitive Behavior in the Insurance Market

At least since the 19th century, insurers engaged in collusion and anticompetitive behaviors between companies. The earliest organization of insurance companies designed to promote their political goals was the National Board of Fire Underwriters, established in 1866. The Board was hostile to state regulation, and decided therefore to promote the adoption of federal regulation (Meier 1988). As the business of insurance spread throughout the different states, each had an independent agency to regulate insurance within its borders, the industry sought federal oversight that would weaken state regulation (Randall 1999). In 1869 the Board took this battle to the Supreme Court in *Paul v. Virginia*, but to their disappointment the Court ruled that insurance was not a matter of interstate commerce, and therefore can be regulated only by states. Soon after state insurance commissioners decided to establish the National Association of Insurance Commissioners (NAIC) (Meier 1988).

The brighter side of *Paul* was that insurance companies were exempted from federal antitrust laws. This cartel-like nature of interstate insurance, was disrupted only 75 years later in *U.S. v. South-Eastern Underwriters Association* (1944). After the revealing of a large-scale price fixing conspiracy, the Supreme Court (partially) overruled *Paul v. Virginia*, and ruled that interstate business of insurance is an act of commerce and therefore the Sherman Antitrust Act applies. Only a few days after the Supreme Court's decision, the insurance industry presented a bill to exclude the entire industry from federal antitrust law. Though it was almost passed by both houses, the bill was eventually defeated, and another bill, the McCarran-Ferguson Act offered by NAIC, was the one that passed. At this point, both insurers and state commissioners were on the same side, promoting state regulation (Meier 1988). The new act largely granted immunity to insurance companies from federal antitrust laws, save for cases involving boycott, coercion, or intimidation (Anderson 1983).

Indeed, since its creation in the 19th century NAIC has been influencing the regulatory law on insurance through the creation of universal model laws on the

various kinds of insurance throughout the states (Meier 1988).<sup>9</sup> For many years the NAIC has explicitly set rate standards within these model laws, including implementing a rate approval system.<sup>10</sup> Indeed, NAIC has not necessarily acted exclusively on behalf of state commissioners. Being a voluntary and private organization, it was closely related to the insurance industry. Towards the end of the 20th century, about a half of the organization's budget arrived from insurance companies' fees (Randall 1999).

Overtime, free from federal scrutiny, the NAIC gained lots of control over states' insurance laws by developing a comprehensive accreditation program that pushes for standardized regulation (Randell 1999).<sup>11</sup> For example, when New York stalled in adopting some of the NAIC's proposed model laws in the 1990s, the NAIC suspended New York's accreditation. This pushed some, such as state Senator Guy Vellella, to accuse the NAIC of acting "in a collusive manner" and of committing antitrust violations. Likewise, many insurance commissioners expressed concerns that the NAIC was exercising inappropriate control over regulators and threatening the notion of state sovereignty.

Insurance companies' anti-competitive behavior goes beyond lobbying for more lenient regulation. In *Hartford Fire Ins. Co. v. California* (1993), there was an alleged conspiracy between American insurers and foreign reinsurers. The Supreme Court ruled that the US market was in fact harmed by the collusion, and that American antitrust law should therefore apply to foreign reinsurers. Indeed, the conspiracy attempted to limit the coverage and applicability of existing policies, and therefore resulted in shifting losses.

Another big concern in policing insurers involves the practice of 'revolving door,' referring to insurance companies' practice of hiring former insurance commissioners who have ended their terms (Heath and Crenshaw 1993). One recent

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<sup>9</sup> Some model laws were drafted by an All-Industry Committee—a group of industry representatives organized by the NAIC. Randall, at 634.

<sup>10</sup> *McCarran-Ferguson Act*, NAIC, [https://content.naic.org/cipr\\_topics/topic\\_mccarran\\_ferguson\\_act.htm](https://content.naic.org/cipr_topics/topic_mccarran_ferguson_act.htm) [<https://perma.cc/Z4MC-S432>] (last updated May 20, 2020). The NAIC openly states its mindset to maintain conformity amongst the state-level insurance laws, stating itself to be "the US standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories." *FAQ*, NAIC, [https://www.naic.org/documents/about\\_faq.pdf](https://www.naic.org/documents/about_faq.pdf) [<https://perma.cc/TBW4-EYF6>] (last visited Feb. 2, 2021).

<sup>11</sup> While all states and many territories are accredited now, early controversies developed as the NAIC would sanction states that did not fall in line with the accreditation standard, which mandated certain model rules written by the NAIC to be adopted; these sanctions would risk insurance companies based in unaccredited states to be subject to manifold financial examinations at their cost whenever they did business in an accredited state that had adopted the regulations (Randall 1999).

study looking at the employment history of 271 insurance commissioners between 2000 and 2018 found that 38% end up working in the insurance industry after their term, and that 29% of those 271 commissioners ended up working in the insurance industry within a year of leaving office (Tenekedjieva 2020). The same study also found that those commissioners who did go into the insurance industry after their term were generally and measurably laxer regulators, with those entering the industry immediately being the most lax.

In sum, the combination of a weak *de jure* enforcement of federal and state antitrust laws with strong *de facto* enforcement of industry collaboration through the NAIC and its ‘revolving doors’ system, enabled the industry to collaborate according to its long-term interest in maintaining risks in society (Burns 2020).

In subsection B below we start with the less controversial claim that the mere existence of insurance facilitates some long-term risks, and that insurers contribute their share to the persistence of this phenomenon. In Subsection C we make the more ambitious claim that anti-social collaboration between insurance companies is not just possible, as we have shown above, but also plausible.

### 1.2.2 Third-Party Moral Hazard

Third-party moral hazard, as recently identified by Parchomovsky and Siegelman, differs from the “classic” (first party) moral hazard because its influence is indirect in that the mere *existence* of insurance incentivizes actors unconnected to the insurance contract to behave less carefully, thus increasing overall risks. Stated differently, what distinguishes third-party moral hazard is its focus on losses caused by third parties, instead of the insureds themselves. Examples range from bus passengers who are aware that bus companies have insurance and might intentionally engage in dangerous behaviors on buses resulting in injuries to themselves to murders motivated by life-insurance plans. Third-party moral hazard is a particularly insidious mechanism for increasing risk, since for insureds the increasing risky behavior appears exogenous—i.e., the harm appears to be independent of the insurance policy. But often, the root of the risk is the incentives to third parties caused by the existence of the insurance policy itself and compounded by the behavior of the insurance companies handling this risk.

More specifically, we identify several problems related to third-party moral hazard. First, the mere existence of some insurance policies gives rise to third-party moral hazard; third parties—be it kidnappers, hackers, or medical providers—are attracted to the deep pocket behind the insureds. Second, insurers, aware of this phenomenon, often exacerbate third-party moral hazard by avoiding to protect their insureds against it, thus facilitating their long-term interest in increasing risk levels. Third, insurers too easily pay money on the policy to those third parties.

Although it is in the short-term interest of insurers to reduce these payouts, they avoid doing so because abstaining from action serves their long-term interests.

The next sections demonstrate these three problems in the cases of kidnapping and ransom insurance, cyber insurance and health insurance.

### 1.2.2.1 Kidnapping and Ransom Insurance

Kidnapping and ransom insurance coverage (“K&R”) exemplifies the phenomenon that insurers seek to increase risks in the world by fueling third-party moral hazard. K&R is an insurance coverage plan designed for wealthy individuals and those who travel frequently and are thus at risk of getting kidnapped (Bell 2015). K&R policies, offered by dozens of insurance companies, typically cover “ransom payments, loss of income, interest on bank loans,” and medical and psychiatric care.<sup>12</sup>

K&R demonstrates insurers’ long-term interests in increasing and maintaining risk, because the coverage for negotiated ransom and other costs arguably energizes more kidnappings and thereby fuels the kidnapping industry (Clendenin 2006). Specifically, the existence of K&R results in “an unintentional conspiracy” between “the terrorist, the victim, and the insurance companies” because as long as K&R exists, the kidnapers continue to be paid, victims continue to purchase insurance, and the insurance company continues to receive premiums. This exchange perpetuates the cycle beyond what may have been if insurers were not providing continuous and definite payouts for the kidnapping victims. But the problem does not end with the mere existence of insurance; insurers’ behavior before and after the occurrence is problematic as well.

After the occurrence, insurers are “softer” with kidnapers than one would expect, paying out and conceding as a matter of policy. Indeed, insurers’ unwillingness to cooperate with U.S. government hostage-crises stances of being “tough” on kidnapping further supports their interest in increasing risk. The Department of State holds that making concessions to hostage takers ultimately increases the danger that others will be taken hostage and thus prohibits concessions when government employees are kidnapped. The Department of State is clear that any U.S. private organizations engaging in hostage resolution in a manner differing from U.S. government policy undertake such action without U.S. approval (Clendenin 2006). Despite this clear policy and warning that concessions lead to future hostage

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<sup>12</sup> In Canada for example, such policy can be purchased from one of 26 companies offering it: Insurance Business Canada, Kidnap and Ransom Insurance Products <https://www.insurancebusinessmag.com/ca/business-insurance-products/?inclusion=30&p=1>.

takings, K&R insurers continue to concede, potentially enabling kidnapping for the sake of K&R premiums.<sup>13</sup>

Anja Shortland, on the other hand, who has extensively studied the K&R insurance market suggested that the K&R market is governed by, effectively, a cartel that keeps payments to kidnapers at levels that are not too high (Shortland 2019). We conjecture however that insurers make sure that payments are neither too low.

Insurers' behavior seems suboptimal not just after-the-fact. Indeed, a big puzzle is why insurers do not focus on kidnapping-reduction or rescue missions rather than on ransom negotiations (Prochnau 1998). Insurers' tendency to resolve the extortion risk only *after* the action has occurred, rather than make preventative efforts prior to a kidnapping incident, furthers the argument that insurers' primary interest is to continue fueling the "unintentional conspiracy" (or tacit collusion) of kidnapping and extortion to serve their intrinsic interest of increasing or maintaining risk in the world.

To be sure, there is a short-term/long-term tension here: insurers still have an interest in lowering payout in individual cases. Indeed, many K&R plans may be voided if unnecessarily revealed to the kidnapers; this is because insurers know that such disclosure creates incentives for kidnapers to target *their* insureds and demand higher ransoms from *them* specifically. As insurance companies would like to limit their own liability, they take precautions to keep their involvement undisclosed, even in negotiations (Prochnau 1998). And yet, the idea that K&R incentivizes kidnapping is so clear that in some countries K&R insurance is banned to prevent increases in the extortion market and harm to travelers (Parchomovsky and Siegelman 2022).

### 1.2.2.2 Cyber Insurance

Insurers' interest in fueling third-party moral hazard is also present in ransomware attacks and payouts from cyber insurance. Ransomware is a malicious software that locks and encrypts a users' data until the user pays ransom to restore access (Fruhlinger 2018). Ransomware attacks vary in harm, but common to all is a ransom demand associated with the data takeover. Insurers have developed cyber insurance plans to protect users against these attacks; indeed, this model is eerily similar if not exactly identical to the K&R model. Just like K&R, cyber insurers effectively incentivize ransomware attackers by providing a certain payout for their attack (Murphy 2017). Just like our theoretical framework predicts, this cycle consequently

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<sup>13</sup> In consistence with the policy and with our claim that K&R insurance increases risks (though not necessarily as a causal proof), when Italy instituted a legal ban on paying ransoms in 1991, the local rate of kidnappings dropped substantially. From 1969 to 1991, 653 kidnappings occurred; in the seven years following the ban, only 38 occurred (Bohlen 1998).

fuels the ransomware practice, ultimately increasing the number of ransom attacks. In fact, the number of cyberattacks increases annually, leading to greater claim frequency, premiums and profit for insurers.

Insurers' disregard for increased risk in the world is supported by cyber insurance policies that lack essential characteristics intended to prevent ransom attacks—thus further solidifying the claim that insurers are not only aware of the issue of third-party moral hazard, but also fuel it. For example, few cyber insurance policies require security software or policies, security system vetting, or an audit of the organization. Very rarely do insurers base premiums on the presence or lack of such measures.<sup>14</sup> Indeed in a recent article Tom Baker and Anja Shortland argue that these kinds of loss prevention techniques are not cost-effective for insurers (Baker and Shortland forthcoming).

However, Kyle Logue and Adam Shniderman argue in a recent article that the “common sense intuition” that the availability of cyber insurance increases ransomware attacks and that it makes cyber-attacks more profitable, is inaccurate. The authors suggest that cyber insurance may increase social welfare because of two major properties: the risk-spreading benefits may be greater than the moral hazard harms, and insurers may implement ex-ante and ex-post regulatory measures to reduce losses. However, as the authors themselves admit various market failures prevent these benefits from materializing (Logue and Shniderman).

### 1.2.2.3 Health Insurance

Perhaps the clearest example of third-party moral hazard lies within the health insurance industry. One salient example is physicians' and providers' widespread practice of recommending and administering procedures that have little-to-no medical value and cause overutilization of the health care services (Silver et al. 2018).

Indeed, over utilization can happen for many reasons. The two important ones are defensive medicine, where physicians provide (and health insurers cover) excessive care to avoid legal liability, and offensive medicine (what economists call-induced demand) where physicians pursue excessive care to maximize their reimbursements (Avraham 2009). As Charlie Silver and David Hyman have shown, “only 10–20% of the medical procedures used” have had proper clinical trials to determine if they are medically effective. The mere existence of health insurance incentivizes physicians to administer and recommend even those procedures that have not undergone adequate scrutiny, because if the patient has insurance s/he does not bear the cost and the physician herself may

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<sup>14</sup> See generally *CyberRisk Coverage Application*, TRAVELERS, <https://www.travelers.com/iw-documents/apps-forms/cyberrisk/cyb-1100-ind-0116.pdf> (last visited Apr. 11, 2020).

profit from it. Indeed, it has been estimated that the costs associated with offensive medicine are much higher than the costs associated with defensive medicine (Avraham 2009, pp 560).

Consider percutaneous vertebroplasty, which is a procedure that involves injecting bone cement into the spine to treat vertebral fractures. As of a decade ago, it was well publicized that this procedure is essentially worthless. However, insurers would still cover the costs of the procedure; consequently, physicians still provided the procedure. The reason for coverage may be twofold: (1) more procedure payouts creates more profits for the insurers, as they receive back a small percentage of each payout directed at covering medical procedures; and (2) facilitating a false need for medical procedures incentivizes patients to purchase insurance by maintaining high enough perceived risk levels to support the insurance business (Silver et al. 2018). Notably, these unnecessary procedures carry risk, even if mild (Al-Nakshabandi 2011). As of today, recent studies found that percutaneous vertebroplasty does have some advantages in treating a specific uncommon disease (Xiao et al. 2021), but this understanding does not apply to all complications, and was not known in the last decade. The results were a continuous subjecting of patients to risk without reason, solely to sustain business and profit. These interests cause insurers to develop coverage policies that give physicians and treatment centers strong financial incentives to continue procuring these unnecessary or ineffective tests and treatments, thereby perpetuating the cycle. Thus, just like K&R or cyber insurance, unnecessary and ineffective tests and procedures in the healthcare industry amount to another way in which insurers can and sometimes do increase risk through third-party moral hazard.

Overall, the phenomenon of insurers fueling risk through third-party moral hazard is rife in the healthcare field. The rise of HMOs in the past decades is best explained as an attempt by society to combat this phenomenon; but, as Silver and Hyman explain, this attempt ended with a “managed care backlash,” which “made it clear to insurers that there would be real costs in trying to reduce health care providers’ revenue streams.” (Silver et al. 2018).

### 1.2.3 Objecting to Technological Progress

Insurers’ approach to innovative technologies that significantly reduce risk reveals their capacity to promote their long-term interest. In this Section we show that in several key areas, insurers were fierce opponents to the adoption of such technologies. We argue that their opposition might have been motivated by their understanding that more rather than less risks better serve their long-term interests.

### 1.2.3.1 Autonomous Vehicles

The claim that insurers might be better off with a more dangerous world could best be illustrated by their reaction to autonomous cars.<sup>15</sup> Reportedly, autonomous cars will reduce fatal traffic accidents by 90 percent. With the introduction of driverless cars, the insurance industry's largest segment of coverage would shrink an estimated 60% by 2050 (Hammond 2018). Not surprisingly, insurers are already claiming that there are issues when drivers rely too heavily on autonomous systems (Cellan-Jones 2018).

Moreover, insurance companies are pushing against the adoption of autonomous vehicles in multiple arenas. For example, insurance companies are putting insurance pricing pressure on the consumer. At least some companies are charging higher premiums for autonomous vehicles, with premium quotes reaching up to \$10,000 a year to insure a Tesla vehicle (Tullis 2019). One could argue that the increased price of the technology justifies this cost; however, even for luxury vehicles, insurance barely broaches the range of \$4000 (Vallet 2019). This price difference may suggest that insurance companies have a strong aversion towards insureds having autonomous vehicles.

Insurance companies have also been lobbying on regulations for autonomous vehicles (Levin 2018). In 2018, GM launched a petition with the National Highway Traffic Safety Administration (NHTSA) to seek regulatory changes that would allow their fully autonomous vehicles on the market (Shepardson 2019). When the NHTSA put the petition out for public comment, insurance companies advocated for more regulations, for more data being collected before these autonomous vehicles made it onto the roads, and even for a complete denial of the petition. The Insurance Institute for Highway Safety (IIHS), a group funded by a multitude of insurance companies, said that GM should not be allowed to withhold safety features such as high-beam headlights from their autonomous vehicle designs. On the surface this would seem rational, until one recalls that autonomous vehicles do not have a need for high-beam lights, using radar and lidar sensors instead. Such features, while useful for human drivers, may well serve only as a regulatory and cost barrier for autonomous vehicles.

The federal government is "all in" on autonomous vehicles, indicating enthusiastic support without adding new regulation (Shepardson 2020). The Advocates for Highway and Auto Safety, a group at least partially directly funded and run by insurance companies, responded negatively to the government's position, calling

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<sup>15</sup> The whole discussion about autonomous cars can be understood as an insurance companies' genuine resistance to a threat on their very existence, and not as a risk increasing method. One way or another, it is a representative example for insurers' use of political power to prevent risk mitigation.

its response inadequate for public safety. As the next section shows, this is not the first time the insurance industry puts its interest first.

### **1.2.3.2 Passive-Restraint Battle**

Another example of how insurers utilize institutional power to object to risk-reducing technology is their reaction to passive restraints (airbags and seat belts) in the 1970s and 1980s. Ben-Shahar and Logue bring this example to demonstrate that insurers can increase safety in the world. While ultimately auto-insurers led the charge in lobbying and promoting mandatory passive restraint laws, the picture is more nuanced. Insurers fought for these laws through litigation, leading to a unanimous Supreme Court decision in favor of passive restraints and a decision from the Secretary of Transportation that all newly manufactured cars must include passive restraints (Kneuper and Yendel 1994). Car manufacturers initially favored neither seatbelts nor airbags because both make cars more expensive, but ultimately decided to go with seatbelts because they were the cheaper of the two. In contrast, insurers strongly supported airbags while providing “at best only lukewarm support for seat-belts.” At first blush, it seems insurers should have been interested in advocating for both airbags and seatbelts to decrease total insurance claims; but upon closer inspection, supporting only air bags presented a much more profitable strategy. Specifically, air bag technology required insurers to deem a car with deployed air bags as a “total loss” due to the need to repackage the airbag after deployment. Insurers preferred total losses in car crash contexts because they represented a certain loss in property damage, compared to volatile bodily injuries. So, even though promoting seatbelts would translate into a dramatic reduction of bodily injury claims, insurers could significantly increase the number and certainty of property losses across all accidents if more airbags deployed. At the end, the insurance industry won the battle and car manufacturers needed to install airbags (Lemov 2015).

The point to pull from this battle is how insurers were willing to achieve their long-term goal of airbag mandates even if it meant sacrificing seatbelt restraint mandates—i.e., additional loss prevention—along the way. This history illuminates the concerning dynamic of insureds valuing their own long-term financial interest over the safety interests of their insureds and the world at large.

### **1.2.3.3 Genetic Testing**

Another concerning example is insurers’ objection to genetic testing and coverage for genetic testing. Consider BRCA (commonly known as the ‘Angelina Jolie’) gene. Blood testing can detect mutations for the gene that have been associated with breast and ovarian cancer, allowing women who are at risk for an inherited breast or ovarian cancer gene to act proactively to mitigate risk of the cancer manifesting. In 2015, insurers raised concerns about the utility of genetic tests and

limited doctors' ability to order tests, even though screening for BRCA can save lives.<sup>16</sup> This was not the first time insurers objected to such technological progress. Insurers in the past have “vehement[ly] object[ed]” to genetic nondiscrimination legislation, most notably the Genetic Information Nondiscrimination Act (GINA) (Rothstein 2008). GINA prevents insurers from requiring genetic tests or inquiring about results in making coverage decisions. Fortunately, GINA overcame these objections and was eventually signed into law. Because genetic testing is used to prevent or mitigate illness and disease, failing to pass GINA would have increased patients' overall risk (Sandler Alfino and Saleem 2018). Insurers framed their objections to genetic testing as a legitimate concern for the stability of the insurance industry. Genetic tests threaten to send health insurance industries into a “death spiral” or at least “perturb the market,” (Kolata 2017) given the risk arising from adverse selection. Namely, those who take cheaply administered genetic tests will discover an impending illness and then insure against such illness, making it more difficult for insurers to manage risk pools (Avraham Logue and Schwarcz 2014). These insurers' claims make sense in theory, but are much less convincing in practice as the reality is that genetic testing does not really place at risk the stability of the insurance industry, making insurers' disapproval indicative of their interest in hindering risk-decreasing technologies. First, the demand for health insurance is consistently found to be price-inelastic, such that the likelihood of low-risk individuals dropping their health insurance is very small (Ringel et al. 2002); and second, because GINA prevents *all* insurers from utilizing genetic information, the risk of cream-skimming by other insurers simply does not exist. Indeed, GINA has existed for over a decade without any visible risk to the insurance industry. Again, we are not saying there might not be alternative explanations for insurers' behaviour other than maintaining or increasing risks. It is totally possible that the (unfounded in advance, and unmaterialized in hindsight) fear from death spiral motivated insurers' resistance, yet we believe our framework should not be overlooked as it provides at least as good as explanation for their behavior.

Policymakers and lawmakers must be aware of insurers' interests when considering regulation or implementation of future technological advances, to ensure that new legislation or regulations surrounding technological developments comport with society's interest in optimal risk levels. This awareness is critical because technology will continue to develop and present novel ways to reduce risk. Properly assessing insurers' arguments against these advances will further society's and insureds' interest in producing a safer world.

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<sup>16</sup> *BRCA Gene Test for Breast and Ovarian Cancer Risk*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/brca-gene-test/about/pac-20384815>.

In sum, examination of insurers' practices in fueling third-party moral hazard and objecting to risk-reducing technological progress, seems to indicate that insurers have a stake in maintaining or increasing risk levels in society. Moreover, what is worrisome is not merely the prospect of an actor interested in increasing risk, but also the fact that this interest is diametrically opposed to the insureds and society's interest in optimally reducing risk and overall harm. Thus, considering this far-reaching impact, it is essential that policymakers incorporate insurers' potential ulterior interest in risk-increasing when assessing future regulations, laws, or other policies, particularly when those decisions involve legislation that may increase risks, impact technological progress, or manifest in third-party moral hazard.

We now turn to discuss a final category of insurer practices that policymakers should be especially aware of. This category harbors practices that combine the demerits described in the last two chapters; that is, practices that are motivated by both shifting losses and increasing total risk.

### **1.3 Shifting Losses and Increasing Risks Simultaneously**

The first two Parts of the Article attempted to classify insurers' harmful activities into two categories: those that are primarily aimed at shifting loss once the risk has materialized and those primarily aimed at increasing or maintaining risk in the long term. Yet some insurers' actions are particularly detrimental, as they are not only intended to shift loss to the insureds or third parties, but also to increase long-term risk. In fact, the very mechanism insurers use to increase risk involves shifting it to others.

To get an initial sense of how such mechanisms operate, consider auto insurers' strict control of choice of repairs (Ben-Shahar and Logue 2012). By controlling the repairs, insurers control the cost of mitigating the insured's damage regardless of the quality of the repair, potentially shifting costs to the insured who may not only lose money when later selling his repaired car, but worse, may drive a car that is less safe. And because this phenomenon is prevalent, road safety is in danger. Or consider insurers' opportunism at the underwriting stage, a problem discussed above. Insurers often ask intentionally vague questions on the applications to "create the opportunity for a misrepresentation defense" later on should litigation arise (Ben-Shahar and Logue 2012). By this process, the insurer shifts loss to the insured, who is unaware of that shift at the time of the application. Through this loss-shifting practice, insurers also achieve another important objective: if the insured is unaware of the full scope of coverage and overestimates it, she is unlikely to invest in efficient precautions aimed at reducing risks. Actually, the same can be said anytime insurers limit their liability via obscure and hidden clauses in the

insurance policy, as long as these clauses can potentially provide insureds with incentives for optimal precautionary behavior.

Perhaps no better example exists to demonstrate the interaction of insurers' short- and long-term interests in handling risks than the battle for tort reform, wherein insurers promote their long-term interest in increasing risks, while also shifting loss to insureds. Consider insurers' lobbying efforts for caps on damages (Medical misdiagnosis 2003). Studies have shown that these coverage limits for physicians act as a "*de facto* cap on payments" in a vast majority of cases (Zeiler et al. 2007), meaning total liability is determined "as much by coverage limits in defendants' policies as by the magnitude of loss incurred by plaintiffs." This practice shifts losses to the insureds' victims. Hence, for example, med mal insurance companies lobbied under the Trump administration to propose stricter limits on non-economic damages for some plaintiffs (Kindy 2017).

Caps on damages initially appear to benefit only insurers' short-term interest in reducing their own liability, as the cap cuts off total coverage costs, shifting uncompensated losses to their doctors-insureds' patients. One would expect that caps would reduce premiums for doctors-insureds as a consequence. Unfortunately, this did not happen. Why? Perhaps because caps on damages also have the ulterior consequence of de-incentivizing doctors to behave carefully, as the caps reduce the total potential liability risk on their actions. This relaxation in care might result in a riskier world as doctors-insureds have suboptimal incentives to take due care. This of course is one possible explanation to the phenomenon, that should not be disregarded even if there might be other explanations.

Indeed, empirical studies reveal premium *increases* after states enact damage caps. For instance, after Oklahoma passed insurer-supported damages caps, medical malpractice premium rates increased by 83 percent. Likewise, in Maryland, Missouri, and other states, insurers lobbied for damage caps claiming that they would reduce premiums. Ultimately, rates increased after legislature enacted reforms. Other studies support this conclusion, finding that caps above \$750,000 increase premiums substantially (Nelson et al. 2007). Considering the widespread evidence of premium increases under cap regimes, especially with higher-level caps, we see that insurers' motives in supporting caps on damages or other reforms do not stem only from their short-term interest in liability reduction but may also stem from their long-term interest in increasing or maintaining risk.

Texas's 2003 tort reform displays this interest precisely. Specifically, the Texas legislature adopted HB 4 in 2003, which among other restrictions, capped non-economic damages (Silver et al. 2018). After the bill, med mal premiums dropped; however, despite this drop, no reduction in loss or risk emerged, as healthcare spending remained steady and "hospitals made more avoidable errors." These

empirical findings show that damage caps, despite insurers' lobbying, do not necessarily reduce risk and in fact may increase it.

With HB 4 and other state's caps, the number of mistakes that hospitals and physicians made increased. Indeed, preventable events occurred more frequently after these reforms. As Zabinski and Black noted, these declines square with traditional tort law deterrence theory, as the damage caps reduced physicians' and providers' incentives to care. Despite lack of risk-reduction, insurers benefited immensely from HB 4, as their profits soared. In fact, their medical malpractice premia-to-payout ratio increased from 4.4 prior to HB 4 to 24.9 after HB 4. Zabinski and Black argue that this premia-to-payout ratio jump demonstrates how insurers benefit from reforms like HB 4 and that insurers lobby for them because they can take advantage of significant drops in premiums by "slowly and gradually reflecting those lower payouts in lower premia" (Zabinski and Black 2019). We suspect that another reason insurers lobby for such reforms may be that they increase risks in the long term.

## 2 Conclusion

The conventional wisdom that insurers make the world a safer place is overstated. Against the conventional wisdom we revealed insurers' interests in increasing or maintaining long-term risks in society, as well their interests in shifting losses away from themselves to injured parties or their victims, rather than reducing those losses overall. Specifically, contrary to the conventional wisdom, in many cases insurers are not interested in purely reducing loss and only incidentally reducing their liability under the policy, but rather vice versa—insurers are interested in reducing their liability, and only incidentally in reducing loss.

We have demonstrated this phenomenon first by showing that the cornerstone of the conventional wisdom—the notion that insurers effectively regulate their insureds' behavior—often is mistaken. We then moved on to discuss more active strategies insurers deploy, like contractual manipulations and apology laws. This phenomenon is concerning, as these loss-shifting practices under-deter potential wrongdoers who are incentivized to rely on these practices that reduce future *legal liability* rather than what they believe they are reducing—future loss. Accordingly, insureds do not guard their behavior optimally and might well create a more dangerous world.

Observations about insurers' interest in loss-shifting compared to loss-reduction form just part of our criticism of the conventional wisdom. The more ambitious claim we make is that insurers have an intrinsic, long-term interest in increasing or at least preserving sufficient levels of risk. We argue that insurers carry out this interest through behaviors such as failing to combat moral hazard of insureds and fueling third-party moral hazard, and opposing risk-reducing technologies.

Lastly, we warned that in some situations, such as those involving health and medical malpractice, a perfect storm might emerge. In such instances, insurers' actions are particularly detrimental, as they not only aimed at shifting loss to the insureds or third parties, but also at increasing long-term risk. As we explained, the very mechanism insurers use to increase long-term risk involves shifting it to others. We demonstrated that through highlighting insurers' lobbying effort to pass federal and state tort reforms, primarily caps on damages. By limiting payouts, victims are left to bear the uncompensated costs, and this under-compensation of victims results in under-deterrence of care-providers and consequently in increased risks in society.

In Table 2 below, we summarize all the insurance practices discussed in this Article, using the framework set out in Table 1, in the Introduction.

As we noted above, the boundary separating these categories is sometimes vague and unstable. Any of the examples discussed in Part I can also make insureds and other parties lower their investment in precautions, thus rendering itself an example suited for Part III. Yet we propose that these categories form a valuable theoretical framework, enabling us to better understand and assess the merit of different insurers' practices.

More specifically, we criticize the conventional wisdom that insurance reduces overall risk in society by managing risks and controlling moral hazard through our observation that the interaction between the short-term, liability-reducing interest and the long-term, risk-increasing interest reveals more surprising insurer interests. Insurers' interest in creating a riskier world is two-fold: as an industry, insurers attempt to increase total risk values—to turn the knob a few inches higher; but as competitors in the market, they often fail to engage in loss-reduction and focus instead on attaining the lowest liability coverage payout.

We do not argue that insurers engage in such practices exclusively. Yet to better formulate future policy, it is important to understand when insurers improve safety and when they do not, and why this difference might occur.

An urgently needed reform would be to eliminate the McCarren-Ferguson Act, which provides the insurance industry exemption from federal antitrust laws. Whereas the chances for abolishing this seventy-seven-year-old federal statute

**Table 2:** Summary – classifying insurers’ practices.

Short term/Long term	No loss shifting	Loss shifting
Risk decreasing/ maintaining	Conventional wisdom Directing insured on how to efficiently reduce risk (e.g., smoke alarms).	Part I Abstaining from regulating insured’s behavior;  Engaging in active loss-shifting actions, including: Obscure contractual language; apology laws and instructing insureds (e.g., police officers, employers) how to avoid liability rather than harm.
Risk increasing	Part II – Third-party moral hazard – Lobbying against risk-reducing technology	Part III Tort reforms

have always seemed negligible, in early 2021, in the last days of the Trump administration, Congress passed the Competitive Health Insurance Reform Act or CHIRA, which removes the exception for health insurers. The law not only removes the antitrust immunity for that subset of insurers, but also places practical limits on the sharing of sensitive data for all insurers, which was ostensibly one of the main purposes of the McCarren-Ferguson Act. Even though some kinds of lobbying efforts may be allowed in the US under the Noerr-Pennington antitrust doctrine (Avraham and Gilo 2022), the new act limits the range of possibilities for insurers to collude. This is increasingly important as market concentration seems to be especially high for health insurers. But other kinds of insurers in the U.S. also seem to have high market concentration levels, such as auto insurance, property and liability insurance, and life insurance. Notably, it seems that high market concentration in the U.S. insurance market leads to greater profitability for those insurers.

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## PRICES & SPENDING

### What price changes contributed the most to increases in the CPI in 2024?

By Casey Carter



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Between December 2023 and December 2024, consumer prices experienced disinflation, where prices still increased but by a smaller amount than before. The [Consumer Price Index](#) (CPI), a measure of the average change over time in the prices paid by urban consumers for a market basket of consumer goods and services, increased 2.9 percent from December 2023 to December 2024. This was a slower rate of increase than in the three previous 12-month periods ending in December.

This **Beyond the Numbers** article explores the year-over-year price changes in December 2024 for major categories in the Consumer Price Index for All Urban Consumers (CPI-U). The article focuses on the components that contributed the most to the overall year-over-year change, including the housing major component group and the food and beverages major component group.

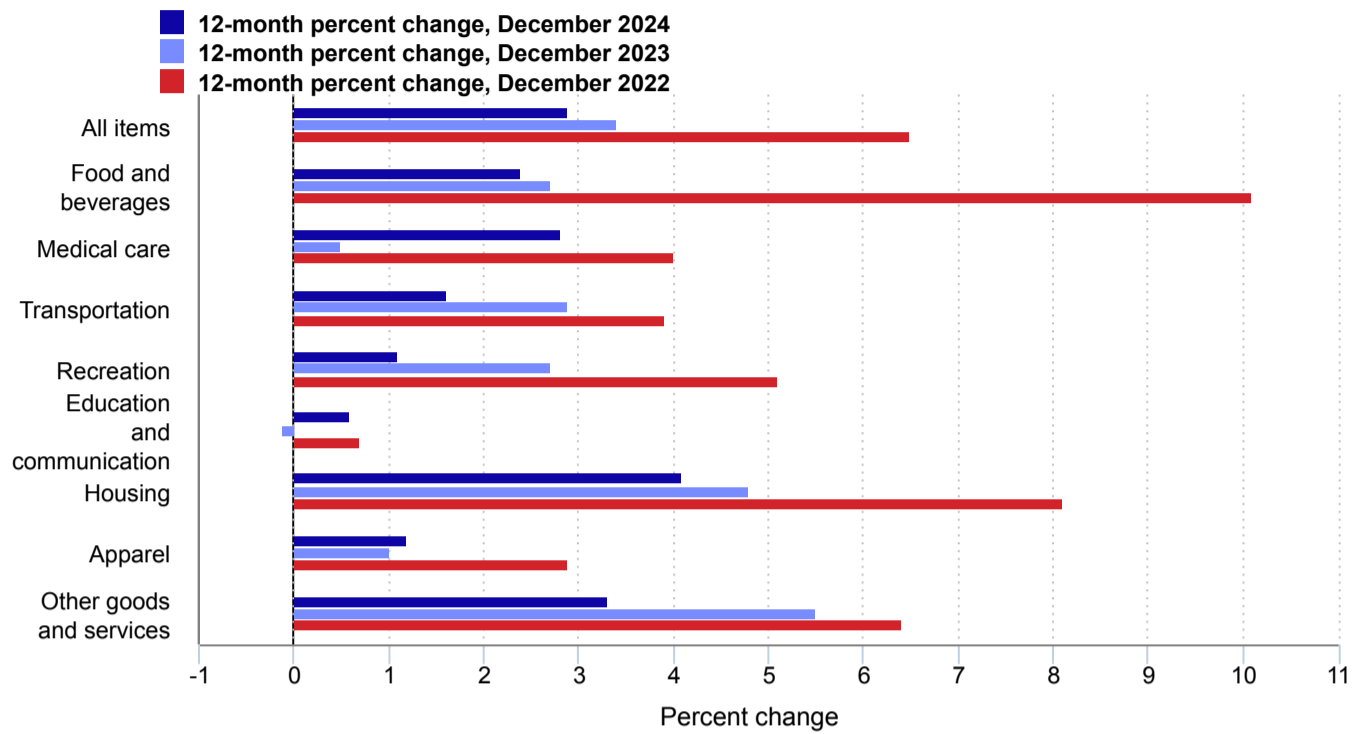
Maryland Association for Justice EXHIBITS Page 41

### All items CPI-U increase in 2024

The all items CPI-U increased 2.9 percent between December 2023 and December 2024, a smaller increase than the 3.4-percent increase in the 12 months ending in December 2023. While each of the eight major component groups rose over the year, five of the eight decelerated from December 2023 to December 2024, continuing the trend from the previous year.

The major component groups that increased by a greater amount in 2024 than in 2023 were medical care, education and communication, and apparel. Of the major component groups, housing had the largest 12-month percent change in December 2024, increasing 4.1 percent from the year before.

**Chart 1. 12-month percent change, Consumer Price Index for All Urban Consumers in U.S. city average, major component groups, not seasonally adjusted**



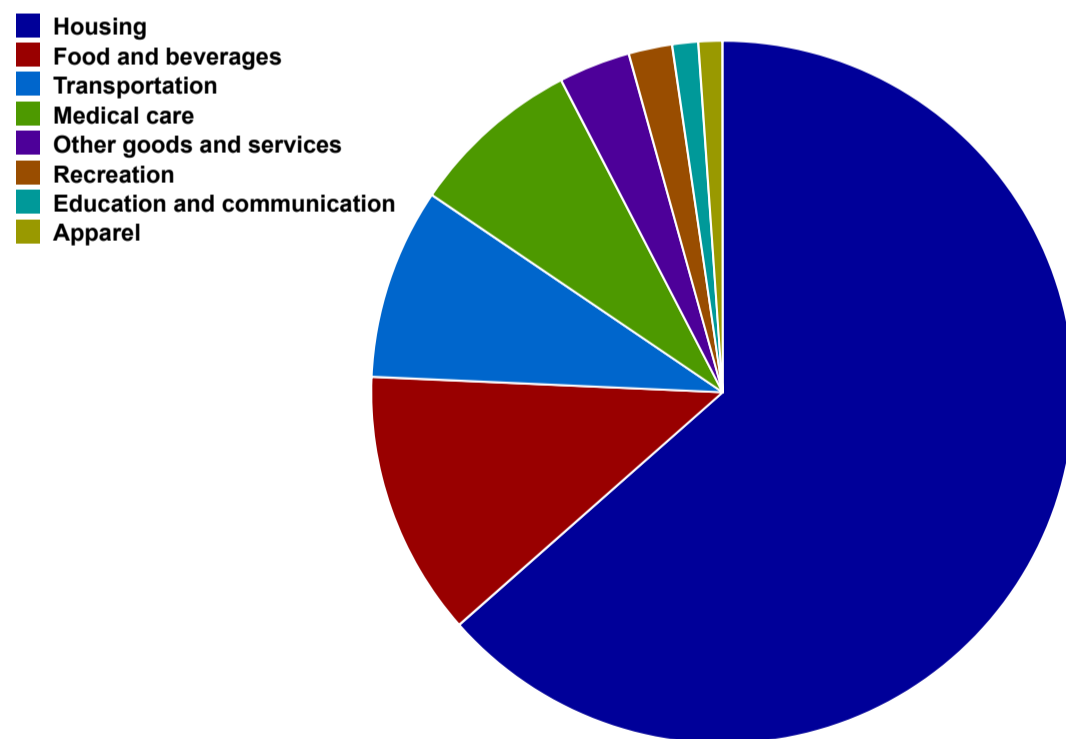
Click legend items to change data display. Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.



[View Chart Data](#)

Accordingly, the housing major component group accounted for 63.5 percent of the increase in all items for the same period (the largest contribution). The major component group with the next largest contribution was food and beverages, which accounted for 12.2 percent of the increase in the all items CPI-U. Other notable contributors to the increase in the all items CPI-U included transportation, which accounted for 8.8 percent of the change, and medical care, which accounted for 7.9 percent.

**Chart 2. Contribution to the December 2024 12-month percent change, major component groups**



Click legend items to change data display. Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.



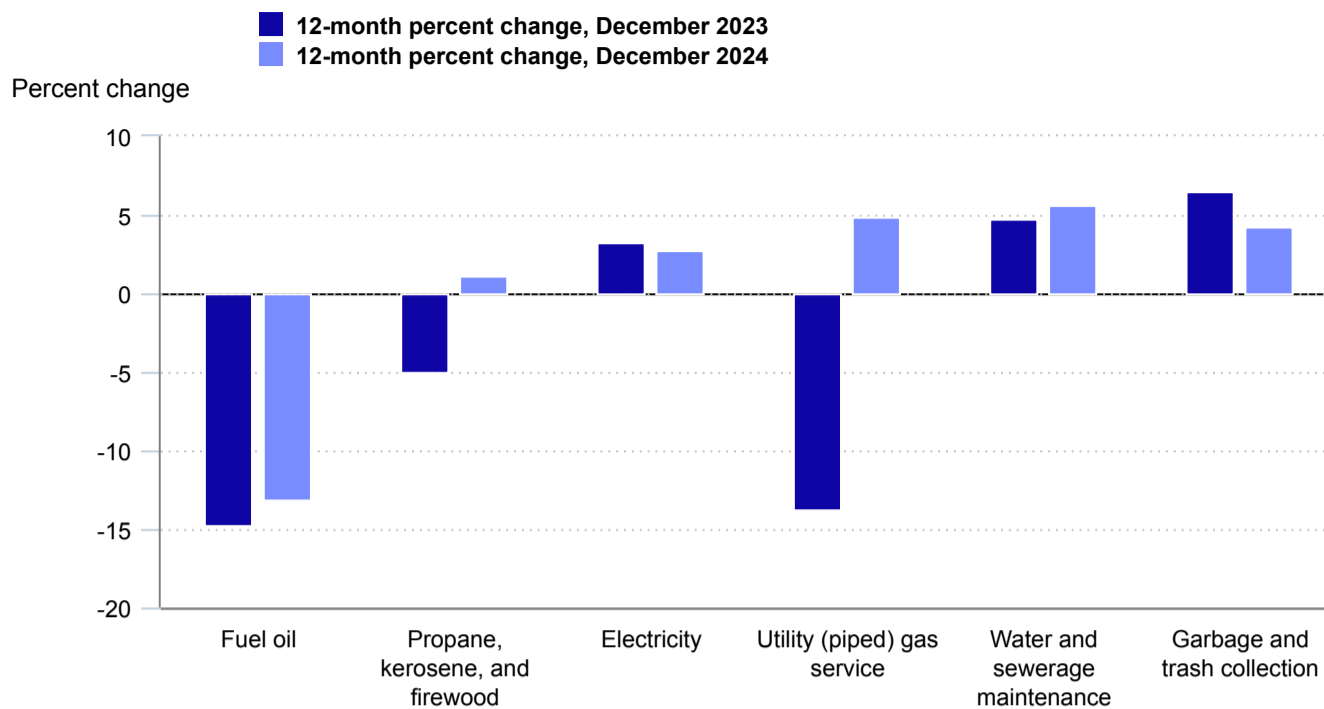
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Most of the increase in the CPI-U can be attributed to rising costs for shelter, which is a component of the housing major component group. When shelter is included, the CPI-U for all items increased by 2.9 percent. By contrast, when shelter is excluded, the CPI-U increased 1.9 percent, the same price change for all items excluding shelter from the previous year. Food and energy had a smaller impact on the all items price change than shelter. Excluding food and energy, the CPI-U increased 3.2 percent. While this was a smaller increase than the 3.9-percent increase the year before, it was a larger increase than in the all items CPI-U.

### Increase in housing prices

As previously mentioned, as shelter and most utility prices increased over the year, housing costs continued to rise in 2024. Shelter prices rose 4.6 percent from December 2023 to December 2024, a smaller increase than the 6.2-percent increase in the previous year. Rent of primary residence and owners' equivalent rent of primary residence both rose during this period (4.3 percent and 4.8 percent, respectively).<sup>1</sup>

**Chart 3. 12-month percent change, Consumer Price Index for All Urban Consumers, fuels and utilities components, not seasonally adjusted**



Click legend items to change data display. Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.



[View Chart Data](#)

Fuels and utilities increased 3.4 percent over the 12 months ending in December 2024. Nonetheless, the components of fuels and utilities were mixed. After declining 13.8 percent the year before, natural gas costs rose 4.9 percent. After increasing 3.3 percent in the 12 months ending in December 2023, electricity prices increased 2.8 percent in the 12 months ending in December 2024. By contrast, after falling in the previous year, fuel oil prices continued to decline, decreasing 13.1 percent from the year before.

Prices for water and sewerage maintenance and garbage and trash collection continued to rise, with increases of 5.6 percent and 4.3 percent, respectively.

**Increase in food and beverage prices**

Food and beverage prices rose 2.4 percent in the 12 months ending in December 2024. Food at home costs increased 1.8 percent over the year, with prices for all six grocery store food components increasing during this period. Prices in the meats, poultry, fish, and eggs component rose the most between December 2023 and December 2024, increasing 4.2 percent. This increase was led by a 36.8-percent rise in egg prices.

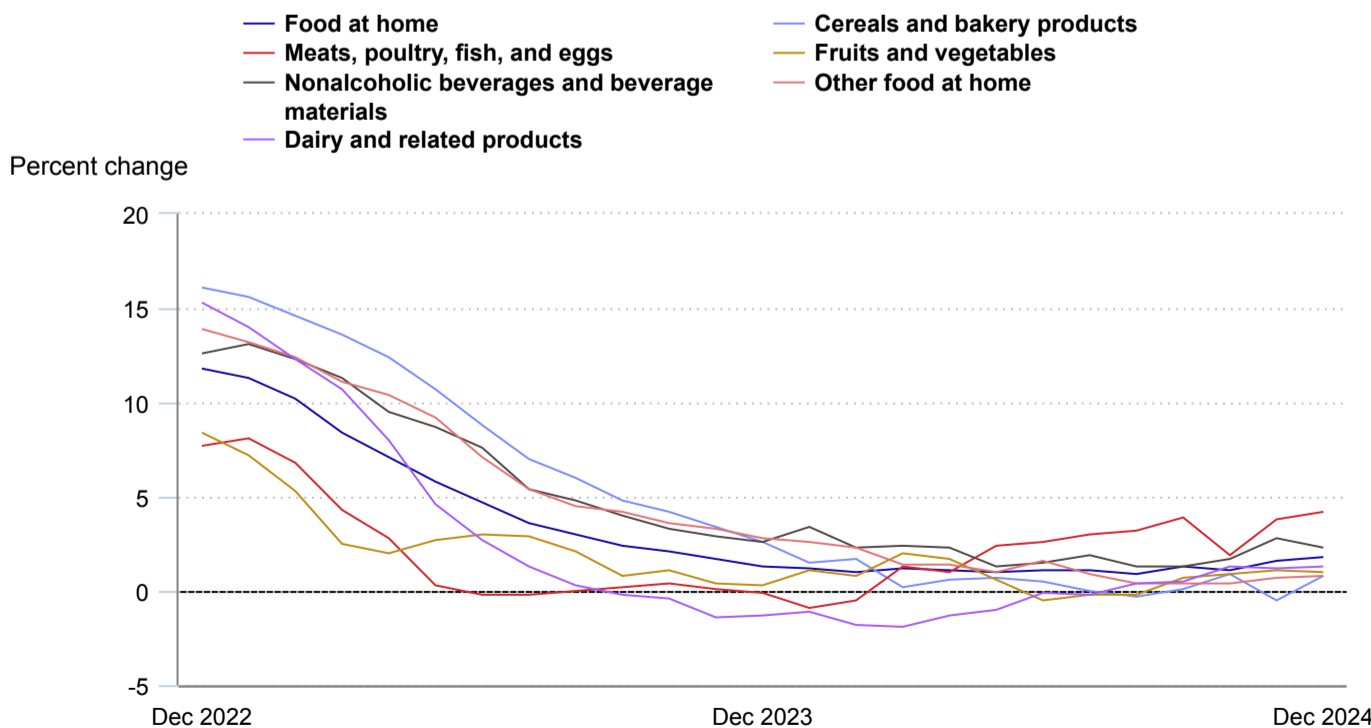
After meats, poultry, fish, and eggs, the next largest increase for the six grocery store food components was in nonalcoholic beverages and beverage materials, which increased 2.3 percent.

Prices for dairy and related products increased 1.3 percent, after declining 1.3 percent in the previous year.

Fruits and vegetables prices increased 1.0 percent from December 2023 to December 2024, after increasing 0.3 percent in the previous year. While fresh fruits and processed fruits and vegetables prices declined over the year, fresh vegetables prices increased by 3.1 percent.

Prices for cereals and bakery products increased 0.8 percent over the year, as did other food at home (which includes food items such as candy, snacks, and sauces). For both components, this was a smaller increase than in the 12 months ending in December 2023.

**Chart 4. 12-month percent change, Consumer Price Index for All Urban Consumers, food at home categories, not seasonally adjusted**



Click legend items to change data display. Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.



[View Chart Data](#)

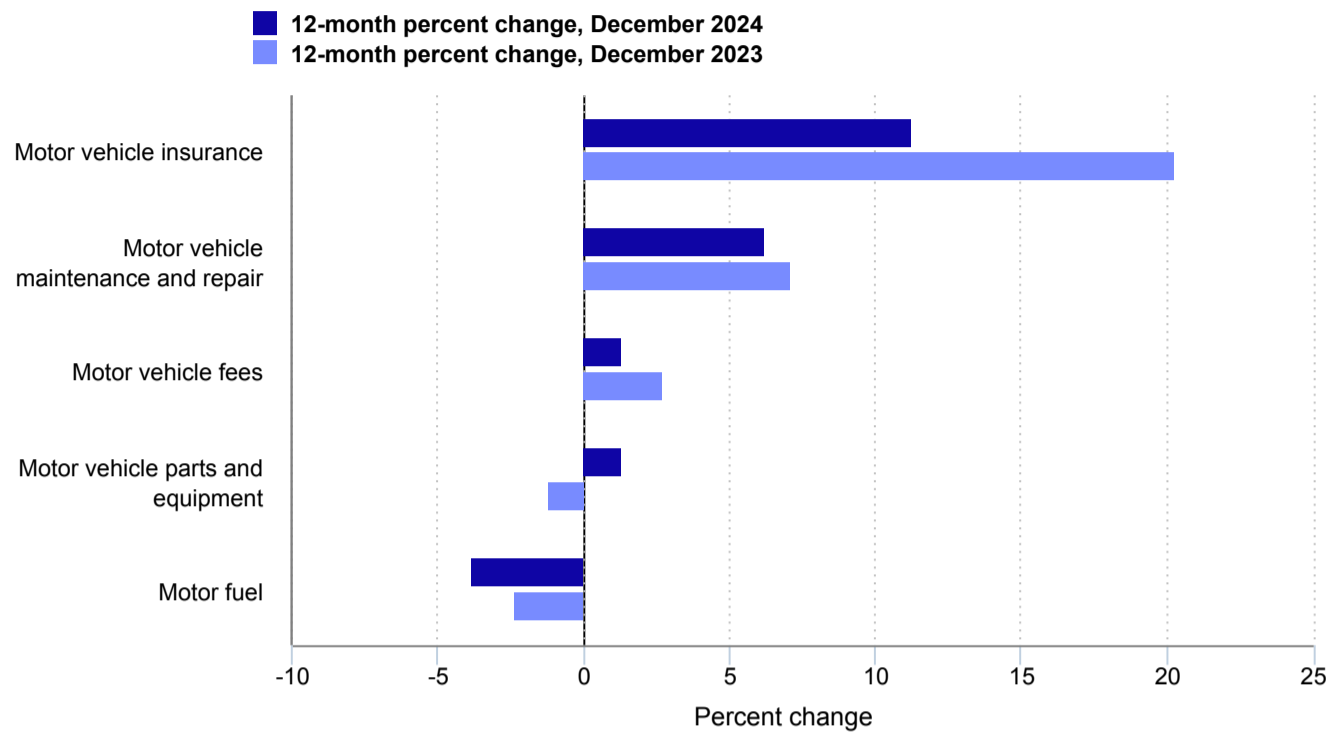
Food away from home prices increased 3.6 percent, continuing to outpace the rise in food at home prices. Prices for full-service and limited-service meals increased 3.6 percent and 3.7 percent, respectively.

Alcoholic beverages prices increased 1.4 percent from December 2023 to December 2024. Like food prices, prices for alcoholic beverages away from home (1.9 percent) increased more than alcoholic beverages at home (1.0 percent). For both indexes, the increase was led by beer, ale, and other malt beverages.

### Increase in transportation prices

Transportation prices increased 1.6 percent from December 2023 to December 2024. Airline fare prices increased 7.9 percent, after declining in the previous year. Prices for both new vehicles and used cars and trucks declined over the year, falling 0.4 percent and 3.3 percent, respectively.

**Chart 5. 12-month percent change, Consumer Price Index for All Urban Consumers, selected transportation components, not seasonally adjusted**



Click legend items to change data display. Hover over chart to view data.  
Source: U.S. Bureau of Labor Statistics.



[View Chart Data](#)

While new and used motor vehicles prices declined, costs for motor vehicle parts and equipment, maintenance, insurance, and other vehicle-related fees increased over the year, contributing to the year-over-year increase in the transportation index. Of these components, motor vehicle insurance costs saw the largest increase, rising 11.3 percent. This was a smaller increase than the 20.3-percent increase in the previous year.

Like insurance costs, motor vehicle maintenance and repair costs, as well as motor vehicle fees, saw smaller increases between December 2023 and December 2024 than in the previous year. After rising 7.1 percent in the year prior, motor vehicle maintenance and repair costs increased 6.2 percent between December 2023 and December 2024.

Over the same period, motor vehicle fees increased 1.3 percent. Within motor vehicle fees, costs for state motor vehicle registration and license fees increased 2.1 percent, and costs for parking fees and tolls increased 4.6 percent.

After declining 1.2 percent in the previous year, prices for motor vehicle parts and equipment increased 1.3 percent between December 2023 and December 2024.

Motor fuel prices continued to decline, decreasing 3.8 percent. For the third consecutive year, prices for gasoline (all types) decreased, declining 3.4 percent between December 2023 and December 2024. Other motor fuels decreased 13.5 percent over the year.

### Increase in medical care costs

Costs for medical care increased 2.8 percent from December 2023 to December 2024, a larger increase than the 0.5-percent increase in the 12 months ending in December 2023.

Prescription drugs prices increased 1.1 percent over the year, and prices for nonprescription drugs decreased 0.3 percent. Prices for medical equipment and supplies also declined between December 2023 and December 2024, decreasing by 1.1 percent.

Costs for medical care services increased 3.4 percent over the same period. Professional services increased 2.8 percent, with each component of this index also increasing. Costs for physicians' services increased by 2.6 percent, dental services increased by 3.0 percent, and services by other medical professionals increased by 1.8 percent. The professional services component that increased the most over the year was eyeglasses and eyecare, which increased 4.3 percent. Finally, the consumer price index for health insurance increased between December 2023 and December 2024, by 4.8 percent.

### Other notable price changes

Apparel prices increased 1.2 percent from December 2023 to December 2024. Men's apparel prices increased 1.8 percent over the year, and women's apparel prices increased 0.4 percent. Boys' apparel and girls' apparel prices also increased over the year, rising 5.7 percent and 2.2 percent, respectively. Likewise, footwear prices rose 0.6 percent.

Recreation costs increased 1.1 percent in the 12 months ending in December 2024. Prices for recreation commodities declined 1.5 percent over the year. Recreation commodities includes prices for sporting goods, which declined 2.0 percent, and prices for pets and pet products, which decreased 0.9 percent. Prices for recreation services increased 2.7 percent over the same period. Among these are video and audio service prices, which increased 1.5 percent over the year. Costs for other recreation services, which includes prices for admissions fees and club memberships, increased by 2.8 percent.

Education and communication prices rose 0.6 percent. Education costs increased 4.0 percent over the year and communication costs declined by 1.8 percent.

Other goods and services prices increased 3.3 percent over the year. This category includes personal care products and services, tobacco and smoking products, and other personal services (such as legal services or financial services). Lastly, costs for personal care increased 2.5 percent and prices for tobacco and smoking products increased 6.7 percent.

### Summary

The CPI-U for all items increased 2.9 percent from December 2023 to December 2024, after rising 3.4 percent the previous year. Shelter continued to be the main driver of the increase in the all items CPI-U, as it was in 2023. Over the year, prices rose for all other major component groups, with notable increases in food and beverages, medical care, and other goods and services.

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## Notes

<sup>1</sup> For an owner-occupied unit, most of the cost of shelter is the implicit rent that owner occupants would have to pay if they were renting their homes, without furnishings or utilities.

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Car Insurance Rates Drove Inflation in U.S. Economy

## Car Insurance Rates Drove Inflation in U.S. Economy

Traffic Safety

FEBRUARY 16, 2024 | JEFF DAVIS

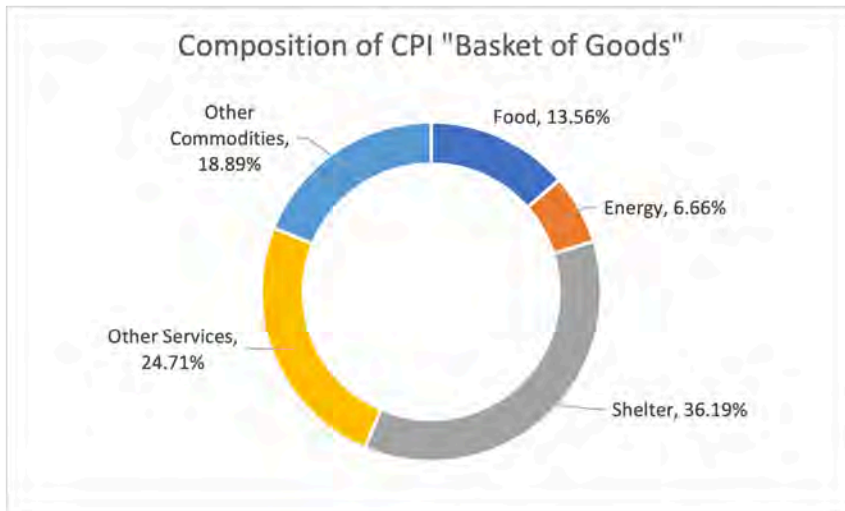
This week’s release of the January 2024 inflation report from the Bureau of Labor Statistics revealed three primary data points:

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1. The total Consumer Price Index for January 2024 was 3.1 percent higher than January 2023, and that 3.1 percent annual rate was almost below the traditional 3 percent target maximum, on its way to a level where the Federal Reserve might think about cutting interest rates later this year. Good news.
2. Once you subtract food and energy costs, traditionally the most volatile variables, the remaining "core" inflation rate, January over January, was 3.9 percent, indicating that there is still work to be done. Not so good news.
3. The core inflation jump was largely due to two things: a 6.0 percent increase in housing costs, and an astounding 20.6 percent increase in automobile insurance rates (both January 2024 versus one year earlier).

The notional "basket of goods," the cost of which is measured by CPI, can be broken down into five categories:



On its own, since shelter is 36.19 percent of the weight of the total CPI, a 6.0 percent increase in shelter costs, on its own, would cause a 2.2 percent increase in the total CPI,

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## TAGS

subject to being possibly offset by decreases elsewhere in the CPI ( $0.3619 \times .06 = .0216$ ).



Transportation actually forms almost 16 percent of total household spending as measured by the CPI basket, with motor fuels from the “energy” category and everything else from “other commodities” or “other services,” to wit:

			Jan. 2024
<u>Category</u>	<u>Expense</u>	<u>Weight</u>	<u>vs Jan. 2023</u>
Energy	Motor Fuel	3.372%	-6.6
Other Commodities	New Vehicles	3.684%	0.7
Other Commodities	Used Cars/Trucks	2.012%	-3.5
Other Commodities	Motor Vehicle Parts/Equipment	0.469%	-0.8
Other Services	Leased Cars/Trucks	0.517%	-1.6
Other Services	Rental of Cars/Trucks	0.139%	-14.1
Other Services	Motor Vehicle Maintenance/Repair	1.233%	6.5
Other Services	Motor Vehicle Insurance	2.794%	20.6
Other Services	Motor Vehicle Fees (incl. Parking)	0.540%	2.6
Other Services	Airline Fares	0.751%	-6.4

Other Services	Other Intercity Transportation	0.089%	-3.4
Other Services	Intracity Mass Transit	0.224%	2.1
<b>Total, Transportation Share of CPI Basket of Goods</b>		<b>15.824%</b>	

Motor vehicle insurance has gotten to the point that it forms 2.794 percent of the basket of goods (five years ago it was 2.415 percent of the basket, and ten years ago it was 2.213 percent). So that 20.6 percent increase in its cost over the last 12 months is equivalent to an 0.6 percent bump in total CPI.

Why is this happening?

There appear to be several reasons.

- CBS News covered a bankrate.com analysis that looked at auto insurance costs on a state-by-state basis and found that the biggest increases were in states that have had a lot of flooding in the last few years (Florida and Louisiana), or else have had a lot of tornado activity. This caused an increase in the percentage of insured vehicles getting totaled or else having very expensive claims filed.
- The *Wall Street Journal* published a story blaming part of the increase on the fact that electric vehicles cost so much more to repair than do internal combustion vehicles (an average of \$6,587 per crash for EVs vs \$4,215 for all vehicles). The number of EVs on road in the entire country probably isn't enough to cause this kind of jump in total insurance costs (yet), but the article does note that EV owners "pay on average \$357

a month for [insurance] coverage compared with \$248 for gas vehicle owners.”

- It is well documented that a lot of people started driving like idiots during COVID and have not stopped, causing an increase in accidents, and the latest LexisNexis Auto Insurance Trends Report estimated that, since 2019, “Bodily Injury and Property Damage severity have increased by 35%” and “Collision severity has increased by roughly 40%,” which also leads to more expensive claims.
- More anecdotally (and hyper-regionally), auto theft is way up post-COVID in many major cities (including here in Washington D.C.), which also trickles upwards to higher insurance rates eventually.

Put it all together in a place like California (with lots of natural disaster and the highest EV market penetration and lots of idiot drivers and a few high-crime large cities), and you get Allstate this week increasing their auto insurance rates in the Golden State by an average of 30 – thirty! – percent (they asked the regulatory board for a 35 percent increase).



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### The Hidden Victims of Tort Reform: Women, Children, and the Elderly

Lucinda M. Finley

*University at Buffalo School of Law*

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# THE HIDDEN VICTIMS OF TORT REFORM: WOMEN, CHILDREN, AND THE ELDERLY

*Lucinda M. Finley\**

## INTRODUCTION

During the 1990s, the insurance market, including medical malpractice, experienced what is known as a “soft market”—with profits padded by the burgeoning stock market, insurance companies reduced premiums, relaxed underwriting criteria, and liberally wrote policies. But, at the beginning of the new century, the liability insurance market significantly hardened. Investment returns plummeted, and some of the poor underwriting decisions made in the previous decade began to generate claims. Insurance companies, particularly in the medical malpractice area, began to raise premium rates dramatically while restricting coverage.<sup>1</sup> As the cyclical insurance market went into this “hard market” period, legislative interest in tort reform experienced renewed vigor. Caps on noneconomic loss damages are the most prevalent feature of tort reform legislation pending in Congress and proposed or enacted in many states. For example, Congress’s response to the current upheaval in medical malpractice insurance cost and availability, H.R. 4280, the “Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2004,” which passed the House in May 2004 by a 229 to 197 vote<sup>2</sup> and has drawn majority

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\* Frank G. Raichie Professor of Law, State University of New York at Buffalo Law School. I thank Dia Nicolatos, J.D., 2003, and Kimberly Boneham, J.D., 2004, for their excellent research assistance. Richard Marshall, Academic Director of the Roscoe Pound Foundation, also assisted with gathering and analyzing data from Maryland and providing invaluable feedback. I also benefited greatly from the comments of John Vail and Robert Peck of the Constitutional Litigation Center in Washington, D.C., who prompted me to start the empirical analysis in this paper by asking me to be an expert witness in cases challenging the constitutionality, including on gender fairness grounds, of damage cap laws in Maryland and Florida. Financial support for this research was provided by the Robert L. Habush, Association of Trial Lawyers of America (ATLA) Endowment, and by the Baldy Center for Law and Social Policy at the University of Buffalo.

<sup>1</sup> The U.S. General Accounting Office has analyzed the hardening market cycle in medical malpractice insurance and its causes. GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES (2003), available at <http://www.gao.gov/new.items/d03702.pdf> [hereinafter GAO REPORT]; see also Rachel Zimmerman, *Insurers’ Malpractice Helped Provoke Malpractice ‘Crisis’*, WALL ST. J., June 24, 2002, at A1.

<sup>2</sup> H.R. 4280, 108th Cong. (2004); 150 Cong. Rec. H2873-74 (daily ed. May 12, 2004). The vote tally is available at <http://clerk.house.gov/evs/2004/roll1166.xml> (last visited Aug. 12, 2004). This vote was the second

support in the Senate,<sup>3</sup> caps the total amount of noneconomic damages that can be recovered in any health care liability suit at \$250,000, regardless of the number of plaintiffs or defendants.<sup>4</sup> This bill broadly defines noneconomic damages:

Damages for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation, and all other nonpecuniary losses of any kind or nature.<sup>5</sup>

The tort reform movement and its agenda of caps on noneconomic loss damages have gained steam recently. In his January 2004 State of the Union address, President George W. Bush called for enacting caps on medical malpractice damages, and Senate Majority Leader Bill Frist, a physician, has declared this one of his legislative priorities. The call for caps on noneconomic loss damages has been propelled by doctors marching on state capitals, contending that such legislation will relieve them of onerous malpractice costs. With pro-tort reform Republicans in control of the White House and both chambers of Congress, the political prospects for widespread enactment of such caps are more favorable than at any previous time. If the Republicans gain a filibuster-proof majority in the Senate and maintain their advantage in the House, a federal law capping at least medical malpractice noneconomic damages—and perhaps all such tort damages—is sure to pass, trumping any contrary policy decisions by states. Thus, it is a particularly propitious time to contemplate the future of the tort system and access to civil justice in a world of nonindividualized, fixed amount payments for noneconomic loss.

The proponents of caps have given little or no thought to what their effects might be on the ability of injured individuals to find lawyers and gain access to

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time during the 108th Congress that the House passed this bill. The 2003 version, the HEALTH Act of 2003, was H.R. 5, 108th Cong. (2003).

<sup>3</sup> S. 2207, 108th Cong. (2004). A similar bill is called the Pregnancy and Trauma Care Access Protection Act of 2004, S. 607, 108th Cong. (2003). These bills have been stalled by Democratic-led filibusters in the Senate, and have not drawn the support of the sixty or more Senators needed to break the filibuster. The most recent vote occurred on April 7, 2004, when the Senate failed to invoke cloture on S. 2207 by a 49 to 48 vote. Helen Dewar, *Medical Malpractice Bill Foiled in Senate*, WASH. POST, Apr. 8, 2004, at A5.

<sup>4</sup> S. 607 § 5(b).

<sup>5</sup> *Id.* § 3(15); H.R. 4280 § 9(15).

the civil justice system or on whether certain groups of people will be more or less adversely affected. Rather, cap proponents seem to be concerned only about an illusory search for relief from market-driven premium policies of insurance companies. The prospect for relief is illusory because there is no empirical evidence that caps on noneconomic damages will have any significant effect on insurance rates.<sup>6</sup> While damages caps are not likely to alter the hard market/soft market cycles that affect premium rates and insurance availability, they do make it less likely that certain types of injuries will be redressed through the courts, because claims with low economic loss recovery value, but high noneconomic loss and significant deterrent impact, are no longer worth pursuing. Moreover, the effects of this changed legal landscape do not fall equally on all members of U.S. society. The caps on noneconomic loss damages that are the favorite target of tort reformers have a significant adverse impact on women and the elderly. They also have a disparate impact on cases involving the ultimate injury of death, especially when a child dies as a result of medical malpractice.

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<sup>6</sup> GAO REPORT, *supra* note 1, concludes that data which would measure the impact of a damages cap on insurers' losses, claim frequency, or claims-handling costs simply does not exist. *Id.* at 42–43. The report examines some states with damage cap laws (e.g., California, Nevada, Texas), and some without (e.g., Minnesota, Florida) and the pattern of premium rates identified in the report shows no correlation with damage caps. *Id.* at 57–65. The state with the lowest increases in rates, Minnesota, does not cap tort recoveries. *Id.* at 61. A recent study by the consumer advocacy group Center for Justice & Democracy examines insurance premiums in states that have passed tort reform, and states that have not, and concludes that there is no correlation between damage caps and other tort reform measures, and insurance rates. CENTER FOR JUSTICE & DEMOCRACY, PREMIUM DECEIT—THE FAILURE OF “TORT REFORM” TO CUT INSURANCE PRICES (1999). Weiss Ratings, an independent insurance-rating agency from Florida, analyzed premium data from 1991 to 2002 and found that states with caps on noneconomic damages experienced a 48% increase in median medical malpractice premiums, which was a greater increase than in states without damage cap laws. AMERICANS FOR INSURANCE REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES 2003 2–3 (2003). California, which has capped noneconomic damages in medical malpractice cases since the mid-1970s, experiences malpractice insurance premium trends close to the national average, and the average malpractice premium grew in California from 1991 to 2000 by 3.5%, slightly more than the national average increase during this time period of 1.9%. Press Release, Center for Justice & Democracy, California Restrictions on Malpractice Victims Has Not Affected Malpractice Premiums (May 29, 2002), available at <http://centerjd.org/press/release/020529.pdf>.

Vanderbilt economics professor Frank A. Sloan performed an analysis of the effect of damage caps passed after the mid-1970s insurance crisis and concluded that the cap laws had no effect on insurance premiums. Frank A. Sloan, *State Responses to the Malpractice Insurance “Crisis” of the 1970’s: An Empirical Assessment*, 9 J. HEALTH POL. POL’Y & L. 629 (1985). But see Daniel P. Kessler & Mark B. McClellan, *The Effects of Malpractice Pressure and Liability Reforms on Physicians’ Perceptions of Medical Care*, 60 LAW & CONTEMP. PROBS. 81, 98 (1997). Based on selected physicians’ self-reports of their malpractice premiums from 1984 through 1993, these authors concluded that tort reforms, including damage caps, could lower the growth in premiums by approximately 8%. *Id.*

I have conducted empirical research from several states on how juries in medical malpractice and other tort suits allocate their damage awards between economic loss damages and noneconomic loss damages. I then compared cases in which men are the victims and cases in which women are the victims. This research demonstrates that while overall men tend to recover greater total damages, juries consistently award women more in noneconomic loss damages than men, and that the noneconomic portion of women's total damage awards is significantly greater than the percentage of men's tort recoveries attributable to noneconomic damages. Consequently, any cap on noneconomic loss damages will deprive women of a much greater proportion and amount of a jury award than men. Noneconomic loss damage caps therefore amount to a form of discrimination against women and contribute to unequal access to justice or fair compensation for women.

One major reason why women, on average, recover more in noneconomic damages—and why a greater proportion of their total damages are for noneconomic loss—is that certain injuries that happen primarily to women are compensated predominantly or almost exclusively through noneconomic loss damages. These injuries include sexual or reproductive harm, pregnancy loss, and sexual assault injuries. The impact of these injuries—impaired fertility or sexual functioning, miscarriage, incontinence, trauma associated with sexual relationships, and scarring or disfigurement in sensitive, intimate areas of the body—is not primarily on the economic wage earning aspects of life. Rather, the impact is more in terms of emotional suffering and self-esteem—an impaired sense of self and ability to function as a whole person, or damaged relationships. These priceless aspects of life hold little economic worth in the market, so market-referenced economic loss damages are ill-suited and inadequate to compensate for them.<sup>7</sup>

This Article will briefly recount the developments in the medical malpractice insurance market and the tort system that are fueling the legislative push for tort reform. The Article will then present my research documenting the discriminatory impact on women and the elderly from the most pervasive tort reform strategy of caps on total allowable recovery for noneconomic loss damages.

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<sup>7</sup> For a full development of the ideas in this paragraph, see Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997).

## I. THE U.S. TORT REFORM MOVEMENT: THE DISCONNECT BETWEEN THE PROBLEM OF INSURANCE CYCLES AND THE SOLUTION OF DAMAGE CAPS

Today, in the aftermath of the stock market's collapse in 2001 and a significant tightening of the excess reinsurance markets after the terrorist attacks on September 11, 2001, there is a wide perception of a crisis in both the availability and cost of liability insurance. Beginning that year, medical malpractice premiums in particular have sharply increased.<sup>8</sup> While investment performance and other business practices of the insurance industry are partly to blame,<sup>9</sup> the tort litigation system has come under heavy attack as the sole presumed culprit. Insurance, business, and manufacturing interests, the American Medical Association ("AMA") and state doctors' groups have been clamoring for limitations on lawsuits and on damages. The litany of accusations against the tort system includes: too many frivolous lawsuits driven by greedy plaintiffs' attorneys; skyrocketing damage awards that bear little or no relation to the actual harm; juries either too ignorant or too sympathetic to the plight of an injured person and too antagonistic to large deep pocket corporations to follow the facts or the law; varying recoveries, especially punitive awards, for similar injuries—which make the tort system seem more like a lottery than a means of fairly delivering compensation; litigation costs so excessive that corporations are financially threatened by even successfully defending the frivolous suits; doctors retiring or moving to other states because of skyrocketing premiums, with a consequent crisis in access to care in areas plagued by high tort verdicts; U.S. companies deterred from marketing safe and beneficial products because of liability fears; and U.S. companies facing global competitive disadvantages because of their litigation and insurance liability costs. Picking up on these claims, the media has fueled the controversy by publishing highly selective—and thus misleading—accounts of some large tort verdicts that seemed to lend truth to the criticisms. A prominent example is the large compensatory and punitive damage verdict a

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<sup>8</sup> See GAO REPORT, *supra* note 1.

<sup>9</sup> The Report concludes that claims losses is the primary factor driving insurance rates in the long term. *Id.* at 2. In the short run, the cycles in the medical malpractice market, such as the current spikes in premiums, are driven by factors other than losses on claims, such as investment performance and loss reserve and adjustment decisions by insurance companies. *Id.* at 4–5, 15. In 2002, the *Wall Street Journal* published an analysis of the recent increases in malpractice premiums that concluded suspect business practices of insurance companies, coupled with declining investment returns, were the principal reasons. Zimmerman, *supra* note 1, at A1.

jury awarded to an elderly woman who suffered third degree burns when she spilled a cup of McDonald's coffee in her lap.<sup>10</sup>

There is little empirical evidence to support the claims of the critics of the tort system. Indeed, most of the available empirical research refutes the criticisms. Tort filings as a percentage of civil case filings have been on a continual decline since 1990.<sup>11</sup> Overall tort case filings in the thirty-five most populous states declined 4% between 1993 and 2002.<sup>12</sup> When adjusted for increasing population, there was a median decline of 19% in tort cases from 1992 to 2001.<sup>13</sup> Texas, a state often mentioned as the epitome of a tort system run amok, had the largest decline in the nation, with a 40% drop in per capita tort filings during the ten year period from 1993 to 2002.<sup>14</sup>

Medical malpractice case filings dropped 4% nationally from 1997 to 2000.<sup>15</sup> There was an increase in medical malpractice case filings in 2001, but when adjusted for population increases there was an overall decline of 1% in medical malpractice case filings from 1992 to 2001.<sup>16</sup> Medical malpractice case filings rose again in 2002, for a total increase in filings for the five year period from 1998 to 2002 of 6%, which amounts to an average increase of just over 1% annually.<sup>17</sup> During this five-year period the U.S. population grew by 4.5%,<sup>18</sup> so the per capita increase in filings is negligible.

Medical malpractice cases are a small percentage of all tort case filings—they represented 5% of the state court tort caseload in 2001,<sup>19</sup> and 4% of the caseload in 2002.<sup>20</sup> Furthermore, less than 5% of medical malpractice cases

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<sup>10</sup> See, e.g., Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996).

<sup>11</sup> NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2003: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 23 (2003), available at [http://www.ncsconline.org/D\\_Research/csp/2003\\_Files/2003\\_Main\\_Page.html](http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Main_Page.html).

<sup>12</sup> *Id.*

<sup>13</sup> NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 25 (2002), available at [http://www.ncsconline.org/D\\_Research/csp/2002\\_Files/2002\\_Main\\_Page.html](http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Main_Page.html).

<sup>14</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 28.

<sup>15</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 13, at 27.

<sup>16</sup> *Id.* at 28.

<sup>17</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 28.

<sup>18</sup> U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 8 tbl.2 (2004), at <http://www.census.gov/prod/2003pubs/02statab/pop.pdf>.

<sup>19</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 13, at 27.

<sup>20</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 28.

filed go to trial. While plaintiffs have never won a majority of these tried cases, juries have become increasingly skeptical of plaintiffs and more likely to rule for defendants.<sup>21</sup> In 1992, plaintiffs won 30% of the tried cases; in 1996, the plaintiff win rate had declined to 23%.<sup>22</sup> The median jury award in 1992 in the seventy-five largest U.S. counties was \$253,000;<sup>23</sup> in 1996 the median medical malpractice jury verdict was \$286,000.<sup>24</sup> In 2001, the median verdict increased to \$431,000.<sup>25</sup> This is a 70% increase from the median ten years prior in 1992, but during this decade medical costs increased by 51.7%, and general inflation, which would drive up wage-based damage awards, was up 26.2%.<sup>26</sup> In addition to inflation, this growth in median awards can also be explained by the fact that in 2001, 90% of medical malpractice trials involved plaintiffs who suffered the most severe injuries of death or permanent disability, and damage awards are the highest in these types of cases.<sup>27</sup> Punitive damage judgments in medical malpractice cases are extremely rare. From 1992 to 2001, the percentage of plaintiffs who received punitive damages ranged between 1% and 4%.<sup>28</sup> Punitive damages are equally rare in product liability suits, another area occasionally targeted by tort reformers, and cluster around a few notoriously lethal products with appalling evidence of

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<sup>21</sup> See, e.g., NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS, AND OUTRAGIOUS DAMAGE AWARDS* 169–71 (1995). This jury skepticism of plaintiffs pervades other types of civil cases as well. See VALERIE HANS, *BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY* 39–41 (2000). As Stephen Daniels and Joanne Martin suggest in their contribution to this Thrower Symposium, the public relations campaign of tort reform proponents, which includes relentless attacks on the civil justice system, has increased jurors' jaundiced view of injured plaintiffs and made it harder for plaintiffs to win meritorious cases. Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004); see also Stephen Daniels & Joanne Martin, "The Impact That it Has Had is Between People's Ears:" *Tort Reform, Mass Culture, and Plaintiffs' Lawyers*, 50 DEPAUL L. REV. 453 (2000).

<sup>22</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 13, at 29; 1 NATIONAL CENTER FOR STATE COURTS, *CASELOAD HIGHLIGHTS 1* (1995), available at [www.ncsconline.org/D\\_Research/csp/Highlights/vol1no1.pdf](http://www.ncsconline.org/D_Research/csp/Highlights/vol1no1.pdf) [hereinafter *CASELOAD HIGHLIGHTS*].

<sup>23</sup> U.S. DEPARTMENT OF JUSTICE, *MEDICAL MALPRACTICE TRIALS AND VERDICTS IN LARGE COUNTIES* (2001), available at <http://www.ojp.usdoj.gov/bjs/abstract/mmtvlc01.pdf>. Based on a sample of states, rather than counties, *CASELOAD HIGHLIGHTS*, *supra* note 22, reports the 1992 median as \$201,000.

<sup>24</sup> NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 29.

<sup>25</sup> U.S. DEPARTMENT OF JUSTICE, *supra* note 23.

<sup>26</sup> U.S. Department of Labor, *Medical Care Inflation Continues to Rise*, Monthly Labor Review, tbl. Annual Change in the Consumer Price Index for All Urban Consumers. Medical Care and All Items, 1991–2000, <http://www.bls.gov/opub/ted/2001/May/wk4/art01.htm> (May 29, 2001).

<sup>27</sup> U.S. DEPARTMENT OF JUSTICE, *supra* note 23.

<sup>28</sup> *Id.*

corporate misconduct and cover-up, such as asbestos and the Dalkon Shield contraceptive device.<sup>29</sup>

Far from the picture of overly generous, plaintiff friendly, “runaway” juries painted by tort reform proponents, the empirical reality of the tort system and medical malpractice cases is one of case filings holding steady with population increases, juries who skeptically assess plaintiffs’ cases, and juries who award damages commensurate with the seriousness of the injury and with medical inflation.<sup>30</sup> The empirical reality picture—that it is not the actions of injured plaintiffs that is driving the sharp increase in medical malpractice insurance premiums—does not change when overall claims filed with insurance companies are added to the canvas. Similar to the downward trend in court cases, the trend in overall malpractice claims is also down. The National Association of Insurance Commissioners reports a 4% decrease in claims between 1995 and 2000, from 90,212 claims filed in 1995 to 86,480 in 2000.<sup>31</sup> According to the federal government’s National Practitioner Data Bank, the median total physician payment to a malpractice claimant rose 35% from 1997 to 2001—the years that should have fueled the current crisis in rising insurance premiums—from \$100,000 to \$135,000.<sup>32</sup> This is less than the medical cost inflation rate.<sup>33</sup>

While total medical malpractice insurance costs have increased less than half the rate of medical cost inflation, premiums have increased at a much higher rate.<sup>34</sup> The rate of preventable medical error far exceeds the number of malpractice claims. Several research studies have estimated that for every six incidents of medical error, only one becomes a malpractice claim.<sup>35</sup> The

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<sup>29</sup> Thomas Koenig & Michael Rustag, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995).

<sup>30</sup> The consistency of jury damage awards with severity of injury is explored in Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265 (1998) and Randall Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling and ‘Pain and Suffering’*, 83 NW. U. L. REV. 908 (1989).

<sup>31</sup> PUBLIC CITIZEN CONGRESS WATCH, MEDICAL MISDIAGNOSIS: CHALLENGING THE MALPRACTICE CLAIMS OF THE DOCTORS’ LOBBY 3 (2003), available at <http://www.citizen.org/documents/PDF%20of%20Report.pdf>.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> See *supra* note 26 and accompanying text.

<sup>34</sup> PUBLIC CITIZEN CONGRESS WATCH, *supra* note 31, at 2.

<sup>35</sup> *Id.* at 1; see, e.g., PAUL WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (1993); Troyen Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practices Study I*, 324 NEW ENG. J. MED. 370 (1991); Eric J. Thomas et al., *Incidence and Types of Adverse Events and Negligent Care in Utah and Colorado*, 38 MED. CARE 261 (2000).

highly regarded Harvard Medical Practices Study noted that “most American doctors fervently believe that the present-day malpractice litigation is excessive and erratic . . . . [However,] the medical setting has provided the strongest evidence that the real tort crisis may consist in too few claims.”<sup>36</sup> The Institute of Medicine (“IOM”) estimated in 1999 that between 44,000 and 98,000 people die each year in U.S. hospitals from medical error, up to double the annual death toll from auto accidents.<sup>37</sup> Recent studies updating the IOM report suggest that medical errors are increasing. In July 2004, HealthGrades, a health care quality rating agency, released a study, based on Medicare data from all fifty states, estimating that an average of 195,000 people a year died from preventable medical errors in U.S. hospitals in 2000, 2001, and 2002.<sup>38</sup> The IOM estimated the annual societal cost of hospital medical error as between \$17 billion and \$29 billion—much greater than the total amount of \$6.4 billion spent on malpractice insurance in 2000 by doctors as well as hospitals.<sup>39</sup>

Even as medical malpractice insurance premiums have started to rise dramatically in the past few years, the General Accounting Office (“GAO”) recently concluded that there has not been any documentable adverse affect on access to health care, except in some scattered, often rural areas, where factors other than malpractice premiums contribute to the access issues.<sup>40</sup> In several of the states trumpeted by the AMA as experiencing crises in the availability of doctors due to rising insurance costs, the number of physicians per capita has actually increased.<sup>41</sup>

In sum, the empirical picture shows tort filings are down, medical malpractice case and claim filings are flat or declining per capita, median verdicts are increasing only marginally more than medical inflation and are commensurate with injury severity, median claims payouts are increasing less than the recent rates of increase in insurance premiums, and numbers of doctors are not declining in states hit hard by huge increases in insurance premiums. Given this picture, it is hard to understand why the interest groups

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<sup>36</sup> WEILER ET AL., *supra* note 35, at 62.

<sup>37</sup> PUBLIC CITIZEN CONGRESS WATCH, *supra* note 31, at 1; INSTITUTE OF MEDICINE, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM (2000).

<sup>38</sup> HEALTH GRADES QUALITY STUDY, PATIENT SAFETY IN AMERICAN HOSPITALS (2004), available at [http://www.healthgrades.com/media/english/pdf/HG\\_Patient\\_Safety\\_Study\\_Final.pdf](http://www.healthgrades.com/media/english/pdf/HG_Patient_Safety_Study_Final.pdf).

<sup>39</sup> PUBLIC CITIZEN CONGRESS WATCH, *supra* note 31, at 1; INSTITUTE OF MEDICINE, *supra* note 37.

<sup>40</sup> GENERAL ACCOUNTING OFFICE, MEDICAL MALPRACTICE: IMPLICATIONS OF RISING PREMIUMS ON ACCESS TO HEALTH CARE 16–19 (2003).

<sup>41</sup> *Id.*

clamoring for tort reform have been so successful in convincing legislatures that limiting damages for the few negligently injured people whose cases go to trial, win, and recover more in noneconomic damages than the amount of a damages cap, will alleviate the periodic cycles that afflict the liability insurance markets.

Legislative interest in caps on noneconomic damages as a supposed solution to the problems in the medical malpractice insurance market is even harder to rationalize with the lack of evidence that caps will fix the problem. In a report issued in the summer of 2003, the GAO concluded that there is no data to establish that damage cap laws have an effect on claims frequency, insurers' losses or claims handling costs, or premium rates.<sup>42</sup> The GAO also noted that some states without damage caps have experienced among the lowest increases in insurance premiums, while some states with damage caps have experienced higher than the national average increase in premiums.

In a report issued in June 2003, Weiss Ratings, Inc., an independent rating agency for insurance and financial services companies, came to a similar conclusion as the GAO. Weiss Ratings concluded that while damage caps do produce a 15.7% reduction in median insurer payouts, caps *do not* induce insurance companies to reduce the premiums they charge doctors. In fact, states with caps experienced a *greater* increase in the median annual premiums in three high-risk medical specialties—internal medicine, general surgery, and obstetrics/gynecology—than states without caps.<sup>43</sup> Thus, caps benefit insurance companies by increasing their profits, while producing no benefit for doctors, and causing a detriment to injured people, especially women and the elderly.

Weiss Ratings concluded that insurers in states with caps actually raised their rates at a faster and greater rate than insurers in states without caps. As the Weiss report summarizes, “[t]hus, on average, *doctors in states with caps actually suffered a significantly larger increase than doctors in states without caps.*”<sup>44</sup> Moreover, the presence of a cap “may be *inversely correlated* to med mal premium levels.”<sup>45</sup>

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<sup>42</sup> GAO REPORT, *supra* note 1.

<sup>43</sup> MARTIN D. WEISS ET AL., WEISS RATINGS, INC., MEDICAL MALPRACTICE CAPS: THE IMPACT OF NONECONOMIC DAMAGE CAPS ON PHYSICIAN PREMIUMS, CLAIMS PAYOUT LEVELS, AND AVAILABILITY OF COVERAGE 7–8 (2003), available at <http://www.weissratings.com/malpractice.asp>.

<sup>44</sup> *Id.* at 8 (emphasis in original).

<sup>45</sup> *Id.* at 13 (emphasis in original).

Weiss Ratings concluded that the reason for this counter-intuitively inverse relationship between damage caps and medical malpractice insurance rates is that “[t]here are other, far more important factors driving the rise in med mal [sic] premiums” than insurer payouts.<sup>46</sup> As the report noted:

We have identified six factors driving up premiums, each of which may be exerting a greater impact on premiums than the presence or absence of caps. These are (1) medical cost inflation, (2) the cyclical nature of the insurance market, (3) the need to shore up reserves for policies in force, (4) a decline in investment income, (5) overall financial safety considerations, and (6) the supply and demand of coverage.<sup>47</sup>

Analyzing each of these factors in depth, the Weiss Ratings report concludes that “it was the combination of two powerful forces—under-reserving throughout most of the 1990s *plus* the rapid fall in investment income in the 2000s—that largely drove the unusually rapid premium increases, not only in medical malpractice, but in many other property and casualty lines as well.”<sup>48</sup>

The Weiss Ratings conclusion that insurance industry practices and general economic and investment conditions cause the hard market/soft market cycles in insurance rates is amply supported by several other studies. Indeed, it is a textbook understanding that the cycles in the pricing of insurance reflect changes in investment earnings, as well as a recurring pattern of excessive optimism followed by excessive pessimism among insurance industry leaders.<sup>49</sup> The conventional understanding is that companies enter or expand into a market when premium prices are high. Competition then brings prices down to the point where insurers are not earning adequate profits, eroding the net worth of all the players in the market and driving some to exit. As a result, the insurers remaining in the market dramatically increase their prices, starting the cycle again.<sup>50</sup>

According to J. Robert Hunter, Director of Insurance for the Consumer Federation of America (and former Federal Insurance Administrator and Texas

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<sup>46</sup> *Id.* at 8.

<sup>47</sup> *Id.* at 9.

<sup>48</sup> *Id.* at 10 (emphasis in original).

<sup>49</sup> See generally Scott E. Harrington & Greg Niehaus, *Volatility and Underwriting Cycles*, in HANDBOOK OF INSURANCE 657 (G. Dionne ed., 2000).

<sup>50</sup> *Id.* at 679.

Insurance Commissioner), the amounts charged for premiums do not track losses paid, but instead rise and fall in concert with the state of the economy. When the economy booms and investment returns are high, companies maintain premiums at modest levels; however, when the economy falters and interest rates fall, companies increase premiums. In an October 2002 report, Americans for Insurance Reform summarized Hunter's analysis:

[S]ince 1975, medical malpractice paid claims per doctor have tracked medical inflation very closely (slightly higher than inflation from 1975 to 1985 and flat since). In other words, payouts have risen almost precisely in sync with medical inflation, which should surprise the doctors who dutifully march off at the insurers' trumpet call to seek tort law changes. These data confirm that neither jury verdicts nor any other factor affecting total claims paid by insurance companies that write medical malpractice insurance have had much impact on the system's overall costs over time. [In addition], while payouts closely track medical inflation, medical malpractice premiums are quite another thing. They do not track costs or payouts in any direct way. Since 1975, the data shows that in constant dollars, per doctor written premiums—the amount of premiums that doctors have paid to insurers—have gyrated almost precisely with the insurer's economic cycle, which is driven by such factors as insurer mismanagement and changing interest rates, not by lawsuits, jury awards, the tort system or other causes.<sup>51</sup>

This is because:

[i]nsurers make most of their profits from investment income. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return. Insurers severely underprice their policies and insure very poor risks just to get premium dollars to invest. This is known as the "soft" insurance market.

But when investment income decreases—because interest rates drop or the stock market plummets or the cumulative price cuts make profits become unbearably low—the industry responds by sharply increasing premiums and reducing coverage, creating a "hard" insurance market usually degenerating into a "liability insurance crisis."

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<sup>51</sup> AMERICANS FOR INSURANCE REFORM, MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES 2-3 (2002), at <http://www.insurance-reform.org/StableLosses.pdf>.

A hard insurance market happened in the mid-1970s, precipitating rate hikes and coverage cutbacks, particularly with medical malpractice insurance and product liability insurance. A more severe crisis took place in the mid-1980s, when most liability insurance was impacted. Again, in 2002, the country is experiencing a “hard market,” this time impacting property as well as liability coverages with some lines of insurance seeing rates going up 100% or more.<sup>52</sup>

This diagnosis of the causes of the current medical malpractice insurance crisis and its disconnect with the tort system echoes the conclusions about the causes of the previous hard market period. In the mid-1980s, there was a “crisis” in the cost and availability of medical malpractice insurance remarkably similar to the “hard market” conditions that started occurring in 2000. In 1986 the National Association of Attorneys General (“NAAG”) conducted a study, which reached conclusions noticeably similar to those of Weiss Ratings and Robert Hunter about the causes of the current conditions. According to NAAG:

The facts do not bear out the allegations of an “explosion” in litigation or in claim size, nor do they bear out the allegations of a financial disaster suffered by property/casualty insurers today. They finally do not support any correlation between the current crisis in availability and affordability of insurance and such a litigation “explosion.” Instead, the available data indicate that the causes of, and therefore solutions to, the current crisis lie with the insurance industry itself.<sup>53</sup>

Notably, industry spokespersons do not claim that damage cap laws will lead to reduced insurance premiums. When Florida was considering tort reform legislation in the mid-1980s, including a \$450,000 cap on noneconomic loss damages,<sup>54</sup> Aetna and St. Paul, two major insurance companies, performed internal claims reviews to ascertain what the effect would be on their payouts. St. Paul ascertained that only four of the 313 claims they had closed in Florida would have been affected by the cap—all of them cases where a patient died.

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<sup>52</sup> *Id.*

<sup>53</sup> ATTORNEY GENERAL OF MASSACHUSETTS FRANCIS X. BELLOTTI ET AL., ANALYSIS OF THE CAUSES OF THE CURRENT CRISIS OF UNAVAILABILITY AND UNAFFORDABILITY OF LIABILITY INSURANCE 45 (1986).

<sup>54</sup> The Florida cap was struck down as unconstitutional by the Florida Supreme Court. *Smith v. Dep’t of Ins.*, 507 So. 2d 1080 (Fla. 1987). But Florida now has a cap on noneconomic damages in medical malpractice cases, of \$500,000 per claimant and per provider, except in cases of death or permanent vegetative state, when the cap rises to \$1,000,000. The law also permits judges to discard the cap in the interests of justice. FLA. STAT. § 766.118 (2004).

Overall, they would have had a total savings of 1.1%. Any projected future savings from the cap was “highly speculative,” in St. Paul’s estimation. “Our best estimate is no effect from the tort changes,” the internal study concluded.<sup>55</sup> Aetna reached a similar conclusion. In a submission to the State Insurance Department seeking a rate increase for 1987, Aetna performed a claims study and estimated that there would be no reduction in their costs from the cap on noneconomic damages.<sup>56</sup> After the wave of state tort reform laws that were passed during the mid-1980s “hard market” cycle in the insurance industry, the Washington State Insurance Commissioner issued a report assessing the effect of these laws. His conclusion echoed that of St. Paul and Aetna: Insurance rates stabilized in the late 1980s because of changing investment and market conditions, not because of tort law changes or damage caps. States that did not pass tort reform experienced similar rate improvements as states that did change their tort law.<sup>57</sup> In 1999, the president of the American Tort Reform Association cautioned that “we wouldn’t tell you or anyone that the reason to pass tort reform would be to reduce insurance rates.”<sup>58</sup> When pressed by state legislators, insurance company executives have admitted that “tort reform will not lower rates.”<sup>59</sup>

After the Nevada Legislature responded to lobbying by physicians’ groups and in the summer of 2002 passed a cap of \$350,000 on noneconomic damages in medical malpractice cases, the major insurance companies operating in the state announced the cap would not cause any reduction in malpractice insurance rates. To the contrary, three major insurance companies applied to

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<sup>55</sup> ST. PAUL FIRE & MARINE INSURANCE COMPANY, MEDICAL PROFESSIONAL LIABILITY, STATE OF FLORIDA (1986) (memorandum on file with author).

<sup>56</sup> Attachments to letter from Thomas Rudd, Aetna, to Florida Insurance Commissioner Bill Gunter (Aug. 8, 1986) (letter and attachments on file with author).

<sup>57</sup> *Health-Care Reform—Bush’s Insurance-Cap Plan a Proven Failure*, SEATTLE TIMES, May 16, 1991, at A12.

<sup>58</sup> *Tort Reforms Don’t Cut Insurance Rates, Study Finds*, 14 LIABILITY WEEK No. 29, at 1, 8 (July 19, 1999).

<sup>59</sup> A representative of the Ohio Health Insurance Company gave this testimony before the Wyoming legislature. Tom Morton, *Malpractice Rates Prompt Goodbye*, CASPER STAR TRIBUNE, May 3, 2003, available at <http://www.casperstartribune.net/articles/2003/05/03/news/casper>. Testifying before the New Jersey legislature, the CEO of the MII Group of Insurance Companies, when asked by Assemblyman Paul D’Amato whether her company would reduce, or at least not raise, premiums if the legislature passed damage caps, replied “No, we’re not telling you that.” Meeting of the New Jersey Assembly Joint Committee of Banking & Insurance and Health and Human Services on Medical Malpractice, June 3, 2002, reported in Press Release, Americans for Insurance Reform, Industry Insiders Admit—and History Shows: Tort Reform Will Not Lower Insurance Rates (June 2, 2003), available at <http://www.insurance-reform.org/pr/Quotes.pdf>.

the state Division of Insurance for rate increases ranging from 16.9% to 93%.<sup>60</sup> Similarly, after an Ohio law capping noneconomic damages at \$500,000 in medical malpractice cases took effect in January 2003, the major malpractice insurers in Ohio announced that they would not lower rates because of the new law, noting the lingering effect of the market conditions that caused them to raise rates in the first place.<sup>61</sup>

Despite this lack of evidence that tort reform, and noneconomic loss damage caps in particular, will alleviate fluctuations and increases in insurance premiums, the proponents of tort reform seem minimally interested in empirical reality. Powerful interest groups such as the insurance industry lobby and the AMA see a propitious political opportunity to obtain legal changes that would reduce their exposure to liability suits and damage awards, something they would want in any event, even if insurance rates do not drop significantly. State medical societies have prepared slick packets designed to convince physicians that malpractice lawsuits and high jury awards for noneconomic damages are the reason why insurance rates have been climbing. Doctors, who hardly relish being sued and live in fear of a large judgment that will exceed their insurance coverage, are a receptive audience for messages assailing the tort system. They have little reason to question the claims of their state medical societies and have even less time to undertake independent research into the actual trends in the tort system and the multiple factors that cause insurance price cycles.

Also, state legislatures are often unaware of the empirical reality. Most lack the staff resources to gather and assess the data and rely simply on what a bill's proponents and opponents tell them. Some state legislatures do not hold organized hearings at which information or contrary views could get aired. On the federal level, the current Republican leadership in Congress has been bringing tort reform bills capping noneconomic loss damages in health care cases up for floor votes without putting the bills through a full hearing process. The lack of hearings may be intended to avoid subjecting the argument that a

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<sup>60</sup> Joelle Babula, *Medical Liability Company Requests Premium Increase*, LAS VEGAS REV.-J., Feb. 11, 2003, at 2B; Joelle Babula, *Medical Liability Laws: Doctors Remain Unsatisfied*, LAS VEGAS REV.-J., Jan. 27, 2003, at 1B; Joelle Babula, *Medical Malpractice: Insurer Has No Plans to Lower Costs*, LAS VEGAS REV.-J., Aug. 10, 2002, at 1A; Joelle Babula, *State Insurance Program Holds Off on Lowering Rates*, LAS VEGAS REV.-J., Aug. 14, 2002.

<sup>61</sup> Laura A. Bischoff, *Taft Signs Malpractice Reform Bill; Caps on Awards for Pain and Suffering*, DAYTON DAILY NEWS, Jan. 11, 2003, at B1; Phil Porter, *Effects of New Ohio Law To Take Time, Experts Say*, COLUMBUS DISPATCH, Jan. 17, 2003, at 1B.

damages cap would help alleviate the insurance crisis to critical factual analysis.

Although tort reform bills proposed or enacted around the country have included features such as limits on punitive damages, elimination of joint and several liability, changes to the collateral source rule, and shortened statutes of limitations, noneconomic loss damages have been a favorite target of tort reformers. One reason is that it is more politically feasible to obtain limits on these types of damages than it is to pass caps on economic loss.<sup>62</sup> It is widely perceived as unfair and unduly harsh to provide accident victims with less than their actual out of pocket losses for medical and rehabilitation expenses and lost wages. Noneconomic damages, however, are perceived as compensating for injuries that are less real and less tangible, because they are not physically verifiable and they are not readily quantified according to monetary measures set by the marketplace. This leads to the accusation that jury awards for noneconomic loss do not “make whole” in the way that wage replacement or medical cost damages do, and thus are arbitrary and subjective. If critics assume that juries pick arbitrary numbers influenced more by emotion than by marketplace evaluations of worth, legislating an equally arbitrary number to cap noneconomic loss damages is seen as somehow reasonable or fair.<sup>63</sup>

What the critics of noneconomic loss fail to appreciate, however, is that measuring economic losses, especially future losses, can be equally arbitrary

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<sup>62</sup> Only Nebraska, Indiana, and Virginia have caps on total damages, including economic loss damages in medical malpractice cases. The Nebraska cap is \$1,250,000. NEB. REV. STAT. ANN. § 44-2825 (1) (2002). The Nebraska cap survived a state constitutional challenge in *Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43 (Neb. 2003). The Indiana cap is also \$1,250,000. IND. CODE ANN. § 34-18-14-3 (Michie 1998). The Indiana Supreme Court upheld the Indiana statute as consistent with the state constitution in *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 599 (Ind. 1980). Virginia caps total damages at \$1,500,000 but allows annual increases of \$50,000 until July 1, 2008, when a final increase of \$75,000 will take effect. VA. CODE ANN. § 8.01-581.15 (Michie 2003). In Louisiana, for doctors who participate in the state patient compensation fund, total damages are capped at \$500,000 plus interests and costs, but this cap does not apply to future medical costs. LA. REV. STAT. ANN. § 40:1299.42 (West 2004). New Mexico also caps total recovery in medical malpractice actions at \$600,000, except for past medical care. N.M. STAT. ANN. § 41-5-6 (Michie 1978). For future medical costs, New Mexico makes the tortfeasor responsible for paying expenses as they are incurred, up to \$200,000, with the remainder paid by the state patient compensation fund. *Id.* § 41-5-7. In addition to these states, eighteen states have some form of cap on noneconomic damages. These vary widely. Some apply only to medical malpractice; some apply only to wrongful death; some apply in all personal injury actions; some are indexed to inflation; some provide for step increases over time. The state caps are summarized and updated in periodic reports by the ATRA. AMERICAN TORT REFORM ASSOCIATION, TORT REFORM RECORD 2-3, 30-35 (2004), available at [http://www.atra.org/files.cgi/7802\\_record6-04.pdf](http://www.atra.org/files.cgi/7802_record6-04.pdf). In five states courts have struck down caps on noneconomic damages as unconstitutional. *Id.*

<sup>63</sup> See Finley, *supra* note 7, at 851.

and subjective. Moreover, the aspects of injury that are compensated through noneconomic loss damages are quite real and often devastating, and the elements of life compensated by these damages are often those we cherish most. Debilitating pain or depression that severely diminishes the quality of life is only one thing compensated through noneconomic loss damages. Reproductive health, fertility, sexual enjoyment, intimacy, and caring for and enjoying loved ones—all these priceless facets of what make us fully human are societally valued by tort law through the device of noneconomic loss damages. While monetary compensation for these losses cannot “make whole” in the sense of eliminating pain or restoring impaired sexual function, economic loss compensation for a job one can never do again also does not “make whole” in the sense of restoring one’s ability to work. Noneconomic loss damages, no less than economic loss damages, are the tort system’s way of signaling what our society values and deems worth protecting. A society that regards only the wage earning and medical bill paying aspects of life worth defending would be a diminished and impoverished society.<sup>64</sup>

Because noneconomic loss damages respond to quite real injuries to invaluable human interests, it is essential that any legislature considering a limitation on them have some awareness of the actual effect of a cap. If the cap is unlikely to have much salutary effect in lowering insurance rates or addressing the market conditions that cause “hard market” cycles in insurance, then what will it do? What types of injuries will be most affected? What types of people will lose more of their jury awards? These pressing equity issues require serious empirical study. In states that have capped noneconomic damages, the most seriously injured people recover less of their compensatory awards, because it is in the more serious injury, higher damage cases, where the amount awarded by the jury is most likely to exceed the statutory cap.<sup>65</sup> Lawyers are also less willing to bring suits acknowledged to be meritorious unless they cross a certain threshold of economic loss damages, no matter how devastating the injury and how compelling the proof of negligence or medical error. For example, in California, which has capped noneconomic loss damages in medical malpractice cases since 1976, parents whose babies or

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<sup>64</sup> For a full elaboration of these responses to criticisms of the role of noneconomic loss damages, see *Finley, supra note 7*.

<sup>65</sup> In most states, and in the proposed federal HEALTH Act, juries are not instructed about the existence or amount of a cap, because of the concern that they would conform their awards upward to the statutory ceiling, or adjust economic damages upwards to compensate for the cap. Thus, damage caps are applied by the judge in rendering the final judgment based on the verdict. See, e.g., HEALTH Act of 2004, H.R. 4280, § 4(c), 108th Cong. (2004).

children die as a result of obstetrical or medical malpractice have difficulty finding lawyers willing to take their case, since the majority of the compensation will be in noneconomic loss damages, while the babies and children who survive the medical error can find lawyers willing to pursue these high economic damages cases.<sup>66</sup>

While the effect of depriving the most severely injured people with the highest jury awards of significant amounts of compensation might have been expected, I have conducted empirical research that brings to light another troubling and discriminatory impact: Women tort victims, the elderly, particularly elderly women, as well as children who suffer the ultimate injury of death, are all disproportionately disadvantaged by a cap on noneconomic loss damages. The discriminatory effect of caps makes them a particularly unfair, and ill-advised, legislative alteration, especially when it also fails to cure the problem it purports to address.

## II. WHO BEARS THE BRUNT OF TORT REFORM?: GENDER- AND AGE-BASED INEQUITIES OF DAMAGE CAP LAWS

Scholarly attention to the gender and racial fairness of the U.S. tort system is a recent development, pursued by some feminist legal scholars and critical race theorists. While damages law issues receive scant scholarly attention compared to other tort law issues, racial and gender equity concerns in damages law are receiving growing attention.<sup>67</sup> Economic loss damages to compensate for past or future wage loss and health care expenses are the most fundamental type of damages and have been relatively immune from attack by the proponents of tort reform. However, this type of damages provides the most benefit to higher wage earners, and thus women, minorities, and the poor receive lesser amounts of economic loss compensation than more economically well off white men. For projecting future wages, attorneys and judges often use wage projection data that are explicitly race and gender based, building on the assumption that past race and gender wage disparities will remain ensconced in the future. There have been some successful legal challenges on

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<sup>66</sup> Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, at C1.

<sup>67</sup> See, e.g., Jamie Cassels, *Damages for Lost Earning Capacity: Women and Children Last!*, 71 CAN. B. REV. 445 (1992); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Finley, *supra* note 7; Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996).

equality grounds to using gender- and race-based data to project future economic loss, but, as the research of Professor Martha Chamallas shows, the widespread use of such data is a further reason that white men recover more in economic loss damages than women and minorities.<sup>68</sup>

This makes noneconomic loss damages take on greater importance for women, racial minorities, and the elderly, who may suffer little economic loss when injured by defective products or negligent treatment since their wage earning days are past. Moreover, the elderly have a lower life expectancy, which reduces future medical costs. Damages for aspects of injury that are not tied directly to market-valued activities are likely to comprise a greater proportion of the overall tort damages award for social groups whose wage earning activity is less valued in the market. My research shows that, for women in particular, noneconomic loss damages can be of crucial importance and comprise a significantly greater proportion of women's overall tort damage awards than for men's damage awards.

The reasons go beyond the lower wages earned by women. Several types of injuries that are disproportionately suffered by women—sexual assault, reproductive harm, such as pregnancy loss or infertility, and gynecological medical malpractice—do not affect women in primarily economic terms. Rather, the impact is felt more in the ways compensated through noneconomic loss damages: emotional distress and grief, altered sense of self and social adjustment, impaired relationships, or impaired physical capacities, such as reproduction, that are not directly involved in market based wage earning activity. Many of these most precious, indeed priceless, aspects of human life are virtually worthless in the market, and there is social resistance to seeing them solely or primarily in commodified, market-based terms.<sup>69</sup> Society, and thus jurors, tends to understand these injuries in noneconomic, nonmarket referenced ways. Consequently, noneconomic loss damages become the principal means by which a jury can signal its sense that these types of harm

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<sup>68</sup> Chamallas, *supra* note 67, at 84.

<sup>69</sup> See, e.g., Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993) (discussing the conflict between commodified and noncommodified concepts of damages); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing the shortcomings of universal commodification and universal noncommodification); see also VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 150–57 (1985) (exploring the societal condemnation of courts, throughout history, that limited tort awards for the death of a child to the economic value of the child to the family).

are serious and profound and provide a woman plaintiff with what it regards as adequate compensation.

To ascertain the effect of caps on noneconomic loss damages on various types of injuries and different types of injured plaintiffs, I have examined jury verdict data to determine how juries allocated their awards to successful plaintiffs between economic loss and noneconomic loss.<sup>70</sup> I selected cases that identified the breakdown of damages between economic and noneconomic loss and when the noneconomic loss award exceeded \$250,000, which is the cap proposed for health care actions in pending federal legislation such as the HEALTH Act of 2004. I also selected cases in which the gender of the injured party was clearly identified to determine whether there were any patterns of gender difference in the way juries allocate damages. Furthermore, I limited my study to plaintiff jury verdicts, excluding settlements, because a damages cap law only overtly affects verdicts and because many settlements are confidential.<sup>71</sup>

Also, I primarily concentrated on jury verdict reports in medical malpractice cases from California. I chose California because it has had a cap of \$250,000 on noneconomic damages in medical malpractice cases in place since 1975, instituted in a law known as MICRA, the Medical Injury

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<sup>70</sup> Jury verdict reporters are an admittedly imperfect and incomplete source of data about the outcomes in tort cases, although as one of the most readily available sources of such data they are widely relied on by scholars, legislatures, and activists seeking tort reform. They report a somewhat random sample of cases, and often exclude settlements. They tend to feature larger verdicts and tend to greatly underreport defense verdicts, because plaintiffs' lawyers and newspaper accounts are two of the major sources of information for the reporter services. Excluding defense verdicts—cases where the damage award is zero—from the calculations of medians and averages obviously heavily skews the results. For these reasons, jury verdict reporting services are useless as a source for making any claims about overall mean and median verdict trends in tort cases in the nation, or in any particular state or locality. See Zimmerman, *supra* note 1; Press Release, Center for Justice & Democracy, Flawed Jury Data Masks Trends (Mar. 23, 2002), available at <http://www.centerjd.org/press/release/020322.pdf>. However, these biases towards higher amount verdicts do not affect my study, since I am focusing only on larger verdicts that exceed a cap, and since I am only interested in how juries allocate awards to successful plaintiffs. Obviously a cap law will have no effect on injured plaintiffs who lose their cases. Thus, although my sample is selected from a random sample, there is no reason to think my conclusions are not representative of tort verdicts that are not included in jury verdict reporters.

<sup>71</sup> A cap on recoverable damages can have an indirect effect on settlement values, because claims adjusters and attorneys will factor likely recoveries into their case valuation assessment for settlement purposes. It is not possible, however, to gather sufficient data to study whether a damages cap law has any impact on settlement values, because there is no requirement to record settlements with courts, many settlements are confidential, and many do not designate any allocation between economic loss and noneconomic loss.

Compensation Reform Act.<sup>72</sup> The California cap amount has become the gold standard for tort reform proponents: The AMA holds California up as a model and urges its \$250,000 cap on other legislatures, and Congress has used it as guidance for selecting \$250,000 as the cap figure in pending bills such as the HEALTH Act of 2004. Thus, studying the effects of the MICRA cap in California can serve as a basis for projecting likely similar effects nationwide should Congress or state legislatures enact a similar cap on noneconomic loss damages in health care liability cases. Additionally, I examined jury verdict reporter data from Florida and Maryland to provide expert testimony in litigation challenging the cap laws in effect in both those states.<sup>73</sup>

In each state that I have examined thus far, my research demonstrates that women receive greater proportions of their tort awards in the noneconomic loss damages categories than men do and that many of the types of “female” injuries mentioned above are compensated overwhelmingly through noneconomic loss damages. Elderly plaintiffs, both men and women, also receive greater proportions of their tort recovery as noneconomic loss, which is not surprising given that a retired elderly person is not likely to have significant lost wages. But, even within the category of elderly plaintiffs, there was a pronounced gender difference: Elderly women receive a notably larger share of their compensatory damage awards in noneconomic loss categories than elderly men. Consequently, tort reform laws that cap noneconomic loss damages or that alter joint and several and other damage apportionment rules—so as to make it more difficult for a plaintiff to collect the full noneconomic damages award—have an adverse impact on women. They will, on average, reduce women’s actual damage recoveries more than men’s, by putting an upper limit on the amount of noneconomic loss damages but not putting such a cap on economic loss. This will exacerbate existing inequities in damage awards stemming from gender-based wage inequities that get reflected in economic loss damages, because a cap on noneconomic loss damages inflates the importance of economic loss damages, making them an even greater proportion of allowable tort recoveries. Even more troubling than this disproportionate effect on reducing women’s tort recoveries, caps on noneconomic loss damages can render certain types of injuries that are compensated almost entirely by noneconomic loss damages—such as sexual

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<sup>72</sup> CAL. CIV. CODE § 3333.2 (West 1997). The California Supreme Court sustained the cap, concluding that it did not offend due process or equal protection in *Fein v. Permanente Medical Group*, 695 P.2d 665, 682 (Cal. 1985).

<sup>73</sup> I am also in the process of gathering data from additional states, but the analysis is preliminary.

harm, reproductive loss, or abuse of elderly nursing home patients—virtually worthless as tort claims. This will lead lawyers to be unwilling to pursue such claims, leaving the injured people uncompensated and the underlying harmful conduct undeterred.

#### A. *California*

Using Westlaw and LEXIS searches of California jury verdicts in medical malpractice cases from 1992 through 2002 in which plaintiffs prevailed and recovered more than the MICRA cap of \$250,000 in noneconomic loss damages, I identified 131 general, “gender-neutral” medical malpractice cases involving adult plaintiffs that fit my criteria. By general, “gender-neutral” malpractice I mean treatment for conditions or injuries that could happen to any person regardless of their gender. I excluded from this category, and analyzed separately, gender-specific cases such as gynecological malpractice and cases where the injury involved pregnancy loss or impaired female fertility. I also analyzed separately cases in which infants or children were the injured plaintiffs and distinguished between cases in which the child died and injuries that the child survived.

In these 131 “gender-neutral adult plaintiff” cases, sixty-seven plaintiffs were female, and sixty-four were male. I calculated the average and median compensatory damage award and the average allocation between economic and noneconomic damages, as follows:

Table 1: Female Plaintiffs in California (67 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,227,411	100%
Average Economic Damages	\$268,754	22%
Average Noneconomic Damages	\$958,657	78%

Additionally, the median award to women was \$879,892. The median economic award was \$112,150. The median noneconomic award was \$536,500. I also calculated the percentage of each individual compensatory award attributable to noneconomic damages and computed that average: For women plaintiffs on average, 76.35% of their jury verdicts were for noneconomic damages. I then calculated the effect of applying the MICRA cap to these women's jury verdicts. The average compensatory award to the women post-MICRA reduction was \$633,850. The cap on noneconomic damages reduced women's tort recoveries by 48.4%. The post-MICRA median for women was \$377,700. This is 43% of the median award before the cap and represents a 57% reduction in the median recovery.

The data for men breaks down as follows:

Table 2: Male Plaintiffs in California (64 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$2,341,996	100%
Average Economic Damages	\$1,216,112	52%
Average Noneconomic Damages	\$1,125,883	48%

Additionally, the median award for men was \$937,250. The median economic award was \$388,737, and the median noneconomic award was \$600,000. After reducing the awards because of the MICRA cap, the average post-MICRA recovery by men was \$1,396,112. The cap on noneconomic loss damages reduced men's tort recoveries by 40%. The post-MICRA median for men was \$643,894. This is 68.7% of the men's pre-cap median and constitutes a 31% reduction in the median award. The average compensatory awards to the male plaintiffs were significantly higher than women's awards to begin with. The MICRA cap served to increase the disparities. Before applying the cap, women's average jury awards were 52% of men's average awards. After the MICRA reduction, the women on average recovered only 45% of men's

average recoveries. The MICRA cap also noticeably increases gender disparities in the median award. Women's pre-cap median jury award was 94% of the men's median. After application of the cap, women's median was down to 58.6% of the male median.

The disparities between men and women would be even greater, but for a few cases in the male plaintiff sample where juries allocated unusually high percentages of the compensatory damages in the noneconomic loss category. In one such case, *Stanaford v. Jung*,<sup>74</sup> the male plaintiff was disabled and unemployable, and the doctor severed a nerve when performing a neck dissection to remove a tumor, causing life-long speech and swallowing problems. The jury gave the entire \$300,000 award for noneconomic loss. In another case, *Bennett v. Manor*,<sup>75</sup> which involved a retarded male mental patient who died from a bowel rupture, the jury allocated 99% of the damages to noneconomic loss. This plaintiff obviously did not incur any lost wages or future medical expenses. In addition, there were five cases in which elderly and retired men over seventy years old were the plaintiffs, and the juries allocated from 76% to 100% of the damages to noneconomic loss. In cases where the injury involved impaired sexual functioning, juries also allocated a significant majority of male plaintiffs' damages to noneconomic loss. For example, *Singh v. Brookside Hospital*<sup>76</sup> involved a misdiagnosis and mistreatment of stomach pain that resulted in partial removal of the bowel and scrotum, leaving a twenty-eight year-old man impotent and infertile. The jury awarded 70% of the total \$1,293,894 award for noneconomic damages. In *Burtscher v. Ikuta*,<sup>77</sup> the physician mistreated a fifty-four year old male's genital warts by putting undiluted acetic acid on the scrotum and penis, resulting in severe burns, permanent scarring, and severe pain if sexual intercourse was attempted. The jury awarded 80% of the total \$501,000 award to noneconomic damages. These cases illustrate that when men suffer sexualized injuries, or when they are not participating in the market economy due to age or disability, they are also severely affected by noneconomic damage caps.

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<sup>74</sup> 31 Trials Digest 3d 146, 2000 WL 1084674 (Sup. Ct. Riverside County Cal. June 21, 2000).

<sup>75</sup> 19 Trials Digest 3d 15, 1999 WL 504604 (Sup. Ct. Los Angeles County Cal. Apr. 22, 1999).

<sup>76</sup> 6 Trials Digest 2d 40, 1995 WL 547375 (Sup. Ct. Costa County Cal. Mar. 29, 1995).

<sup>77</sup> 39 Jury Verdict Weekly (California) 14 (Sup. Ct. Orange County Cal. Oct. 4, 1994) (available on LEXIS in California Jury Verdict file).

To study how juries treat elderly plaintiffs, I analyzed separately the cases from the sample in which the plaintiffs were elderly, defined as over 65, or retired.

Table 3: Elderly Plaintiffs (Both Male and Female) in California (18 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$803,267	100%
Average Economic Damages	\$275,267	34%
Average Noneconomic Damages	\$528,000	66%
Average Post-MICRA Recovery	\$525,267	65.4%

As the post-MICRA average recovery was 65.4% of the total average jury award, the cap produced an average 34.6% reduction in recoverable damages. Of these eighteen cases, the proportion of the total awards allocated to noneconomic damages was greater than in the larger sample of male adults of all ages, as was the reduction in recovery caused by the cap. But the gender pattern appeared reversed. The elderly men in this sample fared worse under the MICRA cap than elderly women, receiving a greater proportion of their jury award as noneconomic damages and experiencing a larger reduction in average recoverable damages. But when I calculated median awards, elderly women were more adversely affected by MICRA.

Table 4: Elderly Male Plaintiffs in California (7 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$559,478	100%
Average Economic Damages	\$71,907	13%
Average Noneconomic Damages	\$487,571	87%
Average Post-MICRA Recovery	\$321,907	57.5%

As the post-MICRA average recovery was 57.5% of the total average jury award, the cap produced an average 42.5% reduction in recoverable damages. Additionally, the median jury award for elderly men was \$380,831. The median award for economic damages was \$53,610, and the median award for noneconomic damages was \$373,000. The median recovery after the MICRA cap was \$277,200, which was 72.8% of the pre-cap median.

Table 5: Elderly Female Plaintiffs in California (11 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$958,405	100%
Average Economic Damages	\$553,727	42%
Average Noneconomic Damages	\$404,678	58%
Average Post-MICRA Recovery	\$654,678	68.3%

As the post-MICRA average recovery was 68.3% of the total average jury award, the cap produced an average 31.7% reduction in recoverable damages. Additionally, the median jury award was \$970,000. The median economic award was \$271,320 and the median noneconomic award was \$518,000. After application of the MICRA cap, the median recovery for elderly women was \$521,320, which is 53.7% of the pre-MICRA median. The cap had a more pronounced effect in reducing elderly women's median recovery than elderly men's.

As I studied these elderly plaintiff cases more closely for possible reasons why the men received a greater proportion of their average awards for noneconomic damages, contravening the usual pattern, an explanation became apparent. Most of the elderly men died as a result of the medical error, whereas a majority of the elderly women survived. Consequently, the women faced greater future medical costs than the deceased men. Cases where death is the injury display some of the highest allocations of damages to noneconomic loss categories of any type of case; thus, the apparent gender reversal in this elderly plaintiff sample has more to do with the distinction between death and nondeath than with gender differences.

In cases where the malpractice resulted in the death of an adult patient, the results are as follows:

Table 6: Adult Deaths (Both Sexes) in California (25 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,234,179	100%
Average Economic Damages	\$481,901	39%
Average Noneconomic Damages	\$752,278	61%
Average Post-MICRA Recovery	\$733,947	59.5%

As the average post-cap recovery in these adult death cases was 59.5% of the pre-MICRA total average jury award, the MICRA cap produced a 40.5% reduction in the average recoverable damages.

I then broke down the adult death cases by gender, and a gender-based disparate impact of the cap was apparent.

Table 7: Adult Male Deaths in California (11 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,628,097	100%
Average Economic Damages	\$778,734	47.8%
Average Noneconomic Damages	\$849,363	52.2%
Average Post-MICRA Recovery	\$1,006,006	61.7%

In each case, the average percentage of damages allocated to noneconomic loss was 65.4%. The average percentage of jury awards that the males lost because of the MICRA cap was 34%. Additionally, the male death median total jury award was \$837,500. The median economic damage award was \$383,581. The median noneconomic damage award was \$580,000.

Table 8: Adult Female Deaths in California (14 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,007,611	100%
Average Economic Damages	\$270,183	27%
Average Noneconomic Damages	\$737,425	73%
Average Post-MICRA Recovery	\$520,186	51.6%

In each case, the average percentage of damages that juries allocated to noneconomic loss was 78.2%, noticeably higher than the allocation for male death cases. The average amount of the verdict that women lost due to the MICRA cap was 48%, contrasted with an average 34% reduction for male death cases.

After the MICRA cap, women's average recovery was 51.7% of the average male post-cap recovery. Before the cap, women's average recovery was 62% of the male average, demonstrating that the cap increased the disparity between male death damages and female death damages.

Additionally, before the MICRA cap, the median jury award for the female death cases was \$902,285, which is 7% higher than the male death median. The median economic jury award in female death cases was \$201,810, and the median noneconomic award was \$761,850.

After the MICRA cap, the median recovery in female death cases was \$451,810, 50% of the pre-cap median. Whereas before the cap the female median was 7% higher than the male median, as a result of the cap the female death median was now 28.7% less than the male median. In other words, the female median recovery was now only 71.3% of the male median.

These results demonstrate that in cases where the medical malpractice resulted in the ultimate, most severe injury of death, the cap on noneconomic damages caused an average 40% reduction in recovery. It produced even

greater gender disparities. Women on average lost a greater percentage of their jury awards, and both the women's overall average and median recoveries were reduced to a much greater extent than men's overall average and median.

After analyzing these adult death cases, I focused on obstetrical and pediatric malpractice cases to compare those in which the baby or child survived and those in which the malpractice caused death. I was interested in determining whether the California lawyers—who were reportedly unwilling or extremely reluctant to handle obstetrical malpractice cases that resulted in the death of infants and attribute their posture to the effect of the noneconomic damages cap<sup>78</sup>—are accurate in their perception that the cap on noneconomic loss damages makes these expensive and time consuming cases not worth pursuing. Consistent with the experience-based perception of the California lawyers, whether the baby lives or dies as a result of the physician's negligence makes all the difference in how the jury allocates the damages. The impact of the cap in cases where an infant or child died as a result of malpractice was even more draconian than in the adult death cases.

Table 9: Infant and Child Deaths in California (8 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,393,508	100%
Average Economic Damages	\$31,633	2.3%
Average Noneconomic Damages	\$1,361,875	97.7%
Average Post-MICRA Recovery	\$281,633	20%

The MICRA cap caused an 80% reduction in average recoverable damages. The average reduction of damages from the cap in each case was 61.5%. The median award before the cap was \$1,207,500. After application of the MICRA

<sup>78</sup> Treaster, *supra* note 66, at C1.

cap, the median recovery was \$254,282. This is a 79% reduction in the median recovery. Both the average and median post-MICRA recoveries are barely above the cap amount of \$250,000, highlighting the tendency of the cap to function as a ceiling on recovery in these types of cases where a family is devastated by the death of a child. This profoundly discriminatory effect of the cap is particularly irrational and cruel, in light of the lack of any evidence that the cap will produce lower insurance premiums or increased availability of insurance.

These results are in sharp contrast with cases in which the baby or child does not die from the negligent medical error.

Table 10: Infant and Child Survivors in California (21 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$8,640,339	100%
Average Economic Damages	\$7,426,006	86%
Average Noneconomic Damages	\$1,214,333	14%
Average Post-MICRA Recovery	\$7,669,339	88.7%

Families of infants and children who survived the malpractice experienced only an 11.3% reduction in recoverable damages, in contrast to the 80% reduction experienced by families of dead babies and children. Also, the median jury award in cases where the infants or children lived was \$6,092,897. After application of the MICRA cap, the median for damages was \$5,489,186. This is only a 10% reduction in the median, compared to the 79% reduction in the median when the baby or child dies.

I then broke out the obstetrical cases, in which the baby was injured during delivery. I focused separately on obstetrical cases because obstetricians suffer some of the highest malpractice premiums of any medical specialty.

Table 11: Infant Deaths in Obstetrical Cases Only in California (4 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$896,750	100%
Average Economic Damages	\$60,500	6.8%
Average Noneconomic Damages	\$836,250	93.3%

Table 12: Infant Survivors in Obstetrical Cases Only in California (16 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$9,303,637	100%
Average Economic Damages	\$7,981,764	85.8%
Average Noneconomic Damages	\$1,321,873	14.2%

As these figures demonstrate, obstetrical malpractice cases in which the infants survive are undoubtedly among the highest overall damages cases, but only a small percentage of the total damages are attributable to noneconomic loss. This is because these surviving children are often severely disabled and face a lifetime of extensive and expensive medical, therapeutic, and special educational services. In these cases, which account for the higher insurance premiums levied against obstetricians, a cap on noneconomic damages has little effect in reducing overall tort liability. The MICRA cap on average deprived the parents of the living but disabled babies in the obstetrical cases of 11.5% of their overall compensatory jury awards. In contrast, where the obstetrical negligence kills the baby, overall damages are noticeably lower, and

almost all of the entire awards are for noneconomic loss damages. This is because the parents are spared the devastating longterm medical costs but suffer the ultimate devastation of losing a child. In these cases, the California cap serves as a virtual ceiling on total recovery.

Laws that cap noneconomic loss damages result in an unintended form of partial but significant immunity for doctors whose negligence results in the most irreparable grievous harm—the death of a baby or young child. In light of the extremely high costs, including expert fees, of pursuing complex medical malpractice cases such as obstetrical and pediatric malpractice, it is apparent that the California cap makes cases in which the infant dies a losing or very tenuous economic proposition for plaintiffs and their attorneys. Given their high cost to develop and pursue, with a likely capped recovery of little more than \$250,000, attorneys are left the unpalatable choice of foregoing the usual contingency fee and doing these cases as a form of pro bono work or leaving the devastated family with only a small net recovery for the loss of a child after deduction of expenses and fees. As a business matter, it is understandable why California's cap on noneconomic loss damages in medical malpractice cases leaves parents whose child has died unable to find attorneys and effectively foreclosed from the civil justice system, no matter how egregious the medical error and no matter how strong the case on causation and liability. If Congress were to pass one of its pending bills that apply a noneconomic damages cap in obstetrical cases,<sup>79</sup> this paradoxical and punitive effect of foreclosing parents whose child has died from seeking redress through the tort system will expand nationwide.

After examining these general malpractice cases and adult and child death cases, I separately analyzed gynecological malpractice cases. These are cases where only women are plaintiffs and do not encompass the obstetrical cases in which the plaintiff was the damaged infant. These cases included misdiagnosed and delayed treatment for cervical or ovarian cancer, unnecessary hysterectomies, misdiagnosed ectopic pregnancies that ruptured, improperly performed episiotomies during delivery that resulted in a torn sphincter or permanent disfigurement and incontinence, vulvular burns when a radiologist erroneously applied a caustic chemical to a woman's vagina, and death from undiagnosed internal bleeding after a cesarean section. I examined these gender specific cases to test the hypothesis that juries would perceive these types of injuries as affecting women primarily in noneconomic ways, as

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<sup>79</sup> See S. 2061, 108th Cong. (2004); S. 2207, 108th Cong. (2004).

mothers and lovers, rather than as wage earners. If so, then a cap on noneconomic loss damages would have a particularly harsh impact on women who are victims of gynecological malpractice. I found twenty-eight cases in which the noneconomic awards exceeded the \$250,000 cap, all obviously involving female plaintiffs.

Table 13: Gynecological Malpractice in California (28 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,399,085	100%
Average Economic Damages	\$342,714	24.5%
Average Noneconomic Damages	\$1,056,321	75.5%

The average percentage of the verdict attributable to noneconomic damages in each of these twenty-eight cases was 83%. Additionally, the median jury award was \$826,335. The median award for economic damages was \$89,625, and the median award for noneconomic damages was \$500,000. The median allocation of the award to noneconomic damages was 92.5%. Just as the table of averages demonstrates, these medians highlight the importance of noneconomic damages to women who experience gynecological malpractice.

After applying the MICRA cap, the average compensatory award was \$503,171, producing a 64% reduction in women's average recoveries. The average reduction in each case attributable to MICRA was 42%, and the median reduction in each case was 36.6%. The median recovery after the MICRA cap was \$300,000, which is only \$50,000, or 20%, above the cap itself. The median amount of reduction in each case due to the cap was \$287,000.

As this data demonstrates, the cap on noneconomic loss damages caused women victims of gynecological malpractice to lose an even greater proportion, average, and median amount of damages awarded by juries than

women in general gender neutral medical malpractice cases. This suggests that a bill such as S. 2061, currently pending in the U.S. Senate, which would cap noneconomic loss damages only in gynecological and obstetrical malpractice cases, would be an especially cruel, discriminatory blow to gender equity in the civil justice system.<sup>80</sup>

The reason juries place so much of the compensation for gynecological injuries in noneconomic damages categories is that the ways in which gynecological injuries impact women—impaired fertility, impaired sexual functioning, incontinence, miscarriage, and scarring in personally sensitive body areas—do not have high marketplace, or lost-wage, impacts. Rather, the impact of these injuries is regarded as primarily a matter of emotional suffering, lost sense of self, impaired self-esteem and ability to engage in intimate relationships, and pain and discomfort. Given the extremely high proportion of awards for these injuries that depend on noneconomic loss damages, damage cap laws for health care cases will have a significantly adverse impact on women.

In sum, my analysis of California medical malpractice jury verdicts reveals that a cap on noneconomic loss damages will deprive women of a greater proportion of their jury awards than men, intensifying already existing disparities between women's average tort awards and men's. The elderly will also lose a greater share of their jury awards, as will the parents of children who die as the result of medical error. In gynecological malpractice cases—such as misdiagnosis of cervical or ovarian cancer, or error that results in female infertility or reproductive loss—juries often award up to 75% of the damages in noneconomic categories, and the \$250,000 cap on these damages had a dramatic downward impact on women's recoveries for their injuries.

### *B. Florida*

Under a comprehensive tort reform statute passed by the Florida Legislature late in 1999, the state eliminated joint and several liability for noneconomic loss damages in most tort cases, not just medical malpractice, and eliminated it in part for total damage awards over \$200,000.<sup>81</sup> The Florida Legislature chose to attack noneconomic loss damages in this indirect way, because the Florida Supreme Court had previously declared unconstitutional,

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<sup>80</sup> See S. 2061.

<sup>81</sup> 1999 Fla. Laws ch. 99-225, § 27 (amending FLA. STAT. ANN. § 768.81 (West 1997)).

under the state constitution, an earlier enactment that placed an outright cap on noneconomic loss damages.<sup>82</sup> By eliminating joint and several liability for noneconomic loss damages, the Florida statute makes it more likely that a person injured by multiple tortfeasors will be unable to collect the full amount of their noneconomic loss award. Accordingly, it disadvantages those types of plaintiffs, such as women and the elderly, for whom the noneconomic loss award is a greater proportion of their overall damages. In 2003, despite the earlier Florida Supreme Court ruling, the legislature re-instituted caps for medical malpractice cases only.<sup>83</sup> Florida law now caps noneconomic damages at \$500,000 per claimant and per practitioner, with an aggregate limit of \$1,000,000. For cases against emergency room doctors and facilities, the cap is \$150,000 per claimant and \$300,000 in aggregate noneconomic damages against practitioners and \$750,000 per claimant with an aggregate of \$1,500,000 per facility. Judges may award damages over the cap in exceptional cases, up to a \$1,000,000 limit.

I examined cases from the Florida Jury Verdict Reporter from January 1, 1989, through December 31, 1999, in which the report identified the gender of the plaintiff and included how the award was allocated between economic loss categories, such as medical costs and past and future wage loss, and noneconomic loss categories, such as pain and suffering, emotional distress, and grief. I excluded loss of consortium claims, because this harm is considered entirely noneconomic loss, so both men and women will be equally adversely affected by a cap law.

For general tort claims with damages over \$200,000—other than sexual assault, gynecological malpractice, nursing home negligence, and wrongful death cases, which I examined separately—there were fifty-one Florida cases that fit my selection criteria, with a total of fifty-four plaintiffs, twenty-four women and thirty men. These cases included a variety of tort claims—medical malpractice, products liability, premises liability, and automobile accidents. I call this group the “gender-neutral” tort claims, because they involve types of injuries that can affect men and women equally, unlike the sexual assault and gynecological malpractice cases.

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<sup>82</sup> *Smith v. Dep't of Ins.*, 507 So. 2d 1080 (Fla. 1987).

<sup>83</sup> 2003 Fla. Laws ch. 416 (amending FLA. STAT. ANN. § 766.118 (West 1997)).

Table 14: Female Plaintiffs with “Gender-Neutral” Tort Claims in Florida  
(24 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$2,627,738	100%
Average Economic Damages	\$1,100,982	41.9%
Average Noneconomic Damages	\$1,526,756	58.1%

Table 15: Male Plaintiffs with “Gender-Neutral” Tort Claims in Florida  
(30 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$2,936,629	100%
Average Economic Damages	\$1,474,810	50.2%
Average Noneconomic Damages	\$1,461,819	49.8%

I then examined Florida cases that involved sexual assault as the injury, with causes of action based on negligence and that specified how the damages were allocated between economic loss and noneconomic loss damages. The cases included medical malpractice, negligent security, negligent supervision, and negligent hiring claims. There were thirty-nine cases that fit the selection criteria, with a total of forty-two plaintiffs. Of these forty-two plaintiffs, forty or 95% were female. The three male plaintiffs were an adult prisoner abused by a cellmate who sued the county jail for failing to remove him from his abuser and two young boys sexually abused by a priest and a teacher. With

male sexual abuse tort cases growing as a result of the pedophilia scandal engulfing the Catholic Church, any tort reform law that would cap noneconomic loss damages in this type of personal injury case might as well be named the Pedophile Priest Protection Act. Damages in these cases were overwhelmingly for noneconomic loss, to a far greater extent than in tort cases generally, but an even greater percentage of the women's damages were in the noneconomic loss category.

Table 16: Female Plaintiffs with Sexual Assault Injuries Claiming Negligence as a Cause of Action in Florida (36 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$864,777	100%
Average Economic Damages	\$71,922	8.3%
Average Noneconomic Damages	\$792,855	91.7%

Table 17: Male Plaintiffs with Sexual Assault Injuries Claiming Negligence as a Cause of Action in Florida (3 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,157,975	100%
Average Economic Damages	\$392,975	34%
Average Noneconomic Damages	\$765,000	66%

These data show that noneconomic loss damages are a much higher proportion of total compensatory tort awards for sexual assault victims than for tort awards overall. Sexual assault victims are overwhelmingly female, and female plaintiffs noneconomic loss damages comprise virtually the entire award—91.6%. For male plaintiffs noneconomic loss damages are two-thirds of the total award. As with the gynecological malpractice cases, the injury from sexual assault affects the victim primarily in noneconomic ways. While there will certainly be some initial medical bills, and perhaps some ongoing mental health therapy costs, the lasting impact is not about medical bills and lost wages, as with a physical disability, but on one's sense of self, on one's comfort with the body and intimate expression, and on feelings of security in going about daily activities and interactions. When juries award significant noneconomic damages to a sexual assault victim, they are expressing the community value that the injury is quite real, severe, long-lasting, and deserving of recognition and deterrence through a tort award far greater than an amount to cover the often modest medical costs. Thus, statutes that cap full recovery for noneconomic loss damages in personal injury cases will have a devastatingly disproportionate impact on sexual assault victims; for women in particular, a cap can become tantamount to a virtual ceiling on total recovery. Depending on the costs, difficulties of proof, and need for expensive expert testimony, a damages cap may serve as a strong disincentive for lawyers to accept these cases, even though the injuries are some of the most calamitous that anyone can suffer.

The next set of cases I examined were gynecological malpractice cases in which the direct victims are all female. (Again, I excluded loss of consortium damages to male spouses.) These cases included improperly performed gynecological surgery; unnecessary hysterectomies; misdiagnoses, such as misread pap smears or mammograms; and premature pregnancy loss. As I did in my California analysis, I excluded obstetrical malpractice cases that resulted in damaged babies, because the victims primarily compensated in such cases are the children, not the women on whose bodies the malpractice was committed. There were fifteen cases that fit my selection criteria, all with female direct victim plaintiffs.

Table 18: Gynecological Malpractice in Florida (15 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$426,256	100%
Average Economic Damages	\$72,888	17.1%
Average Noneconomic Damages	\$353,368	82.9%
Median Compensatory Damages	\$391,368	100%
Median Noneconomic Damages	\$300,000	76.6%

The percentage of jury awards attributable to noneconomic loss is much higher than for tort awards generally and echoes the pattern I found in California, where the noneconomic loss component for gynecological malpractice was over 75% of the total average awards.

The next set of Florida cases that I examined were wrongful death cases. While some states in the U.S. limit wrongful death recoveries to pecuniary loss damages, including the lost value of services and support, Florida is one of the states that also permits the recovery of noneconomic loss damages in wrongful death cases, including grief and pain and suffering attributable to the loss. As I reviewed verdict reports for the general personal injury cases, I began to notice that in Florida, as in California, when a tort resulted in the death of the victim, juries apportioned a significant share of the award to noneconomic damages. To ascertain whether there were gender differences in these awards, I pulled wrongful death cases from the other categories, and analyzed them separately. I used gender of decedent, rather than gender of surviving plaintiffs, since the decedent was the actual victim of the tort, and juries would use his or her life as the basis for calculating awards. I found ninety-six cases decided between

1989 and 1999 in which the allocation of the compensatory award between economic loss items of damages and noneconomic loss damages was specified. Of these ninety-six cases, thirty-two decedents were female and sixty-four were male.

Table 19: Female Deaths in Florida (32 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$4,995,506	100%
Average Economic Damages	\$527,610	10.6%
Average Noneconomic Damages	\$4,467,896	89.4%
Median Compensatory Damages	\$1,500,000	100%
Median Noneconomic Damages	\$1,200,000	80%

Table 20: Male Deaths in Florida (64 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$2,535,507	100%
Average Economic Damages	\$863,614	34.1%
Average Noneconomic Damages	\$1,671,893	65.9%
Median Compensatory Damages	\$1,001,870	100%
Median Noneconomic Damages	\$650,000	64.9%

While this table shows that a significantly higher proportion of the compensation in male death cases is for noneconomic loss than in overall male tort cases, on average the male victims received remarkably less of their total compensatory award as noneconomic damages than the female decedents. The notably high proportion of total awards in the noneconomic loss category when a woman is killed by a tortfeasor may be due to the fact that even when the deceased woman was a wage earner who was contributing to the family income, members of society—including jurors—tend to regard women's contributions to their families as primarily nurturing and caretaking. Similarly, society may place a higher monetary value on the emotional bonds between mother and child than on these bonds between father and child, reflecting the greater role mothers tend to play in the daily caretaking of children. Based on these data, it appears that statutory caps on noneconomic loss damages will have an adverse impact on overall recoveries for wrongful death and that this disadvantageous impact will be especially pronounced in the case of female decedents.

A final category of cases that I analyzed was nursing home cases, involving medical malpractice or caretaking malpractice or neglect. I examined these cases both to ascertain effects of damage cap laws on elderly plaintiffs and to examine gender effects. During the ten-year period in Florida, there were verdict reports for a total of seventy-one nursing home cases. Females were the victim/plaintiffs in forty-four, or 62%, of the cases. Men were the victim/plaintiffs in thirty-three, or 46%, of the cases. (Some cases had multiple plaintiffs.) The greater proportion of women plaintiffs is not surprising, given the greater average longevity of women.

Of these seventy-one cases that resulted in plaintiffs' verdicts, twenty-one cases provided the breakdown of damages between economic and noneconomic loss, with thirteen female plaintiffs and nine male plaintiffs.

Table 21: Female Plaintiffs in Nursing Home Cases in Florida (13 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$2,185,658	100%
Average Economic Damages	\$78,443	3.6%
Average Noneconomic Damages	\$2,107,215	96.4%
Median Compensatory Damages	\$233,893	100%
Median Noneconomic Damages	\$160,000	68.4%

Table 22: Male Plaintiffs in Nursing Home Cases in Florida (9 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$312,872	100%
Average Economic Damages	\$126,757	40.5%
Average Noneconomic Damages	\$186,115	59.5%
Median Compensatory Damages	\$163,310	100%
Median Noneconomic Damages	\$100,000	61.2%

These data show that nursing home negligence cases, which involve elderly plaintiffs, have a much higher proportion of noneconomic damages than general tort awards, so damage cap laws will disproportionately affect the elderly. This disadvantageous impact will be particularly pronounced for elderly women, since they have a significantly greater proportion of their damages awarded as noneconomic loss damages. Indeed, as with sexual assault cases, a noneconomic damages cap law may set the effective ceiling on tort recoveries for elderly women, while still allowing elderly men to collect a greater amount of the total awarded by the jury.

Many state tort reform laws also cap punitive damages. Some set an overall upper limit, while others limit punitive damages to a certain multiplier of the economic loss compensatory award. The latter type of damage cap will exacerbate the effects documented above of gender disparities in how juries allocate economic and noneconomic damages for men and women plaintiffs. Men will tend to collect more in punitive damages than women. My data also revealed that sexual assault cases invoke a much higher percentage of punitive damage awards than tort cases in general—not surprising, since egregious,

intentional misconduct lies at the heart of these claims. In the Florida sexual assault cases I examined, punitive damages were awarded in ten of the thirty-nine cases, or 25.6%. Thus, caps on punitive damages will have a greater limiting effect on sexual assault awards, where the victims are overwhelmingly female. Professors Rustad and Koenig have done an empirical study of punitive damages in medical malpractice cases, which reveals that while punitive damages are rare, they are awarded primarily in cases of sexual assault or abuse by a health care provider, where women are again far more often the victims than men.<sup>84</sup> In products liability punitive damage cases, outside of the unique situation of asbestos litigation, where the injured are primarily working class men, punitive damages, while quite rare, have clustered around a few products—primarily drugs and medical devices used on women’s bodies in connection with sex or reproduction: Dalkon Shield, Copper-7 IUD, and breast implants.<sup>85</sup> For these reasons, caps on punitive damages that tie them to the amount of economic loss only can have a disparate impact on injured women.

### C. Maryland

Maryland has had a cap on noneconomic loss damages in all personal injury cases since 1986. The cap is \$350,000 for cases arising after July 1986 and \$500,000 for cases arising after October 1, 1994, with some allowable increase for inflation.<sup>86</sup> I reviewed case reports supplied by Metro Verdicts Monthly, a national jury verdict reporting service that covers Maryland courts. I selected personal injury cases decided between 1988 and 1999 in which the damages were more than the initial cap amount of \$350,000 and that identified the gender of the plaintiff and the allocation of damages between economic and noneconomic.

There were eighty-eight cases that fit this selection criteria, with 107 plaintiffs, of which sixty-three were women and forty-four were men. In all these cases, the average noneconomic award to women was \$714,881, and the average noneconomic award to men was \$495,457. Thus, the average noneconomic award to women was \$219,424 more than that to men, or 44% more than men’s noneconomic awards. The median noneconomic award for women was \$450,000, while the men’s median was \$331,250. The median

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<sup>84</sup> Koenig & Rustad, *supra* note 29.

<sup>85</sup> *Id.*

<sup>86</sup> MD. CODE ANN. CTS. & JUD. PROC. § 11-108 (2003).

noneconomic award to women was 36% higher than for men and shows that more than half of women's cases were affected by the \$350,000 cap, while less than half of men's cases were similarly affected.

Thirty-two of the cases were medical malpractice, twenty-six female plaintiffs and twelve male plaintiffs. The average noneconomic award to the women was \$839,341; for men it was \$544,429. Women's average noneconomic award was \$294,912 more than men's, or 54%, greater. The median noneconomic award to women was \$350,000 and the male median noneconomic award was \$379,000. This shows that approximately half of both men's and women's awards would be affected by the \$350,000 cap, but with the higher average for women's noneconomic awards, women would experience greater reductions in damages.

Twenty-three of the cases were auto cases, with seventeen female plaintiffs and fourteen male plaintiffs. The average noneconomic award to the women was \$669,474, and the average noneconomic award to men was \$450,354, a difference of \$219,120 or 48.6%. The median noneconomic auto award to women was \$450,000, which was \$125,000 greater than the median award to men of \$325,000. This higher median and average for women shows that more women's cases would be affected by the cap, and in greater amounts. In wrongful death cases fourteen decedents were women and eleven were men. In the women's cases the average noneconomic award was \$1,264,655; for men it was \$674,242, or \$590,413 less than for women. Women's average noneconomic awards were 87.5% greater than men's. The median noneconomic award for women in wrongful death cases was \$750,000, \$250,000 greater than the men's median award of \$500,000. This shows, as in the other states, that death cases will be hard hit by a cap, and women's death cases more so than men's.

I also separately analyzed gynecological malpractice cases, including misdiagnosed breast cancer, negligence in prenatal care that caused pregnancy loss, botched hysterectomies, and malpractice that resulted in infertility. There were nine gynecological malpractice cases in my sample with noneconomic damages over the cap amount, and the juries' allocation was consistent with the pattern in California: on average 70.35% of the women's total awards were for noneconomic loss damages.

Table 23: Gynecological Malpractice in Maryland (9 cases)

<i>Category</i>	<i>Amount</i>	<i>Percent of Total Damages</i>
Average Total Compensatory Award	\$1,346,500	100%
Average Economic Damages	\$399,278	29.7%
Average Noneconomic Damages	\$947,222	70.3%
Median Compensatory Damages	\$1,000,000	100%
Median Noneconomic Damages	\$600,000	60%
Median Economic Damages	67,852	-
Average Percent of Noneconomic Damages in Each Case	-	82%
Average Damages Post-Cap	\$732,611	54.4% (pre-cap)
Median Percent Noneconomic Damages in Each Case	-	88%
Median Damages Post-Cap	\$417,852	41.7% (pre-cap)

The reduction in women’s average and median recoveries would be even greater under the proposed federal cap of \$250,000. With this lower cap, women would recover only 48.2% of their pre-cap average award, and only 31.7% of their pre-cap median award.

The compelling facts of the gynecological malpractice cases within the data set highlight the serious, life-altering nature of these uniquely female injuries. They are also highly illustrative of the tendency to compensate pregnancy loss primarily through noneconomic loss damages and the adverse impact of a cap on women. In *Harrison v. Seigel*,<sup>87</sup> a forty-one year old women who had been trying to conceive throughout her ten years of marriage, presented to her OB/GYN because of blood spotting and missed menstrual periods. Without performing any sort of a pregnancy test, the physician performed a dilation and curettage ("D&C"), which involves scraping the uterus. It turned out that plaintiff was pregnant with a desperately wanted fetus, but because of this D&C procedure, her membranes ruptured, and the 32-week old fetus was delivered very prematurely, with severe cerebral palsy as a result. The jury awarded damages only to the mother for the malpractice committed on her and for her loss. All but \$2960, or 99.5% of the \$602,960 total award, was in noneconomic loss damages, and because of the cap law, the mother's damages had to be reduced to \$352,960, depriving her of 58% of the jury award.

In *Warehime v. Franks*<sup>88</sup> the defendant improperly performed breast reduction surgery and post-operative care on the female plaintiff, compromising blood flow to the nipple. As a result, plaintiff had to undergo numerous corrective surgeries over an extended period, and was left with permanent scarring and distortion of the breast. Demonstrating that juries regard this type of injury as having primarily a noneconomic impact on a woman, of the total damages of \$617,852, \$550,000, or 89%, were for noneconomic loss.

Two breast cancer misdiagnosis cases in the data set, *Linsin v. Community Radiology Ass'n*<sup>89</sup> and *Condon v. Anne Arundel Medical Center, Inc.*,<sup>90</sup> further illustrate this tendency to compensate breast injuries through extensive reliance on noneconomic damages. In both cases, mammograms or breast biopsies were misdiagnosed in younger women under forty, preventing sufficiently early detection of breast cancer. By the time the cancers were properly

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<sup>87</sup> 4 Metro Verdicts Monthly No. 1, at 26 (Cir. Ct. Montgomery County Md. Nov. 15, 1991) (available on LEXIS in Maryland Metro Verdicts Monthly file).

<sup>88</sup> 10 Metro Verdicts Monthly No. 2, at 15 (Cir. Ct. Baltimore County Md. Oct. 21, 1997) (available on LEXIS in Maryland Metro Verdicts Monthly file).

<sup>89</sup> 6 Metro Verdicts Monthly No. 12, at 462 (Cir. Ct. Montgomery County Md. June 29, 1994) (available on LEXIS in Maryland Metro Verdicts Monthly file).

<sup>90</sup> 5 Metro Verdicts Monthly No. 10, at 375 (Cir. Ct. Anne Arundel County Md. July 14, 1993) (available on LEXIS in Maryland Metro Verdicts Monthly file).

detected, the plaintiffs either had terminal cancer, or required far more extensive surgery, with greatly reduced life expectancy. In *Linsin*, of the total verdict of \$2,007,570, 54%, or \$1,081,000 was for pain and suffering. The jury's award had to be substantially reduced by \$731,000 because of the cap, down to \$1,276,570. *Linsin* lost 36.4% of her compensatory award. In *Condon*, of a total verdict of \$3,061,719, 58.8%, or \$1,800,000, was for pain and suffering. Again, as a result of the cap this injured woman was substantially undercompensated compared to the jury's determination of the value of her injury. Her verdict was reduced by \$1,450,000, down to \$1,611,719, so the cap deprived her of 47.3% of her jury award.

Although not a medical malpractice case, another permanent breast injury in the data set also powerfully demonstrates how juries recognize this type of injury through noneconomic damages. In *Wertz v. Wakefoose*,<sup>91</sup> the twenty-four year old female plaintiff was rear-ended in a high impact collision by defendant driver, who was driving a truck owned by the defendant company. As a result of shoulder and muscular injuries suffered in the collision, plaintiff had to undergo severe and permanently disfiguring breast reduction surgery. Of her total jury award of \$3,156,000, the jury awarded \$2,367,000, or 75%, for pain and suffering. Thus, because of the \$350,000 cap, her award was reduced by 63.9%, or almost two-thirds, to \$1,139,000. The jurors' actual award for noneconomic damages reflects their understanding of the pain, impaired self-esteem, dignity, and personal life prospects a young woman with disfigured breasts must endure for the rest of her life. A statute that caps noneconomic damages does not permit full implementation of this fundamental understanding, and thus undermines the social valuation function of juries.

There was only a single sexual assault case in the data set. It illustrates, similar to the Florida cases, how these types of injuries, which disproportionately happen to women, are compensated primarily through noneconomic loss damages, and thus women sexual assault victims are adversely affected by the cap. In *Solder v. Queen Anne-Belvedere Ass'n*,<sup>92</sup> a twenty-five year old woman was kidnapped in her building lobby, dragged into the laundry room, orally sodomized, and brutally beaten. The assailant was a convicted felon who the landlord knew had been illegally residing in the building, with a set of keys, despite the landlord's assurances to tenants,

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<sup>91</sup> 6 Metro Verdicts Monthly No. 6, at 224 (Cir. Ct. Montgomery County Md. Dec. 2, 1993) (available on LEXIS in Maryland Metro Verdicts Monthly file).

<sup>92</sup> 5 Metro Verdicts Monthly No. 12, at 460 (Cir. Ct. Baltimore County Md. July 23, 1993) (available on LEXIS in Maryland Metro Verdicts Monthly file).

including plaintiff, that no one other than carefully screened tenants could live in the building and have keys. The injury was severe, traumatic, and with life-long emotional consequences. But, as a twenty-five year old waitress who could go back to work, the victim did not suffer significant wage loss. Reflecting these facts, the jury's entire \$800,000 verdict was for noneconomic loss, and it had to be reduced to the statutory cap amount of \$350,000. As the *Solder* case demonstrates, the Maryland cap in some instances can operate as the upper limit on recovery for brutal and traumatic rape and other forms of sexual assault, to the serious detriment of women who disproportionately are victimized by these forms of assault.

There was also a single nursing home case, involving serious negligent abuse of an elderly woman in a nursing home. For this type of elderly female plaintiff, noneconomic loss damages are likely to constitute the majority of a tort recovery, because a retired plaintiff suffers no wage loss from life-altering injuries. Moreover, since women on average live longer than men, women comprise a greater proportion of the residents of nursing homes and other long-term care facilities, and thus any malpractice and abuse within these settings falls disproportionately on women. In this case, *King v. Montgomery County Maryland Nursing Enterprise*,<sup>93</sup> a nursing aide poured scalding water into a foot massager bath and placed the elderly female plaintiff's feet into the scalding water for thirty minutes, resulting in third degree burns, a three month hospitalization with skin graft surgery, and permanent impaired mobility. Pain and suffering was 78.6% of the verdict: \$2,000,000 out of a total of \$2,542,557. The cap reduced the verdict by \$1,485,000, removing 58.4% of the woman's compensatory award.

These few Maryland cases of elder abuse, sexual assault, gynecological malpractice, and sexualized disfiguring injuries to women are consistent with the patterns identified in California and Florida: For these highly gendered types of injuries that happen disproportionately to women, noneconomic loss damages comprise the significant majority of tort compensation. Caps on these damages can approach ceilings on recovery for these devastating injuries, as in sexual assault cases, or can deprive women of from a third to over half of the compensation deemed by a jury to be necessary, fair, and reasonable.

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<sup>93</sup> 9 Metro Verdicts Monthly No. 4, at 24 (Cir. Ct. Montgomery County Md. Sept. 18, 1996) (available on LEXIS in Maryland Metro Verdicts Monthly file).

## CONCLUSION

So, what will the future look like in a world where more and more states and the federal judicial system place caps on noneconomic loss damages? Based on my research, several lessons or cautionary tales emerge. While doctors and other entities will receive little relief from the hard market/soft market cyclical nature of the insurance markets, which produce periodic spikes in insurance premiums, women and elderly accident victims will suffer a significant disparate impact from caps. They will lose greater percentages of their total compensatory awards than men who are of working age. These disparate negative effects will be especially pronounced for elderly women. A cap on noneconomic loss damages will also unduly limit recoveries in cases where the victim died as a result of the negligent misconduct. This limitation on death recoveries will have the greatest impact in cases where an infant or child dies; the cap will come close to serving as a ceiling on recovery, leaving the families of dead babies shut off from seeking redress and recognition through the tort system. Cap laws will also place an effective ceiling on recovery for certain types of injuries disproportionately experienced by women, including sexual assault and gynecological injury, that impair childbearing or sexual functioning. By depressing the recovery value of these injuries, lawyers will be increasingly unwilling to take the cases of sexual assault victims, women suffering from fertility loss or loss of the ability to enjoy sexual intimacy, or elderly women victimized by neglect and abuse in nursing homes. As caps on noneconomic loss damages make the civil justice system an increasingly unavailable option for these types of plaintiffs with these types of injuries, any deterrent value from the tort system will be lost, and general societal funds will be stretched to absorb the medical and lost productivity costs flowing from these serious injuries. Also lost will be the opportunity for tort suits to bring chronic problems or abuses to public and regulatory attention. But the most profound loss of all will be to the fairness and equality of our civil justice system, as the effects of cap laws send the message that women, the elderly, and the parents of dead children should not bother to apply.

Another unintended consequence of the legislative battle over caps is that women's rights advocacy groups and elder advocacy groups are starting to recognize the disparities discussed in this paper, causing these groups to put

tort reform and damage equity issues on their agenda for the first time.<sup>94</sup> Traditionally, the arena of tort law and accident compensation was thought to be gender and age neutral, and thus not of particular interest to organizations such as National Organization for Women or American Association of Retired Persons. As these groups start to take an interest in the tort system, new political coalitions are emerging between the consumer rights and trial lawyers' groups that traditionally fought tort reform, and women's rights and women's health organizations. This emerging alliance is likely to be much more effective in combating tort reform legislative initiatives, or in advancing grounds for litigation challenges, than the old alliance was alone. Legislative support for a proposed bill dissipates once it is demonstrated that the legislation has gender discriminatory effects.<sup>95</sup>

The ultimate lesson of this research for legislatures is that when facing proposals for tort law reform, legislatures should consider not only whether there is any solid empirical evidence that damage caps will alleviate the problems in the insurance markets, but also the effect of caps on access to justice. It is important not to lump all accident victims into one indistinguishable category and assume some single norm of race, gender, class, and age. Legislatures must be attentive to discriminatory disparate impacts of damage cap laws on women and the elderly and should avoid enacting provisions that so starkly undermine our national ideals of equality and equal access to the civil justice system.

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<sup>94</sup> For example, as word about my research on the effects of damage caps has spread, I have been contacted by representatives of women's rights organizations such as the National Organization for Women and some of its state affiliates, sexual assault and domestic violence victims' advocacy organizations, and women's health groups advocating for women suffering from breast and ovarian cancer or from the reproductive system effects of the drug DES. These groups have placed tort reform on their list of issues to watch as a result of my findings.

<sup>95</sup> For example, I previously presented my work on the gender impact of several tort reform proposals, including damage cap provisions, to the U.S. Congress when it was considering federal products liability reform bill during the mid 1990s. As a result, several women's health and women's advocacy groups got involved in the legislative debates and lobbying efforts for the first time. The Congressional Caucus for Women's Issues undertook examination of the issue, prompting several key members of that caucus to change their position on the legislation. A bill that had once seemed easily on its way to passage was then derailed because of concerns that it would discriminate against women. See, e.g., *The Product Liability Fairness Act of 1995: Hearings on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce, and Tourism of the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 164 (1995) (statement of U.S. Representative Patsy Mink); *id.* at 131 (statement of Professor Lucinda M. Finley); *The Product Liability Fairness Act: Hearings on S. 687 Before the Senate Comm. on the Judiciary*, 103d Cong. 78 (1994) (statement of Professor Lucinda M. Finley); *Product Liability Standards: Hearings on H.R. 1910 Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 103d Cong. 43 (1994) (statement of Stephanie Kanarek).

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## ARTICLE

### MARYLAND TORT DAMAGES: A FORM OF SEX-BASED DISCRIMINATION

By: Rebecca Korzec\*

#### I. INTRODUCTION

Maryland law provides that “compensatory damages are not to be awarded in negligence or strict liability actions absent evidence that the plaintiff suffered a loss or detriment.”<sup>1</sup> At the same time, Maryland imposes a statutory cap on noneconomic damages in tort claims for personal injury.<sup>2</sup> First enacted in 1986, the statutory cap imposed a \$350,000 limit on recovery of noneconomic damages.<sup>3</sup> Following a Court of Appeals of Maryland decision that the cap did not apply to wrongful death actions,<sup>4</sup> the Maryland General Assembly explicitly modified the statute to include wrongful death actions.<sup>5</sup> At the same time, the cap was increased to \$500,000 for causes of action arising after October 1, 1994.<sup>6</sup> In 1996, the Maryland General Assembly increased the cap by an additional \$15,000 for causes of action arising after October 1, 1995.<sup>7</sup> A single cap applies to the action of an injured spouse and includes the award for loss of consortium.<sup>8</sup>

In this essay, I argue that the statutory cap on noneconomic damages in Maryland disproportionately disadvantages women. For this reason, the cap, although facially neutral, is in fact discriminatory

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1. *Owens-Illinois v. Armstrong*, 87 Md. App. 699, 735, 591 A.2d 544, 561 (1991).
2. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b) (West 1986).
3. *Id.*, see also *Gooslin v. State*, 132 Md. App. 290, 298, 752 A.2d 642, 646 (2000) (holding cap does not violate equal protection claims); *Edmonds v. Murphy*, 83 Md. App. 133, 573 A.2d 853 (1990), *aff'd* 325 Md. 342, 370, 601 A.2d 102, 116 (1992) (holding a cap on noneconomic damages is constitutional).
4. *United States v. Streidel*, 329 Md. 533, 552, 620 A.2d 905, 915 (1993).
5. MD. CODE ANN., CTS. & JUD. PROC. § 11-108(a)(1)(ii) (West Supp. 1994) [hereinafter CTS. & JUD. PROC.].
6. CTS. & JUD. PROC. § 11-108(b)(2)(i).
7. CTS. & JUD. PROC. § 11-108 (West Supp. 1995). The \$15,000 increase will take effect on October 1 of each year.
8. *Oaks v. Connors*, 339 Md. 24, 37-38, 660 A.2d 423, 430 (1995); see also *Klein v. Sears, Roebuck & Co.*, 92 Md. App. 477, 492-94, 608 A.2d 1276, 1283-84 (1992) (holding spouse entitled to damages for loss of services, affection, society and sexual relationship deceased spouse would have contributed if spouse had lived).

in its impact on female litigants.<sup>9</sup> In addition, the cap may have the unintended effect of limiting the quality of the legal representation available to female tort litigants in Maryland.<sup>10</sup> Moreover, several other issues in Maryland tort law may inadvertently contribute to discrimination against women litigants. These include the Maryland adherence to contributory negligence as a complete bar to negligence claims and the Maryland approach to punitive damages. Ultimately, Maryland tort law, although facially neutral, disadvantages women.

## II. DEVALUATION OF WOMEN'S WORK

Scholars have suggested that both the method of calculating tort damages and tort reform legislation,<sup>11</sup> such as statutory limits on noneconomic damages, harm women.<sup>12</sup> For example, Martha Chamallas argues that courts rely on gender-based generalizations in calculating damages for future earnings.<sup>13</sup> Employing gender-based tables founded on economic patterns for women results in lower awards for individual female plaintiffs because the tables project the fact that women earn less than men.<sup>14</sup> Such damage awards perpetuate inaccurate gender stereotypes of women, devalue the employment contributions of individual women and deprive those women of just compensation for their tort injuries.<sup>15</sup>

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9. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635, 643-47 (2006); see generally, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988) [hereinafter *A Lawyer's Primer*].

10. Daniels, *supra* note 9; see also Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1313 (2004) [hereinafter *Hidden Victims*].

11. See, e.g., Finley, *Hidden Victims*, *supra* note 10; see generally Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); see, e.g., Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 465, 503-04, (1998) [hereinafter *Architecture of Bias*].

12. See Finley, *Hidden Victims*, *supra* note 10, at 1267-80, 1313; see generally Michael L. Rustad, *Nationalizing Tort Law: The Republican Attack on Women, Blue Collar Workers and Consumers*, 48 RUTGERS L. REV. 673, 733, 744 (1996); Thomas Koenig & Michael Rustad, *His & Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1, 1, 5 (1995).

13. Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994) [hereinafter *Questioning the Use*].

14. *Id.*

15. *Id.*

The devaluation of women's work results in lower tort damage awards which fail to adequately compensate them for their losses.<sup>16</sup> In the aggregate, women's tort damage awards are lower than their male counterparts.<sup>17</sup> Since the goal of tort damages is to make the tort victim whole, it is not surprising that tort damage awards reflect and reinforce gender disparities.<sup>18</sup> In particular, feminist scholars argue that "tort law devalues the lives, activities, and potential of women, and that one can see this at work both in substantive rules governing liability and in common methods for calculating damages."<sup>19</sup> Women earn less than their male counterparts in all work environments;<sup>20</sup> therefore, their economic damages are lower than awards for male plaintiffs.<sup>21</sup> Martha Chamallas has demonstrated that in a 1995 guide for personal injury lawyers, awards to male plaintiffs were twenty-seven percent higher than for women.<sup>22</sup> Significantly, a nationwide study of personal injury awards by juries indicated that women received lower median and mean awards for compensatory damages.<sup>23</sup>

These studies demonstrate that tort damages reinforce gender-based stereotypes about women. Contemporary tort law elevates some types of injuries, giving them more legal protection and awarding greater damages. Claims and injuries associated with women often receive less legal protection in the societal hierarchy which tort doctrine reflects. For example, tort doctrine places a higher value on physical injury and property loss than emotional harm. Moreover, tort reform legislation stresses the importance of economic losses, such as lost income and medical expenses over noneconomic damages, such as

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16. *Id.*

17. *Id.*

18. See generally John C. Coughenour, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994).

19. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 198 (1999).

20. In 2005, women were paid seventy-seven cents for each dollar paid to men. See America's Union Movement, EQUAL PAY (Mar. 1, 2007), <http://www.aflcio.org/issues/jobseconomy/women/equalpay.html>. Much of the reason for this is that women perform unpaid childcare, household work and care of elderly relatives in more significant numbers than men. Scholars have argued that such unpaid work should be compensated and recognized. See, e.g., JOAN WILLIAMS, UNBENDING GENDER 125-27 (2000) (proposing that the non-wage earning spouse receive a joint property right in the income of the wage earning spouse); Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 3-6 (1996).

21. See Chamallas, *Architecture of Bias*, *supra* note 11, at 464-65.

22. CHAMALLAS, *supra* note 19.

23. *Id.*

pain and suffering, emotional distress, hedonic damages, loss of companionship and punitive damages.<sup>24</sup>

Maryland substantive tort law, like tort law in general, does not recognize a cause of action for caretakers of children when those children are injured. As the child's primary caretaker, women usually have greater responsibility for a child's safety and happiness. Women caretakers tend to place an extremely high value on their relational ties to their children.<sup>25</sup> When a child is seriously injured, the child's caretaker also suffers. For example, the caretaker must deal with the child's injury and disability. The caretaker may feel intense grief and anxiety, even guilt. The effects of an accident can be life-altering for the caretaker as well as the child.<sup>26</sup> Yet, tort law largely dismisses the caretaker's loss, assigning it mere derivative status. It denies a claim for "filial consortium" for the loss of the child's companionship.<sup>27</sup> These losses fall more heavily on women as primary caretakers of children in our society. Today, most child caretakers are women -- mothers, grandmothers, paid nannies, babysitters and day care providers.<sup>28</sup> Although popular culture praises "stay at home" mothers, such as the "soccer mom" who abandons the workplace to raise her children, tort law provides her no separate claim for the devastating impact of her child's injury on her daily life. The most dramatic, painful and devastating event in the mother's life, as primary caregiver of her child, is likely not compensable in tort law.

### III. GENDERED TORT REFORM

Added to this problem of undercompensation is the "tort reform" <sup>29</sup> movement, leading to limits on damage recovery, such as statutory

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24. *Id.* at 199.

25. Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 135, 153, 157-58 (1992).

26. *See, e.g.*, Regina Graycar, *Before the High Court: Women's Work: Who Cares?*, 14 SYDNEY L. REV. 86, 87 (1992) (describing hardships suffered by a mother caring for her disabled daughter).

27. Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41, 50 (1989) [hereinafter *A Break in the Silence*]. In 1997, Maryland changed wrongful death actions to permit parents to recover noneconomic damages for the wrongful death of an adult child. MD. CODE ANN., CTS. & JUD. PROC. § 3-904(e) (LexisNexis 2006).

28. *See, e.g.*, Becker, *supra* note 25 at 137, 213, 219. Most caretakers and maids in the United States today are immigrant women of color. BARBARA EHRENREICH & ARLIE RUSSELL HOCHSCHILD, *GLOBAL WOMEN: NANNIES, MAIDS AND SEX WORKERS IN THE NEW ECONOMY* 6-7 (Barbara Ehrenreich & Arlie Russell Hochschild eds., 2003).

29. *See generally supra* note 12.

caps. This reform is fueled by what business and insurance interests consider a litigation explosion, defined by excessive jury awards, increased class action litigation and frivolous suits. As in Maryland, the tort reform movement often saw the enactment of legislative limits or caps on noneconomic damages, often extending beyond medical malpractice and products liability claims, to include all personal injury claims.

As previously argued, these caps may have a negative impact on women. For example, an empirical study by Thomas Koenig and Michael Rustad indicates that women litigants are detrimentally affected when noneconomic damages are limited.<sup>30</sup> The study demonstrates that women comprise two-thirds of plaintiffs recovering punitive damages in medical malpractice cases, particularly in gender-linked cases involving sexual abuse, cosmetic surgery, childbirth and nursing home abuse.<sup>31</sup> Moreover, significant mass products liability litigation has focused on women's reproductive health and gender-linked injuries. These include the Dalkon Shield, Norplant, breast implants and super absorbent tampons. Clearly, limiting noneconomic damages in these products liability cases harms female plaintiffs. Although this gendered result may be completely inadvertent or unintended, its effect is devastating.

Koenig and Rustad demonstrate that limiting noneconomic damages disproportionately affects female litigants.<sup>32</sup> Women earn lower incomes, largely because they spend more time on unpaid child care, housekeeping and other relational care. As a result, female litigants tend to have lesser economic losses than their male counterparts.<sup>33</sup> Moreover, physical injuries to women may not result in significant damages awards since no current medical treatments may exist.<sup>34</sup> For example, a "soccer mom" who suffers injury by having to undergo a hysterectomy caused by a Dalkon Shield or other intrauterine device suffers little economic harm. Restricting or limiting her noneconomic damages may result in an insignificant award of damages. For those reasons, Martha Chamallas argues that: "For feminists who maintain that the market reflects and reinforces

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30. Koenig & Rustad, *supra* note 12, at 85.

31. *Id.* at 61-62.

32. *Id.* at 80.

33. *Id.* at 78-79.

34. See Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847, 847-57, 861-66, 870 (1997); see also Koenig & Rustad, *supra* note 12, at 64-77.

cultural biases and systems of privilege, changing tort law to curtail noneconomic damages seems misguided. They argue that such reform solidifies the tendency to privilege economic losses over noneconomic ones, and intensifies implicit gender bias in tort law.”<sup>35</sup>

Medical malpractice litigation has been a source of substantial reform efforts. Generally, advocates of caps on noneconomic damages argue for practical results rather than doctrinal purity. The argument goes that caps will lead to lower malpractice premiums for physicians preventing them from deserting certain medical specialties or geographical areas. Similarly, in the products liability arena, caps are viewed as an instrument for preventing manufacturer abandonment of significant innovation and product development or from engaging in a “race to the bottom” offering the least possible protection for the victims of defective products.

However, the nexus between damages caps and these legitimate policy issues remain attenuated. For example, in addressing the medical malpractice issue, a 2003 General Accounting Office study found:

Interested parties debate the impact these various measures may have had on premium rates. However, a lack of comprehensive data on losses at the insurance company level makes measuring the precise impact of the measures impossible. As noted earlier, in the vast majority of cases, existing data do not categorize losses on claims as economic or noneconomic, so it is not possible to quantify the impact of a cap on noneconomic damages on insurers’ losses. Similarly, it is not possible to show exactly how much a cap would affect claim frequency or claims-handling costs. In addition, while most claims are settled and caps apply only to trial verdicts, some insurers and actuaries told us that limits on damages would still have an indirect impact on settlements by limiting potential damages should the claims go to trial. But given the limitations on measuring the impact of caps on trial verdicts, an

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35. CHAMALLAS, *supra* note 19, at 202.

indirect impact would be even more difficult to measure.<sup>36</sup>

Moreover, Lucinda Finley's 2004 review of the efficacy of statutory limitations on noneconomic damages reached similar results.<sup>37</sup> She argues that women will be among the "hidden victims of tort reform" who will be less likely to obtain lawyers willing to represent them.<sup>38</sup> Professor Finley's empirical study included analysis of jury verdicts in Maryland, Florida and California. She concludes that women, children and the elderly will be most affected by damage caps, arguing: "[T]hese disparate negative effects will be especially pronounced for elderly women. . . . [C]ap laws will also place an effective ceiling on recovery for certain types of injuries disproportionately experienced by women, including sexual assault and gynecological injury, that impair childbearing or sexual functioning."<sup>39</sup>

Lucinda Finley concludes that decreasing the recovery value of these injuries for women will mean that lawyers will be unwilling to take meritorious claims which are not cost-efficient.<sup>40</sup> She argues that the effect of statutory damage caps will be "[T]he message that women, the elderly, and the parents of dead children should not bother to apply."<sup>41</sup>

#### IV. PUNITIVE DAMAGES

The Maryland approach to punitive damages aggravates the statutory cap problem by making it extremely difficult to recover punitive damages. For the plaintiff to recover punitive damages, the defendant must be characterized by "evil motive, intent to injure, or fraud,"<sup>42</sup> i.e., actual malice. Essentially a two-prong test has evolved. First, the plaintiff must demonstrate that the defendant had actual

36. U.S. GEN. ACCOUNTING OFFICE, MEDICAL MALPRACTICE INSURANCE: MULTIPLE FACTORS HAVE CONTRIBUTED TO INCREASED PREMIUM RATES 42-43 (2003).

37. Finley, *Hidden Victims*, *supra* note 10, at 1267-80.

38. *Id.* at 1313.

39. *Id.*

40. *Id.*

41. *Id.*; see generally Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393 (1993) (arguing that tort reform makes contingency fee-based law practices less profitable, forcing plaintiff's lawyers to represent fewer litigants or abandon the market altogether).

42. *Owens Corning v. Bauman*, 125 Md. App. 454, 533, 726 A.2d 745, 784 (1999); *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 460, 601 A.2d 633, 652 (1992).

knowledge of the defect. Second, the plaintiff must prove that the defendant exhibited deliberate disregard of the consequences of that defect.<sup>43</sup> Moreover, punitive damages must be proven by clear and convincing evidence.<sup>44</sup>

Noneconomic damage recovery, such as the award of punitive damages, is extremely important to women litigants because they help counteract the low value placed on women's economic claims.<sup>45</sup> Punitive damages, pain and suffering and other noneconomic damage awards help correct the bias in tort damage awards. Preferring economic losses over noneconomic claims reinforces implicit gender bias.

## V. COMPARATIVE FAULT AND CONTRIBUTORY NEGLIGENCE

Although the doctrine of comparative fault<sup>46</sup> is accepted in almost every jurisdiction, Maryland has not adopted it.<sup>47</sup> Comparative fault's widespread acceptance stems from the harshness of the contributory negligence rule which bars a plaintiff from any recovery against a tortfeasor, if the plaintiff was at fault in any respect in connection with the accident.<sup>48</sup> The harshness and potential unfairness of the contributory negligence approach is that it "[P]laces upon one party the entire burden of a loss for which two are, by hypothesis, responsible."<sup>49</sup> By contrast, the doctrine of comparative fault does not take this all-or-nothing approach to accident liability. Rather the doctrine proportionately reduces the accident victim's damages according to the victim's fault.<sup>50</sup> The doctrine can significantly alter the results in products liability and other litigation.<sup>51</sup>

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43. *Zenobia*, 325 Md. at 462, 601 A.2d at 653.

44. *Id.* at 469, 601 A.2d at 657.

45. Finley, *supra* note 34 (arguing that tort reform proposals have a "possible adverse impact on women and women's health.").

46. See DAVID G. OWEN, PRODUCTS LIABILITY LAW (2005) 811 n.1 [hereinafter OWEN, PRODUCTS LAW]; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 67, at 468-69 (5th ed. 1984).

47. The only other jurisdictions are Alabama, The District of Columbia, North Carolina and Virginia. See OWEN, PRODUCTS LAW, *supra* note 46.

48. *Id.* at 811.

49. W. PAGE KEETON ET AL., *supra* note 46.

50. OWEN, PRODUCTS LAW, *supra* note 46, at 811-12.

51. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § 1 cmt. a (2000); UNIF. APPOINTMENT OF TORT RESPONSIBILITY ACT § 3 (amended 2003), 12 U.L.A. 12 (Supp. 2006).

Maryland's contributory negligence doctrine may be especially problematic for women litigants. Feminist scholars argue that negligence's "reasonable person" standard may not reflect women's experiences and sensibilities.<sup>52</sup> The "reasonable person" standard is a mainstay of the view that law is objective in viewpoint. The objective, "reasonable person" standard is intended to encourage the trier of fact to reach an unbiased result, which avoids the perspective of either litigant.<sup>53</sup> However, this "objectivity" has been criticized as an example of "point-of-viewlessness,"<sup>54</sup> which actually ignores women's experiences by adopting the viewpoint of the dominant, male group.<sup>55</sup>

Maryland's view of the sole proximate harm issue complicates the contributory negligence problem. *Anthony Pools v. Sheehan*<sup>56</sup> is an example of these issues in current Maryland products liability law. In Maryland, plaintiff's contributory negligence defeats a negligence claim. However, simple contributory negligence cannot bar a strict liability in tort claim.<sup>57</sup> To bar the strict liability claim, the plaintiff must assume the risk.<sup>58</sup> Nevertheless, in Maryland, the doctrine of "sole proximate cause" may bring ordinary contributory negligence back into a products liability case.<sup>59</sup> In a strict products liability claim, the plaintiff must still demonstrate that the product defect is the proximate cause of the plaintiff's harm.<sup>60</sup> In effect, the same actions which might be considered plaintiff's contributory negligence may

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52. *A Lawyer's Primer*, *supra* note 9, at 31 (stating that "Negligence law could begin with . . . the feminine voice's ethic of care -- a premise that no one should be hurt. We could convert the present standard of 'care of a reasonable person under the same or similar circumstances' to a standard of 'conscious care and concern of a responsible neighbor or social acquaintance for another under the same or similar circumstances.'"). *But cf.* Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 214 (arguing "most neighbors are not caring, and most accident victims are not neighbors. Human nature will not be altered by holding injurers liable for having failed to take the care that a caring neighbor would have taken.").

53. CHAMALLAS, *supra* note 19, at 57.

54. CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 162 (1989).

55. *Id.*

56. 295 Md. 285, 455 A.2d 434 (1983) (holding that plaintiff's claim was not barred by his contributory negligence when he was injured as he fell off the side of the diving board of his new swimming pool onto the concrete coping at the edge of the pool).

57. *Sheehan v. Anthony Pools*, 50 Md. App. 614, 626, 440 A.2d 1085, 1092 (1982). The Court of Appeals of Maryland adopted Part III of the Court of Special Appeals' decision. *Anthony Pools v. Sheehan*, 295 Md. at 299, 455 A.2d at 441.

58. *See generally* Dix W. Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93 (1972).

59. *See, e.g., Anthony Pools*, 50 Md. App. at 622, 440 A.2d at 1090.

60. *See id.* at 621-23, 440 A.2d at 1090.

reappear in the defendant's argument as also constituting the sole proximate cause of the harm.<sup>61</sup> In other words, the plaintiff's risk-taking behavior, rather than any alleged product defect, is the "sole proximate cause" of the product user's harm.<sup>62</sup>

In *Anthony Pools*, in his strict liability tort action, the plaintiff asserted that the fact that non-skid material on the diving board did not extend to and over the edges of the diving board constituted a design defect.<sup>63</sup> Defense counsel argued the plaintiff's injury was not caused by any product defect, but rather by the way the plaintiff used the diving board. In closing argument, defense counsel argued:

You must find that this defect proximately caused the accident. The clear testimony here from Mr. Weiner and using your common sense is that if someone steps on the board with about an inch of their foot on it, they will fall off the side. That was the proximate cause, the way the board was used, not the design of the board. I am not willing to concede for a moment that there is anything defective about the board. . . . [E]ven if you feel there was, I ask you to find that the proximate cause was the way Mr. Sheehan used it, not the way it was designed.<sup>64</sup>

The trial judge denied the defendant's request to instruct the jury that contributory negligence was a defense, and also denied the plaintiff's request to instruct the jury that the plaintiff's inadvertence in using the diving board was not a defense.<sup>65</sup> Reversing the jury verdict for the defendant, the Court of Special Appeals of Maryland held that the trial court should have granted the plaintiff's instruction on inadvertence.<sup>66</sup>

*Anthony Pools* indicates that juries can be easily confused about the role of the accident victim's conduct in establishing product defect and liability. Accident victim carelessness, inadvertence, and risk-taking activity must be considered, but should not be a complete bar to

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61. *See id.* at 622, 440 A.2d at 1090.

62. OWEN, PRODUCTS LAW, *supra* note 46, at 809-10.

63. *Anthony Pools*, 50 Md. App. at 616, 440 A.2d at 1087.

64. *Id.* at 622, 440 A.2d at 1090. In this case, the defense counsel is using the rubric of "sole proximate cause" to defeat the plaintiff's strict liability claim by arguing that the way the plaintiff used the diving board rather than the design of the diving board was the proximate cause of the injury.

65. *Id.*

66. *Id.* at 626, 440 A.2d at 1092.

products liability recovery. Their effect, as doctrines limiting liability, and the effect of the doctrine of sole proximate cause, must only be applied in a manner which assures fairness in products liability litigation.

Maryland negligence law, with its emphasis on contributory negligence, adds to the problems women litigants face. In evaluating whether an individual has acted “reasonably,” negligence standards, by definition, measure women’s actions according to traditional male norms and viewpoints. Male norms simply may ignore the impact of female experience and conduct on notions of reasonableness. Similarly, confusing the separate products liability doctrines of defect and causation with the unhelpful rubric of “sole proximate cause” reduces the likelihood of achieving a just result.

## VI. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY

The Products Liability Restatement has not been adopted in Maryland. Nevertheless, its potential impact on gender discrimination must be considered. The Restatement (Third) of Torts: Products Liability has been the subject of considerable debate<sup>67</sup> and criticism.<sup>68</sup> However, the concerns of feminist jurisprudence have been largely ignored.<sup>69</sup> Increasingly, feminist scholars<sup>70</sup> have argued that an ethic

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67. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1998) [hereinafter PRODUCTS LIABILITY RESTATEMENT]; see, e.g., Symposium, *Restatement (Third) of Torts: Products Liability: Is the Best Defense Redefining the Offense?*, 26 N. KY. L. REV. 531, 678 (1999); see also James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257 (1993).

68. See, e.g., Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995); see generally John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns “New Cloth” for Section 402A Products Liability Design Defects: A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996).

69. For a student comment addressing feminist concerns with section 6(c), see Dolly M. Trompeter, Comment, *Sex, Drugs, and the Restatement (Third) of Torts, Section 6(c): Why Comment E is the Answer to the Woman Question*, 48 AM. U. L. REV. 1139 (1999). There is considerable feminist jurisprudence on tort law. See, e.g., Bender, *A Lawyer’s Primer*, supra note 9; Bender, supra note 11; Finley, supra note 45; Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DEPAUL L. REV. 335 (1999).

70. There are many schools of feminist scholarship including cultural feminists, accommodation feminists, radical feminists, and critical legal studies feminists. They all share the goal of incorporating women’s experiences and values into law and of employing feminist methodology. See generally Katharine T. Bartlett, *Feminist Legal*

of care,<sup>71</sup> promoting considerations of empathy and interdependence must be integrated into law. Unlike competing analyses, such as the law and economics approach,<sup>72</sup> which seek to achieve justice by deciding disputes with the object of promoting greater social good through wealth maximization resolutions,<sup>73</sup> cultural feminists find the efficiency norm unworkable. Cultural feminism regards law as just and equitable only when administered with empathy, resulting in a redistributive impact for economically and politically disadvantaged members of society.<sup>74</sup> At first blush, efficiency and empathy appear to be irreconcilable.<sup>75</sup> Nevertheless, I argue that, in the world of products liability, efficiency and wealth maximization must be reconciled with requirements of empathy and fairness. The Products Liability Restatement shift from strict liability to negligence essentially adopts the law and economics focus on efficiency and wealth maximization in derogation of empathic care as a normative principle of justice.<sup>76</sup> The claims of cultural feminism, emphasizing empathic care and interdependence, are essential for a valid products liability doctrine. Indeed, empathy and efficiency can and must be merged into a construct where both are achievable and viable.

Major concepts in the law of products liability, such as defectiveness, causation, and damages, reveal social policy considerations. One group of scholars emphasizes the role of products liability law in deterring product injury by providing appropriate incentives to product manufacturers. The other group focuses on products liability as an after the fact attempt to achieve corrective justice between the product producer and the product user. Often the scholarship of each group either ignores or deprecates the views of the other. I suggest that feminist jurisprudence may provide an important

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*Methods*, 103 HARV. L. REV. 829 (1990); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

71. The ethic of care or cultural feminism owes much to the work of Carol Gilligan. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

72. See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970).

73. See generally RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981).

74. See Ann C. Scales, *The Emergence of a Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); see generally MATTHEW H. KRAMER, CRITICAL LEGAL THEORY AND THE CHALLENGE OF FEMINISM (1995).

75. Cf. CALABRESI, *supra* note 72, at 24, 307-08.

76. See, e.g., Mark McLaughlin Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1133 (1994); see generally William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

bridge in this products liability scholarly gap. Specifically, a cultural feminist ethic of care can provide significant new insights for products liability doctrine.

#### *A. Products Liability Goals of Efficiency and Corrective Justice*

For more than a decade, a vigorous tort reform debate has refocused examination of how legal rules promote the goals of compensation and deterrence.<sup>77</sup> Numerous scholars have studied the question of how to compensate tort victims for their injuries.<sup>78</sup> Clearly, payments to tort victims can have both compensatory and deterrent goals. Nevertheless, payments needed to promote deterrence may not be identical to payments needed to attain compensatory goals.<sup>79</sup>

An important tort compensation theory is the insurance theory -- the theory that tort payments should be based on the insurance choices which individuals would make in actuarially fair markets.<sup>80</sup> The insurance theory has significant theoretical and practical implications in that it provides a radical shift from the major compensation paradigm of tort law -- the "make the tort victim whole" theory of recovery.<sup>81</sup> Moreover, the insurance theory has received support from prominent scholars in the tort reform debate, including law and economics scholar Professor Steven Shavell,<sup>82</sup> empirical analysts Professors W. Kip Viscusi<sup>83</sup> and Patricia Danzon,<sup>84</sup> and theorists such

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77. See, e.g., *Products Liability Law Symposium*, 53 S.C. L. REV. 777 (2002).

78. See, e.g., Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering"*, 83 NW. U. L. REV. 908 (1989); Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CAL. L. REV. 772 (1985).

79. See generally George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987).

80. *Id.* at 1556 (stating that when the tort victim purchases a product or service she pays in advance for insurance so that "[C]ompell[ing] insurance greater than the amount demanded by the purchaser reduces, rather than increases, his or her welfare.").

81. See, e.g., FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS*, § 25.1 at 493 (Little, Brown, and Co. 2d ed. 1986) (1956) (examining the traditional tort damage rule).

82. See Steven Shavell, *Economic Analysis of Accident Law* 260-61 (1987).

83. See W. Kip Viscusi, *Reforming Products Liability* 89-94 (1991).

84. See Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. Legal Stud. 517, 520-26 (1984); Patricia M. Danzon, *Medical Malpractice: Theory, Evidence and Public Policy* 10 (1985).

as Professor Alan Schwartz.<sup>85</sup> It is also supported by the American Law Institute.<sup>86</sup>

Some aspects of the Products Liability Restatement, no matter how well grounded in products liability policy or in theories of justice, nevertheless, will have the unintended consequences of harming women. Therefore, the Restatement doctrine must be analyzed and evaluated. In particular, the Restatement's transition from strict liability to negligence doctrine raises legitimate concerns for feminists. Negligence is generally considered more difficult to prove than strict liability in tort law.<sup>87</sup> Another concern is the adoption of a more stringent standard for determining medical product and prescription drug defectiveness than for other products.

An additional concern is normative, asking which values should fashion products liability doctrine. Products liability doctrine reveals societal values and priorities in valuing wealth, safety and innovation. Should products liability be premised on fault or on strict liability? Should deterrence or compensation be preferred?<sup>88</sup>

## *B. Moral and Economic Theories*

### *1. Corrective Justice and Distributive Justice*

Corrective justice seeks to right wrongs by restoring the balance of rights which have been wrongly disrupted.<sup>89</sup> Suppose a manufacturer's product injures a product consumer. The manufacturer's liability might depend on concepts of corrective justice -- what it takes to right the wrong done by the manufacturer. If the manufacturer is bankrupt or judgment-proof, the issue might be whether consumers and manufacturers as a group should use some of their money to help the injured consumer. This becomes a distributive

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85. Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L.J. 353, 362-67 (1988).

86. See The Am. Law Inst. Reporters' Study on Enter. Responsibility for Pers. Injury: Volume II Approaches to Legal & Institutional Change (1991). This study, released in April 1991, discusses the insurance theory of compensation, and states that "[e]mpirical corroboration of these analytical claims" exists. *Id.* at 206 n.13; see generally Stephen D. Sugarman, *A Restatement of Torts*, 44 Stan. L. Rev. 1163 (1992) (book review).

87. See, e.g., Page Keeton, *Product Liability and the Meaning of Defect*, 5 St. Mary's L.J. 30, 34-35 (1973).

88. See generally David G. Owen, *Philosophical Foundations of Fault in Tort Law*, in *Philosophical Foundations of Tort Law* 201 (1995).

89. Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 Mich. L. Rev. 2348, 2350 (1990).

justice question of how society's assets should be distributed among people.

## 2. *Corrective Justice v. Utilitarian Approach to Justice*

Corrective justice can be contrasted with a utilitarian approach to justice. Under a utilitarian approach, we ask what is good for society as a whole.<sup>90</sup> The manufacturer's fault in causing the product user's harm is a basis for deciding the case based on corrective justice.<sup>91</sup> We can conclude that the blameworthy manufacturer should pay compensation to the product user since it redresses a wrong when compensation is paid. As a result, fault or unreasonableness provides a legitimate moral basis for corrective justice.<sup>92</sup>

## 3. *Corrective Justice and Strict Liability*

In some situations, although neither the product manufacturer nor the product user is at fault, the user, nevertheless, is injured by the product. Unless the product manufacturer is held strictly liable, the innocent product user must bear the loss. In other words, without manufacturer strict products liability, the blameless product user must pay for his losses. Therefore, strict products liability is consistent with concepts of corrective justice.<sup>93</sup>

Richard Epstein is a major proponent of strict liability on the basis of corrective justice. Basically, Epstein argues that strict liability is preferable to a negligence system because negligence is not morally grounded.<sup>94</sup> Negligence cannot promote moral responsibility because it weighs into the balance the social utility of the defendant's conduct or product.<sup>95</sup> Epstein would argue that regardless of the social utility

90. Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. Rev. 257, 286-93 (1987) (stressing the importance of loss spreading, fairness and safety in strict products liability).

91. *Id.* at 286.

92. See generally Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 Ind. L.J. 349 (1992). Often court decisions confirm the core morality of redressing fault. Cf. Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort Law*, 26 Ga. L. Rev. 601 (1992) (analyzing judicial rejection of some forms of strict liability in products liability cases).

93. See generally Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 Wm. & Mary L. Rev. 259 (1976).

94. See generally Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).

95. *Id.* at 153.

of defendant's product, if it harms the plaintiff, the defendant should be liable.<sup>96</sup>

C. *The Products Liability Restatement Meets the Feminist Ethic of Care*

Cultural feminists argue that tort law should emphasize safety rather than profit or efficiency.<sup>97</sup> They view the masculine voice, with its protection of rights, autonomy, and abstraction, as a standard which promotes only efficiency and profit.<sup>98</sup> According to the feminist ethic of care, a much-needed feminine voice would refocus the tort system to encourage behavior which is caring about safety and responsive to victim needs, with their attendant human contexts and consequences.<sup>99</sup> Over the past decade, feminist scholars have provided significant critiques of tort doctrines.<sup>100</sup> The critiques have applied various schools of feminist theory.<sup>101</sup>

Feminist scholarship has demonstrated that contemporary tort law reinforces the economic subordination of women.<sup>102</sup> The traditional devaluation of women's work, including child rearing and homemaking, has affected the damage awards for women.<sup>103</sup> When the tort law determines which harms are worthy of legal protection, to what extent these harms should be compensated, and how they should be valued, it makes fundamental judgments which affect tort victims.<sup>104</sup> Tort settlements and damage awards represent both economic security and fundamental fairness.<sup>105</sup> Moreover, tort law expresses the social value placed upon certain relationships and personal interests.<sup>106</sup>

Given the economic position of women, it is not altogether surprising that women receive less tort compensation than men. The basic, underlying purpose of tort damages is to place the injured

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96. *Id.*; see generally Richard A. Epstein, *A Theory of Strict Liability: Toward a Reformation of Tort Law* (1980); Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 *J. Legal Stud.* 421 (1982).

97. See, e.g., Bender, *A Lawyer's Primer*, *supra* note 9.

98. *Id.*

99. *Id.*

100. See generally Bender, *supra* note 11.

101. *Id.*

102. See Chamallas, *supra* note 19.

103. *Id.*

104. See Finley, *supra* note 10.

105. *Id.*

106. *Id.*

plaintiff in her pre-accident economic position.<sup>107</sup> Most empirical studies demonstrate that women, regardless of race, receive significantly lower tort damage awards than white men.<sup>108</sup> Interestingly, the efforts to study gender and race bias in the courts have provided much of the data demonstrating the higher value placed on white men's lives and injuries.<sup>109</sup> For example, as previously discussed, Martha Chamallas has demonstrated through empirical studies that awards for male plaintiffs were twenty-seven percent higher than those for women in a 1995 guide for personal injury lawyers.<sup>110</sup>

Gender-based generalizations about women lead courts to under calculate tort damages for the loss of future earning capacity.<sup>111</sup> Damages for the loss of future earning capacity compensates the tort victim for injuries that impair earning power.<sup>112</sup> When a young woman is injured, economists appearing as expert witnesses often rely on tables based on past economic patterns.<sup>113</sup> These tables project that women will work fewer years than men and will earn less money than their male counterparts.<sup>114</sup> As a result, women receive dramatically reduced awards.<sup>115</sup> Employing these gender-based generalizations ignores the fact that individual women may alter traditional patterns of employment participation. Applying liberal feminist principles would produce tangible gains for women because their experiences and viewpoints would be the norm rather than the exception.

General tort principles submerged into the Products Liability Restatement, as previously discussed, create problems from a feminist perspective. For example, the "reasonable person" tort law standard can be viewed as problematic. Although the standard may be perceived as objective, it may actually result in what Catherine MacKinnon has described as "point-of-viewlessness."<sup>116</sup> Objective

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107. Fleming James, Jr., *Damages in Accident Cases*, 41 Cornell L. Q. 582, 582 (1956).

108. See Chamallas, *supra* note 19.

109. See generally Judith Resnik, *Asking About Gender in Courts*, 21 Signs: J. Women in Culture and Soc'y 952 (1996).

110. Chamallas, *supra* note 19.

111. See generally Chamallas, *Questioning the Use*, *supra* note 13, at 84-89; Chamallas, *Architecture of Bias*, *supra* note 11, at 465-66.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. MacKinnon, *supra* note 54, at 162 (arguing that objectivity does not exist -- rather the attempt to appear objective actually reflects the viewpoint of the dominant group).

analysis is often the viewpoint of the dominant group, accepted as valid because the dominant group's version of reality is deemed true.<sup>117</sup>

Leslie Bender has re-examined the tort "no duty to rescue" doctrine from a cultural feminist perspective.<sup>118</sup> Bender argues that liability should result when an individual refuses to save a stranger since that stranger should be viewed as a person who is interconnected with the community and whose well-being, therefore, affects others.<sup>119</sup> Another problematic area of the products liability arena is the "fetal protection" policies which exclude women from certain workplaces.<sup>120</sup>

American products liability law, as it developed for three decades, came closer to achieving these goals than the Products Liability Restatement. Under the Restatement (Second) of Torts, if a medical product harmed a patient, she could be compensated by bringing a tort claim against the manufacturer.<sup>121</sup> The patient could establish liability in one of two ways: (1) under a negligence theory, she could establish liability by proving that the manufacturer lacked due care in designing, manufacturing or marketing the product; (2) under the theory of strict liability in tort, she could prove that the product was in a defective condition, unreasonably dangerous to the user.<sup>122</sup> Under the Restatement (Second) of Torts, section 402A, a patient could find protection in a tort system concerned with care and safety rather than insulating product manufacturers from liability.<sup>123</sup> This focus on the product user was to be expected since strict liability in tort, as recognized by Dean Prosser, a Reporter of the Restatement (Second), is grounded in notions of fairness and product user protection.<sup>124</sup>

However, the "tort reform" movement may have elevated product innovation, profit maximization and efficiency above user safety.<sup>125</sup>

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117. *See id.*

118. Bender, *A Lawyer's Primer*, *supra* note 9, at 33-36.

119. *Id.*

120. *See generally* Sally J. Kenney, For Whose Protection? Reproductive Hazards and Exclusionary Policies in the United States and Britain (1992) (arguing that "fetal protection" policies excluding women from some toxic workplaces discriminate only against mothers even though fathers can also be affected from this environment).

121. Restatement (Second) of Torts § 402A (1965).

122. *See generally* Kenney, *supra* note 120.

123. *Id.*

124. Prosser, *supra* note 76, at 1120 (quoting *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring)).

125. *See, e.g.*, Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 Chi.-Kent L. Rev. 409 (1992).

Arguably, a prime example of this trend is section 6(c) of the Products Liability Restatement.<sup>126</sup> Section 6(c), which governs design defect liability for prescription drugs and medical devices, is one of the most controversial sections of the Products Liability Restatement since it requires the patient to prove that no reasonable healthcare provider would have prescribed the product for any class of patients.<sup>127</sup> Thus, in order for a patient to bring a successful claim for design defect, product users must demonstrate that they suffered harm and that no patient class could have derived benefit from the prescription drug or medical device. This new standard basically relieves medical product manufacturers of liability and responsibility. Since women consume more prescription drugs and products than men,<sup>128</sup> they are likely to be more disadvantaged by section 6(c). First, women consume a greater share of medical products than men.<sup>129</sup> Second, the regulatory system has not adequately tested and monitored products intended for women since men are generally the prototypes for medical studies and testing.<sup>130</sup>

Significantly, section 6(c) is not the only Products Liability Restatement provision which defines product design defect. Section 2 establishes a separate standard of liability for defective product design.<sup>131</sup> This standard of liability for general product design is separate from medical or prescription products.<sup>132</sup> Section 2 allows an aggrieved product user more latitude in establishing design defect

126. Products Liability Restatement, § 6(c) states:

A prescription drug or medical device is not reasonably safe due to defective design if the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device for any class of patients.

127. *Id.*

128. L. Elizabeth Bowles, *The Disfranchisement of Fertile Women in Clinical Trials: The Legal Ramifications of and Solutions for Rectifying the Knowledge Gap*, 45 *Vand. L. Rev.* 877, 878 (1992) (discussing the fact that women consume more prescription drugs than men and disproportionately suffer a greater number of side effects from these drugs).

129. *See, e.g.*, Joan E. Steinman, *Women, Medical Care, and Mass Tort Litigation*, 68 *Chi.-Kent L. Rev.* 409 (1992).

130. *Id.*

131. *See* Products Liability Restatement, §§ 2(b), 6(c). "Because of the special nature of prescription drugs and medical devices, the determination of whether such products are not reasonably safe is to be made under Subsections (c) and (d) rather than under §§ 2(b) and 2(c)." *Id.* § 6 cmt. b.

132. Products Liability Restatement § 2 cmt. a.

liability. The Reporters of the Restatement admit that the requirements to establish general design liability are less stringent than those for medical products.<sup>133</sup> Rather than proving that the product was ineffective for all users, section 2 allows the product user to present a reasonable alternative design as an effective means of establishing a design defect claim for general product defectiveness.<sup>134</sup> The Restatement offers comment (e) as an exception to the liability standard for general product design defect claims in section 2.<sup>135</sup> Comment (e) provides that if the product's design renders its social utility low in relation to its potential to cause harm, liability attaches even though no reasonable alternative design exists.<sup>136</sup> The reasoning behind comment (e) is that rigid liability standards should not apply to products with extremely low social utility.<sup>137</sup> Unfortunately, section 6(c) does not have the same exception for prescription drugs and medical devices design defect claims. Simply stated, not all prescription drugs deserve special protection for public policy reasons; a cosmetic drug is not as important as life-saving chemotherapy.

The seriousness of the general product defect exception in comment (e) is most harshly felt when examining these new theories of liability from the vantage point of the injured female patient. Clearly, adopting this exception to women asserting medical product design defect claims would lighten the female patient's legal burden. In turn, this would shift the focus from maximization of product manufacturer profits to appropriate concern for patient safety.

Lucinda Finley argues that, "[T]orts suits define and signify basic social values about what human activities are worthy of protecting . . ." <sup>138</sup> Unfortunately, the new standard established by section 6(c) of the Products Liability Restatement does not seem to value women's health and safety over corporate profits. The tort reform achieved by

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133. *See id.* § 6 cmt. f, (arguing Subsection c of section 6 imposes a more rigorous test for defect than does section 2(b) which does not apply to prescription drugs and medical devices).

134. *Id.* § 2(b). This section provides a product defect:

[I]s defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

135. *See id.* § 2 cmt. e.

136. *See id.*

137. *Id.*

138. Finley, *supra* note 34, at 849.

the Products Liability Restatement reduces corporate liability and responsibility, resulting in an increase in corporate profits and a decrease in patient safety. Since men and women are different biologically, women suffer injuries from defective reproductive products placed inside their bodies, while men are seldom injured by such products.<sup>139</sup> These injuries suffered by women are difficult to assess in traditional economic terms, since they affect reproductive loss and other noneconomic losses.<sup>140</sup> Often these reproductive and emotional harms are not compensated in traditional tort damages.<sup>141</sup> Nevertheless, they affect women's economic, educational and career choices.<sup>142</sup> The traditional tort approach, as exemplified by the Products Liability Restatement, tells women that their value in the labor force is not important enough to be incorporated into the market-based tort reform formula.<sup>143</sup> Not only is the Products Liability Restatement approach unfair to those women harmed by medical products, it also sends a message to society as a whole that women are less valuable than their male counterparts.<sup>144</sup>

## VII. CONCLUSION

Maryland tort law discriminates against women in a number of important ways. Although facially neutral, the Maryland statutory cap on noneconomic damages and the standard for awarding punitive

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139. Koenig & Rustad, *supra* note 12, at 48.

140. *See, e.g.*, Finley, *supra* note 34, at 857-58. Many of these defective, unsafe products have been intended for the use by healthy women to affect, interrupt, or enhance natural bodily processes, rather than to treat illness or disease. They include: (1) Des, a synthetic estrogen marketed to prevent miscarriage which proved ineffective for that purpose, but elevated the risk of breast cancer among the exposed mothers by forty percent, and which caused cancer, reproductive abnormalities and infertility in the exposed daughters and sons of the pregnant women who took it; (2) Early versions of birth control pills which had high hormone levels that caused strokes, heart attacks and blood clots; (3) IUDs such as the Dalkon Shield and Copper-7, which presented an elevated risk of pelvic inflammatory disease, sterility, perforated uteruses and septic abortions; and (4) Parlodel, a drug prescribed to suppress lactation, which proved ineffective and caused deaths from strokes or heart attacks. *See id.* at 869.

141. *Id.* at 857-58.

142. *Id.* at 858.

143. Finley, *A Break in the Silence*, *supra* note 27, at 52. The disparate impact of market-based damage measurement is derived from two principle sources: 1) the generally lower value the market assigns to women's work and 2) the market's failure to recognize or value many productive activities in which women engage, such as household management and care-taking performed within the family.

144. *Id.* As Professor Martha Chamallas has noted, earning-based damages calculations signal that white men are worth more, and reinforce beliefs that they will achieve more than white women or minority men and women. Chamallas, *supra* note 19, at 197-98.

damages disadvantage women litigants. Moreover, adoption of the Products Liability Restatement would exacerbate the situation. Adding to this problem is Maryland's failure to adopt the doctrine of comparative negligence. The current Maryland approach is confusing and unfair. Disadvantaging women may be an unintended result of the current Maryland regime. Nevertheless, it should be remedied. Maryland tort law should take women's experiences and lives seriously.

# The Racial Implications of Tort Reform

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## INTRODUCTION

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

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

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## I. THE RACIAL DISPARITY LURKING BEHIND MEDICAL MALPRACTICE TORT RESTRICTIONS

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

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

### *A. Treatment and Access*

Over a decade ago, the Harvard Medical Practice Study found that “there were significant differences between hospitals that serve a predominantly minority population and other hospitals. That is, blacks were more likely to be hospitalized at institutions with more AEs [adverse events] and higher rates of negligence.”<sup>2</sup> 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*

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

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

*Disparities in Health Care*, which was conducted at the request of Congress.<sup>3</sup> This report found that

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

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

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

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

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

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

6. *Id.* at 5–6.

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

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

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

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

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

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

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

11. *Id.*

12. *Id.* at 10–11.

13. Clancy, *supra* note 7.

14. *Id.*

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

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.<sup>18</sup> 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.”<sup>19</sup> In other words, white patients are more likely to be treated in hospitals with experienced surgeons who are less likely to commit errors.

### *B. Health Insurance*

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

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15. *Id.*

16. *Id.*

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

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

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

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

one-third of the U.S. population, they comprise over half of the 45.8 million uninsured.”<sup>21</sup> 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.<sup>22</sup> In addition, these researchers discovered that the uninsured rate for African-Americans is 50% higher than for non-Hispanic whites.<sup>23</sup> Similarly, according to the U.S. Census Bureau, over one-third of all Hispanics and one-fifth of all African Americans were without health insurance in 2004, compared with 13.1% of non-Hispanic whites that same year.<sup>24</sup>

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

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without\_report3b26.pdf; CENTER FOR DISEASE CONTROL, HEALTH, UNITED STATES, 2002, <http://www.cdc.gov/nchs/data/hus/02.pdf>; U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE: 1999 (2000), <http://www.census.gov/prod/2000pubs/p60-211.pdf>; AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, HISPANICS AND BLACK AMERICANS STILL MORE LIKELY THAN WHITES TO BE UNINSURED (2000), <http://www.ahrq.gov/news/press/pr2000/meps98pr.htm>; HENRY J. KAISER FAMILY FOUNDATION & UCLA CENTER FOR HEALTH POLICY RESEARCH, RACIAL AND ETHNIC DISPARITIES IN ACCESS TO HEALTH INSURANCE AND HEALTH CARE (2000), <http://www.kff.org/content/2000/1525/UCLAReport.pdf>.

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

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

23. *Id.*

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

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

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

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

Perhaps more significantly, the hospital location with the highest proportion of negligent adverse events (52.6%) was the emergency department, where people without health insurance may go for primary care.<sup>28</sup> In addition, uninsured persons with traumatic injuries are less likely than those with insurance to be admitted to the hospital, receive fewer services if they are admitted, and are more likely to die.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> Lack of financial incentives for healthcare providers also plays a role, with low payment rates limiting the supply of providers to low-income groups and fostering an unwillingness to spend adequate time with patients, disproportionately affecting ethnic minorities.<sup>32</sup>

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

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

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

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

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

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

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

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

### *C. Limits on Non-Economic Damages*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

46. *Id.*

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

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

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

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

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

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

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

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

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

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

Senator Edward Kennedy offered an amendment to this legislation that would have exempted discrimination cases from CAFA's procedural and substantive hurdles.<sup>54</sup> The amendment was rejected and CAFA was signed into law on February 18, 2005.<sup>55</sup>

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

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

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

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

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

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

A similar result may be occurring in workplace discrimination cases. Although many employment discrimination lawsuits are filed under Title VII, and therefore already in federal court, filings of federal employment discrimination cases dropped by 14.3% between 2004 and 2005.<sup>57</sup> It is entirely possible that this decline is attributable to circumstances other than CAFA, but it must be noted that since the passage of CAFA, filings of these types of cases has noticeably decreased.<sup>58</sup>

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

### III. HELLHOLES AND OTHER ATTACKS ON THE JURY SYSTEM

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

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

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

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

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

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

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

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

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

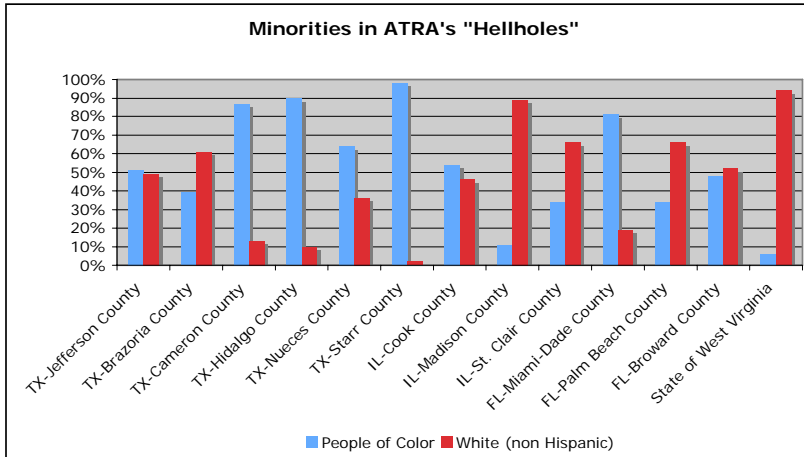
62. *Id.*

63. *Id.*

64. *Id.*

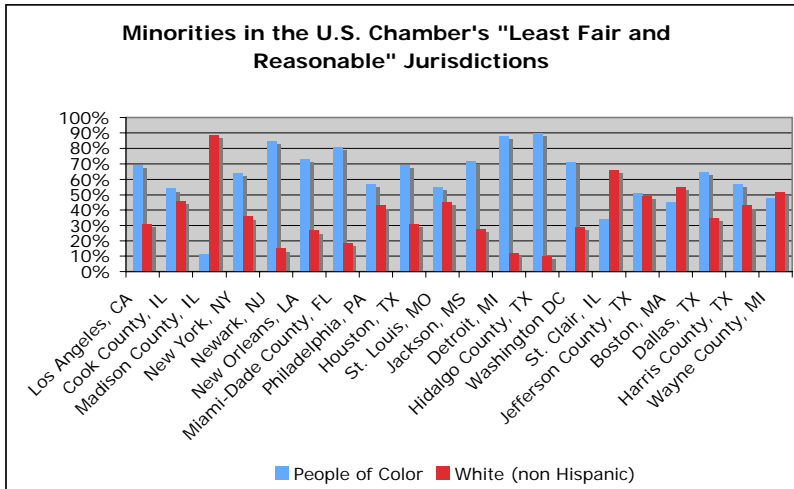
65. It should be noted that ATRA’s earlier “hellhole” reports attacked juries quite specifically, in addition to judges from these communities. *See, e.g.*, AMERICAN TORT REFORM ASSOCIATION, BRINGING JUSTICE TO JUDICIAL HELLHOLES 8 (2002), *available at* [http://www.atra.org/reports/hellholes/2002/hellholes\\_report\\_2002.pdf](http://www.atra.org/reports/hellholes/2002/hellholes_report_2002.pdf). “Orleans Parish was described by one counsel with whom we spoke as an area where the majority of judges and many juries are pro-plaintiff.” *Id.* at 13. “An attorney who litigates in south Texas described the problem in these counties as a combination of juries who tend to be persuaded by emotion rather than the facts, plaintiff-oriented judges, and a local environment in which everybody knows everybody.” *Id.* at 16. “[J]uries[] in St. Louis tend to disfavor large corporations.” *Id.* at 17. “The judges who will allow even a weak case to the jury and juries who are willing to grant high verdicts suggests to some that this county should be designated a judicial hellhole.” *Id.* *See* Mark A. Hofmann, *Illinois County Once Again Leads List of ‘Hellholes,’* BUSINESS INSURANCE, Dec. 20, 2004, at 2; AMERICAN TORT REFORM ASSOCIATION, *supra* note 61 (quotations preceding Table of Contents).

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



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

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



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

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

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

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

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

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

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."<sup>71</sup>

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.<sup>72</sup> The

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

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

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

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

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

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

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

Civil jury trials historically have been an important tool for protecting civil rights in the United States. In a 1965 civil rights action, *Basista v. Weir*,<sup>73</sup> 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 . . . .<sup>74</sup>

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

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

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

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

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

75. *Id.*

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

### A. Hate Crimes

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

As exemplified by the above case, members of minority communities are all too often targets of violent bigotry. According to the most recent FBI data, over 9500 people reported being victims of violence based on racial, religious, sexual orientation, disability or ethnicity/national origin bias in 2004.<sup>77</sup> Approximately two-thirds of these violent attacks were motivated by race or ethnic bias.<sup>78</sup> Yet these figures represent only a small percentage of those emotionally, physically, and psychologically hurt by hate crimes each year. According to the Southern Poverty Law Center, the number of hate groups has risen drastically, over 33%, since 2000.<sup>79</sup> As of 2005,

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

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

78. *Id.*

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

there were over 800 known hate groups operating in the United States.<sup>80</sup>

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

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

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

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

Members of the Christian Knights burned down a black church in South Carolina in 1995.<sup>84</sup> Today, the Christian Knights can no longer

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80. *Id.*

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

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

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

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

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

In November 1988, members of East Side White Pride, a skinhead gang organized by the White Aryan Resistance (WAR), killed Mulugeta Seraw, a twenty-six year-old Ethiopian student, as he approached his front door on his way home from work.<sup>86</sup> Trial evidence showed that the skinhead gang received WAR propaganda, which targeted blacks, Jews, and other “enemies” of the white race.<sup>87</sup> 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.<sup>88</sup> After a jury awarded \$9 million, WAR was shut down.<sup>89</sup>

The Invisible Empire Klan was disbanded after a \$1 million jury verdict against the Klan’s leader and his organization.<sup>90</sup> 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.<sup>91</sup> 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

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

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

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

87. *Id.*

88. *Id.*

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

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

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

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

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

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

In 1997, Congress passed the so-called "Volunteer Protection Act of 1997."<sup>95</sup> 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.

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

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

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

95. 42 U.S.C. §§ 14501-14505 (1997).

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

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

As Conyers put it,

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

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

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

97. *Id.*

### *B. Environmental Justice*

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

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

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

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

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

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

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

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

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

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

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

104. Executive Order 12, 898.

105. H. Josef Hebert, *EPA Inspector Criticizes Agency Reviews*, SEATTLE POST-INTELLIGENCER, Sept. 19, 2006, available at [http://seattlepi.nwsource.com/national/1155AP\\_Environmental\\_Justice.html](http://seattlepi.nwsource.com/national/1155AP_Environmental_Justice.html).

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

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

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

#### CONCLUSION

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

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

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

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

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



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## Democratic Renewal and the Civil Jury

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## Democratic Renewal and the Civil Jury

### Cover Page Footnote

\* Associate Professor of Law, Southwestern Law School. † Charles F. Reclin Professor of Law, Cornell Law School. ‡ President of the Center for Constitutional Litigation, P.C. This article draws on our white paper, written for the Civil Justice Research Initiative at the University of California, Berkeley, School of Law. The authors thank Anne Bloom, Erwin Chemerinsky, Kevin Clermont, and Alexandra Lahav for their extraordinarily helpful comments on early drafts.

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## DEMOCRATIC RENEWAL AND THE CIVIL JURY

Richard L. Jolly,\* Valerie P. Hans,† & Robert S. Peck‡

*The United States is in a period of democratic decline. Waning commitment to principles of self-governance throughout the polity necessitates urgent action to revitalize the Republic. The civil jury offers an often-overlooked avenue for such democratic renewal. Welcoming laypeople into the courthouse and deputizing them as constitutional actors demonstrates a profound faith in representative governance and results in wide-reaching and pronounced sociopolitical and administrative benefits. The Seventh Amendment of the U.S. Constitution and similar state provisions protect the rights of litigants to jury trials in most circumstances. But these promises have been hollowed over time through legal, political, and practical challenges. The result is that civil juries play a more minor role in resolving civil disputes today than at any other point in American history. If the civil jury is to serve as a locus of democratic power and as an emboldening civic experience for those who serve, it too must be renewed. To this end, this Article offers six research-based recommendations, informed by the distinctive approach that jurors bring to decision-making as well as the sociopolitical benefits that undergird the institution. Adopting these strategies can help reintroduce democracy into the civil justice system, and in doing so, can help direct America back toward the nation's democratic aspirations.*

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## I. INTRODUCTION

The United States is in a period of crisis. At the time of this writing, COVID-19 has claimed the lives of over a million people and hospitalized over four million.<sup>1</sup> The sickness has upended every aspect of the nation's social, economic, and government institutions, and, with new variants regularly emerging, there seems to be little sign of abatement.<sup>2</sup> The dominant political parties, which were deeply polarized even before the pandemic, have grown only more so.<sup>3</sup> And opportunistic public figures have used the emergency to foment a loss of faith in the nation's institutions with shocking effectiveness.<sup>4</sup> A Harvard study found that a plurality of young Americans today believe that American democracy is "in trouble" or "failing," with a third believing that the country is on a path to civil war.<sup>5</sup> But perhaps the darkest indicator of democratic malaise occurred on January 6, 2021, when a violent mob stormed the Capitol in an attempt to prevent the peaceful transfer of political

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<sup>1</sup> These figures were cited by the Supreme Court on January 13, 2022. *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA*, 142 S. Ct. 661, 670 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting); see also *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES (Aug. 5, 2022), <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (reporting 1,029,108 total deaths due to COVID-19).

<sup>2</sup> See Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, YALE MED. (Aug. 31, 2022), <https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron> ("One thing we know for sure about SARS-CoV-2, the virus that causes COVID-19, is that it is changing constantly.").

<sup>3</sup> See, e.g., *Political Polarization in the American Public*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/> (offering empirical evidence of increasing partisan polarization in the United States from 1994 through 2014); see also, e.g., Michael Dimock & Richard Wike, *America is Exceptional in the Nature of its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), <https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/> (noting that "the 2020 pandemic has revealed how pervasive the divide in American politics is relative to other nations" and claiming that "Americans have rarely been as polarized as they are today").

<sup>4</sup> Cf. *Toplines and Crosstabs December 2021 National Poll: Presidential Election & Jan 6th Insurrection at the US Capitol*, U. MASS. AMHERST (Dec. 28, 2021), <https://polsci.umass.edu/toplines-and-crosstabs-december-2021-national-poll-presidential-election-jan-6th-insurrection-us> (finding that a substantial number of Republicans doubt the legitimacy of the 2020 presidential election).

<sup>5</sup> See HARVARD KENNEDY SCH. INST. POL., HARVARD YOUTH POLL FALL 2021: TOP TRENDS AND TAKEAWAYS (42d ed. 2021) (concluding that "[a] majority (52%) of young Americans believe that our democracy is either 'in trouble' or 'failing'" and that "[y]oung Americans place the chances that they will see a second civil war in their lifetime at 35%").

power at the federal level for the first time in the nation's history.<sup>6</sup> It is said without hyperbole that the flame of American democracy is rapidly extinguishing.<sup>7</sup>

Given the depth and severity of the Republic's current crisis, the civil jury might not be the first solution to come to mind as a potential democratic corrective. The institution is regularly relegated in popular and constitutional discussions to being little more than an optional dispute resolution tool, with some disparaging it as a poor one at that.<sup>8</sup> It is rarely spoken about broadly in terms of its sociopolitical significance and the role it plays in enabling democratic participation and a commitment to representative governance. But what critics of the civil jury fail to appreciate is that the institution is an integral piece of the constitutional puzzle that, along with other reforms, may help America forge a path toward democratic renewal.<sup>9</sup> As political and social leaders search for institutional and legislative reforms to address the nation's current legitimacy crisis, the civil jury should be high on their shortlist.

It is easy to forget that in early American history the right to trial by civil jury was widely celebrated as among the most cherished constitutional protections. Indeed, commitment to the institution served as a chief motivator in prompting the American Revolution and in debating and achieving the Constitution's ratification. Recall that British efforts to restrain colonial civil juries through enacted legislation motivated not only the First Congress of the American Colonies in 1765,<sup>10</sup> but was also explicitly listed in the Declaration

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<sup>6</sup> See Kat Lonsdorf, Courtney Dorning, Amy Isackson, Mary Louise Kelly & Ailsa Change, *A Timeline of How the Jan. 6 Attack Unfolded—Including Who Said What and When*, NPR, (June 9, 2022, 9:11 AM) <https://www.npr.org/2022/01/05/1069977469/a-timeline-of-how-the-jan-6-attack-unfolded-including-who-said-what-and-when> (documenting the January 6, 2021, Capitol riots' timeline).

<sup>7</sup> See SARAH REPUCCI, *FROM CRISIS TO REFORM: A CALL TO STRENGTHEN AMERICA'S BATTERED DEMOCRACY* (Freedom House 2022), <https://freedomhouse.org/report/special-report/2021/crisis-reform-call-strengthen-americas-battered-democracy> (noting the United States' rapid democratic decline in relation to established democracies around the world).

<sup>8</sup> See *infra* Section III.B.

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See RESOLUTION VII OF THE STAMP ACT CONGRESS (1765) (listing among grievances "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies" and "[t]hat the late Act of Parliament, . . . by extending the jurisdiction of the courts of Admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists").

of Independence as a grievance justifying the Revolution.<sup>11</sup> And roughly a decade later, ratification of the United States Constitution was in no small part secured by a promise to guarantee civil jury protections as part of a subsequent Bill of Rights,<sup>12</sup> which was realized in 1791 with the Seventh Amendment.<sup>13</sup>

Furthermore, the civil jury has never been merely a feature of the federal government. The constitutions of all thirteen original states secured the institution—in fact, the civil jury was likely the only right so universally protected at the Founding.<sup>14</sup> When the Fourteenth Amendment was ratified roughly a century later, the constitutions of thirty-six out of thirty-seven states guaranteed the right to a jury trial.<sup>15</sup> And today, Colorado, Louisiana, and Wyoming are the only states without civil jury guarantees in their constitutions, though all three protect the right by legislation in certain contexts.<sup>16</sup> Furthermore, this broad protection is in some sense uniquely American. Though England was the progenitor of common law civil juries, the country abandoned their widespread use after the First World War.<sup>17</sup> And while lay participation in resolving disputes has recently expanded in some countries—

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<sup>11</sup> See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (“For depriving us in many cases, of the benefits of Trial by Jury”).

<sup>12</sup> See Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 411–13 (1999) (outlining how one of the most potent arguments against the ratification of the Constitution was “[t]he absence of a guarantee that litigants would have a right to jury trial in civil cases in any new federal courts” and “[o]nly by promising amendments did the Federalists prevail”).

<sup>13</sup> See U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

<sup>14</sup> See LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 281 (1960) (“The right to trial by jury was probably the only one universally secured by the first American state Constitutions . . .”).

<sup>15</sup> See Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868*, 87 TEX. L. REV. 7, 115 (2008) (surveying the adoption of jury trial rights in state constitutions at the time of the Fourteenth Amendment’s ratification).

<sup>16</sup> See Eric J. Hamilton, Note, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 858–59 (2013) (reviewing state practices and protections as to civil jury rights).

<sup>17</sup> See William V. Dorsaneo, III, *The Decline of Anglo-American Civil Jury Trial Practice*, 71 SMU L. REV. 353, 355–56 (2018) (noting that the civil jury began in England around the end of the 1100s before it all but disappeared in the 1900s).

perhaps most successfully in Argentina<sup>18</sup>—no other countries protect the right to trial by civil jury as widely and as foundationally as the United States does.

Strong political, social, and administrative motivations compel America's commitment to civil juries and provide guidance for addressing the nation's current democratic decline. By nature of its institutional characteristics, the jury is positioned to check the application and development of law as enacted and enforced by the government, and to serve as a bulwark against powerful social and economic actors.<sup>19</sup> It is a democratic part of the Constitution's complex system of checks and balances, ensuring that few acts of government affecting core private rights can be brought to bear without passing through a body of local laypeople.<sup>20</sup> For this reason, jury service and voting have long been conceptually linked as forms of meaningful political participation; in fact, as Professor Andrew Ferguson notes, "In the hierarchy of political rights, the jury trumped voting in importance [at the Founding]."<sup>21</sup> And as French thinker Alexis de Tocqueville recognized after closely studying the early American body, "The jury is . . . above all a political institution."<sup>22</sup> Even today, to serve as a juror is a political designation: It is to be deputized as a constitutional officer worthy of resolving private disputes.<sup>23</sup> The civil jury is enshrined in the Constitution specifically because of—not despite—it being a locus of democratic power.

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<sup>18</sup> See Vanina G. Almeida, Denise C. Bakrokar, Mariana Bilinski, Natali D. Chizik, Andrés Harfuch, Lilián Andrea Ortiz, Maria Sidonie Porterie, Aldana Romano & Shari Seidman Diamond, *The Rise of the Jury in Argentina: Evolution in Real Time*, in *JURIES, LAY JUDGES, AND MIXED COURTS* 25, 26, 31, 41–42 (Sanja Kutnjak Ivković, Shari Diamond, Valerie P. Hans & Nancy S. Marder, eds., Cambridge U. Press, 2021) (discussing the recent adoption and expansion of juries in Argentina and prospects for its implementation elsewhere in Latin America).

<sup>19</sup> See NANCY S. MARDER, *THE JURY PROCESS* 10–14 (2005) (discussing the jury's political role); SUJA A. THOMAS, *THE MISSING AMERICAN JURY* 58–62 (2016) (articulating the relationship between the jury and the traditional branches of government).

<sup>20</sup> See THOMAS, *supra* note 19, at 92 (describing the jury's position in relation to the traditionally recognized branches of government).

<sup>21</sup> Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1119 (2014).

<sup>22</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 (J. P. Mayer ed., George Lawrence trans., 1969) (1835).

<sup>23</sup> See Ferguson, *supra* note 21, at 1115–34 (discussing the relationship between jury service and constitutional identity).

But it is not just the inherent political power that makes the institution of interest in this time of American crisis; perhaps more important is that through exercising this power, the jury serves as a venue for fostering a commitment to democratic governance. Again, looking to the early body, Tocqueville described jury service as a virtue-enhancing exercise that impresses upon those who serve the skills required for self-governance, noting: “[Juries] make all men feel that they have duties toward society and that they take a share in its government. By making men pay attention to things other than their own affairs, they combat that individual selfishness which is like rust in society.”<sup>24</sup> These observations are not anachronistic. Recent empirical studies show that individuals who serve on civil juries to the point of issuing a final verdict tend to view their service favorably and as a form of significant civic engagement.<sup>25</sup> Studies also show that civil jurors who served on larger juries that were required to reach a unanimous decision are significantly more likely to vote in elections after jury service than they were before serving.<sup>26</sup>

The civil jury further provides jurors, and society more broadly, with valuable information. Bringing the public into the courthouse to hear a controversy and to serve as an integral part of its resolution provides transparency that is necessarily lacking from common forms of private dispute resolution, such as mandatory mediation and arbitration.<sup>27</sup> Resolving disputes publicly shines light on social ills and provides information that voters and policymakers may draw upon in addressing common harms.<sup>28</sup> For a

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<sup>24</sup> TOCQUEVILLE, *supra* note 22, at 274.

<sup>25</sup> See, e.g., Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 298–300 (Robert E. Litan ed., 1993) [hereinafter Diamond, *What Jurors Think*] (discussing studies on the impact on individuals of civil jury participation).

<sup>26</sup> See Valerie P. Hans, John Gastil & Traci Feller, *Deliberative Democracy and the American Civil Jury*, 11 J. EMPIRICAL LEGAL STUD. 697, 710–12 (2014) (presenting empirical data indicating that individuals were more likely to vote after serving on a jury that required them to reach a unanimous verdict; jurors who served in twelve-person as opposed to smaller juries, and who sat in cases with organizational as opposed to individual defendants, also showed a boost in subsequent voting).

<sup>27</sup> See *infra* Section II.B.1.

<sup>28</sup> See CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 3–5 (2001) (discussing the impact of lawsuits in prompting societal or legislative changes); ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 1–2 (2017) (concluding that “litigation is a social good” and justifies the

recent example of this process, consider how the #MeToo movement gained visibility and strength by publicity surrounding high-profile instances of sexual harassment and sexual assault.<sup>29</sup> The litigation and attendant publicity encouraged other victims to come forward, which provided society a better idea of the frequency and impact of this widespread problem.<sup>30</sup> In this way, the public resolution of private disputes provides a public good that benefits society as a whole.

Emphasizing these political and social benefits is not to ignore the direct advantages that jurors offer in the administration of civil justice. Laypeople drawn from the community for one-off trials enhance fact-finding by bringing their diverse viewpoints to bear on a given dispute.<sup>31</sup> For this reason, the jury has at times been referred to as “the lower judicial bench” in a bicameral judiciary, and as “the democratic branch of the judiciary power.”<sup>32</sup> This structural power arrangement—built into the very architecture of American courtrooms<sup>33</sup>—has advantages over deferring to professional judges. As repeat players, judges are likely to approach cases in a routinized fashion and fall victim to confirmation biases.<sup>34</sup>

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costs of litigation because “it enables people to promote the rule of law and affirms our citizen-centered political system”).

<sup>29</sup> See Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where to, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155, 156–57 (2019) (arguing that binding arbitration clauses have halted the social movement’s progress by denying victims access to public courts).

<sup>30</sup> See Mary Graw Leary, *Is the #MeToo Movement for Real? Implications for Jurors’ Biases in Sexual Assault Cases*, 81 LA. L. REV. 81, 83 (2020) (reviewing how the social movement “gained staggering momentum from a tweet and evolved into a worldwide acknowledgment of the sexual harassment and violence that many women experience”).

<sup>31</sup> See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1275 (2000) (explaining that “[b]ecause the jury’s work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions” and that interaction among jurors from various experience levels, both limited and expansive, “will expand the range of issues to be discussed” among jurors).

<sup>32</sup> See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1189 (1991) (collecting early American sources).

<sup>33</sup> See Jonathan D. Rosenbloom, *Social Ideology as Seen Through Courtroom and Courthouse Architecture*, 22 COLUM.-VLA J.L. & ARTS 463, 487 (1998) (discussing how the physical division between the judge and jurors reflects social ideology).

<sup>34</sup> English writer G.K. Chesterton captures this well: “[T]he horrible thing about all legal officials . . . is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they

And jurors possess attributes that judges do not. As community representatives, jurors are informed of societal norms from which the unrepresentative judicial class is often detached. What is more, unlike individual trial judges, jurors must deliberate to reach a decision, thus allowing for robust and multifaceted consideration of a dispute.<sup>35</sup> These jury characteristics ensure that the law is applied and develops in a way that is grounded in community norms.

However, while the civil jury has the potential to offer these many sociopolitical and administrative benefits that can be of service toward the ends of democratic renewal, they are not currently sufficiently realized. To the contrary, over the course of the twentieth century, the civil jury as an institution has languished under sustained attacks from the state and powerful private actors. The judiciary adopted procedures deliberately designed to limit the use of and role for the civil jury by transferring power into the hands of unrepresentative judges and private arbitrators.<sup>36</sup> Legislatures, too, enacted laws restricting access to the jury by allowing for mandatory arbitration agreements, as well as limiting the jury's fact-finding role by restricting their authority to assess and award civil damages in certain contexts.<sup>37</sup> And businesses, particularly those in the insurance industry, have engaged in a decades-long political campaign to convince the public, practitioners, and the judiciary that these restrictions on the civil jury are not only warranted but also should be expanded.<sup>38</sup> The jury, they say, is unqualified to decide complex disputes, and that twelve laypeople routinely bring not wisdom but prejudice against certain litigants—specifically those with business interests.<sup>39</sup>

These attacks, fundamentally unfounded or subject to built-in correctives, have been so effective that they have come close to nearly eradicating the jury as a meaningful component of the

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do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop." G. K. Chesterton, *The Twelve Men*, in *TREMENDOUS TRIFLES* 80, 85–86 (1909).

<sup>35</sup> See *infra* Section II.B.

<sup>36</sup> See *infra* Section III.A.

<sup>37</sup> See *infra* Section IV.B.

<sup>38</sup> See *infra* Section III.C.

<sup>39</sup> See *infra* Section III.C.

American civil justice system.<sup>40</sup> Although at common law the civil jury was the primary means by which legal disputes were resolved,<sup>41</sup> the jury today is but an afterthought. In 2019—the last complete pre-pandemic fiscal year—juries disposed of just 0.53% of filed federal civil disputes.<sup>42</sup> The trend is mirrored in state courts. Although figures are incomplete (in part because the federal government no longer collects them), data from the Court Statistics Project shows that in 2019, juries disposed of a median of only 0.09% of state civil disputes.<sup>43</sup> Hawaii reported just a single civil jury trial that year; Alaska reported zero.<sup>44</sup> So while ostensibly the civil jury is secured for use in all legal disputes to ensure the democratic application and development of law, the reality is that the institution's use has been drastically reduced.

The COVID-19 pandemic poses a new threat to the civil jury, with the potential to topple the institution entirely. From the beginning of the outbreak, it was clear that the airborne spread of the disease posed unique challenges to the jury, which, as a deliberative body, traditionally requires some degree of interpersonal interaction. As a result, in the spring of 2020, many courts around the country responded by completely suspending civil

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<sup>40</sup> While our analysis focuses on the civil jury, it must be noted that the criminal jury, too, has been diminished as a locus of democratic power. See THOMAS, *supra* note 19, at 79 (noting that plea bargaining is one of the primary reasons “for the decline of criminal jury trials”). As the Supreme Court has recognized, American criminal justice today is for the most part “a system of pleas, not a system of trials.” *Lafler v. Cooper*, 566 U.S. 156, 169–70 (2012). Like the civil jury, this displacement of the criminal jury has had deleterious effects on the democratic health of the Republic. See CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 1, 19–26, 221–22 (2021) (documenting the decline of jury trials and the rise of guilty pleas and describing the negative consequences). We emphasize the civil jury here, however, because its near collapse offers substantial upside from revival, and it is most often overlooked in the conversation.

<sup>41</sup> See Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 419 (1999) (explaining how juries “retained the ultimate power to decide the great majority of cases” in colonial American courts).

<sup>42</sup> Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (2019).

<sup>43</sup> See Sarah Gibson, Bree Harris, Nicole Waters, Kathryn Genthon, Amanda Fisher-Boyd & Diane Robinson, *Trial Court Caseload Overview*, CT. STAT. PROJECT, <https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil> (last updated July 8, 2022) (compiling disposition data from selected state courts).

<sup>44</sup> *Id.*

jury trials.<sup>45</sup> In Los Angeles Superior Court, for instance, all non-preference civil trials were postponed for all of 2020.<sup>46</sup> And some state and federal courts took the same approach in response to the highly-contagious Omicron variant in late 2021 and early 2022.<sup>47</sup> Such postponements produce backlogs that will likely plague a court system's docket long after normal operations resume. For some civil litigants—such as those who are elderly, injured, or ill—this delay will operate as a complete denial of justice.<sup>48</sup> And for others, the lengthy delays raise the prospect of stale or faulty evidence when their case eventually is tried.<sup>49</sup>

This near complete lack of civil trials has been a boon for the private arbitration industry. As the American Arbitration Association advertises on their website: “With court delays caused by the COVID-19 pandemic, a jury trial is unlikely in the near

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<sup>45</sup> See *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge> (“About two dozen U.S. district courts have posted orders that suspend jury trials or grand jury proceedings, and scale back other courthouse activities in response to a sharp nationwide rise in coronavirus (COVID-19) cases.”).

<sup>46</sup> See Administrative Order of the Presiding Judge Re: COVID-19 Pandemic, Gen. Order No. 2020-GEN-023-00 at 10 (Super. Ct. L.A. Cnty. Oct. 9, 2020) (“All non-preference civil jury trials may commence on or after January 4, 2021.”); see also CA.CIV. PROC. CODE § 36 (giving preference to those civil actions involving, inter alia, a party “who is over 70 years of age” or concerning “wrongful death or personal injury”).

<sup>47</sup> See Christine Schiffner, *Omicron Spike Forces Plaintiffs Firms to Reassess Trial and Case Strategy*, NAT'L L.J. (Jan. 14, 2022), <https://www.law.com/nationallawjournal/2022/01/14/omicron-spike-forces-plaintiffs-firms-to-reassess-trial-and-case-strategy/> (noting that the spike in COVID-19 cases due to the Omicron variant caused litigants to continue to face delays, “especially when it [came] to jury trials”); Michael Finnegan, *Federal Jury Trials Suspended in L.A. Amid Rapid COVID Spread*, L.A. TIMES (Jan. 4, 2022), <https://www.latimes.com/california/story/2022-01-04/federal-jury-trials-suspended-omicron-coronavirus-covid> (stating that the rapid spread of COVID-19's Omicron variant caused “[f]ederal jury trials in Los Angeles, Santa Ana[,] and Riverside” to be suspended for a few weeks in January of 2022).

<sup>48</sup> While many jurisdictions have procedures to give certain litigants scheduling preference—which are meant to recognize that some elderly and very ill plaintiffs will not survive substantial trial delays—these procedures are neither automatic nor preferred. See, e.g., Jay P. Barron, *Foxing Your Way to Trial with Statutory Preference*, 61 ORANGE CNTY. LAW. 1, 43 (2019) (reviewing the process by which parties request scheduling preference).

<sup>49</sup> Cf. Irving R. Kaufman, *Judicial Reform in the Next Century*, 29 STAN. L. REV. 1, 2 (1976) (noting the “pervasive extent of cost and delay, and their corrosive impact upon our judicial system”).

future.”<sup>50</sup> They are not wrong. Courts are reporting that the backlog just in criminal cases could take years to work through, let alone the pile of hundreds of thousands of actively pending civil cases.<sup>51</sup> Moreover, there are an unknown number of civil cases that were not filed in 2020 because parties chose instead to wait out the pandemic.<sup>52</sup> The Court Statistics Project estimates this number of “shadow cases” to be over 1.1 million for just the twelve states that reported their 2020 caseloads, and it warns that these cases “have the potential to overwhelm the civil justice system.”<sup>53</sup> Factor in the continued underfunding of the judicial branch<sup>54</sup> and it is not alarmist to recognize that the already rare civil jury trial is likely to lay dormant for the foreseeable future, despite some admirable experiments in virtual jury trials.<sup>55</sup>

Accordingly, if the sociopolitical benefits inherent in the use of civil juries are to be realized in this time of American democratic decline, it is necessary that the institution itself be restored. Strategies for doing so should be motivated by the animating principles of lay participation in resolving civil disputes—including the democratic representation of the community and the emboldening role of jury decision-making. Efforts must be made to remove barriers to jury trials so that they can occur more frequently

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<sup>50</sup> *The Arbitration Solution to COVID-19-Stalled Court Litigation*, AM. ARB. ASS'N, <https://www.adr.org/litigation-to-arbitration> (last visited Nov. 10, 2022).

<sup>51</sup> See DIANE ROBINSON & SARAH GIBSON, PANDEMIC CASELOAD HIGHLIGHTS, CT. STAT. PROJECT, (Mar. 22, 2021), [https://www.courtstatistics.org/\\_data/assets/pdf\\_file/0022/61519/2020\\_4Q\\_pandemic.pdf](https://www.courtstatistics.org/_data/assets/pdf_file/0022/61519/2020_4Q_pandemic.pdf) (citing data showing the staggering amount of pending criminal and civil cases in 2020).

<sup>52</sup> See *id.* (“Although courts remained open for filing throughout the pandemic, litigants . . . may simply have chosen to wait to file civil or domestic relations cases.”).

<sup>53</sup> *Id.*

<sup>54</sup> See Mandi Hunter, *Who Pays if Kansas Doesn't Fund Its Court System Adequately? You, Eventually*, THE KAN. CITY STAR (Apr. 30, 2021), <https://www.kansascity.com/opinion/readersopinion/guestcommentary/article251037774.html> (noting that Kansas state courts “have not been adequately funded for years”); Tom Coulter, *Officials: Budget Cuts Likely to Have Effects on Court System*, RAWLINS TIMES (Oct. 13, 2020), [wyomingnews.com/rawlinstimes/news/officials-budget-cuts-likely-to-have-effects-on-court-system/article\\_924174e7-4a35-521c-89f6-36da8f278fef.html](http://wyomingnews.com/rawlinstimes/news/officials-budget-cuts-likely-to-have-effects-on-court-system/article_924174e7-4a35-521c-89f6-36da8f278fef.html) (explaining that the cuts in funding will result in a decrease in trials).

<sup>55</sup> See *Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Aug. 7, 2022) (providing links to state court experiments with virtual jury trials); see generally ONLINE COURTROOM PROJECT, <https://www.onlinecourtroom.org/> (last visited Aug. 7, 2022) (describing efforts by trial consultants and others to study and improve online trials).

and to improve the fairness and accuracy of jury fact-finding so that more litigants view jury trials as a desirable mode of dispute resolution. We offer here six research-based strategies aimed at making these changes. Adopting these strategies can help rebuild the civil jury so that it is once again a key component of our democracy.

This Article recognizes that the jury represents a profound commitment to the principles of democratic self-governance and contends that looking to the institution can help guide the nation back toward those principles. To this end, it is divided into three main parts. Part II recounts the history and the anticipated role of the civil jury within the constitutional structure. It emphasizes that bringing the community into the application and development of the law has pronounced administrative and sociopolitical benefits. Part III presents the history of the institution's decline in use and esteem over the twentieth century. It recounts how critiques and successful attacks on jury authority have created a culture that views the institution as expendable. Part IV contends that if the democracy-enhancing benefits associated with the civil jury are to be once again realized, strategies must be taken to restore the institution to its position as a core part of the constitutional body. It offers strategies empirically shown to remove barriers to, and to improve the fairness and accuracy of, civil jury trials. The Article concludes that while the civil jury is unlikely to alone renew American democracy, it must be part of the conversation.

## II. THE FOUNDATIONAL BENEFITS OF TRIAL BY CIVIL JURY

To understand the sociopolitical benefits that restoring the civil jury can bring in this time of democratic crisis, it is helpful to examine the role the institution played at the time of the Founding. The civil jury was cemented in the U.S. Constitution and widely protected in the states as a core institution designed to check abuses of power by the government and powerful actors.<sup>56</sup> It was a democratic body, bringing laypeople into the administration of

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<sup>56</sup> See Eric Fleisig-Greene, *Why Contempt Is Different: Agency Costs and Petty Crime in Summary Contempt Proceedings*, 112 *YALE L.J.* 1223, 1229 (2003) (suggesting that the Founders included the right to a jury trial, at least in part, because of “the functional role of the jury as a way to assure that the judiciary remained accountable to, and aligned with, the interests of the citizenry it purported to serve”).

justice and allowing them to exercise meaningfully the practice of self-governance. These are not theoretical benefits. Modern empirical research shows that jury service supports these foundational interests.<sup>57</sup> The jury enhances the administration of justice by democratizing the process of fact-finding and ensuring that outcomes conform with communitarian notions of justice. And through that civic engagement and transparency, laypeople are imbued with a deeper commitment to the legitimacy of government institutions.

#### A. THE CONSTITUTIONAL ROLE OF THE CIVIL JURY

It is difficult to overstate the role that the civil jury played in the run-up to the American Revolutionary War and the founding of the United States. The jury at the time was a core channel through which the colonists challenged the distant and unrepresentative monarchy.<sup>58</sup> In establishing their new system of government, many former colonists insisted that these jury protections be preserved in writing to act as a similar bulwark against the proposed American federal government.<sup>59</sup> To this end, the civil jury was constitutionalized not merely as a dispute resolution tool but also as a democratic body meant to bind the hands of powerful actors to the mast of the community.<sup>60</sup> It was an integral, structural component of the constitutional system itself.

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<sup>57</sup> See, e.g., Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278–94 (2009) (describing one of the jury’s roles as a “deliberative accountability paradigm”).

<sup>58</sup> In fact, colonial America was familiar with the resistance that criminal juries showed to the Crown not only in criminal prosecutions like Zenger’s trial or the trial of William Penn, but also in civil cases that held British officials accountable for overstepping their authority and restricting civil liberties through damage verdicts, as in *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765) and *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763).

<sup>59</sup> See, e.g., *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (recognizing that juries were “designed ‘to guard against a spirit of oppression and tyranny on the part of rulers,’ and were ‘from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.’” (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873))).

<sup>60</sup> See J. H. Michael Jr., *Right to Trial by Jury: How Important?*, U.S. DEP’T OF JUST. OFF., OF JUST. PROGRAMS (Oct. 1991), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/right-trial-jury-how-important> (listing “the vindication of interests of private citizens in litigation with the government” and “protection of litigants against overbearing and oppressive judges” as arguments in favor of civil jury trials that were advanced during the Constitution’s ratification process).

It is unsurprising that the Founders so entrusted the jury. Eighteenth-century jurists and scholars revered the jury for its sociopolitical significance. Perhaps most famous among these champions was English jurist William Blackstone. In his widely circulated *Commentaries*,<sup>61</sup> Blackstone celebrated the jury with an almost religious zeal. He called it “the glory of English law,” “a privilege of the highest and most beneficial nature,” and “the principal bulwark of [every Englishman’s] liberties.”<sup>62</sup> It was, he said, a “strong and two-fold barrier . . . between the liberties of the people[] and the prerogative of the crown” because “the truth of every accusation . . . [s]hould afterwards be confirmed by the unanimous suffrage of twelve of [a defendant’s] equals and neighbours, indifferently chosen, and superior to all suspicion.”<sup>63</sup>

It was this politically active jury that the American colonists weaponized in the decades leading up to the Revolution. Relying not just on colonial assemblies that opposed British tyranny, juries served “to protect the rights of the people from being violated by the Crown and its dependents,” as a representative institution.<sup>64</sup> One of the early and most famous examples of the colonists exerting such political power is the seditious libel case of John Peter Zenger in 1735. Zenger was accused of printing allegations of corruption against the New York Governor, including the governor’s attempt to recover a debt in an equity court to evade the debtor’s right to a jury trial.<sup>65</sup> At the trial, because it was agreed that Zenger had published the material, his attorney Andrew Hamilton argued in support of the jury’s power to determine both law and fact and to acquit Zenger on the basis that the corruption allegations were truthful, despite the fact that truth was not a defense for libel under

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<sup>61</sup> The Supreme Court has recognized that “[a]t the time of the adoption of the Federal Constitution, [Blackstone’s *Commentaries*] had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it.” *Schick v. United States*, 195 U.S. 65, 69 (1904).

<sup>62</sup> 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*350, \*379 (1765).

<sup>63</sup> *Id.* at \*349–50.

<sup>64</sup> Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 *Geo. L.J.* 1061, 1074 (2007).

<sup>65</sup> See CLARK GAVIN, *FAMOUS LIBEL AND SLANDER CASES OF HISTORY: FOUL, FALSE AND INFAMOUS* 45–46 (Collier Books 1962) (“Zenger was arrested . . . on a Council warrant charging seditious libel.”).

the law.<sup>66</sup> Although the judge threatened Hamilton with disbarment for making the argument and the jurors with perjury if they returned a not guilty verdict, the jury acquitted Zenger.<sup>67</sup> The outcome was celebrated throughout the colonies.<sup>68</sup>

The Zenger case proved to be no outlier. By the mid-eighteenth century, colonists were regularly employing the jury to nullify the excesses of the Crown. They did so both offensively—for instance, by refusing to enforce civil penalties against smugglers—and defensively—by awarding smugglers damages for harms resulting from the trespass of officers’ searches.<sup>69</sup> In doing this, colonial jurors essentially rendered British law unenforceable, so much so that one governor complained, “[A] trial by jury here is only trying one illicit trader by his fellows, or at least by his well-wishers.”<sup>70</sup> Another governor warned in 1761: “A custom house officer has no chance with a jury, let his cause be what it will. And it will depend upon the vigorous measures that shall be taken [in London] for the defense of the officers, whether there be any Custom house here at all.”<sup>71</sup>

The Crown soon took vigorous measures against the jury, specifically by expanding the jurisdiction of juryless tribunals. This began with the Stamp Act of 1765, which required that all printed documents used or created in the colonies bear an embossed revenue stamp, with violations to be tried in juryless vice-admiralty courts.<sup>72</sup>

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<sup>66</sup> See *id.* at 52–53 (reciting the hearing transcript when Hamilton stressed that a jury may “determine both the law and the fact, and where they do not doubt of the law . . . they ought to do so”).

<sup>67</sup> See Arthur E. Sutherland, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 77 HARV. L. REV. 787, 788 (1964) (noting that the jury acquitted Zenger while spectators cheered).

<sup>68</sup> For a review of the Zenger trial and its significance in the colonies, see generally JAMES ALEXANDER, *PRINTER OF THE NEW YORK WEEKLY JOURNAL, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (Stanley Nider Katz ed., 1963).

<sup>69</sup> See, e.g., *Erving v. Cradock*, 1 Geo. 3 (1761), in JOSIAH QUINCY, JR., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772* app. II at 555 (1865) (returning a verdict for a ship owner in breach of revenue law and against a customs collector for trespass when the collector held the plaintiff’s ship and cargo pending payment of a civil fine).

<sup>70</sup> STEPHEN BOTEIN, *EARLY AMERICAN LAW AND SOCIETY* 57 (1983) (quoting Governor William Shirley).

<sup>71</sup> Letter from Governor Francis Bernard to Lords of Trade (Aug. 2, 1761), in QUINCY, JR., *supra* note 69, app. II at 557.

<sup>72</sup> Duties in America (Stamp) Act 1765, 5 Geo. 3, c. 12.

Over the next three years, the British passed a series of taxes known as the Townshend Acts,<sup>73</sup> which also placed jurisdiction beyond juries in vice-admiralty courts.<sup>74</sup> Since the Crown could not directly control the obstinate colonial jurors, it took steps so that juries would simply be avoided.

The colonists met these several Acts with fierce objections.<sup>75</sup> The Stamp Act, for instance, triggered the First Congress of the American Colonies in October of 1765, where the body declared that “trial by jury is the inherent and invaluable right of every British subject in these colonies” and that “[the Stamp Act], and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.”<sup>76</sup> A similar claim was made soon thereafter in the Declaration of Independence, which proclaimed that independence was justified in part because the Crown had “depriv[ed] [the colonists] in many cases, of the benefits of Trial by Jury.”<sup>77</sup>

Americans’ reverence for the jury did not diminish after the war. Under the short-lived Articles of Confederation, Congress required civil juries to resolve certain disputes and all thirteen states broadly secured the institution.<sup>78</sup> Likewise, the institution was secured in the Northwest Territory.<sup>79</sup> Thus, it is somewhat surprising that the Constitution as originally drafted in 1787 only secured the right to trial by jury for all crimes, except those of impeachment; it did not secure civil jury protections. This absence was not because the drafters found the civil jury an unworthy institution of such protection or because they intended to destroy it. Instead, the

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<sup>73</sup> See Catherine S. Menand, *The Revolutionary Moment and the Supreme Judicial Court*, 77 MASS. L. REV. 22, 23 (1992) (explaining that these “acts provided for certain import taxes and tightened existing customs regulations”).

<sup>74</sup> Vice Admiralty Court Act 1767, 8 Geo. 3., c. 22.

<sup>75</sup> For a review of American colonial vice-admiralty courts in the American colonies and how changes in their jurisdiction helped spark the Revolution, see generally CARL UBBELOHDE, *THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION* (1960).

<sup>76</sup> RESOLUTIONS VII, VIII OF THE STAMP ACT CONGRESS (1765).

<sup>77</sup> THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

<sup>78</sup> See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1972) (discussing the broad protection the civil jury enjoyed).

<sup>79</sup> See NORTHWEST ORDINANCE OF 1787 art. II (“The inhabitants of the said territory shall always be entitled to the benefits of . . . the trial by jury”); see also SOURCES OF OUR LIBERTIES 387 (Richard L. Perry ed., 1978) (noting that “the Northwest Ordinance contains the first federally enacted bill of rights”).

drafters found it difficult to find language that would correspond with the different civil jury practices in the states and believed the right to be so ingrained that those in power would have no incentive to restrict it.<sup>80</sup>

Nevertheless, the initial lack of civil jury protections in the Constitution was met with great skepticism throughout the states. As Alexander Hamilton acknowledged, “The objection to the [Constitution], which has met with most success[,] . . . is that relative to the want of a constitutional provision for the trial by jury in civil cases.”<sup>81</sup> Anti-Federalists persuasively charged that the original Constitution’s grant of the Supreme Court appellate jurisdiction both “as to law and fact” effectively abolished civil juries altogether.<sup>82</sup> They wrote passionately on the horrors that would result if civil jury protections were not constitutionalized: “[W]hat satisfaction can we expect from a lordly court of justice, always ready to protect the officers of government against the weak and helpless citizen, and who will perhaps sit at the distance of many hundred miles from the place where the outrage was committed?”<sup>83</sup>

The civil jury, then, provided protection not only against executive abuses of power, but also against those judges who might bless such abuses. As the Federal Farmer, a prolific Anti-Federalist, expounded: “[F]requently drawn from the body of the people . . . we secure to the people at large, their just and rightful control in the judicial department.”<sup>84</sup> And Thomas Jefferson, a reluctant supporter of the Constitution, went so far as to answer: “Were I

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<sup>80</sup> See THE FEDERALIST NO. 83 (Alexander Hamilton) (“From this sketch it appears that there is a material diversity, as well in the modification as in the extent of the institution of trial by jury in civil cases, in the several States; and from this fact these obvious reflections flow: first, that no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States; and secondly, that more or at least as much might have been hazarded by taking the system of any one State for a standard, as by omitting a provision altogether and leaving the matter, as has been done, to legislative regulation.”).

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., ESSAY OF A DEMOCRATIC FEDERALIST (1787), reprinted in 3 THE COMPLETE ANTI-FEDERALIST 58, 60 (Herbert J. Storing ed., 1981) (discussing that appellate jurisdiction of the supreme court “precludes every idea of a trial by jury”).

<sup>83</sup> *Id.*; see also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 87 (1998) [hereinafter AMAR, THE BILL OF RIGHTS] (providing “graphic[] illustrat[i]ons” of cases where English “judges had at times abetted government tyranny”).

<sup>84</sup> LETTERS FROM THE FEDERAL FARMER XV (1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST, 315, 320 (Herbert J. Storing ed., 1981).

called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making [of] them.”<sup>85</sup> He continued, highlighting distrust of a permanent judiciary, noting that such “judges acquire an *Esprit de corps*,” and are liable to be misled “by a spirit of party” or “by a devotion to the executive or legislative power.”<sup>86</sup> “It is in the power, therefore, of the juries, if they think permanent judges are under any bias whatever, in any cause,” Jefferson said, “to take on themselves to judge the law as well as the fact.”<sup>87</sup>

Finally, the civil jury—and particularly the importance of constitutionalizing it—was thought to be necessary to guard against the national legislature, which might pass obnoxious and unpopular legislation, or even worse, seek to restrict the use of juries in cases arising under such legislation.<sup>88</sup> So celebrated was the right to a civil jury that some Federalists’ response to this argument was that reasonable legislators would dare not restrict the right out of their own self-interest.<sup>89</sup> Prior to serving as one of the nation’s first Supreme Court Justices, James Iredell earnestly contended that if jury protections were stripped, “[Congress’s] authority would be instantly resisted,” drawing upon the legislators “the resentment and detestation of the people” such that “[t]hey and their families . . . would be held in eternal infamy.”<sup>90</sup> But it was precisely because legislators could not be trusted to draw the contours of significant

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<sup>85</sup> Letter from Thomas Jefferson to M. L’Abbe Arnond (July 19, 1789), in 3 *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE* 82 (H. A. Washington, ed., 1853).

<sup>86</sup> *Id.* at 81.

<sup>87</sup> *Id.* at 82.

<sup>88</sup> See Wolfram, *supra* note 78, at 654 (“A deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England in 1774–1776 had been the extent to which colonial administrators were making use of judge-tryed cases to circumvent the right of civil jury trial.”).

<sup>89</sup> See *id.* at 664–65 (discussing the Federalists’ position that the right to a jury trial was better left to Congress based on the assumption that “decent men would be elected”).

<sup>90</sup> James Iredell in the North Carolina Ratifying Convention (July 28, 1788), in 4 *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787* 120, 148 (Jonathan Elliot ed., 1891).

rights that amendments were thought necessary to the proposed Constitution—the civil jury being chief among them.<sup>91</sup>

The Anti-Federalists’ arguments “struck a very responsive chord” among the American populace, who had in no small part just fought a bloody revolution over the importance of civil jury protections.<sup>92</sup> As part of the ratification process, eight of the nine states that submitted amendment proposals offered specific language for securing a civil jury right.<sup>93</sup> Massachusetts explicitly conditioned its ratification on the addition of such a clause.<sup>94</sup> Accordingly, it was the promise of what would come to be the Seventh Amendment that convinced many skeptics to sign on to the American experiment. Without such an implicit agreement on civil jury protections, the U.S. Constitution may very well never have been ratified.<sup>95</sup>

As this historical account demonstrates, the civil jury at the Founding was anticipated to be more than just one adjudicative body among many for resolving private disputes. It was instead established as a necessary institution within the constitutionally established balance of power, responsible for integrating laypeople into the administration of justice and for checking abuses of power at various levels. Constitutional scholar Professor Akhil Amar goes so far as to suggest: “If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury.”<sup>96</sup> The jury was the lynchpin tying the experiment together; empowering laypeople to serve as the nation’s true sovereigns in the administration of law.

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<sup>91</sup> Cf. *Blakely v. Washington*, 542 U.S. 296, 308 (2004) (noting that, in the criminal context, “the Framers put a jury-trial guarantee in the Constitution [because] they were unwilling to trust government to mark out the role of the jury”).

<sup>92</sup> Wolfram, *supra* note 78, at 668.

<sup>93</sup> See Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 B.Y.U. L. REV. 331, 353 (2017) (noting that the civil jury proposal was the second most popular proposal behind the reservation of power to the states).

<sup>94</sup> See Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966) (explaining that it was necessary for Massachusetts to “recommend certain ‘conciliatory propositions’” to achieve a majority, which included civil jury trials).

<sup>95</sup> See *Parsons v. Bedford*, 28 U.S. 433, 446 (1830) (“One of the strongest objections originally taken against the [C]onstitution of the United States[] was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the [S]eventh [A]mendment . . . [that] received an assent of the people so general[] as to establish its importance as a fundamental guarantee of the rights and liberties of the people.”).

<sup>96</sup> AMAR, *THE BILL OF RIGHTS*, *supra* note 83, at 96.

## B. THE SOCIOPOLITICAL BENEFITS OF THE JURY IN PRACTICE

Our overview of the jury's beginnings identifies important systemic justifications for the civil jury. But it is important to note that these benefits are not merely theoretical. Over the last sixty years, researchers have examined how the civil jury operates in practice. We summarize the empirical evidence on two main dimensions: (1) the civil jury's competence in fact-finding as compared to that of a professional judge, and (2) the civil jury's impact on civic engagement of the citizenry and its contributions to the transparency and legitimacy of the legal system. This contemporary empirical evidence about the operation and the impact of civil juries confirms many of the Founders' assumptions and experiences.

1. *The Civil Jury's Fact-Finding Advantages over Judges.* Civil juries add to the quality of fact-finding in civil trials. This assertion might surprise some readers. After all, judges are elite, legally trained, and experienced in adjudication, whereas jurors are drawn from all walks of life and usually have no special legal training or experience.<sup>97</sup> Expertise in a particular subject matter can be very helpful in aiding decision-making, especially in complex trials.<sup>98</sup> Jurors' diverse backgrounds and perspectives, and even their lack of experience, however, offer numerous benefits in terms of quality fact-finding—particularly in comparison to that of a professional judge.<sup>99</sup> By bringing their democratic insights to bear, the civil jury enhances the work of the judicial department.

A lay citizen's lack of specialized knowledge and experience confers some benefits even over an experienced and expert judge.

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<sup>97</sup> Special juries, in which individuals are selected for specific education, training, or experience to serve as civil jurors, remain an option in the United States, but their usage has declined dramatically in recent years. See generally JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 174–212* (2006) (reviewing the history of special juries in the United States).

<sup>98</sup> See Valerie P. Hans, David H. Kaye, B. Michael Dann, Erin J. Farley & Stephanie Albertson, *Science in the Jury Box: Jurors' Comprehension of Mitochondrial DNA Evidence*, 35 *LAW & HUM. BEHAV.* 60, 69 (2011) (showing that jurors with more education and more science courses do better on DNA quizzes).

<sup>99</sup> See Taylor-Thompson, *supra* note 31, at 1275 (explaining that “[b]ecause the jury’s work largely depends on subjective interpretations of evidence, a variety of perspectives will enrich jury discussions” and that interaction among jurors from various experience levels, both limited and expansive, “will expand the range of issues to be discussed” among jurors).

Judges are repeat players; a jury decides one case at a time. As judges sit in case after case over the years, judicial fact-finding becomes routinized.<sup>100</sup> Judges may jump to premature conclusions because of similar fact patterns in prior cases, might regularly favor one party over the other, or might even become jaded about the process of civil litigation.<sup>101</sup> Judges may be affected by confirmation bias, the unconscious psychological process in which people look for evidence that confirms their previous views and experiences and interpret evidence in ways that are consistent with their existing views.<sup>102</sup> This is especially so when prior cases are presented by the same legal counsel. Despite differences in facts and even trial strategy, the presence of the same advocate or even the same opponents can cause the judge to view the case with expectations based on prior experience.<sup>103</sup> Because lawyers often regularly appear in a single jurisdiction, this can occur with surprising frequency, particularly when both lawyers practice in a specialized field. Jurors deciding a single case come with a fresh perspective.

Relatedly, judges' personal characteristics and their prior legal work experiences correlate with their decisions.<sup>104</sup> For example, studies show that judges who worked in corporate law or as

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<sup>100</sup> See Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 13 ANN. REV. L & SOC. SCI. 203, 216 (2017) (“[E]xperience might induce judges to adopt mental shortcuts that they did not use when they were new judges.”).

<sup>101</sup> *Id.*; see also *supra* note 34 and accompanying text.

<sup>102</sup> JENNIFER K. ROBBENOLT & VALERIE P. HANS, *THE PSYCHOLOGY OF TORT LAW* 80–81, 212 (2016).

<sup>103</sup> See Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1041–42 (2019) (“[E]ven if judges attempt to shield their decisions from their explicit biases, implicit biases may seep into judicial decision making . . . [which] could be particularly consequential in trial courts when juries are not utilized, or when the same litigants appear before the same judges repeatedly.”); Jordan M. Singer, *Gossiping About Judges*, 42 FLA. ST. U. L. REV. 427, 435, 468 (2015) (finding repeated appearances create an overall advantage for lawyers but that judges often recall conduct of attorneys from previous interactions in future interactions); Bahaar Hamzehzadeh, *Repeat Player v. One-Shotter: Is Victory All that Obvious*, 6 HASTINGS BUS. L.J. 239, 243–44 (2010) (analyzing the impact on success caused by repeated appearances before the same judge).

<sup>104</sup> See JOANNA SHEPHERD, *JOBS, JUDGES, AND JUSTICE: THE RELATIONSHIP BETWEEN PROFESSIONAL DIVERSITY AND JUDICIAL DECISIONS* 12–16 (2021), <https://demandjustice.org/wp-content/uploads/2021/03/Jobs-Judges-and-Justice-Shepherd-3-08-21.pdf> (presenting data showing that “certain types of career experiences are associated with judges favoring individuals over corporations, or vice versa”).

prosecutors before becoming judges are less likely to favor employees in employment discrimination cases.<sup>105</sup> There is also a link between campaign contributions and judges' decisions.<sup>106</sup> The same is true for a judge's race and political affiliation.<sup>107</sup> Senator Sheldon Whitehouse points to the increasing politicization of judicial appointments and special interest funding in judicial elections as causes for concern, both of which underscore the value of having an effective and efficient civil jury trial option.<sup>108</sup>

True, judges operate within a laudable system of accountability. Their judgments and written opinions are part of the public record, are reviewed by appellate courts, and may be considered in retention and promotion. But some studies of judicial decision-making have found a downside to these consequences. Judges in state courts facing reappointment or retention elections impose more severe sentences or show less favorability toward capital defendants' appeals, according to research.<sup>109</sup> This should not be

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<sup>105</sup> See *id.* at 13 (“[F]ormer prosecutors and lawyers with a corporate background are less likely to rule in favor of claimants—individual employees or the EEOC or Department of Labor on behalf of employees—than are judges without these backgrounds.”).

<sup>106</sup> See Rachlinski & Wistrich, *supra* note 100, at 211 (collecting studies that show that “donations from a political party correlate with judicial decision making” (first citing Damon M. Cann, *Justice for Sale? Campaign Contributions and Judicial Decisionmaking*, 7 STATE POL. & POL'Y Q. 281, 281–97 (2007); and then citing Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 69–130 (2011))).

<sup>107</sup> See, e.g., *id.* at 216–22 (“[P]ersonal characteristics of judges—their political ideology, gender, race, and experience—affect their decisions in cases that reflect those characteristics.”). For examples of relevant research, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (documenting decision-making differences in judgments by judges appointed by Republican and Democratic presidents); Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 399–406 (2010) (finding that a judge's gender affects decisions in sex discrimination cases).

<sup>108</sup> See Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1266–67 (2014) (“Concerns over corrupt influence may not be relevant as often in our contemporary civil justice system, but as judicial appointment becomes more politicized, and as special interest funding becomes more influential in judicial elections, corruption, particularly in the sense meant by the Founders, is a consideration not to be overlooked.” (footnote omitted)).

<sup>109</sup> See, e.g., Rachlinski & Wistrich, *supra* note 100, at 210 (indicating that “judges facing retention elections are less favorable to capital defendants' efforts to overturn their sentences” and that the effect on judge behavior extends to reappointment (first citing Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when*

surprising. As former California Supreme Court Justice Otto Kaus colorfully explained: “There’s no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub.”<sup>110</sup> Jurors, as temporary agents of the state, generally face no such professional peril from their one-off decisions.

The jury’s beneficial fact-finding flows from its comparative advantage over judges in community representativeness. A group of jurors is more likely than an elite judge to represent the range of backgrounds, experiences, views, and attitudes of the community at large.<sup>111</sup> A substantial body of theory and research on juror decision-making confirms that jurors draw on their life experiences, attitudes, and perspectives as they assess and weigh evidence in the trial.<sup>112</sup> The story model of juror decision-making posits that jurors rely on their world knowledge to interpret evidence in the case and to develop a narrative account of what happened in the events that led to the trial.<sup>113</sup> Knowledge of the world varies with life experiences. As such, demographic and attitudinal characteristics such as gender, race, and political affiliations are associated with distinctive decisions by jurors<sup>114</sup> and by judges as well.<sup>115</sup> A group of laypeople drawn from a cross-section of the community is better able to reflect a community’s social and political characteristics, and to

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*it Runs for Office?* 48 AM. J. POL. SCI. 247, 247–63 (2004); then citing John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 465–503 (1999); and then citing Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 169–203 (2009)).

<sup>110</sup> Paul Reidinger, *The Politics of Judging*, A.B.A. J., Apr. 1, 1987, at 52, 58.

<sup>111</sup> See Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 874–77 (2014) (discussing why judges are not representative of societal standards).

<sup>112</sup> See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 520–29 (1991) (contending that the “central cognitive process in juror decision making is *story construction*”); see generally NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000) (exploring how jurors attribute blame for accidental injury or death).

<sup>113</sup> Pennington & Hastie, *supra* note 112, at 521–23.

<sup>114</sup> See, e.g., EDIE GREENE & BRIAN H. BORNSTEIN, *DETERMINING DAMAGES: THE PSYCHOLOGY OF JURY AWARDS* 79–94 (2003) (describing research showing demographic effects on damage award decision-making).

<sup>115</sup> See *supra* notes 106–107 and accompanying text.

be better informed about community norms.<sup>116</sup> In sum, the civil jury is in an ideal position to incorporate the community's views and attitudes about responsibility and the valuation of injuries in its legal judgments.

Research on public reactions to a police car chase video footage that was integral to the Supreme Court's decision in *Scott v. Harris*<sup>117</sup> offers a vivid illustration of the superior ability of a representative community group to reflect the diverse range of citizens' opinions. The majority of the justices in that case asserted after viewing the footage that "no reasonable jury" could conclude that the car's driver did not pose a substantial risk.<sup>118</sup> But when researchers surveyed the public on their perception of the footage, their "subjects didn't see eye to eye."<sup>119</sup> Specifically, "African Americans, low-income workers, and residents of the Northeast," as well as "individuals who characterized themselves as liberals and Democrats," were all more likely to disagree with the Supreme Court's conclusion as to the risk posed by the driver.<sup>120</sup> When people assess the reasonableness of others' actions, research confirms that even if they are instructed to use an objective standard, they rely on their own values.<sup>121</sup> And when judges are asked to anticipate the collective mind of the jury, they are likely to be influenced by their own experiences and perspectives.<sup>122</sup>

Other benefits accrue from the group nature of jury decision-making. Juries engage in the process of deliberation, which offers the opportunity to compare, contrast, and test differing evaluations of the trial evidence. Deliberation and group decision-making are especially robust when the jury is composed of individuals with

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<sup>116</sup> See Ryan, *supra* note 111, at 878–80 (discussing how juries are necessarily more representative of their communities than are judges).

<sup>117</sup> 550 U.S. 372 (2007).

<sup>118</sup> *Id.* at 380.

<sup>119</sup> Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?: Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009).

<sup>120</sup> *Id.*

<sup>121</sup> See Mark D. Alicke & Stephanie H. Weigel, *The Reasonable Person Standard: Psychological and Legal Perspectives*, 17 ANN. REV. L. & SOC. SCI. 123, 123 (2021) (noting that there is a tendency to "rely on the self" when following a reasonable person standard).

<sup>122</sup> See, e.g., Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 760 (2009) ("[J]udges decide dispositive motions based on their [own] views of the evidence, as opposed to what a reasonable jury could find.").

diverse backgrounds and experiences.<sup>123</sup> Furthermore, studies have shown that jury deliberation is more robust when juries are required to reach unanimous as opposed to majority decisions.<sup>124</sup> Through the diversity of individuals and their viewpoints, a more thorough and searching decision-making process results.

In short, a jury trial—with a professional judge presiding—combines the multiple benefits of both lay and legally-trained decision-makers. Professional judges possess advantages of legal expertise and experience. And juries bring diverse perspectives, life experiences, and a strong grounding in community norms to the fact-finding task. Deliberation aids jurors in testing their interpretations of evidence and in developing a sound common account of the events leading to the lawsuit. A representative jury is thus able to fulfill one of the major purposes of trial by jury envisioned by the Founders—to stand in for the community in legal fact-finding to enhance the democratic legitimacy of the judicial department and its decisions.

Extensive research on civil jury decision-making supports the strength of the jury not only as a democratic institution but also as a fair and accurate fact-finder.<sup>125</sup> Interviews and post-trial questionnaire research confirm that the vast majority of jurors take

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<sup>123</sup> See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 606 (2006) (reporting research that found differences in decision-making between racially diverse and non-racially diverse groups).

<sup>124</sup> See Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Nonunanimous Civil Jury*, 100 NW. U. L. REV. 201, 230 (2006) (“[T]he deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.”); see also Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 23–24 (2001) [hereinafter Hans, *The Power of Twelve*] (summarizing empirical evidence of the benefits of a unanimity decision rule and a larger jury size).

<sup>125</sup> See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 63–65 (1966) (presenting research on judge-jury agreement rates); Valerie P. Hans, *What’s it Worth? Jury Damage Awards as Community Judgments*, 55 WM. & MARY L. REV. 935, 937 (2014) [hereinafter Hans, *What’s it Worth?*] (“Civil jury damage awards serve to check or endorse private power”); see also Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1148–55 (1992) (contrasting perceptions of civil juries with the realities of their decision-making).

their jury duty seriously.<sup>126</sup> Researchers have compared the verdicts reached by juries to judicial decisions or judicial evaluations of the same or similar types of cases; they have also used experimental methods to examine the decision processes in civil disputes.<sup>127</sup>

It is difficult to directly compare the outcomes of jury trials and bench trials because litigants select which cases go to the jury and which go to the judge.<sup>128</sup> In judge-jury agreement studies, judges presiding over jury trials are asked to record the jury's verdict and to indicate what verdict they themselves would have reached had they been trying the case as a bench trial. Therefore, the judge and jury assess the same case, and a comparison of the actual jury verdict and the judge's hypothetical verdict is more readily attributable to the distinctive qualities of the fact-finder.<sup>129</sup> The first judge-jury agreement study occurred in the 1950s and revealed that the judge agreed with the jury's verdict in civil trials seventy-eight percent of the time.<sup>130</sup> Interestingly, in that study, the disagreements between the judge and jury were symmetrical; judges would have found for the plaintiff when the jury reached a defense verdict in ten percent of the trials, and judges would have found for the defendant when the jury decided the case for the plaintiff in twelve percent of the trials.<sup>131</sup> Subsequent studies using a similar methodology have found comparable overall agreement

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<sup>126</sup> See Diamond, *What Jurors Think*, *supra* note 25, at 288 (asserting that “the vast majority of jurors are motivated to do a good job”).

<sup>127</sup> NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 19 (2007) (describing the multiple methods used to evaluate the jury system, including “interviewing and surveying jurors, analyzing jury verdicts, and conducting experiments to test hypotheses about jury decision processes”); *see also id.* at 267–79 (presenting research findings about juror judgments of civil liability).

<sup>128</sup> For a thoughtful discussion of the impact of these “selection effects” (that different streams of cases are heard by judges versus juries), see Kevin M. Clermont, *Litigation Realities Redux*, 84 *NOTRE DAME L. REV.* 1919, 1961–64 (2009). Differences in outcomes could thus be attributable to case differences or to differences between judge and jury decision-making. *See id.* at 1963 (concluding, in part, that “small differences between judges’ and juries’ treatment of cases and . . . the parties’ varying the case selection that reaches the judge and jury” contribute to differences in outcomes).

<sup>129</sup> Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 *CORNELL L. REV.* 119, 144 (2002) (discussing the data collection methodology for judge-jury agreement studies).

<sup>130</sup> KALVEN & ZEISEL, *supra* note 125, at 63.

<sup>131</sup> *Id.* at 64. For a comparison of judge and jury verdicts, see Clermont & Eisenberg, *supra* note 129, 144–47 (analyzing data on the rate of agreement between judge and jury on liability) and Clermont, *supra* note 128, at 1961–64.

rates.<sup>132</sup> Importantly, several judge-jury agreement studies have found that the complexity of evidence in the case is unrelated to the agreement rates between juries and legal experts; a relationship would have been expected if jury incompetence led juries to choose a different verdict.<sup>133</sup>

Studies of money damage awards in civil cases, too, offer some reassurance.<sup>134</sup> The civil jury is in an ideal position to determine damage awards, which is a fact-finding function constitutionally assigned to the jury.<sup>135</sup> Jury damage awards reflect the community's assessment of the value of an injury by considering the context and circumstances of the injury and the identities and behavior of the parties.<sup>136</sup> The need to examine each case's specific facts, and the ability to handle both the uncertainty and the intangibility of some injuries, make the representative jury a societally appropriate decision-maker on damages. As the Virginia Supreme Court once noted, "[T]he law wisely leaves the assessment of damages, as a rule, to juries, with the concession that there are no scales in which to weigh human suffering, and no measure by which pecuniary compensation for personal injuries can be accurately

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<sup>132</sup> Shari Seidman Diamond, Neil Vidmar, Mary Rose, Leslie Ellis & Beth Murphy, *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 67 n.108 (2003) [hereinafter Diamond et al., *Juror Discussions*] (finding a seventy-seven percent agreement rate between judges and juries); Larry Heuer & Steven Penrod, *Trial Complexity: A Field Investigation of its Meaning and its Effects*, 18 LAW & HUM. BEHAV. 29, 48 (1994) (finding a sixty-three percent agreement).

<sup>133</sup> See, Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans & Nicole L. Waters, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's The American Jury*, 2 J. EMPIRICAL LEGAL STUD. 171, 191–92 (2005) (presenting research detailing similar judge-jury agreement across different evidentiary complexities).

<sup>134</sup> See, e.g., VIDMAR & HANS, *supra* note 127, 281–320 (presenting research on compensatory and punitive damage award decision-making by juries); Hans, *What's it Worth?*, *supra* note 125, at 939–41 (discussing how jury-determined damage awards for intangible injuries display the community's value assessment of those injuries).

<sup>135</sup> See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2002) ("A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination."); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) ("The jury are the judges of damages." (quoting *Lord Townshend v. Hughes* (1677) 86 Eng. Rep. 994, 995 (C.P.)); see also BLACKSTONE, *supra* note 62, at \*324 ("[T]he quantum of damages . . . is a matter that cannot be done without the intervention of the jury.").

<sup>136</sup> See Hans, *What's it Worth?*, *supra* note 125, at 939 (discussing how damage awards are often closely associated with a community's value of the injury); Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 160 (1958) (explaining that a foundational premise of a jury is to evaluate the damage award on a case-by-case basis).

ascertained.”<sup>137</sup> The jury can draw on its collective experiences with injuries and the resulting financial consequences as they engage in the necessary fact-finding.<sup>138</sup>

Empirical studies show that the concrete factual details and injuries at issue in a case regularly explain a jury’s damage award. First, the overall severity of plaintiffs’ injuries is strongly related to jury damage awards.<sup>139</sup> In states that separate out economic and noneconomic damages, the amount of economic damages is a powerful predictor of the amount of noneconomic damages.<sup>140</sup> Second, empirical research on jury decision-making with respect to punitive damages reassures that the civil jury acquits itself fairly; punitive damages are generally proportionate to compensatory damages, suggesting that the jury often is not unduly harsh.<sup>141</sup> Instead, as with all of the jury’s decisions, the community’s consciousness is channeled through the institution, enhancing the accuracy and democratic legitimacy of the judgment.

*2. The Civil Jury Promotes Civic Engagement and Systemic Legitimacy.* Beyond the benefits that jurors bring in fact-finding and the administration of civil justice, the civil jury institution and juror experience itself promote civic engagement and broader systemic

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<sup>137</sup> *Chesapeake & Ohio Ry. Co. v. Arrington*, 101 S.E. 415, 423 (Va. 1919), *abrogated by* *John Crane, Inc. v. Jones*, 650 S.E.2d 851 (Va. 2007).

<sup>138</sup> See Hans, *What’s it Worth?*, *supra* note 125, at 939, 941 (explaining how jurors’ independent evaluations combined to establish a damage award rooted in community values).

<sup>139</sup> See Randall R. Bovbjerg, Frank A. Sloan & James F. Blumstein, *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 941 (1989) (summarizing evidence showing the strong relationship between injury severity and damage awards; those who are more severely injured generally receive higher damage awards).

<sup>140</sup> See Herbert Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of “Noneconomic” Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 1010–13 (2014) (presenting research examining possible predictive relationships between noneconomic and economic damages based on conditional variables).

<sup>141</sup> See Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Relation Between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, in *CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES* 105, 106–07 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008) (finding a strong correlation between compensatory and punitive damage awards); see also Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 142, 144 (2011) (same). After reviewing the empirical literature, the Supreme Court found that jury “discretion to award punitive damages has not mass-produced runaway awards,” but, instead, “show[s] an overall restraint.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497, 499 (2008).

legitimacy. The French political thinker Alexis de Tocqueville trenchantly observed that the civil jury operates as an ever-open “public school” that educates American citizens about the law through their participation.<sup>142</sup> He added:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. . . . It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.<sup>143</sup>

Studies bolster this observation. One phenomenon that has been widely documented is the largely favorable reaction that citizens have to the experience of jury service.<sup>144</sup> Although many citizens express concern about receiving a jury summons, once they participate as jurors, they generally recognize their experience as a positive form of civic engagement.<sup>145</sup> In one of the largest studies, over 8,000 jurors from sixteen federal and state courts completed questionnaires following their jury service; sixty-three percent reported that their view of jury service became more favorable after serving.<sup>146</sup> In other research, after they have served, jurors are more apt to say that they see the courts as fair and to have more favorable views about the justice and equity of the legal system.<sup>147</sup>

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<sup>142</sup> See TOCQUEVILLE, *supra* note 22, at 274 (noting how the civil jury system educates the public on the law and instills a shared responsibility to achieve justice).

<sup>143</sup> *Id.*

<sup>144</sup> See Diamond, *What Jurors Think*, *supra* note 25, at 298–300 (summarizing the research documenting jurors’ favorable responses to serving and finding that “willingness to serve again was high”).

<sup>145</sup> See James B. Binnall, *A “Meaningful” Seat at the Table: Contemplating Our Ongoing Struggle to Access Democracy*, 73 SMU L. REV. F. 35, 46 (2020) (“[J]ury service fosters a general sense of empowerment that frequently leads to other forms of civic engagement.”).

<sup>146</sup> JANET T. MUNSTERMAN, G. THOMAS MUNSTERMAN, BRIAN LYNCH & STEVEN D. PENROD, NAT’L CTR. FOR STATE CTS., *THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE* 6 (1991).

<sup>147</sup> See Diamond, *What Jurors Think*, *supra* note 25, at 286 (“The jurors [that were] studied became more positive in their assessments of the justice and equity of the legal system following jury service.”).

Jury service is a form of civic participation, and, in this way, the jury is a responsibility-taking institution.<sup>148</sup> It pulls individuals from their daily lives and assigns them the task of implementing society's judgments, forcing them both to express and to create community identity through group deliberation.<sup>149</sup> Given this substantial task and the transformative role required of laypeople to perform it, perhaps it should not surprise us that participating as a juror—in either a criminal or a civil trial—boosts other forms of citizen engagement. Professor John Gastil and his colleagues put Tocqueville's observation to an empirical test in a set of studies that examined the links between jury service and voting.<sup>150</sup> In one such study, they obtained jury service data from seven U.S. states and linked these records with jurors' voting history before and after jury service.<sup>151</sup> Citizens who served in criminal cases and who were infrequent voters boosted their voting after completing jury service.<sup>152</sup> Another study found that jurors who served on twelve-person civil juries or juries that were required to reach a unanimous

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<sup>148</sup> See Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999) (articulating the virtues reflected in the jury system and in jury service); see also Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 192 (1990) (describing a theory of jury responsibility in which “the jury is conceptualized as a democratic representative of the community” that should “convey the moral condemnation of the community in a criminal case and the range of viewpoints of the community in a civil case”).

<sup>149</sup> Note, too, that the jury system may relieve judges of responsibility, allowing them to take cover behind the work of jurors. See, e.g., *KALVEN & ZEISEL*, *supra* note 125, at 7 (noting that one of the “collateral advantages” of the jury system is that jurors may serve as a “lightning rod for animosity and suspicion which otherwise might center on the more permanent judge”).

<sup>150</sup> See JOHN GASTIL, E. PIERRE DEESS, PHILIP J. WEISER & CINDY SIMMONS, *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 45–47 (2010) [hereinafter GASTIL ET AL., *THE JURY AND DEMOCRACY*] (finding that low-frequency voters who served as jurors in a criminal case were more likely to vote in later elections); see also John Gastil, E. Pierre Deess, Philip J. Weiser & Jordan Meade, *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POLS. 351, 358–60 (2008) (analyzing the effect of deliberation on jurors' likelihood to vote); John Gastil, E. Pierre Deess & Philip J. Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POLS. 585, 586 (2002) (examining “the link between political participation and an institutionalized form of citizen deliberation,” specifically inquiring into the effect of deliberation and reaching a verdict on a jury on the likelihood of voting in subsequent elections).

<sup>151</sup> GASTIL ET AL., *THE JURY AND DEMOCRACY*, *supra* note 150, at 45–47.

<sup>152</sup> See *id.* at 45–47 (finding that for low frequency voters, “[c]riminal jurors reaching a verdict” were 4.3% more likely to vote in a future election).

decision—in other words, the traditional form of trial by jury—were significantly more likely to vote following their service, controlling for their pre-service voting history.<sup>153</sup> Civil jurors who decided cases with organizational (as opposed to individual) defendants also showed increased voting behavior.<sup>154</sup>

What is more, the civil jury enhances systemic legitimacy more broadly. Disputants who can discuss their differences and reach fair and equitable resolutions through mediation or other private settlement mechanisms may not need to resort to the courts. Surveys have found that people often are satisfied with these private remedies.<sup>155</sup> But for other litigants, and for the rest of society, the public trial—and in particular the civil jury trial—offers several advantages. In her book, *In Praise of Litigation*, Professor Alexandra Lahav identifies the multiple ways in which litigation protects important democratic values:

Litigation helps democracy function in a number of ways: it helps to *enforce* the law; it fosters *transparency* by revealing information crucial to individual and public decision-making; it promotes *participation* in self-government; and it offers a form of *social equality* by giving litigants equal opportunities to speak and be heard.<sup>156</sup>

With respect to enforcement and transparency, jury trials, and public litigation more generally, add value because they produce information about what otherwise might be unfairly hidden practices and procedures.<sup>157</sup> The trial is a transparent and public

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<sup>153</sup> See Hans et al., *supra* note 26, at 710–12 (finding that jurors on twelve-person juries had the “highest increase in voting” participation after service).

<sup>154</sup> See *id.* (“When jurors served on cases with organizational defendants, they had an experience that resulted in a more positive change in their voting rates . . . than did those jurors whose cases featured only individual defendants.”).

<sup>155</sup> See Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 120, 132 (2020) (finding that respondents “preferred [mediation] significantly to arbitration and bench trials”).

<sup>156</sup> LAHAV, *supra* note 28, at 1–2.

<sup>157</sup> See *id.* at 56–57 (offering a real-world example of how adversarial litigation can increase transparency and bring vital information to light); see also Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683 (2016) (reviewing the externalities associated with public dispute resolution, including the production of information).

event. Citizens observe the evidence and arguments presented by each side. Others, potentially liable under the same circumstances, also see the results and can take additional safety measures as a form of self-regulation, improving their products or services and filling gaps in our system of formal regulation.<sup>158</sup>

Litigants have their day in court; their arguments and evidence are given in public to their peers and the state. The opportunity to present one's views and the chance to be heard are key elements contributing to procedural justice, a sense that fair processes are used to resolve a dispute.<sup>159</sup> In turn, a sense that one has been heard and treated fairly in a dispute resolution procedure increases the perceived legitimacy of the procedure.<sup>160</sup> Because it takes place in a public forum and because there is a framework for appealing the results, there are possibilities for error correction. Private adjudication lacks not only the transparency of inviting the public to decide cases and check the work of arbiters but also does not have the same corrective potential in the form of appellate review.<sup>161</sup>

In sum, the transparent and public nature of civil jury trials, allowing the presentation of evidence on both sides, providing litigants the opportunity to be heard, and giving citizens the right to decide the outcomes, operates to reinforce democratic self-governance. Combined with the other benefits we discuss, this positions the civil jury as an institution of great significance during this time of American democratic decline. The jury is poised to play the role anticipated by the Founders—bringing laypeople into the administration of justice, investing them in the fair and democratic

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<sup>158</sup> See, e.g., BOGUS, *supra* note 28, at 169 (offering examples from the automobile industry); see also Stephan Landsman, *Juries as Regulators of Last Resort*, 55 WM. & MARY L. REV. 1061, 1067 (2014) (discussing the civil jury's role in filling in gaps in the regulatory regime).

<sup>159</sup> See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 19–68 (1990) (examining the positive effect of procedural justice in legal experiences on legitimacy and compliance with the law).

<sup>160</sup> See *id.* at 20 (concluding that satisfaction with court performance increases the perception of legitimacy). From the earliest days of the Republic, the Supreme Court has recognized the importance of that perception, opining that a legitimate system of justice “recognizes and [s]trongly [r]ests on this great moral truth, that justice is the [s]ame whether due from one man or a million, or from a million to one man” and enables every person “to obtain justice without any danger of being overborne by the weight and number of their opponents.” *Chisholm v. Georgia*, 2 U.S. 419, 479 (1793).

<sup>161</sup> See, e.g., Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704–12, 754 (1999) (describing how “[a]rbitration privatizes the creation of law”).

application of laws, and ensuring their power to push back against state and other powerful actors. However, as will be discussed next, the civil jury has been under sustained attack for nearly a century, greatly inhibiting its ability to serve its emboldening role. If the civil jury is to help redirect America toward democratic principles, it is necessary to understand what has caused the decline of the civil jury and to make urgent efforts to preserve and strengthen the institution.

### III. THE PRECIPITOUS DECLINE OF THE CIVIL JURY

Despite this foundational commitment to, and the sociopolitical and administrative benefits of, the civil jury, the institution has fallen precipitously in use and esteem. The factors contributing to the civil jury's decades-long decline are numerous and interrelated. The adoption of new procedures in the twentieth century altered the institutional relationship between the judge and the jury, empowering the former and divesting the latter of the authority that existed at common law. Judges hurried this transformation through their decisions denigrating jurors as incapable of deciding complex disputes or too impassioned to decide them impartially.<sup>162</sup> Similarly, powerful economic actors have engaged in a lengthy campaign to convince the public and policy makers that jurors should not be trusted.<sup>163</sup> The result is a popular and judicial culture that does not value lay participation and views it as an expendable part of the civil justice system. Thus, when budgetary or, most recently, public health crises arise, the civil jury is easily sidelined.<sup>164</sup> And as a result, the many potential sociopolitical benefits of this institution are squandered.

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<sup>162</sup> See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 389, 485–91 (1996) (outlining common criticisms of juries and how judges quickly exercised greater control over civil juries under the new Rules through mechanisms such as “special verdicts and special interrogatories, summary judgment, the directed verdict, and the judgment notwithstanding the verdict”).

<sup>163</sup> See Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 34, (2017) (discussing corporate defendants’ “longstanding distrust of juries”).

<sup>164</sup> See *supra* notes 45–48 and accompanying text.

## A. PROCEDURAL DIVESTING OF THE CIVIL JURY'S AUTHORITY

Despite its lofty beginnings, the civil jury has long faced a steady drumbeat of criticism from state and economic actors, leading to decline of both its use and constitutional esteem. To be sure, for much of American history, the jury fell short of including all segments of the community, and its verdicts have not been immune to racism, sexism, and other forms of bigotry.<sup>165</sup> But whereas the jury at the founding was seen as a great well of community knowledge that injected laypeople into the administration of justice, only decades into our history jurors had become—as one judge put it—“mere *assistants* of the courts, whose province it is to aid them in the decision of disputed questions of fact.”<sup>166</sup> This new conception, matched with substantial changes in civil procedure in the past 100 years, has made civil jury trials exceptionally rare.<sup>167</sup> So uncommon are they today that at least one leading scholar has proclaimed: “The civil jury is dead.”<sup>168</sup>

This decline is not new. Scholars have voiced concerns about the decline of the civil jury going back at least to the late 1920s.<sup>169</sup> Their concerns were borne out. Starting in 1962, the year when federal judicial statistics become most reliable, a consistent decline has been readily apparent in the percent of civil cases disposed of by

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<sup>165</sup> For an overview of the history of jury exclusion, see Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 *PSYCH. PUB. POL'Y & L.* 201, 204–08 (2001); see also Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 *WASH. & LEE L. REV.* 557, 560 (2016) (discussing the roles that race and racism have played, historically and through to today, in debates and actions taken to control civil jury power around the country).

<sup>166</sup> *Ernst v. Hudson River R.R. Co.*, 24 *How. Pr.* 97, 105 (N.Y. 1862).

<sup>167</sup> Renée Lettow Lerner, *The Uncivil Jury, Part 4: The Collapse of the Civil Jury*, *WASH. POST: DEMOCRACY DIES IN DARKNESS* (May 28, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/28/the-uncivil-jury-part-4-the-collapse-of-the-civil-jury/> (explaining how civil procedure has “expanded the scope of discovery” which leads to fewer parties seeking to fight until trial).

<sup>168</sup> *Id.*

<sup>169</sup> See Herbert M. Kritzer, *The Trials and Tribulations of Counting “Trials,”* 62 *DEPAUL L. REV.* 415, 416 (2013) (identifying scholarship concerning the decline of the jury trial to date back to the 1920s).

jury trial.<sup>170</sup> That rate was 5.5% in 1962; 3.7% in 1972; 2.6% in 1982; 1.9% in 1992; 1.2% in 2002; 0.81% in 2012; and just 0.31% in 2021 (the most recent year on file at time of writing).<sup>171</sup> A similar pattern has been experienced in state courts. In those states that kept accurate statistics, between 1976 and 2002, civil jury trials fell threefold from 1.8% to 0.6% in courts of general jurisdiction.<sup>172</sup> And the most recent data from the Court Statistics Project shows that the COVID-19 pandemic has driven these numbers to their lowest point ever. In 2020, for those states reporting, juries disposed of a median of only 0.06% of filed civil disputes—with Alaska reporting zero civil jury trials for the second year in a row.<sup>173</sup> Simply put, civil jury trials are today the very rare exception and not the rule.

Critically, bench trials have also been falling during this time. At the federal level, 6% of civil cases were resolved by bench trial in 1962, versus just 0.21% in 2021.<sup>174</sup> Indeed, since 1987 there have been fewer bench trials than jury trials at the federal level.<sup>175</sup> Figure 1 depicts the decline in federal bench and jury trials since 1962.

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<sup>170</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (showing that the rate of civil trials by jury in 2002 “was less than one-sixth of what it was in 1962”); see also Kritzer, *supra* note 169, at 438 (“It is clear that the number of jury trials declined in many, perhaps most, jurisdictions in the United States over the last fifty years.”).

<sup>171</sup> Galanter, *supra* note 170, at 461; Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021) (offering the total number of cases filed and disposed of by civil jury trial).

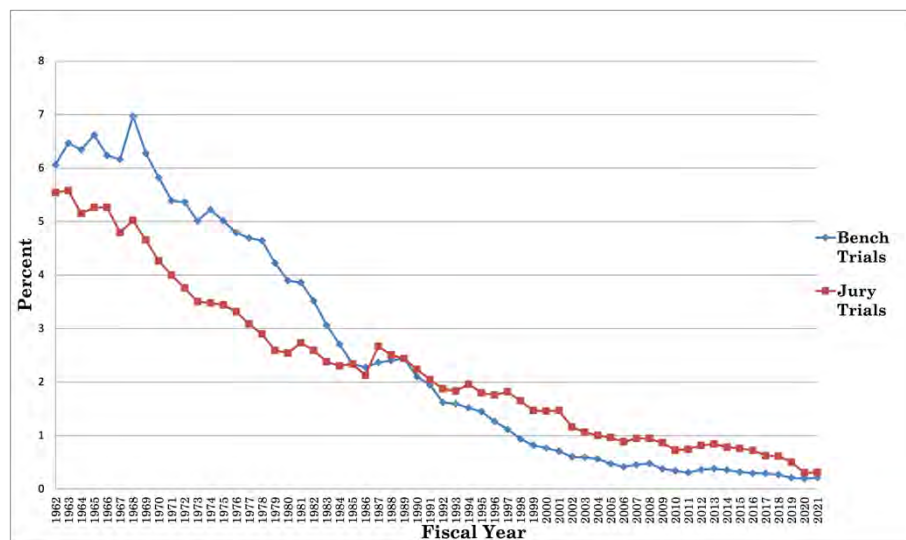
<sup>172</sup> Brian J. Ostrom, Shauna Strickland & Paula Hannaford, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768 (2004).

<sup>173</sup> According to the National Center for State Courts, seventeen states reported publishable data for total civil dispositions and jury trials in 2020: Alaska (0.0 percent), California (0.15 percent), Florida (0.07 percent), Georgia (0.05 percent), Hawai‘i (0.06 percent), Indiana (0.02 percent), Michigan (0.01 percent), Minnesota (0.06 percent), Missouri (0.03 percent), Nevada (0.06 percent), New Jersey (0.03 percent), North Carolina (0.02 percent), Ohio (0.06 percent), Rhode Island (0.02 percent), Texas (0.08 percent), Vermont (0.09 percent) and Wisconsin (0.05 percent). *CSP STAT Civil*, NAT’L CTR. FOR STATE CTS., (Jan. 6, 2022), <https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-civil>.

<sup>174</sup> See Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021) (presenting the total number of civil cases filed and disposed of by judge and jury); see also Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, 143 DÆDALUS, J. OF THE AM. ACAD. OF ARTS & SCI. 115, 116–18 (2014) (charting and discussing this trend).

<sup>175</sup> Galanter, *supra* note 170, at 461

**Figure 1: Percent of Civil Cases Resolved by Bench and Jury Trials, U.S. District Courts, 1962–2021<sup>176</sup>**

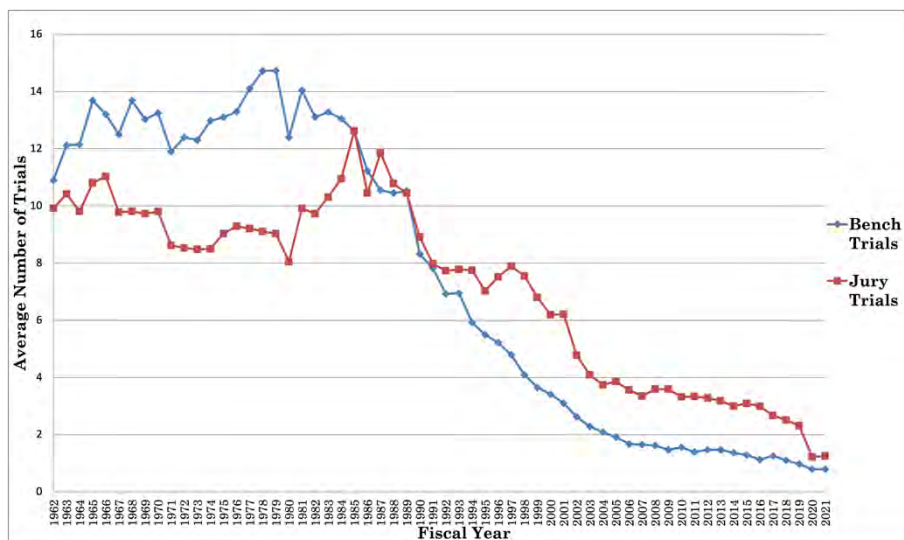


Perhaps unsurprisingly, this steady historical decline in bench and jury trials has been associated with a modified role of trial judges. Despite a fourfold increase in the number of civil case filings since the 1960s, judges are conducting increasingly fewer civil trials than ever before.<sup>177</sup> As Figure 2 illustrates, until the mid-1980s, on average, federal judges conducted a few dozen bench and jury trials each year. However, the number of trials began a precipitous decline in the mid-1980s and has not recovered. The most recent data show an average of fewer than two jury trials and one bench trial per judge per year.

<sup>176</sup> Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021); see also Galanter & Frozena, *supra* note 174, at 125–26 (charting and discussing this trend). To demonstrate the clear trend, Figure 1 controls for the mass disposition of oil refinery explosion cases in the Middle District of Louisiana in 2007 and 2008, which added over 6,300 jury trials in 2007 and over 1,400 bench trials in 2008 that had been pending in that district for over a decade. If these refinery cases had been included in the figure, jury trials would have accounted for 3.8% of all federal civil cases disposed of in 2007, and bench trials would have accounted for 1.1% of such cases in 2008. See Administrative Office of the U.S. Courts, Annual Report of the Director, Table 6.3 (2007), Table 4.1 (2008).

<sup>177</sup> See Galanter, *supra* note 170, at 474 (discussing this inverse relationship).

**Figure 2: Civil Trials per Article III Judgeship, U.S. District Courts, 1962–2021<sup>178</sup>**



As Figures 1 and 2 make clear, jury trials are not being “replaced” with bench trials. Instead, the civil trial itself is disappearing. The system of civil justice itself is more broadly under assault.

The reasons for the civil jury’s decline are many and interrelated. Perhaps most significantly, civil procedures adopted over the course of the twentieth century have played a central role. Many point to the adoption of the Federal Rules of Civil Procedure in 1938 as a pivotal moment of transformation.<sup>179</sup> The original drafters of the rules were radically anti-jury; as one scholar recognized, “[V]irtually everyone connected with urging uniform procedural

<sup>178</sup> Administrative Office of the U.S. Courts, Annual Report of the Director, Table C-4 (1962–2021); see also Galanter & Frozema, *supra* note 174, at 125–26 (charting and discussing this trend). For the reasons given in *supra* note 176, Figure 2 controls for cases brought in the Middle District of Louisiana in 2007 and 2008. If those cases had been included in the figure, the average district court judge would have conducted 12.9 jury trials in 2007 and 3.7 bench trials in 2008. See Administrative Office of the U.S. Courts, Annual Report of the Director, Table 6.3 (2007), Table 4.1 (2008).

<sup>179</sup> See, e.g., Rex R. Perschbacher & Debra Lyn Bassett, *The Revolution of 1938 and Its Discontents*, 61 OKLA. L. REV. 275, 275–76 (2008) (calling the Rules an “innovative set of procedural rules for a court system that was just coming into its own”); John F. Preis, *In Defense of Implied Injunctive Relief in Constitutional Cases*, 22 WM. & MARY BILL RTS. J. 1, 44 (2013) (describing them as one of the “major legislative event[s] of the twentieth century”).

rules denigrated juries.”<sup>180</sup> Charles E. Clark (the principal architect of the Federal Rules)<sup>181</sup> disparaged the civil jury, claiming that it “injected an element of rigidity—of arbitrary right—into a system wherein general rules of convenience should prevail.”<sup>182</sup> When Fleming James, one of the rule committee’s assistants, whittled the core objectives of united procedure down to just three, number two read: “The right of jury trial should not be expanded. This method of settling disputes is expensive, dilatory—perhaps anachronistic. Indeed, the number of jury trials should be cut down if this can be done so as to not jeopardize the attainment of other objectives.”<sup>183</sup>

One way the drafters accomplished this was by including a jury-waiver default rule,<sup>184</sup> which was meant to discourage the number of jury trials. Whereas historically a litigant would need to affirmatively request a bench trial, the new rule required a litigant to affirmatively request a jury trial; failure to do so defaulted to a trial by judge.<sup>185</sup> Clark was explicit in noting that under a jury-waiver default regime, judges were more likely to sit without juries since inertia leads to waiver and not to jury trial like under the old system.<sup>186</sup> And as a practitioner noted just four years after the adoption of the federal default rule, “The most effective device yet evolved for effectuating a more limited use of the jury and yet which preserves the constitutional right is that of requiring a party to

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<sup>180</sup> Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 968 (1987).

<sup>181</sup> See generally Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914 (1976) (outlining Clark’s integral role).

<sup>182</sup> CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 53 (1928).

<sup>183</sup> Fleming James, Jr., *Trial by Jury and the New Federal Rules of Procedure*, 45 YALE L.J. 1022, 1025–26 (1936).

<sup>184</sup> See FED. R. CIV. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed.”).

<sup>185</sup> See Deborah J. Matties, *A Case for Judicial Self-Restraint in Interpreting Contractual Jury Trial Waivers in Federal Court*, 65 GEO. WASH. L. REV. 431, 442 (1997) (reviewing the history of the jury trial waiver).

<sup>186</sup> See Charles E. Clark, *The New Illinois Civil Practice Act*, 1 U. CHI. L. REV. 209, 213 (1933) (“Moreover where a judge is sitting without a jury, as he does more and more when dockets become crowded and jury waiver automatic . . .”). Clark had studied this and, in other writings, compared empirical data on the number of jury trials in New York and Connecticut, attributing Connecticut’s lower rate of jury trials to its automatic waiver rule. See Charles E. Clark, *Fact Research in Law Administrations*, 2 CONN. B.J. 211, 226–27 (1928) (noting that “[t]he small number of jury trials and the large number of jury-waived cases is remarkable” when comparing a state like New York to one like Connecticut that implements a jury-waiver rule).

make a timely demand or be deemed to have waived his rights.”<sup>187</sup> Automatic waiver allowed the drafters to limit jury trials under the guise of litigant preferences.

Beyond introducing inertia against lay participation, the drafters also limited jury trials by rendering them, essentially, unnecessary through the adoption of procedures previously employed in juryless courts of equity—namely, liberal discovery.<sup>188</sup> Whereas at common law trial was the premier opportunity for the competing sides to share evidence, pretrial discovery practices required by the Federal Rules allowed each side to assess the strength of their case in advance.<sup>189</sup> Under the new discovery rules, litigants could therefore more accurately gauge the value of the case and, as they deemed desirable, enter settlement agreements.<sup>190</sup> The expected and realized result is that most cases settle.<sup>191</sup> As United States Supreme Court Justice Neil Gorsuch pithily acknowledged: “Not long ago, we used to have trials without discovery. Now we have discovery without trials.”<sup>192</sup>

The Federal Rules also led to fewer trials by permitting liberal joinder of parties and claims.<sup>193</sup> To make sense of these more complicated proceedings, judges took on a more managerial role.<sup>194</sup>

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<sup>187</sup> Harry W. Henry, Jr., *The Proposed Code of Civil Procedure for Missouri—Parties and Pleadings*, 7 MO. L. REV. 1, 6 (1942).

<sup>188</sup> See Alan K. Goldstein, *A Short History of Discovery*, 10 ANGLO-AM. L. REV. 257, 266 (1981) (discussing rule reforms intended to “facilitate wider availability of discovery”).

<sup>189</sup> See Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—“Much Ado About Nothing?”*, 46 HASTINGS L.J. 679, 690–91 (1995) (describing how the Federal Rules of Civil Procedure caused a shift from “a system in which lawyers were . . . largely unrestrained in their efforts to prevail through surprise at trial” as most evidence was presented for the first time at trial to a system of “economy, efficiency, and justice” where “discovery was intended to narrow issues that remained in dispute, equalize knowledge among the parties about the evidence, [and] eliminate trickery or surprise at trial”).

<sup>190</sup> See *id.* at 719 (“[D]isclosure [as encouraged by the Rules] would accelerate disposition (including settlement) of cases by getting facts out early and facilitate planning when discovery is necessary by focusing the courts and parties on areas where factual gaps exist.”).

<sup>191</sup> Even though many think settlement is a welcome outcome, it is not an unalloyed good. For a discussion of that problem, see generally Marc Galanter & Mia Cahill, *“Most Cases Settle”: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

<sup>192</sup> Tony Mauro, *In Speech Notes, Neil Gorsuch Painted a Dark Picture of Litigation*, NAT’L L.J. (Mar. 14, 2017), <http://www.nationallawjournal.com/id=1202781242573/>.

<sup>193</sup> See FED. R. CIV. P. 18–20 (outlining the rules for joinder of parties and claims).

<sup>194</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 443 (1982) (“[T]he structure of the Federal Rules, with provisions permitting liberal joinder of parties and issues, encourages the problems that in turn invite management.”).

In the 1960s, to facilitate case management, the judiciary abandoned master calendars and adopted an individual assignment system such that a single judge handled a case from filing to finish.<sup>195</sup> At the same time, courts issued a handbook instructing judges to adopt a process of extensive pretrial conferencing, which was designed to help judges address discovery disputes and to identify and refine the issues in dispute.<sup>196</sup> And by 1983, the Rules listed “facilitating settlement” as a core objective of pretrial conferencing.<sup>197</sup> Trials were no longer the process of resolving disputes, but rather the result of a breakdown in the settlement process.

Legislation and further rule changes exacerbated these trends in subsequent decades. Enacted in 1996, the Civil Justice Reform Act required all federal district courts to implement “expense and delay reduction plan[s]” to “facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”<sup>198</sup> It promoted case management principles, guidelines, and techniques for courts to adopt, and created a race among judges to dispose of cases as quickly as possible.<sup>199</sup> Anything that short-circuited trial became preferable. Moreover, the 2015 changes to Rule 26 of the Federal Rules of Civil Procedure regarding discovery emphasized the need for discovery to be reasonable and proportionate.<sup>200</sup> These changes were designed, as the Advisory

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<sup>195</sup> See *id.* at 377–78 (discussing the effects of the individual assignment system).

<sup>196</sup> See *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 355 (1960) (setting forth judges’ pretrial investigative duties).

<sup>197</sup> See Fed. R. Civ. P. 16(a)(5) (“In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as . . . facilitating settlement.”).

<sup>198</sup> 28 U.S.C. § 471.

<sup>199</sup> See generally JAMES S. KAKALIK, TERENCE DUNWORTH, LAURAL A. HILL, DANIEL F. MCCARRREY, MARIAN OSHIRO, NICHOLAS M. PACE & MARY E. VALANA, *THE INST. FOR CIV. JUST., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996)* (analyzing the widespread effects of the Civil Justice Reform Act).

<sup>200</sup> See FED. R. CIV. P. 26(b) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”).

Committee Notes to the new rule explain, to place even greater emphasis on taking a managerial approach to judging.<sup>201</sup>

Other explanations for the decline of civil trials focus on more recent interpretations of the Federal Rules, particularly on those Rules governing dispositive motions. The Supreme Court's 1986 trilogy of cases concerning Rule 56 summary judgment, for instance, empowered judges to dismiss cases in which they concluded that no genuine dispute of material fact existed so as to necessitate a trial.<sup>202</sup> The result is that a once rarely used procedure—indeed, once earnestly referred to by a leading scholar as a “toothless tiger”<sup>203</sup>—has had a major impact on the disposition of federal cases. Approximately nineteen percent of federal cases are now resolved by summary judgment.<sup>204</sup> That figure is higher in certain types of cases; for instance, a 2006 study found that courts granted in whole or in part eighty percent of defendants' summary judgment motions in employment discrimination cases.<sup>205</sup>

Roughly twenty years after the Supreme Court judicially-transformed the summary judgment standard, the Court took a similar approach with respect to Rule 12(b)(6)'s motion to dismiss for failure to state a claim. In dual cases, the Court reformed the traditional standard—one that for most of the twentieth century required a plaintiff to provide only “a short and plain statement of

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<sup>201</sup> See FED. R. CIV. P. 26 advisory committee notes to 2015 amendment (noting, *inter alia*, that “[t]he parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes”).

<sup>202</sup> See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598–99 (1986) (finding no genuine dispute of material fact because the factual context rendered the claims of the plaintiffs implausible); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (“[A] court ruling on a motion for summary judgment must be guided by the . . . clear and convincing evidentiary standard in determining whether a genuine issue of actual malice exists.” (internal quotation marks omitted)); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” (quoting FED. R. CIV. P. 1)).

<sup>203</sup> Arthur R. Miller, *The Pretrial Rush to Judgment*, 78 N.Y.U. L. REV. 982, 1056 (2003).

<sup>204</sup> Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 861 (2007).

<sup>205</sup> Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1033.

the claim” showing that the pleader is entitled to relief<sup>206</sup>—to the far more restrictive requirement that plaintiffs plead “enough facts to raise a reasonable expectation that discovery will reveal evidence of [the claim].”<sup>207</sup> The Court tasked trial judges with drawing upon their “judicial experience and common sense” in making that determination.<sup>208</sup> While judges still must accept all well-pleaded allegations as true and credit all logical inferences, they may reject conclusory allegations.<sup>209</sup> Of course, what is conclusory is often in the eye of the beholder. Judges thus now have license to decide for themselves if a plaintiff’s claims are sufficiently plausible to allow for further proceedings.<sup>210</sup>

Another explanation for the decline in trials emphasizes the rise of mandatory arbitration. Although the 1925 precursor to what would come to be the Federal Arbitration Act anticipated only agreements between sophisticated actors—such as distant merchants who were increasingly reliant on the nation’s railroad networks and desired enforceable private dispute resolution agreements<sup>211</sup>—by the second half of the century, the Supreme Court had dramatically expanded its application to nearly all agreements.<sup>212</sup> Chasing what they hoped to be favorable treatment, powerful economic actors began including binding arbitration

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<sup>206</sup> FED. R. CIV. P. 8(a)(2); see *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (reinforcing a literal interpretation of Rule 8(a)(2) as “not requir[ing] a claimant to set out in detail the facts upon which he bases his claim” and that “to the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”); Lucas F. Tesoriero, *Pre-Twombly Precedent: Have Leatherman and Swierkiewicz Earned Retirement Too?*, 65 DUKE L.J. 1521, 1527 (2016) (“For nearly fifty years after *Conley*, notice pleading was the dominant standard employed by lower courts when assessing a complaint’s sufficiency.”).

<sup>207</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

<sup>208</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

<sup>209</sup> *Twombly*, 550 U.S. at 561.

<sup>210</sup> Some authors have noted how similar the standard for motion to dismiss and summary judgment have become under the Court’s *Iqbal-Twombly* standard. See, e.g., Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18–38 (2010) (making this comparison and asserting that the “*Iqbal/Twombly* standard is unconstitutional”).

<sup>211</sup> See Sam Cleveland, Note, *A Blueprint for States to Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption*, 104 MINN. L. REV. 2515, 2520–21 (2020) (explaining how the major supporters of the Federal Arbitration Act in the early 1920s were business groups and commercial organizations and that “[m]uch of the [Act]’s legislative history shows that Congress only contemplated arbitration between businesses”).

<sup>212</sup> See *infra* notes 214–216.

clauses in a wide variety of employment and consumer contracts.<sup>213</sup> Much of the case law, especially at the federal level, has developed such that these agreements between actors of disparate sophistication are enforceable even against typical contract defenses such as fraud,<sup>214</sup> illegality,<sup>215</sup> and unconscionability.<sup>216</sup> So widespread has this system of jury-less private adjudication grown that some have called it the “new litigation.”<sup>217</sup>

Finally, observers point to tort reform efforts to explain the decline in jury trials in state courts.<sup>218</sup> Specifically, the use of damage caps—both for economic and noneconomic damages<sup>219</sup>—has had a deleterious effect on the rate of public adjudication. Funded

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<sup>213</sup> See David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 366–68 (2018) (discussing the effect of widespread arbitration clauses in employment and consumer contracts).

<sup>214</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding that under the Federal Arbitration Act a court may only consider a claim of “fraud in the inducement of the arbitration clause itself” and not “fraud in the inducement of the contract generally”).

<sup>215</sup> See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (“[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”).

<sup>216</sup> See *Rent-A-Center, West, Inc. v. Jackson*, 531 U.S. 63, 71 (2010) (“[T]he basis of [the] challenge [must] be directed specifically to the agreement to arbitrate before the [C]ourt will intervene.”).

<sup>217</sup> Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 8.

<sup>218</sup> See generally Ronen Avraham, *Database of State Tort Law Reforms (7.1)* (U. Tex. L., L. & Econ. Rsch. Paper No. e555, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=902711](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=902711) (collecting and sorting the many tort reform measures from around the country); see also Joanne Doroshow, *Tort Reform: Blocking the Courthouse Door and Denying Access to Justice*, in 2 COLLECTED ESSAYS ON EXPANDING ACCESS TO JUSTICE 57 (2016) (arguing that tort reforms have limited access to justice and reduced jury trials).

<sup>219</sup> The distinction between economic and noneconomic damages is often overstated in the policy and popular discourse. Both forms of damages aim to compensate the victims of private harm by making them whole, rather than to punish tortfeasors for their wrongdoing. Economic damages compensate a victim for more easily calculable losses, such as medical bills, lost income, or property loss. Noneconomic damages compensate a victim for harms that are not readily translated into monetary terms, such as disfigurement or loss of reproductive capacity. For a fuller discussion, see generally Kritzer et al., *supra* note 140. Still, the “calculation of lost wages and future medical care can be hotly contested trial issues.” Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. REV. 391, 439 (2005). As a result, assessing economic damages may oftentimes be just as challenging as determining noneconomic damages.

largely by pro-business interest groups,<sup>220</sup> these tort reform efforts set a maximum value for certain types of injury claims within causes of action for medical malpractice, products liability, and premises liability.<sup>221</sup> These reforms not only arbitrarily supplant the jury as fact-finder of the value of a given dispute, but they also limit litigant's and their attorney's incentive to bring such claims because the costs of litigating certain cases are prohibitive when compared to the chance of receiving artificially limited compensation well below what a judge or jury would find appropriate.<sup>222</sup> As such, these caps simultaneously decrease the number of trials and render jury service less democratically meaningful. Where artificial damage caps are in place, they also destroy the transparency of the jury trial

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<sup>220</sup> The insurance industry in particular lobbies vigorously for damage caps or immunity based on false claims of increased claiming, rising jury verdicts, and skyrocketing tort system costs in general, when their proposed solutions have no impact on the problems they identify. See Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POL'Y, L., & ETHICS 357, 363 (2005) ("The insurance industry, the U.S. Chamber of Commerce, and corporate front groups such as the American Tort Reform Association have spent many tens of millions of dollars in pursuit of immunity or limitations on liability from wrongdoing." (footnote omitted)). In striking down Florida's noneconomic damage caps, the state supreme court observed that, while doctors received no relief from high medical-malpractice insurance premiums, the purported purpose of the cap, insurance companies enjoyed "an increase in their net income of more than 4300 percent." *Estate of McCall v. United States*, 134 So. 3d 894, 914 (Fla. 2014). The caps, then, serve as little more than increased profitability when insurance companies' investments slide downward. See Robert B. McKay, *Rethinking the Tort Liability System: A Report from the ABA Action Commission*, 32 VILL. L. REV. 1219, 1219–21 (1987) (discussing how the insurance industry fared from the 1960s through the 1980s).

<sup>221</sup> See, e.g., S.D. CODIFIED LAWS § 21-3-11 (2022) (limiting damages in medical malpractice actions); MICH. COMP. LAWS ANN. § 600.2946a (products liability actions); TEX. CIV. PRAC. & REM. CODE ANN. § 75.004 (West 2021) (certain premises liability suits).

<sup>222</sup> See Stephen Daniels & Joanne Martin, *Damage Caps and Access to Justice: Lessons from Texas*, 96 OR. L. REV. 635, 660–71 (2018) ("Ultimately, damage caps will not allow for adequate compensation—enough to compensate the client, cover the lawyer's costs, perhaps a referral fee, and the lawyer's fee."); see also Mohammad Rahmati, David A. Hyman, Bernard Black & Charles Silver, *Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980–2010*, 13 J. EMPIRICAL LEGAL STUD. 183, 202 (2016) (examining Illinois data and concluding that, with caps, smaller damage cases "all but disappeared" and led to an "increase in mean and median payouts [that] led many to conclude that the med mal system has become more generous to plaintiffs [when] [t]he opposite [was] closer to reality").

because jurors are not informed that their verdicts will be subsequently reduced.<sup>223</sup>

The impact of these explanations on the jury's decline is difficult to measure, both due to their overlapping nature but also due to the lack of data. A 2020 study conducted by Professors Shari Seidman Diamond and Jessica Salerno, and sponsored by the American Bar Association, sought to make sense of these explanations by conducting a national survey of legal professionals on their understanding of why cases no longer proceed to jury trial.<sup>224</sup> They solicited participation from legal professionals across the country by inviting them to complete the online survey anonymously.<sup>225</sup> In total, the study involved 1,460 respondents: "173 judges, 70% state and 30% federal, and 1,282 attorneys, 63% who handle primarily civil cases, 33% who handle primarily criminal cases, and 4% who did not indicate whether they primarily handle civil or criminal cases."<sup>226</sup>

The results of the study are illuminating. They show that among the most commonly accepted reasons among legal professionals for the decline in trials was that "litigants would rather settle than go to trial."<sup>227</sup> Judges particularly felt this way, with 89% of them agreeing or strongly agreeing with that statement; attorneys indicated their agreement, with 63.6% of attorneys agreeing or strongly agreeing that preference for settlement resulted in fewer trials.<sup>228</sup> As Professors Diamond and Salerno note, "[W]hether or not the perception is accurate in describing what most litigants want, it

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<sup>223</sup> See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998) (rejecting an argument that the jury's job was completed once it assessed damages, so that the law could then be applied as failing "to preserve 'the substance of the common-law right of trial by jury,'" as required by the Seventh Amendment); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 223 (Ga. 2010) (holding that a cap that applies once damages are assessed "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function").

<sup>224</sup> See Diamond & Salerno, *supra* note 155, at 120–21 ("The survey was designed to investigate how legal professionals who have firsthand experience with the decisions that lead to or away from jury trials explain the reduction in jury trials in recent years. This Article describes the results from this national survey of 1,460 legal professionals, both attorneys and judges.").

<sup>225</sup> *Id.* at 120–21.

<sup>226</sup> *Id.* at 127.

<sup>227</sup> *Id.* at 128.

<sup>228</sup> *Id.* at 128, 131.

may explain why judges and attorneys encourage—or pressure—litigants to waive trial and accept a settlement . . . .”<sup>229</sup>

The study also measured systemic effects as sources of the reduction in civil jury trials. Respondents were asked to evaluate the effects of five systemic changes: damage caps, mandatory binding arbitration, increases in successful summary judgment motions, increases in successful *Daubert* motions, and increases in successful motions to dismiss.<sup>230</sup> Damage caps and mandatory binding arbitration were identified by respondents as having the greatest influence on reducing trial rates.<sup>231</sup> More than half of all respondents perceived these two features as causing medium or large reductions in the rate of jury trials—61.6% for damage caps and 52.1% for mandatory binding arbitration.<sup>232</sup> A significant proportion of respondents (39.9%) perceived the increased use of successful summary judgment motions as causing a moderate or large reduction in jury trials.<sup>233</sup> In contrast, most respondents saw increases in successful *Daubert* motions and motions to dismiss as having little to no effect in reducing jury trials.<sup>234</sup>

Also of interest, the study assessed how respondents compared jury trials to other modes of dispute resolution, such as bench trials, mediation, and binding arbitration.<sup>235</sup> Respondents viewed jury trials as among the fairest procedures (second only to nonbinding mediation), and the procedure they preferred most.<sup>236</sup> Attorneys who regularly represented either plaintiffs or defendants saw jury trials as fairer overall than bench trials; whereas, perhaps understandably, civil judges saw themselves as fairer than juries.<sup>237</sup>

With that said, respondents also acknowledged that jury trials had certain notable detriments, including that they were perceived as “less predictable, slower, and less cost-effective than alternative

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<sup>229</sup> *Id.* at 131.

<sup>230</sup> *Id.* at 143.

<sup>231</sup> *Id.* at 121.

<sup>232</sup> *Id.* at 144.

<sup>233</sup> *Id.* at 144–45.

<sup>234</sup> *Id.* at 145.

<sup>235</sup> *See id.* at 131–39 (“The survey asked civil attorneys and judges to rank four procedures used to resolve civil cases—arbitration, mediation, jury trials, and bench trials—based on their predictability, speed, cost effectiveness, fairness, and the respondent’s overall preference for the procedure.”).

<sup>236</sup> *Id.* at 121.

<sup>237</sup> *Id.* at 137 fig. 5.

procedures.”<sup>238</sup> The authors note that “[t]his pattern suggests that perceived risk, costs, and delay deter the use of jury trials despite their attractiveness on other important dimensions.”<sup>239</sup> These perceived detriments are not new and have been seized on to justify critiques and attacks on the institution by powerful economic and political actors with dramatic effectiveness.

#### B. LEGAL CRITIQUES AND ATTACKS ON THE CIVIL JURY

Judicial and economic elites have hurried the decline of the civil jury brought on by the practices just discussed by sustaining critiques and attacks on the institution. Although civil juries were celebrated in colonial America as well as during the nation’s first century as a check on the exercise of arbitrary authority,<sup>240</sup> it inevitably followed that those with influence and clout resented the loss of their natural institutional advantages when decision-making is placed in the hands of more common folk. In fact, “[e]ver since there have been juries or jurylike tribunals . . . there have been attacks on their competence and even calls for their abolition.”<sup>241</sup>

The critiques have hardly varied over time. At a time when the public clamor for civil jury trials in the Constitution should not yet have faded, Georgia Chief Justice Joseph Lumpkin observed that, while in “*criminal* proceedings, trial by jury cannot be too highly appreciated or guarded with too much vigilance,” “[w]e may, however, after all, *doubt* the *essentiality* of trial by jury in *civil cases*.”<sup>242</sup> Among the problems that existed when civil juries were de rigueur, Lumpkin said, was the “time, trouble, and expense” involved.<sup>243</sup> Nearly a century later, particularly around the 1930s, a number of judges, academics, and bar associations soured on civil juries, questioning both their expense and their competence.<sup>244</sup> For

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<sup>238</sup> *Id.* at 121.

<sup>239</sup> *Id.*

<sup>240</sup> *See supra* Section II.A.

<sup>241</sup> Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCH. PUB. POL’Y & L. 788, 789 (2000).

<sup>242</sup> *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 206 (1848).

<sup>243</sup> *Id.* at 207.

<sup>244</sup> *See* Stanley E. Sacks, *Preservation of the Civil Jury System*, 22 WASH. & LEE L. REV. 76, 79 (1965) (outlining the history of jury treatment at that time and how authors of “anti-jury ferment” concluded that the “jury system deserved condemnation” due to delay and “incompetence to perform the function assigned to it”).

instance, Chief Justice Charles Evans Hughes in 1928 did not mince words in a speech to the Federal Bar Association in New York: “Get rid of jury trials as much as possible. . . . The ideal of justice is incarnated in the judge.”<sup>245</sup> Three decades later, many critics continued to express that view, as Harvard Law School Dean Erwin Griswold asked in 1962, “Why should anyone think that twelve persons brought in from the street, selected in various ways, for their lack of general ability, have any special capacity for deciding controversies between persons?”<sup>246</sup>

These various critiques gained a modern-day foothold when the Supreme Court was called upon to decide whether the Seventh Amendment mandated trial by jury in stockholder derivative actions. In *Ross v. Bernhard*, the Court held that the “right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury.”<sup>247</sup> The decision relied on the traditional dividing line of which aspects of a case sounded in equity as opposed to those sounding in law.<sup>248</sup> The Court’s opinion divided the claims within the lawsuit to reach its conclusion and stated that the answer to the question of when a jury is required “depends on the nature of the issue to be tried rather than the character of the overall action.”<sup>249</sup> A footnote attached to that statement explained that one of the three factors that must be taken into consideration to determine the applicability of the jury-trial right was “*the practical abilities and limitations of juries.*”<sup>250</sup>

That phrase has only appeared in one other Supreme Court opinion, also in a footnote, where the Court limited its meaning and application to instances where “Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or

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<sup>245</sup> Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 873–74 (2014) (quoting *Fewer Jury Trials Urged by Hughes: More Power for the Federal Judges Would Improve System, He Says*, N.Y. TIMES, Dec. 7, 1928, at 3).

<sup>246</sup> Hans Zeisel, *The Debate over the Civil Jury in Historical Perspective*, 1990 U. CHI. LEGAL F. 25, 26 (quoting 1962–63 HARVARD LAW SCHOOL DEAN’S REP. 5–6).

<sup>247</sup> 396 U.S. 531, 532–33 (1970).

<sup>248</sup> *See id.* at 533 (discussing case law defining “the line between actions at law with legal rights and suits in equity dealing with equitable matters” (first citing *Parsons v. Bedford*, 3 Pet. 433, 447 (1830); then citing *Whitehead v. Shattuck*, 138 U.S. 146, 151 (1891))).

<sup>249</sup> *Id.* at 538.

<sup>250</sup> *Id.* at 538 n.10 (emphasis added).

specialized court of equity, and . . . jury trials would impair the functioning of the legislative scheme.”<sup>251</sup> Still, the Court’s earlier acknowledgement that a practical assessment of a generic jury’s capabilities is relevant to determining if the jury right applies to particular issues became a talisman for those who continued to advance the criticism that lay jurors were ill-equipped to make factual findings when the issues were outside the average person’s experience.

Even though the Supreme Court itself ascribed little meaning to the footnote’s suggestion that the Seventh Amendment was cabined by jurors’ presumptively limited abilities, the phrase “practical abilities and limitations of juries” gained wider purchase among other federal courts, appearing in thirty-four federal appellate decisions and 114 district court opinions (yet only a mere fifteen state court opinions).<sup>252</sup> The phrase signaled to those who were dissatisfied with jury verdicts that critiques of civil juries might obtain traction with the courts sufficient to avoid jury trials. Perhaps it is only coincidence, then, that shortly thereafter a corporate public relations campaign took off, telling the public that jurors were unqualified to decide complex and sophisticated issues and tended to let sympathies override reason to reach supposedly unfathomably high verdicts.<sup>253</sup>

As discussed in the previous section, the jury in actuality tends to perform its fact-finding role fairly and admirably.<sup>254</sup> High damage awards in civil jury trials make the news because of their unusual

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<sup>251</sup> *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989).

<sup>252</sup> See Westlaw, <https://www.westlaw.com> (last visited Sept. 15, 2022) (search “492 U.S. 33”; then navigate to the menu titled “Citing References” and select “Cases”); see also Arthur R. Miller, *The Pretrial Rush To Judgment: Are The “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day In Court And Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1104–09 (1997) (discussing the impact of “the Supreme Court’s footnote in *Ross v. Bernhard* announcing a three-prong jury-triability test” and providing examples of courts’ applications and interpretations of this test).

<sup>253</sup> See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 L. & CONTEMP. PROBS. 269, 292 (1989) (outlining how the insurance industry led an effort in the mid-1970s “through advocacy advertising to influence and shape public opinion in cause of civil justice reform” to prevent what it characterized as “ridiculously high jury awards”).

<sup>254</sup> See *supra* notes 134–141 and accompanying text (providing evidence that juries and judges tend to award damages at similar amounts and that punitive damages are generally proportional to compensatory damages among other findings which indicate that juries tend to perform their role in regards to damages appropriately).

man-bites-dog quality, but their appearance may lead audience members to overestimate their frequency and in turn causes risk managers to overestimate liability exposure.<sup>255</sup> Looking to tamp down verdicts against their sponsors, corporate groups seized upon these news reports and circulated skewed and fictionalized stories about runaway juries giving large verdicts to undeserving plaintiffs.<sup>256</sup> This skewed rendition of what juries did helped to create a political environment primed for jury-restrictive legislation while blaming plaintiffs' lawyers and juries for a broken civil justice system.<sup>257</sup>

Attacks on civil juries not only encouraged legislation designed to take constitutionally secured prerogatives away from the jury, such as through damage-cap laws, but also influenced judicial thinking and legal doctrine.<sup>258</sup> It caused judges even in some jurisdictions thought to be "plaintiff-friendly" to opine about the problems with juries. For example, the Alabama Supreme Court has noted three frequent criticisms of jurors: "the helplessness and lack of sophistication of jurors obligated to resolve issues in complex

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<sup>255</sup> See Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 426, 427 (1996) (presenting findings that media portrayals of damages depict higher awards of damages than actually occur in most cases and indicating that such portrayals "provide[] a dubious basis for sound decision making"); Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 250 ("The availability heuristic also suggests that when decisionmakers consider liability risk they often substantially overestimate it. Contributing to this are high-visibility liability episodes such as unusually large awards, punitive damages, and liability when injury causation is disputed by respected authorities.").

<sup>256</sup> For a comprehensive debunking of the tall tales that were circulated, see generally Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) (providing empirical data and detailing the facts of lawsuits in which large damages were awarded and those same facts as portrayed by corporate groups).

<sup>257</sup> See, e.g., THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 26 (2002) ("The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the antiligation agenda."); STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 20–21 (1995) (describing the political clout, resources, and propaganda utilized to sell the ideas of runaway juries and a system out of whack).

<sup>258</sup> See Shaakirrah R. Sanders, *Deconstructing Juryless Fact-Finding in Civil Cases*, 25 WM. & MARY BILL RTS. J. 235, 257 n.160 (2016) (explaining how a "core dispute among states is the scope of state legislative power to alter or replace the jury's determination of the value of an injury" using damage-cap laws and citing several state court decisions evaluating such laws).

litigation;” jurors’ overcompensation of “injured tort victims for noneconomic damages;” and the “unbridled’ discretion jurors enjoy in imposing massive punitive damage awards.”<sup>259</sup> The West Virginia Supreme Court of Appeals expressed a similar sentiment when it asserted that “[c]ourts understand that juries operate on largely emotive principles and that jury awards can be substantially in excess of what judges, educated in law as a science, would award in similar circumstances.”<sup>260</sup> Yet empirical research establishes that judges and jurors tend to reach similar conclusions about liability,<sup>261</sup> compensatory damages,<sup>262</sup> and punitive damages.<sup>263</sup>

Perhaps there is no better example of how this campaign influenced judicial doctrine than in the area of punitive damages. To understand, it is important to stress that the Seventh Amendment both preserves civil trial by jury as it was practiced under the English common law at the time when the Bill of Rights was added to the Constitution and also prohibits reexamination of facts determined by a jury.<sup>264</sup> The English common law recognized that “the jury are judges of the damages.”<sup>265</sup> Thus, if damage assessment was committed to the jury’s determination, judges have no authority to substitute their own numbers for the jury’s.<sup>266</sup> Nor do legislatures in common-law causes of action.<sup>267</sup> Since at least

<sup>259</sup> Cent. Ala. Elec. Coop. v. Tapley, 546 So. 2d 371, 376 (Ala. 1989).

<sup>260</sup> Roberts v. Stevens Clinic Hosp., Inc., 345 S.E.2d 791, 803 (W. Va. 1986).

<sup>261</sup> See VIDMAR & HANS, *supra* note 127, at 148–52 (2007) (presenting research findings that judges and juries agreed on liability “in about four out of five cases”).

<sup>262</sup> See *id.* at 299–302 (presenting findings that jurors and judges “thought about the relative severity of the injuries in remarkably similar ways” and generally awarded approximately the same amount of compensatory damages).

<sup>263</sup> See Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) (“Juries and judges award punitive damages at about the same rate, and their punitive awards bear about the same relation to their compensatory awards.”).

<sup>264</sup> U.S. CONST. amend. VII.

<sup>265</sup> Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998) (quoting Lord Townsend v. Hughes (1677) 86 Eng. Rep. 994, 994–95 (C.P.)).

<sup>266</sup> See Hetzel v. Prince William Cnty., 523 U.S. 208, 211 (1998) (per curiam) (stating that the Seventh Amendment’s “prohibition on the reexamination of facts determined by a jury” bars a court from substituting its own “estimate of the amount of damages” for the damages as determined by the jury).

<sup>267</sup> See, e.g., Hilburn v. Enerpipe Ltd., 442 P.3d 509, 524 (Kan. 2019) (holding that the Kansas Constitution Bill of Rights disallows statutory noneconomic damage caps); Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012) (en banc) (deciding that statutory

1851, the Supreme Court has recognized that the jury's preeminent role in assessing punitive damages was so well established that "the question will not admit of argument."<sup>268</sup>

Despite this constitutional history, and the infrequency with which punitive damages were awarded,<sup>269</sup> a campaign developed in the 1980s that caught the Supreme Court justices' eyes.<sup>270</sup> Businesses used a comprehensive array of press releases to highlight outlier punitive damage verdicts, portraying them as typical.<sup>271</sup> These tall tales, such as the highly publicized McDonald's "hot coffee" case, were further circulated by politicians hoping to score points with a well-heeled constituency.<sup>272</sup> Insurers and business groups bemoaned the bet-the-company consequences of an

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noneconomic damage caps infringes on the right to trial by jury guaranteed by the Missouri Constitution); *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010) (finding that noneconomic damage caps violate the Georgia Constitution); *Moore v. Mobile Infirmary Ass'n.*, 592 So. 2d 156, 164 (Ala. 1991) (holding that statutorily limiting noneconomic damages violates the Alabama Constitution); *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 712 (Wash. 1989) (en banc) (deciding that noneconomic damage caps violate the Washington Constitution). Oddly, while not overruling *Watts*, the Missouri Supreme Court subsequently held that when the legislature codifies the common law and adds a damage cap, it removes the issue from the purview of the state constitution's "inviolable" right to trial by jury. *Ordinola v. Univ. Physician Assocs.*, 625 S.W.3d 445, 449–51 (Mo. 2021) (en banc). The decision, thus, permits the legislature to restrict the authority of a civil jury even if such a ploy would not be valid under the Seventh Amendment. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989) (relying on the legal-equity dichotomy to determine if the issue was committed to a jury's determination).

<sup>268</sup> *Day v. Woodworth*, 54 U.S. 363, 371 (1851).

<sup>269</sup> See THOMAS H. COHEN & KYLE HARBACEK, U.S. DEPT OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATS., PUNITIVE DAMAGE AWARDS IN STATE COURTS, 2005, at 1 (2011), <https://www.bjs.gov/content/pub/pdf/pdasc05.pdf> (reporting that "[p]unitive damages were awarded in 700 (5%) of the 14,359 trials where the plaintiff prevailed" and that the "median punitive damage award for the 700 trials with punitive damages was \$64,000 in 2005").

<sup>270</sup> See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 3–10 (1988) (describing a supposedly rampant increase in tort suits and damage awards). But see Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539, 547, 579 (1990) (pointing out fallacies in figures used by Huber).

<sup>271</sup> See Stephen Daniels & Joanne Martin, *Jury Verdicts and the Crisis in Civil Justice*, 11 JUST. SYS. J. 321, 325 (1986) (describing the "horror story" public relations campaigns that big businesses ran).

<sup>272</sup> See Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 316 (1999) ("Politicians exchange tales of the psychic who recovered a million dollars from her doctor, claiming that a CAT scan destroyed her psychic powers, and stories of the woman who won several million dollars from McDonald's after spilling a cup of coffee on herself.").

adverse punitive damages verdict, paid for studies that often utilized problematic methodologies to support the campaign's viewpoint,<sup>273</sup> and cited these studies and unfiltered examples from news reports in Supreme Court certiorari petitions and briefs<sup>274</sup> with a plea that unrestricted punitive damages constituted a form of excessive fines or violated due process.<sup>275</sup>

The Supreme Court initially resisted entreaties to apply a constitutionally based limit on punitive damages.<sup>276</sup> However, usual swing-Justice Sandra Day O'Connor bemoaned "skyrocketing" punitive damage awards and their supposed adverse effect on product innovation,<sup>277</sup> apparently accepting the false portrayal of out-of-control juries. It was not long before a majority of the Court shared Justice O'Connor's sentiment; it held that due process placed a constitutional limit on "grossly excessive" punitive damages, relying on vague and subjective guideposts<sup>278</sup> and whether the size of the punitive damages "raise[s] a suspicious judicial eyebrow."<sup>279</sup>

After subjecting punitive damage verdicts to a due-process override, the natural next question was what to do when punitive damages were unconstitutionally excessive. Should the question be resubmitted to the jury, or should a judge choose the amount? The answer depends on whether the Seventh Amendment applies. The constitutional history was clear; juries are "judges of the

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<sup>273</sup> See Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 14 (1990) (describing press kits and publicity tactics highlighting tales and anecdotes about punitive-damage verdicts.); see also Michael L. Rustad, *The Closing of Punitive Damages' Iron Cage*, 38 LOY. L.A. L. REV. 1297, 1298 (2005) ("Much of what is asserted about the nature of punitive damages is untrue, unknown, or stitched together from questionable sources.").

<sup>274</sup> See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 n.17 (2008) (declining to rely upon Exxon-funded studies that used "mock juries" to demonstrate the unpredictability of punitive damage awards and describing the studies as part of "a body of literature running parallel to anecdotal reports").

<sup>275</sup> See *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–78 (1989) (finding that the due-process argument was not preserved and rejecting the applicability of the Excessive Fines Clause).

<sup>276</sup> *Id.* at 280.

<sup>277</sup> *Id.* at 282 (O'Connor, J., concurring in part and dissenting in part) (citing HUBER, *supra* note 270, at 152–71).

<sup>278</sup> See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (holding that the degree of reprehensibility, the disparity of harm and award, and sanctions in comparable cases are the controlling factors).

<sup>279</sup> *Id.* at 583 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993) (O'Connor, J., dissenting)).

damages.”<sup>280</sup> But the Supreme Court adopted a fiction to conclude that judges could replace the jury’s determination with their own. It declared that compensation was the type of fact reserved for a jury’s determination and that, although punitive damages previously served a compensatory purpose, they no longer did.<sup>281</sup> Instead, the Court said that punitive damages were the jury’s “expression of its moral condemnation” of egregious misconduct and not a factual determination.<sup>282</sup> By reclassifying the jury’s role with respect to punitive damages, the Court opened the door to revision of the verdict by both trial and appellate judges. Without any change in constitutional language and disregarding the longstanding regard of punitive damages as separate and above compensation,<sup>283</sup> the Court limited the jury’s role in determining punitive damages and increased the role of judges.<sup>284</sup>

Years later, the Court considered newly collected data and concluded that the empirical assumptions underlying this jurisprudential change were not well grounded. As the Court recognized, “[T]he most recent studies tend to undercut much of [the criticism of punitive damages].”<sup>285</sup> Moreover, research “reveals that discretion to award punitive damages has not mass-produced runaway awards.”<sup>286</sup> Rather than the bill of goods they had been sold, the Justices conceded that the data revealed “an overall restraint” on the part of juries.<sup>287</sup> The die, however, had been cast.

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<sup>280</sup> *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (quoting *Lord Townshend v. Hughes* (1677) 86 Eng. Rep. 994, 995 (C.P.)).

<sup>281</sup> *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432, 437, 437–38 n.11 (2001) (“Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries . . .”).

<sup>282</sup> *Id.* at 432.

<sup>283</sup> *See Lake Shore & Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893) (recognizing that punitive damages are awarded “not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others”); *see also* Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 *CHI.-KENT L. REV.* 163, 164 (2003) (“[I]t would be at best anachronistic (and at worst misleading) to say that punitive damages served primarily a compensatory function in the early years of American tort law . . .”).

<sup>284</sup> *See Cooper Indus.*, 532 U.S. at 431 (holding that appellate courts must review the constitutionality of punitive damages awards under a *de novo* standard, rather than the less intensive “abuse of discretion” standard).

<sup>285</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 497 (2008).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 498–99.

Judges would scrutinize and adjust punitive damage verdicts after the fact, rendering the jury's determination more advisory.

The transformation of the jury's role with respect to punitive damages followed a strategic blueprint that has successfully transformed the law in other areas where juries have historically played a constitutionally consecrated role as well. Step one is to appeal to the idea that jurors lack the sophistication necessary to assess complex information and give in too easily to emotion. Then, having established a level of agreement with that proposition, step two is to advocate for changes that limit the jury's scope.

For instance, another area where this blueprint succeeded is the increased authority of judges over expert evidence. First, the critics argued that juries could not be expected to understand complex scientific or other technical evidence from experts.<sup>288</sup> Second, giving examples of juries siding with seemingly incredulous expert testimony that was purposely presented in a damning light as "junk science,"<sup>289</sup> a call was made to rethink the rules that would admit such evidence.<sup>290</sup> And, as with punitive damages, the Court

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<sup>288</sup> See, e.g., Daniels, *supra* note 253, at 280 ("[J]uries are not competent to decide issues in complex, lengthy trials . . . [as] jury attention span decreases in long trials, especially antitrust, products liability, or medical malpractice cases, which entail complicated evidence . . . [and] [j]uries are likely to be misled, or confused in such cases by . . . technical evidence, thereby eliminating any chance for a fair, rational decision. . . . Uninformed, gullible lay jurors may accept expert testimony uncritically, ignore it, or just not understand it at all."); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577, 580 (1984) (contending that jurors are "incompetent to evaluate scientific proof critically"); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 505 (1975) (questioning ability of jurors in complex antitrust or shareholder suits).

<sup>289</sup> PETER W. HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 1–6 (1991). The basis for the claim that junk science was overrunning the courts was authoritatively refuted by other writers. See Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1642 (1993) ("*Galileo's Revenge* and its author have received heavy publicity and have been treated by lawyers as well as laypeople as if they were part of legitimate scholarship on these issues . . .").

<sup>290</sup> See, e.g., Peter Huber, *Junk Science and the Jury*, 1990 U. CHI. LEGAL F. 273, 278, 302 (1990) (calling for a change to "reduce the amount of science that juries must decide for themselves" because of the continuing problems of "junk science" as "juries sometimes accept factual claims that mainstream scientists categorically reject"). *But see* Robert Blomquist, *Science, Toxic Tort Law, and Expert Evidence: A Reaction to Peter Huber*, 44 ARK. L. REV. 629, 652 (1991) (finding Huber's arguments to limit scientific evidence admitted to juries

succumbed to the criticism and created a gatekeeper role so that judges would prevent juries from hearing certain expert testimony previously deemed admissible.<sup>291</sup> To accomplish that result, the Court read the existing rule in a new way. The relevant rule on expert evidence states that such testimony is admissible if its probative value helps the jury understand a fact at issue,<sup>292</sup> such as whether exposure to a toxic chemical caused the plaintiff's injury.

For years, under the previous standard, courts had admitted expert testimony to help the jury connect the dots when the evidence provided was “generally accepted” within the expert's field.<sup>293</sup> However, because of how quickly science advances, this general-acceptance standard was presented as failing to keep up with new research.<sup>294</sup> To address that concern, the Court reinterpreted the expert evidence rule to permit the admission of novel scientific evidence so long as it was based on scientifically acceptable methodologies.<sup>295</sup> On its face, the change appeared to liberalize the admissibility of expert evidence. Yet, at the same time, in adopting the new standard, the Court also enhanced the gatekeeper role that judges play in deciding the expert-evidence admissibility question.

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unpersuasive because his “vision expects too much of mainstream scientific testimony in an area where too little expert consensus exists” and “expects too little of our common law heritage” including judge and jury prerogatives in furthering equity and social justice).

<sup>291</sup> See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993) (“Faced with a proffer of expert scientific testimony, then, *the trial judge must determine* at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” (emphasis added) (footnote omitted)).

<sup>292</sup> See FED. R. EVID. 702(a) (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if . . . the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue . . .”).

<sup>293</sup> See *Frye v. United States*, 193 F. 1013, 1014 (D.C. Cir. 1923) (“[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”).

<sup>294</sup> See Frederick B. Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 265 (1984) (“[T]he *Frye* jurisdictions will always lag behind the advances of science while they wait for novel scientific techniques to gain ‘general acceptance.’”).

<sup>295</sup> See *Daubert*, 509 U.S. at 588 (discarding the traditional “general acceptance” test for admissibility of expert opinion evidence).

The corporate public-relations machine then again moved into high gear, proclaiming a great victory against “junk science.”<sup>296</sup> Conferences, articles, and continuing legal education programs emphasized the judges’ gatekeeper role in keeping expert evidence from coming before a jury, rather than the broader admissibility of new or novel science.<sup>297</sup> Judges’ understanding of the new precedent aligned with that publicity.<sup>298</sup> The result was a more restrictive approach to expert evidence that ended up frequently constricting juries in the discharge of their constitutionally assigned role as fact-finders. As with punitive damages, the empirical evidence did not catch up in time. Studies do not bear out the inaccurate caricature of juries completely befuddled by scientific evidence.<sup>299</sup>

### C. A CULTURE DISCOURAGING OF CIVIL JURY TRIALS

The artificial barriers constructed through legislation, rules, and judicial doctrine have significantly diminished the uses and prevalence of jury trials. Meanwhile, other developments, such as budgetary crises, have compounded the problem and further diminished juries.<sup>300</sup> If not for a cultural predilection that believes juries are not a core component of our democratic structure and instead are luxuries that are expensive, antiquated, and unnecessary, years-long postponements of civil jury trials would not be seen as a solution to nearly every subsequent crisis faced by society.

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<sup>296</sup> For a description of these efforts, see Allan Kanner & M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 296–97 (2007).

<sup>297</sup> See Robert S. Peck & Erwin Chemerinsky, *The Right to Trial by Jury as A Fundamental and Substantive Right and Other Civil-Trial Constitutional Protections*, 96 OR. L. REV. 489, 508–09 (2018) (describing how the *Daubert* Test has increased pretrial attacks on experts).

<sup>298</sup> See Kanner & Casey, *supra* note 296, at 283 (recognizing that, rather than liberalize admission of scientific evidence, *Daubert* accomplished “the exact opposite”).

<sup>299</sup> See, e.g., Richard Lempert, *Civil Juries and Complex Cases: Taking Stock After Twelve Years*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 235 (Robert E. Litan ed., 1993) (“[T]he weight of the evidence indicates that juries can reach rationally defensible verdicts in complex cases.”).

<sup>300</sup> See RICHARD Y. SCHAUFFLER & MATTHEW KLEIMAN, *THE BOOK OF THE STATES, STATE COURTS AND THE BUDGET CRISIS: RETHINKING COURT SERVICES* 2010, at 289 (“Like other public institutions, courts in many states are thrust into crisis mode, and forced to respond by creating immediate savings through reducing services, closing courthouses, [and] suspending jury trials in civil cases.”).

Examples abound. Tightened state budgets have resulted in court systems deferring civil jury trials despite state constitutional promises against “unnecessary delay” and an “inviolate” right to a jury trial.<sup>301</sup> For more than a decade, states have cut overall budgets, resulting in reductions of money allocated to state courts by as much as twenty percent.<sup>302</sup> New Hampshire started this money-crunching trend by suspending civil jury trials.<sup>303</sup> In California, where the courts have been hit hard by budget cuts, the 2021 budget contained an increase in court funding, but was insufficiently large such that the legislature’s budgetary analysis arm projected that they would still need to reduce expenditures by a minimum of fifty million dollars in 2021–22.<sup>304</sup> As an expensive item for trial courts, civil jury trials may well be suspended—again. Similarly, Florida faced an overall budget deficit of \$5.4 billion in 2020, while its courts estimated that nearly one million more cases would be added to trial courts’ dockets by mid-2021.<sup>305</sup> All that is to say, funding courts is a choice. And the policy of cutting budgets and insufficiently funding courts is part of a broader, growing notion that civil trials can be easily discarded if done in furtherance of some vague notion of efficiency.<sup>306</sup>

The COVID-19 pandemic has further exposed this cultural disposition to devalue the jury and exacerbated the effects. Health concerns have required courts to adjust their approaches to conducting jury trials to ensure public safety, but courts around the country largely took the approach of simply refusing to hold civil

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<sup>301</sup> See, e.g., WASH. CONST. art. I, §§ 10, 21 (respectively).

<sup>302</sup> See SCHAUFFLER & KLEIMAN, *supra* note 300, at 289 (“In the 2010 fiscal year, 40 state court budgets were cut . . . . The cumulative cuts have reached as high as 20 percent of the court budget . . .”).

<sup>303</sup> *Id.* at 290; see also Abby Goodnough, *Jury Trials to Be Halted in One State Feeling Pinch*, N.Y. TIMES (Dec. 8, 2008), <https://www.nytimes.com/2008/12/09/us/09court.html> (“The Superior Court . . . in New Hampshire will take the unusual step of halting jury trials . . . because of a widening state budget crisis.”).

<sup>304</sup> See THE 2021–22 BUDGET: TRIAL COURT OPERATIONS PROPOSALS, CAL. LEGIS. ANALYST’S OFF. (Feb. 11, 2021), <https://lao.ca.gov/Publications/Report/4362> (“[T]he expiration of \$50 million in one-time funding provided in the current year means that trial courts could need to reduce expenditures by at least a further \$50 million in 2021–22.”).

<sup>305</sup> Andrew Strickler, *State Court Budget Forecast: Stormy, with Rising Case Backlogs*, LAW360 (Nov. 23, 2020), <https://www.law360.com/articles/1331216/state-court-budget-forecast-stormy-with-rising-backlogs>.

<sup>306</sup> See Peck & Chemerinsky, *supra* note 297, at 493 (recognizing that “[t]hese movements away from jury trials [are] often in the name of efficiency”).

jury trials rather than find ways to make it work.<sup>307</sup> Like many states, New Mexico instituted a suspension of jury trials in response to surging COVID-19 cases at the end of 2020 and only began those trials again on February 1, 2021.<sup>308</sup> The federal court system acted similarly, with the Administrative Office of U.S. Courts reporting in November 2020 that “[a]bout two dozen U.S. district courts have posted orders that suspend jury trials.”<sup>309</sup> The result left hundreds of thousands civil cases languishing in a standstill and has discouraged litigants from bringing new cases, leading to a looming backlog of cases some estimate to number in the millions.<sup>310</sup>

Though as of this writing, many state and federal courts have reopened, the more than a year of courts treating civil jury trials as expendable has had both short-term and long-term effects. Among the federal appellate courts, only the Ninth Circuit held that the suspension of jury trials for lack of funds violated the Seventh Amendment’s guarantee.<sup>311</sup> And the COVID-19 Omicron variant’s emergence in the winter of 2021 again caused many courts to shutter their doors to civil jury trials, demonstrating the unpredictability of a pandemic.<sup>312</sup>

In the short term, the decision to forgo civil jury trials creates significant backlogs, which further causes court systems to look for ways to cut corners to reduce the number of cases requiring juries because of the time and resources needed. The public loses its

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<sup>307</sup> See, e.g., Ed Spillane, *The End of Jury Trials: Covid-19 and the Courts: The Implications and Challenges of Holding Hearings Virtually and in Person During a Pandemic from a Judge’s Perspective*, 18 OHIO ST. J. CRIM. L. 537, 538 (2021) (“[T]he ability to hold jury trials has almost completely grounded to a halt since March 2020.”).

<sup>308</sup> Order in the Matter of the Amendment of the New Mexico Judiciary Public Health Emergency Protocols for the Safe and Effective Administration of the New Mexico Judiciary During the COVID-19 Public Health Emergency, No. 20-8500-042, at 17 (N.M. Dec. 14, 2020).

<sup>309</sup> *Courts Suspending Jury Trials as COVID-19 Cases Surge*, U.S. CTS. (Nov. 20, 2020), <https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge>.

<sup>310</sup> See ROBINSON & GIBSON, *supra* note 51 (“[O]ver a million cases that were not filed in 2020 could make their way into the courts. . . . [T]his speaks to the need to address growing backlogs in civil courts . . .”).

<sup>311</sup> See *Armster v. U.S. Dist. Ct. for the Cent. Dist. of Cal.*, 792 F.2d 1423, 1430 (9th Cir. 1986) (“[W]e conclude that the Seventh Amendment right to a civil jury trial is violated when, because of [budgetary] suspensions, an individual is not afforded, for any significant period of time, a jury trial he would otherwise receive.”).

<sup>312</sup> See *supra* note 47 and accompanying text (detailing the effect of the Omicron variant on state and federal courtroom closures in California).

opportunity to be involved in resolving disputes during a time when it is perhaps most necessary that it be involved. And in the long-term, lay participation atrophy sets in, leading litigants and jurists to believe that their business does not require the public's scrutiny.<sup>313</sup> Even more people will be driven to private adjudication services,<sup>314</sup> further diminishing the number of jury trials. With jury trials now a rarity, few new lawyers will learn the art of trying a case before a jury, thereby creating a persistent cycle of lawyers opting not to go the jury route because they lack the skillset and familiarity needed for success before a panel.<sup>315</sup>

The cost to society if this culture and decline are not reversed will be substantial. Recall an observation Alexis de Tocqueville made in a preface to his book, *Democracy in America*:

If the lights that guide us ever go out, they will fade little by little, as if of their own accord. Confining ourselves to practice, we may lose sight of basic principles, and when these have been entirely forgotten, we may apply the methods derived from them badly; we might be left without the capacity to invent new methods and only able to make a clumsy and an unintelligent use of wise procedures no longer understood.<sup>316</sup>

It is critical that the benefits of the civil jury and jury service be fully appreciated, and that we take appropriate action to revive it, lest the institution's light be fully extinguished. American

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<sup>313</sup> See James M. Chadwick & Gary L. Bostwick, *Images of Fair Use: A Fair Use of Jury Trial*, 24 *COMM'NS L.* 11, 18 (2006) (explaining public scrutiny's role in the court system).

<sup>314</sup> See Smith & MacQueen, *supra* note 163, at 33 (noting that even prior to the pandemic an increasing number of cases were being resolved through private adjudication).

<sup>315</sup> Some judges have grown particularly concerned with this phenomenon and have adopted "Junior Attorney Rules" encouraging litigants to give standup roles to attorneys with less than five years' experience. See, e.g., CHIP'S NEXT GEN COMM., *JUDICIAL ORDERS PROVIDING/ENCOURAGING OPPORTUNITIES FOR JUNIOR LAWYERS* (2016), <https://nextgenlawyers.com/wp-content/uploads/2013/04/Judicial-Orders-re-Next-Gen-6-13-16.pdf> (noting that Judge Lucy Koh, Northern District of California, "strongly encourages parties to permit less experienced lawyers to examine witnesses at trial and to have an important role at trial").

<sup>316</sup> TOCQUEVILLE, *supra* note 22, at 464.

democratic renewal might lie through restoring the promises of the civil jury.

#### IV. RESTORING THE DEMOCRATIC PROMISE OF THE CIVIL JURY

Given the centrality of the civil jury in the United States' constitutional structure,<sup>317</sup> as well as the benefits the jury offers for the administration of civil justice and society more broadly,<sup>318</sup> the severe decline and disuse of the institution should give us pause. Exalting the role of judges in resolving disputes at the cost of excluding people from meaningful civic participation has rippling consequences. It disinvests the public in the success of the Republic, suggesting to individuals that the state operates without them. As Plato warned over a two millennia ago, "[I]n private suits, too, as far as is possible, all should have a share; for he who has no share in the administration of justice, is apt to imagine that he has no share in the state at all."<sup>319</sup> America's recent turn toward abandoning its democratic principles might be course-corrected by reinvesting the public in civil dispute resolution.

To do so, it is imperative that active measures be taken to revive the institution to its once premier role. Critically, these strategies should not be based on speculation or misrepresentation of the jury or jurors, but instead on empirical support and research to ensure that the benefits of lay judicial participation are more fully realized. Drawing on such research, we offer here the following six recommendations designed to (A) remove barriers to civil jury trials to make them more likely to occur when parties so desire, and (B) promote better civil jury fact-finding to ensure more accurate dispute resolution. Strengthening the institution so as to encourage inviting the public back into the courthouse can help loosen that coddling mindset that a private dispute and its just resolution belongs solely to the litigants.

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<sup>317</sup> See *supra* Section II.A.

<sup>318</sup> See *supra* Section II.B.

<sup>319</sup> Plato, *Laws IV 768*, in 2 THE DIALOGUES OF PLATO 529 (B. Jowett trans., Random House ed., 1937).

## A. REMOVING BARRIERS TO CIVIL JURY TRIALS

The first step for reviving the civil jury as an institution so that it might again contribute to renewing America's commitment to democratic self-governance is ensuring that all litigants who desire a jury trial are able to receive one. The sociopolitical benefits of jury service can only result if trials actually occur and if jurors are called upon to determine the outcome. The following three research-based recommendations are designed to remove barriers to civil jury trials and thereby lower costs associated with employing juries. These include (1) returning to a civil jury-trial default rule; (2) repealing statutory restrictions on jurors calculating damages; and (3) experimenting with procedural arrangements to lower the costs to litigants and society associated with employing civil juries.

1. *Adopt a Jury-Trial Default Rule.* One of the easiest ways to restore the civil jury as a meaningful component of the judiciary is for courts to readopt a jury-trial default rule. This means that litigants would receive a civil jury trial unless they affirmatively waived their right to one, as opposed to the current approach taken in federal and most state jurisdictions in which litigants must affirmatively demand a civil jury trial.<sup>320</sup> As noted above, the current waiver default was adopted purposefully by drafters motivated by anti-jury animus in order to limit the number of jury trials.<sup>321</sup> Now-Supreme Court Justice Neil Gorsuch and U.S. Court of Appeals for the Ninth Circuit Judge Susan Graber have argued in support of the proposal because reverting back to a jury-default approach would accomplish three main goals: (1) “encourage jury trials;” (2) increase “simplicity;” (3) result in “greater certainty,” particularly for pro se litigants and in cases removed from state courts; and (4) “honor[] the Seventh Amendment more fully.”<sup>322</sup>

The automatic waiver rule was adopted at the federal level in 1938 concomitantly with the merger of courts of law and equity, and it has remained largely unchanged since then.<sup>323</sup> But it is important

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<sup>320</sup> See *supra* notes 187–188.

<sup>321</sup> See *supra* notes 180–187 and accompanying text.

<sup>322</sup> HON. NEIL GORSUCH & HON. SUSAN GRABER, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, MEMORANDUM: 16-CV-F (June 13, 2016), [https://www.uscourts.gov/sites/default/files/16-cv-f-suggestion\\_gorsuch\\_0.pdf](https://www.uscourts.gov/sites/default/files/16-cv-f-suggestion_gorsuch_0.pdf).

<sup>323</sup> The only changes have concerned at what time the litigant need to make the demand. See FED. R. CIV. P. 38 advisory committee notes (“The times set in the former rule at 10 days have been revised to 14 days.”).

to note that nothing about merged courts necessitates this approach to the jury. A number of state judiciaries merged their courts in the mid-nineteenth century without requiring litigants to affirmatively demand a jury trial.<sup>324</sup> But as the trend toward merged courts spread in late nineteenth century, so too did broad antipathy toward the jury.<sup>325</sup> Following the Civil War, the jury-waiver rule grew as a popular tool for limiting the frequency of jury trials while, at least formally, securing the institution's position within the new courts.<sup>326</sup> It was this trend that the drafters of the Federal Rules latched onto as a mechanism to sideline the jury in 1938.<sup>327</sup> So common did this approach become over the twentieth century that today only Georgia, Minnesota, Mississippi, Missouri, and Oregon broadly maintain jury-trial default rules in most of their civil courts.<sup>328</sup>

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<sup>324</sup> New York, after merging their courts in 1846, was the first state by statute to allow litigants to waive their right to a civil jury trial, but such waiver could only occur in three ways: "(1) by failing to appear at the trial; (2) by written consent, in person or by attorney, filed with the clerk; or (3) by oral consent in open court, entered in the minutes." Act of Apr. 12, 1848, ch. 379, § 221, 1848 N.Y. Laws 497, 538. It did not require an affirmative jury demand. *Id.*

<sup>325</sup> As Justice Lumpkin of the Supreme Court of Georgia noted in 1848: "[I]t is notorious, that modern law reform, both in England, and in this country, seeks . . . to dispense, as much as possible with juries. A jury is never to be invoked, unless specially demanded by one of the parties." *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 207 (1848). He added further that this approach "is a vast saving of time, trouble, and expense, to suitors and the country," though recognized that there might be broader detriments. *See id.* ("Whether these considerations should outweigh the advantages resulting from a personal participation, by every citizen, in the practical administration of public justice, it does not become me to say.")

<sup>326</sup> For an excellent review of the migration of the Field Code across the country in the nineteenth century, which served as a model for many states, see Kellen Funk & Lincoln A. Mullen, *The Spine of American Law: Digital Text Analysis and U.S. Legal Practice*, 123 AM. HIST. REV. 132, 132–33 (2018).

<sup>327</sup> *See supra* notes 186–187 and accompanying text.

<sup>328</sup> *See* O.C.G.A. §§ 9-11-38 to -39 (2007) ("The right of trial by jury as declared by the Constitution of the state or as given by a statute of the state shall be preserved to the parties inviolate."); MINN. R. CIV. P. 38.01 ("[T]he issues of fact shall be tried by a jury, unless a jury trial is waived or a reference is ordered."); MISS. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Constitution or any statute of the State of Mississippi shall be preserved to the parties inviolate."); MO. SUP. CT. R. 69.01 01 ("The right of trial by jury as declared by the Constitution or as given by a statute shall be preserved to the parties inviolate."); OR. R. CIV. P. 51(c) ("The trial of all issues of fact shall be by jury unless . . ."). Some states, such as Nebraska, have different default rules for different types of courts. *See, e.g., Jacobson v. Shresta*, 849 N.W.2d 515, 519 (Neb. 2014) (noting that the Nebraska constitution "provides

Restoring the jury-trial default rule could have a number of positive consequences for the jury and the administration of civil justice. For one, it could increase the number of civil jury trials conducted. As legal scholars James Pike and Henry Fisher succinctly noted in 1940, “[Under the waiver rule] the formula has been changed from inertia = jury trial, to inertia = no jury trial.”<sup>329</sup> Flipping that equation back could have the opposite effect. There is robust economic literature on the power of default rules to nudge actors toward preferred outcomes while preserving their freedom to choose alternative options.<sup>330</sup> That is, the default rule would not inhibit those litigants who wish to have a bench trial, but it would instead impose a small cost (in the form of an affirmative action) for them to do so.

Moreover, adopting the rule would prevent the inadvertent waiver of a significant constitutional right. This is particularly true for low-information litigants, who are most likely to be affected by default rules.<sup>331</sup> But it would also be implicated in cases removed to federal court under Federal Rule of Civil Procedure 81(c)(3).<sup>332</sup> That rule and its dizzying exceptions have been criticized as “poorly crafted” with “needless complexity,” and has been called a “trap for the unwary.”<sup>333</sup> A jury-default rule could greatly simplify this

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the constitutional right to a jury trial” in that “[t]he right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury” (quoting NEB. CONST. art. 1, § 6)).

<sup>329</sup> James A. Pike & Henry G. Fisher, *Pleadings and the Jury Rights in the New Federal Procedure*, 88 U. PA. L. REV. 645, 647 (1940).

<sup>330</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 10 (2008) (arguing that in formulating default rules, “[t]here is . . . no way of avoiding nudging in some direction, and whether intended or not, these nudges will affect what people choose.”).

<sup>331</sup> See CASS R. SUNSTEIN, *CHOOSING NOT TO CHOOSE: UNDERSTANDING THE VALUE OF CHOICE* 7 (2015) (discussing that effect of default rules on low information actors).

<sup>332</sup> See FED. R. CIV. P. 81(c)(3) (requiring that, in removed actions, “[a] party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal,” but “[i]f the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so”; and going on to require that “[i]f all necessary pleadings have been served at the time of removal,” a party must demand a jury trial “within 14 days after it files a notice of removal” or “it is served with a notice of removal,” with failure to do so resulting in waiver).

<sup>333</sup> 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2334 (4th ed. 2022) (collecting judicial criticisms of Rule 81(c)); see also Susan M. Halpern,

process, ensuring litigants that they can readily receive a federal jury trial regardless of the status of the case at the time of removal. While those scholars who have studied the jury-default proposal differ on their conclusions as to the degree that the proposal would increase the number of jury trials, basic economics suggest it would have at least some positive impact.<sup>334</sup>

But even if reverting to the original rule failed to substantially increase the number of jury trials, it is still a worthwhile proposal for its symbolic significance. Procedural rules reflect the virtues of the societies that adopt them.<sup>335</sup> The current jury-waiver rule reflects the erroneous notion that common law courts can largely operate at their full potential without the democratic insights of the governed. It suggests to litigants and the society more generally that the civil jury is but one of many options for dispute resolution, rather than a central and favored component of the constitutional structure. Justice Gorsuch and Judge Graber are correct in suggesting that readopting a jury-default rule “honors the Seventh Amendment more fully.”<sup>336</sup> The rule would better reflect the systemic value and virtue of the jury as a nonexpendable part of the American system of government, and it would nudge litigants toward that socially desirable outcome.

2. *Remove Damage Caps.* Another tool to lower barriers to the use of civil juries, so that they may once again serve their emboldening sociopolitical role, is to remove statutorily imposed restrictions on their fact-finding—specifically, damage caps. The Supreme Court has made it clear that a damage calculation is a fact reserved for

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*Federal Rule 81(c) and Jury Demand in a Removed Action: A Procedural Trap for the Unwary*, 47 ALA. L. REV. 623, 638 (1983) (discussing how the result of this rule is “widespread judicial inconsistency” and that litigants unaware of the rule “unintentionally waive[] their right to a jury”); see also Richard Lorren Jolly, *Toward A Civil Jury-Trial Default Rule*, 67 DEPAUL L. REV. 685, 695 (2018) (discussing the complexity of Rule 81(c)(3) and the different approaches taken by circuit courts in addressing it).

<sup>334</sup> Compare Jolly, *supra* note 333, at 694 (arguing that a jury-trial default is unlikely to result in substantially more jury trials), with David Crump, *A Response to the Jury Default Proposal: Court Dockets, Jury Trials, and Finding the Best Solution*, 38 REV. LITIG. 239, 241–43 (2019) (arguing that the change is likely to substantially increase the number of jury trials).

<sup>335</sup> See, e.g., JOHN P. DAWSON, A HISTORY OF LAY JUDGES 1 (1960) (arguing that the structure and organization of courts are influenced by, among other things, “the alternative or competing means by which group decisions could be made,” and that these “are a product and a reflection of many forces in society”).

<sup>336</sup> GORSUCH & GRABER, *supra* note 322, at 73.

the jury's determination.<sup>337</sup> Allowing legislatures and judges to displace jurors in that fact-finding role has dramatic consequences as to the practicable ability for some litigants to bring certain causes of action.

As the Diamond-Salerno study previously cited shows, artificial caps on damages undermine the availability of jury trials by changing the “practical and economic realities of mounting a jury trial.”<sup>338</sup> When a plaintiff's attorney must finance the costs of the litigation and take into account the uncertainty of a return on the investment for both the client and counsel's time,<sup>339</sup> as one Texas lawyer colorfully put it: “You're talking about a lot of money, and—in other words—it makes the juice not worth the squeeze.”<sup>340</sup> Restricting the authority of civil jurors effectively restricts entire causes of action.

Noneconomic damage caps make it particularly problematic to move forward in a legitimate case for those who are unlikely to have significant lost wages or income that might ameliorate a cap's effect.<sup>341</sup> As a result, retirees, children, full-time caregivers, and those living in poverty may be unable to seek compensation in states with capped damages because the litigation's costs will often exceed

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<sup>337</sup> See *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.* 532 U.S. 424, 437 (2001) (noting that “the measure of actual damages suffered . . . presents a question of historical or predictive fact” within the province of the jury); see also *St. Louis, Iron Mountain & S. Ry. Co. v. Craft*, 237 U.S. 648, 661 (1915) (holding that the amount of damages to be awarded is “only a question of fact” and is within the power, duty, and responsibility of the lower court).

<sup>338</sup> *Diamond & Salerno*, *supra* note 155, at 144.

<sup>339</sup> The contingency fee embodies this approach to financing litigation, in which the lawyers' services and expenses will only be collected if the client prevails. See *City of Burlington v. Dague*, 505 U.S. 557, 561 (1992) (“Under the most common contingent-fee contract for litigation, the attorney receives no payment for his services if his client loses.”). For most potential plaintiffs who lack the means to self-finance litigation, the contingency fee is their “key to the courthouse.” See, e.g., *Sneed v. Sneed*, 681 P.2d 754, 756 (Okla. 1984) (“[C]ontingent fees are still the poor man's key to the courthouse door [and] allows persons who could not otherwise afford to assert their claims to have their day in [c]ourt.” (footnote omitted)); Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 *LITIG.* 27, 28 (1976) (“[The plaintiff] must obtain representation without a requirement that he pay for it out of already depleted recourses.”).

<sup>340</sup> *Daniels & Martin*, *supra* note 222, at 660.

<sup>341</sup> In some states, however, damage caps limit total damages—economic and noneconomic—and may not even compensate fully for medical expenses caused by the tortious conduct. See, e.g., *COLO. REV. STAT. § 13-64-302* (2005); *IND. CODE § 34-18-14-3* (2017); *LA. REV. STAT. ANN. § 40:1231.2* (2015); *NEB. REV. STAT. § 44-2825* (2014); *VA. CODE ANN. § 8.01-581.15* (2011).

the potential recovery.<sup>342</sup> The cap also discriminates against groups that have historically received lesser wages because of their gender or minority status, rendering their noneconomic damages a larger proportion of their compensatory damages.<sup>343</sup> As Professor Lucinda Finley contends in discussing those she calls “the hidden victims of tort reform”: “[W]omen, minorities, and the poor receive lesser amounts of economic loss compensation than more economically well off white men,” and “wage projection data . . . are explicitly race and gender based, building on the assumption that past race and gender wage disparities will remain ensconced in the future.”<sup>344</sup> Damage caps exacerbate social inequality in the courthouse.

The simple solution to these problems is to repeal the caps<sup>345</sup> and thereby restore the civil jury’s constitutional authority over fact-finding. This would not destroy the economy as some pro-business interests have argued.<sup>346</sup> Damage caps have not been shown to have any positive effect on, for instance, the availability or affordability of health care—the most frequent justification offered by their proponents.<sup>347</sup> Instead, damage caps create significant obstacles to jury trials and access to the courts. Their removal could thus increase the number of jury trials and, what is more, reflect a trust

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<sup>342</sup> See Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1265, 1305 (2004) (discussing disparate impacts resulting from damages caps).

<sup>343</sup> *Id.* at 1280.

<sup>344</sup> *Id.*

<sup>345</sup> Courts are split on whether damage caps in common-law causes of action violate constitutional jury trial guarantees. Compare *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 524 (Kan. 2019) (“Regardless of whether an existing damages cap is technically or theoretically applied as a matter of law, the cap’s effect is to disturb the jury’s finding of fact on the amount of the award. Allowing this substitutes the Legislature’s nonspecific judgment for the jury’s specific judgment.”), with *Siebert v. Okun*, 485 P.3d 1265, 1277 (N.M. 2021) (holding that, once a jury “returns a verdict based on its factual findings,” the “legal consequence of that verdict is a matter of law, which the Legislature has the authority to shape [by reducing damages to a statutory limit]”).

<sup>346</sup> See *supra* note 38 and accompanying text.

<sup>347</sup> See, e.g., BERNARD S. BLACK, DAVID A. HYMAN, MYUNGHO PAIK, WILLIAM M. SAGE & CHARLES SILVER, *MEDICAL MALPRACTICE LITIGATION* 211–23 (2021) (finding no evidence that damage caps positively affect physician supply); Myungho Paik, Bernard Black & David A. Hyman, *Damage Caps and the Labor Supply of Physicians: Evidence from the Third Reform Wave*, 18 AM. L. & ECON. REV. 463, 463 (2016) (same); David A. Hyman, Charles M. Silver, & Bernard S. Black & Myungho Paik, *Does Tort Reform Affect Physician Supply? Evidence from Texas*, 42 INT’L REV. L. & ECON. 203, 217 (2015) (same).

in Americans to govern themselves fairly, while keeping with constitutional principles.

3. *Expand Procedural Experimentation.* Restoring the jury to its position within the constitutional structure does not require pretending that nothing has changed since 1791. Another way to revive civil jury trials is to expand the use of alternative procedural tracks, such as expedited jury trials, which allow speedy access to community input, as well as remote or virtual jury trials, as solutions to the current public health crisis.<sup>348</sup> Such experimentation, however, should only be widely adopted if it can maintain the key benefits of lay judicial participation. As the Supreme Court has recognized, “[N]otions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government.”<sup>349</sup> Any experimentation must live up to those motivating concepts.

Consider first expedited jury trial projects, which offer an alluring solution for bringing the public back into the jury box. Courts have recognized that for some litigants, the time and cost of a full civil jury trial can be prohibitive, deterring them from exercising their right to seek community judgment of their disputes.<sup>350</sup> In the 1990s, states around the country began to address the problem by experimenting with expedited jury trials.<sup>351</sup> These alternative trial procedures offer abbreviated jury trials designed to resolve factually and legally straightforward cases with lower-value damages quickly, often in a single day.<sup>352</sup> The specifics of these procedures differ meaningfully among jurisdictions, though they often involve a trial before fewer than twelve jurors, mandatory

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<sup>348</sup> See, e.g., Robert A. Patterson, *Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs*, 2014 *BYU L. REV.* 951, 951 (discussing how expedited jury trials can be a means of reviving civil jury trials).

<sup>349</sup> *Glasser v. United States*, 315 U.S. 60, 85 (1942).

<sup>350</sup> See Patterson, *supra* note 348, at 960 (stating that expedited jury trials are attempts at making the process speedier and less expensive).

<sup>351</sup> See PAULA L. HANNAFORD-AGOR, NAT’L CTR. FOR STATE CTS., *SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS* 23 (2012) (“The short trial program in the Maricopa County Superior Court allows civil litigants to opt for a streamlined jury trial as an alternative to mandatory arbitration or as an appeal from an unfavorable arbitration decision.”).

<sup>352</sup> See *id.* at 24 (“Most short trial cases are lower-value personal-injury cases, especially automobile torts involving soft-tissue injuries.”).

damage caps or high-low agreements, and the jury's verdict may or may not be binding on the parties.<sup>353</sup>

Make no mistake, as currently designed, these projects are not an ideal solution to America's democratic woes. They cut against the full benefits of lay judicial participation by limiting the responsibility of jurors to resolve whole factual disputes, at times operate with as few as four jurors, and do not require unanimity.<sup>354</sup> However, there are certain benefits. By ensuring court access and limiting incentives to overinvest in litigation, litigants and the judiciary receive many of the benefits of jury trials while avoiding some of the commonly observed detriments.<sup>355</sup> Moreover, shorter trials may prove less of a hardship, financial and otherwise, on the people serving as jurors, thereby allowing for a greater diversity of voices to be represented.<sup>356</sup> And if the programs were modified to require full juries of twelve—which better represent the community and are more reliable fact-finders compared to smaller bodies—expedited trials could prove significantly valuable in jumpstarting the institution while not discarding the democratic and administrative benefits of lay judicial participation.<sup>357</sup>

Another option is to explore the potential benefits of remote or virtual civil jury trials.<sup>358</sup> In the spring of 2020, the COVID-19 pandemic led many courts to shift to online proceedings.<sup>359</sup> For

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<sup>353</sup> See generally *id.* (comparing expedited and summary jury trial projects around the country).

<sup>354</sup> See *id.* at 6 (citing the Maricopa County, Arizona Superior Court Short Trial Program, which involved a four-person jury selected from a ten-person panel with a verdict requiring only three votes).

<sup>355</sup> See *id.* at 4 (noting that the short-trial programs were designed to address concerns about “uncertainty, delay, and expense” of a typical jury trial).

<sup>356</sup> For a discussion on how these burdens limit juror diversity, see generally Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613 (2021) (“[T]he routine dismissal of citizens who face economic hardship excludes not only people but also the diversity of ideas, experiences, and frames of interpretation that characterize the American population.”).

<sup>357</sup> See *supra* Section II.B.

<sup>358</sup> See Valerie P. Hans, *Virtual Juries*, 71 DEPAUL L. REV. 301, 301 (2022) [hereinafter Hans, *Virtual Juries*] (examining how virtual jury trials may affect “the issues of jury representativeness, the adequacy of virtual jury selection, the quality of decision making, and the public's access to jury trial proceedings”).

<sup>359</sup> For state court perspectives on online proceedings, see NATIONAL CTR. FOR STATE CTS., JUDICIAL PERSPECTIVES ON ODR AND OTHER VIRTUAL COURT PROCESSES, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0018/42912/2020-07-27-Judicial-Perspectives-002.pdf](https://www.ncsc.org/_data/assets/pdf_file/0018/42912/2020-07-27-Judicial-Perspectives-002.pdf). For current federal court procedures, see *Court Orders and Updates During COVID-*

many courts and lawyers, a virtual jury trial, in which jury selection, trial proceedings, and jury deliberation are all conducted online, was a bridge too far.<sup>360</sup> Commentators analyzing the prospect of virtual jury trials expressed concerns about whether the quality of justice would be compromised.<sup>361</sup> A small number of courts, however, embarked on virtual jury trials, primarily in civil cases.<sup>362</sup> For example, as of March 2021, the Superior Court in King County, Washington, had conducted more than 300 virtual civil trials, including a significant number of civil jury trials.<sup>363</sup> Courts in Arizona, California, Florida, and Texas also have undertaken virtual civil jury trials, with generally positive evaluations.<sup>364</sup> As courts reopened their buildings for business, many began to schedule in-person jury trials (with masks and social distancing) rather than experiment with the novel option of virtual jury trial proceedings.<sup>365</sup> But as we noted earlier, a substantial backlog and continuing health issues related to COVID-19 have led to substantial delays in scheduling civil jury trials and fraught

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<sup>19</sup> *Pandemic*, U.S. CTS, <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic>; see also Herbert B. Dixon, Jr., *Pandemic Potpourri: The Legal Profession's Rediscovery of Teleconferencing*, 59 ABA JUDGES' J. 37 (2020) (discussing the switch to virtual court proceedings).

<sup>360</sup> See, e.g., TAYLOR BENNINGER, COURTNEY COLWELL, DEBBIE MUKAMAL & LEAH PLACHINSKI, STANFORD CRIM. JUST. CTR., *VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT* 5–12 (2021) (expressing access to justice concerns about remote criminal case proceedings).

<sup>361</sup> See Susan A. Bandes & Neal Feigenson, *Virtual Trials: Necessity, Invention, and the Evolution of the Courtroom*, 68 BUFFALO L. REV. 1275, 1280 (2020) (analyzing the potential risks to justice created by the use of virtual jury trials).

<sup>362</sup> See Sozi Tulante, Kimberly Branscome & Emily Van Tuyl, *Demystifying the Virtual Civil Jury Trial Experience*, LAW360 (Apr. 29, 2021) <https://www.law360.com/articles/1379757/demystifying-the-virtual-civil-jury-trial-experience> (“During the pandemic, formats of civil jury trials have varied widely, and have included fully in-person trials—with participants maintaining social distance and wearing personal protective equipment—as well as fully virtual trials and hybrid approaches.”).

<sup>363</sup> See Matt Markovich, *King County Court Shifts to Virtual Trials, Potentially Changing Future of Courtrooms*, KOMO NEWS (Mar. 4, 2021), <https://komonews.com/news/local/king-county-superior-court-shifts-to-virtual-trials-chips-away-at-massive-case-backlog> (“[T]he court has done over 300 virtual civil trials and at least eight criminal trials, all over Zoom.”).

<sup>364</sup> See Hans, *Virtual Juries*, *supra* note 358, at 310–13 (summarizing virtual jury trial experimentation in these courts and noting that beyond some technical issues, the cases “proceeded well”).

<sup>365</sup> See, e.g., Bill Rankin, *Ga. Courts Try to Keep Jury Trials Going Despite COVID-19 Delta Surge*, THE ATLANTA-J. CONST. (Aug. 18, 2021) (explaining how some judges require masks and distancing in returning to the courtroom).

experiences when jurors, witnesses, or litigants become sick during their trials.<sup>366</sup>

Virtual civil jury proceedings—for part or all of the trial—could help reduce the backlog and avoid the negative health consequences of assembling with large numbers of others during the pandemic. Several judges who participated in virtual jury trials observed that when jury selection was conducted virtually, and with assistance and alternatives for those who had limited or no access to the required technology, it appeared that the panels were as diverse or more diverse than in-person jury selection panels.<sup>367</sup> The prospective jurors who participated in virtual jury selection expressed overall favorable reactions to the experience as well.<sup>368</sup> Of course, we still need to know more about how the virtual character of the trial affects the jury's evaluation of evidence and witnesses, participation by jurors who lack their own remote access, and the robustness of the jury deliberation.

If we take care to implement these procedural innovations in a way that ensures representative and high-quality citizen participation, the benefits may outweigh the detriments. Put simply, having some jury trials is better than having no jury trials. And given the ongoing impact of COVID-19, expedited or virtual jury trials could provide methods for managing the backlog of civil cases in a way that provides some, albeit a more limited, space for community involvement. Expedited jury trials provide a way to address the concerns of those litigants who, correctly or incorrectly, believe that even during non-pandemic times that jury trials are too slow, risky, and expensive.<sup>369</sup> And virtual jury trials offer a safer way to give voice to the community in the resolution of societal disputes during a pandemic. Critically, in our view, until we are assured that these alternative procedures do not compromise justice, they should be optional and not forced on those litigants who desire traditional jury trial procedures.

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<sup>366</sup> See *supra* notes 46–49 and accompanying text.

<sup>367</sup> See Hans, *Virtual Juries*, *supra* note 358, at 310–13 (reporting judges' favorable observations about jury panel diversity in virtual proceedings).

<sup>368</sup> See *id.* at 311 (concluding that “[o]n the whole, participants gave positive feedback about the experience”).

<sup>369</sup> Diamond & Salerno, *supra* note 155, at 121 (discussing the “risk, costs, and delay” associated with jury trials).

## B. PROMOTING FAIR AND ACCURATE JURY FACT-FINDING

To better realize the democratic promise of the civil jury, the institution itself must be a desirable form of dispute resolution. If litigants do not trust jurors, they will avoid them in favor of alternative arbiters and venues. As such, in order to revitalize the jury, strategies for increasing the already strong fairness and accuracy of jury fact-finding should be adopted. The following research-based recommendations can help make litigants more confident in the outcomes of their disputes while also ensuring that the jury as an institution continues to fulfill its constitutionally anticipated sociopolitical role.

1. *Ensure Representative Juries.* The jury that decides a civil trial is drawn from a jury venire, ideally one that constitutes a representative cross-section of the community. Earlier we discussed the multiple benefits of representative juries.<sup>370</sup> Our laws do not guarantee a representative trial jury, but they do require courts to assemble representative venires from which those juries are picked.<sup>371</sup> Even so, in many jurisdictions, jury venires still fall short of fully reflecting the community.<sup>372</sup> And the COVID-19 pandemic has made summoning a representative cross-section of the population even more challenging. This is disturbing considering that diverse juries engage in more robust and thorough fact-finding.<sup>373</sup> Vigorous deliberation can give voice to people with differing perspectives to debate their views and arrive at a verdict that incorporates multiple perspectives in the community. Perhaps

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<sup>370</sup> See *supra* Section II.B.

<sup>371</sup> See NANCY GERTNER, JUDITH H. MIZNER & JOSHUA DUBIN, *THE LAW OF JURIES* 34–35 (11th ed. 2020) (“First, litigants have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division where the court sits. Second, all citizens have the opportunity to be considered for service on grand and petit juries and have the obligation to serve as jurors when summoned.”).

<sup>372</sup> See, e.g., VALERIE P. HANS, *POUND CIV. JUST. INST., CHALLENGES TO ACHIEVING FAIRNESS IN CIVIL JURY SELECTION* 7–12 (2021) [hereinafter HANS, *CHALLENGES TO ACHIEVING FAIRNESS*], <https://www.poundinstitute.org/wp-content/uploads/2021/06/2021-Pound-Forum-Paper-Valerie-Hans.pdf>. (summarizing evidence of failures to achieve jury representativeness in civil jury trial); Shari Seidman Diamond & Valerie P. Hans, *Fair Juries*, U. ILL. L. REV. (forthcoming) (examining causes of the lack of representativeness in jury trials).

<sup>373</sup> See *supra* note 123 and accompanying text.

for that reason, diverse juries are seen as more legitimate.<sup>374</sup> Therefore, we urge courts to take multiple steps to modify jury selection procedures to ensure the fullest possible community representation.

Multiple reasons for underrepresentation call for multiple remedies.<sup>375</sup> The first place to begin is the sources of the names of community residents that courts use to generate master jury lists. Information collected by the National Center for State Courts (NCSC) shows that states use diverse sources to populate their master jury lists.<sup>376</sup> Even today, some jurisdictions rely upon a single source list such as the voters list, or combine multiple lists that still fall short of fully including the jury-eligible population.<sup>377</sup> The results are jury pools that are less than fully reflective of the community.<sup>378</sup> One of the most important ways to promote fuller representation is to use multiple source lists. Doing so has been identified as “perhaps the most significant step” that courts can use to maximize the representativeness of the master jury list.<sup>379</sup> But

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<sup>374</sup> See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1039 (2003) (discussing the costs of unrepresentative juries).

<sup>375</sup> See SHARI SEIDMAN DIAMOND, POUND CIV. JUST. INST., JUDICIAL RULEMAKING FOR JURY TRIAL FAIRNESS 5–12 (2021), <https://www.poundinstitute.org/wp-content/uploads/2021/06/2021-Pound-Forum-Paper-Shari-Seidman-Diamond.pdf> (recommending actions to promote jury pool representativeness); see also Ellis & Diamond, *supra* note 374 (recommending a two-pronged approach to developing impartial juries).

<sup>376</sup> GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTR. FOR STATE CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT (2007), [https://www.ncscjurystudies.org/\\_data/assets/pdf\\_file/0016/5623/soscompendiumfinal.pdf](https://www.ncscjurystudies.org/_data/assets/pdf_file/0016/5623/soscompendiumfinal.pdf). NCSC resources on fair cross-section law and summoning practices may be found at <https://www.ncsc-jurystudies.org/what-we-do/fair-cross-section>.

<sup>377</sup> See William Caprathé, Paula Hannaford-Agor, Stephanie McCoy Loquvam & Shari Seidman Diamond, *Assessing and Achieving Jury Pool Representativeness*, 55 ABA JUDGES’ J. 16 (2016) (describing how to assess and improve representativeness of master jury lists); see also *id.* at 18 (recommending that the master jury list should include at least eighty-five percent of the jury-eligible population).

<sup>378</sup> See VIDMAR & HANS, *supra* note 127, at 76–79 (2007) (describing points in the jury selection process that contribute to decreases in jury representativeness); HANS, CHALLENGES TO ACHIEVING FAIRNESS, *supra* note 372, at 11–12 (describing a study that found how nonresponses to jury qualification questionnaires and summonses threatened representative jury venires).

<sup>379</sup> Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761, 780 (2011).

the efforts should not stop there. Courts need to continually update their master lists, at least annually, recognizing that a significant number of residents regularly move into and out of the jurisdiction.<sup>380</sup>

Representativeness is also affected by nonresponse to the jury summons.<sup>381</sup> Perhaps the most common reason for this is that the jury summons was never received in the mail.<sup>382</sup> However, at least some of the nonresponse is likely due to people's reluctance to participate as jurors. And the COVID-19 pandemic has introduced new challenges to courts that attempt to seat fully representative juries, whether they are traditional in-person jury trials or remote virtual jury trials.<sup>383</sup> Multiple follow-ups to jury summonses have been shown to reduce the nonresponse rate.<sup>384</sup> Something as simple as a follow-up postcard sent within a few weeks of the initial nonresponse significantly increases the likelihood of the citizen responding.<sup>385</sup> Some reformers have also proposed redesigning the jury summons with messaging that stresses the positive and emboldening aspects of jury service, rather than the punitive results that may flow from a failure to respond, as a way to increase yield rates.<sup>386</sup> A jury will only be as diverse as the venire from which it is chosen.

As for in-court jury selection, the voir dire process in which prospective jurors are questioned about whether they can be fair and impartial jurors also affects jury representativeness. Evidence that attorneys in both civil and criminal cases exercise their peremptory challenges along racial lines has led some states to take

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<sup>380</sup> See Caprathe et al., *supra* note 377, at 18 (“The master jury list should be updated at least annually”).

<sup>381</sup> See *id.* at 19 (“Nonresponse and FTA [(Failure to Appear)] rates contribute to underrepresentation of minorities in the jury pool.”).

<sup>382</sup> See *id.* at 18 (noting that “12 percent of jury-related mailings are returned by [the United States Postal Service] as undeliverable”).

<sup>383</sup> See HANS, CHALLENGES TO ACHIEVING FAIRNESS, *supra* note 372, at 13 (describing how health problems and access to technology may undermine jury pool representativeness).

<sup>384</sup> See Caprathe et al., *supra* note 377, at 19 (“[T]he most effective post-hoc strategy for minimizing nonresponse/FTA rates is a second notice/second summons program.”).

<sup>385</sup> See *id.* (“The most effective follow-up programs are those that follow up within three weeks after the person’s nonresponse/FTA and that are consistently administered.”).

<sup>386</sup> See D.C. JURY PROJECT COMM., JURY SERVICE REVISITED: UPGRADES FOR THE 21ST CENTURY, COUNCIL FOR CT. EXCELLENCE 9 (2015) (“The DC Jury Project believes that if positive reinforcement is provided[,] . . . a greater percentage of jurors will be eager to serve in the future . . .”).

innovative approaches, ranging from California's<sup>387</sup> and Washington State's<sup>388</sup> new strategies for handling potentially race-based peremptory challenges, to Arizona's elimination of peremptory challenges entirely.<sup>389</sup> These states will serve as laboratories, allowing scholars and policy makers to examine the extent to which such innovations affect justice and fairness in jury trials and to propose further strategies accordingly.

In a very real sense, although jury duty is technically obligatory, it is more accurately seen as a voluntary activity in the court's work. Failing to respond to a jury summons, developing good-enough excuses for excusal, answering questions during voir dire in such a way as to suggest bias—there are multiple ways that one can avoid serving.<sup>390</sup> So, we also need to consider developing effective community outreach efforts that explain not only the nuts and bolts of jury duty and what to expect, but also that emphasize the central importance of jury service to our democracy through outreach into the community. Some jurisdictions have begun celebrating the first week of May as Juror Appreciation Week, with programs and advertisements to “educat[e] the public about the judicial system, enhance public awareness of the importance of jury service, and appreciation to citizens who perform their civic duty”—with

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<sup>387</sup> See CA. CODE OF CIV. P. § 231.7 (2021) (establishing a procedure for reviewing exercises of peremptory challenges requiring the party to show “by clear and convincing evidence that an objectively reasonable person would view the rationale as unrelated to a prospective juror’s [membership in a protected class]” and defining “objectively reasonable person” as someone that is “aware that unconscious bias, in addition to purposeful discrimination, have resulted in unfair exclusion of potential jurors in the State of California”).

<sup>388</sup> See WASH. R. GEN. 37 (2018) (establishing a procedure for reviewing exercises of peremptory challenges requiring the court to determine whether “an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge,” and defines an “objective observer” as someone who is aware of “implicit, institutional, and unconscious biases”).

<sup>389</sup> Order Amending Rules 18.4 and 18.5 of The Rules of Criminal Procedure, and Rule 47(E) of The Rules of Civil Procedure, No. R-21-0020 (Ariz. Aug. 30, 2021). For a discussion on the potential benefits associated with abolishing peremptory challenges, see generally Hon. Morris B. Hoffman, *Peremptory Challenges Should be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809 (1997).

<sup>390</sup> Step-by-step instructions for “getting out of” jury service are readily available online. See, e.g., Jacob Maslow, *How to Legally Get Out of Jury Selection in 2022?*, LEGAL SCOOPS (Jan. 27, 2022), <https://www.legalscoops.com/how-to-legally-get-out-of-jury-selection-in-2022/>.

promising results.<sup>391</sup> Adopting and expanding such efforts can help increase the diversity of the summons's yield and boost the institution's reputation as a democratic body.<sup>392</sup>

2. *Return to Twelve-Person Civil Juries.* Related to the above, the jury's size coincides with its ability to represent the community. Larger juries are much better able to reflect the range of diverse backgrounds, experiences, and viewpoints in a community.<sup>393</sup> The decisions that many jurisdictions have made to reduce the civil jury's size from the traditional number of twelve have also reduced the ability of today's civil juries to fully represent the local community.<sup>394</sup> Judge Patrick Higginbotham, Judge Lee Rosenthal, and Professor Steven Gensler surveyed the frequency of different jury sizes in federal district courts, discovering that in recent years the most common size was an eight-person civil jury.<sup>395</sup> Research on jury size shows that there are strong reasons to recommend twelve-person juries: the decisions of larger juries are more representative, more reliable, and less influenced by outlier juror preferences.<sup>396</sup>

An interesting study by Professor Shari Diamond and her colleagues shows the crucial way in which the jury's size directly

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<sup>391</sup> Taylor Simpson-Wood, *The Rise and Fall of Bad Judge: Lady Justice Is No Tramp*, 17 TEX. REV. ENT. & SPORTS L. 1, 29 (2015) (internal quotation marks omitted); see also ABA COMM'N ON THE CIV. JURY, JUROR APPRECIATION KIT [https://www.americanbar.org/content/dam/aba/administrative/american\\_jury/juror\\_kit\\_part\\_1.pdf](https://www.americanbar.org/content/dam/aba/administrative/american_jury/juror_kit_part_1.pdf) (contending that implementing Juror Appreciation Week can help to “[r]einforce public confidence in the justice system, [i]mprove communication with jurors and employers, [and] [d]isseminate an important and positive message to the public about jury service”).

<sup>392</sup> See, e.g., Caprathe et al., *supra* note 377, at 19 (contending that “educat[ing] the public about the consequences of failing to appear” may improve appearance rates, and higher appearance rates “will improve the inclusiveness and representativeness” the jury pool).

<sup>393</sup> See *Jury Size: Does It Matter?*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/newsroom/at-the-center/2022/jury-size-does-it-matter> (last visited Sept. 14 (2022) (“Smaller juries are often less diverse and less likely to accurately represent their communities.”)).

<sup>394</sup> See Shari S. Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 425 (2009) [hereinafter Diamond et al., *Achieving Diversity*] (“[J]ury size had a substantial effect on minority representation.”).

<sup>395</sup> See Patrick E. Higginbotham, Lee H. Rosenthal & Steven S. Gensler, *Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, 104 JUDICATURE 46, 49–50 (2020) (studying jury size in fifteen district courts during 2016–18 and finding that 61.4% of civil juries in these district courts were eight-person juries).

<sup>396</sup> See *id.* at 51–53 (summarizing the empirical research).

affects its ability to fully represent the community.<sup>397</sup> Observing the use of peremptory challenges and jury composition in 277 Chicago-area civil juries of different sizes, Professor Diamond and her collaborators found that peremptory challenges by both sides were associated with prospective jurors' race. Defense attorneys challenged more black prospective jurors, whereas plaintiffs' attorneys challenged fewer black jurors.<sup>398</sup> The patterns of their challenges offset, so that the overall jury pool's composition were not significantly affected by the race-based peremptory challenges.<sup>399</sup> However, the jury's size was significantly related to its representativeness.<sup>400</sup> Just two percent of the twelve-person juries had no black members, while twenty-eight percent of the six-person juries had no black members.<sup>401</sup> The authors concluded that the "change most likely to promote diversity on the jury is a return to the jury of 12."<sup>402</sup>

In addition to its positive effect on jury representativeness, research also documents the superior fact-finding ability of larger juries. It is said that "[t]welve heads are better than one"; and empirical jury research confirms that insight.<sup>403</sup> So too does ancient wisdom. As Aristotle explained:

Taken individually, any one of these people is presumably inferior to the best person. But a city consists of many people, just like a feast to which many contribute, and is better than one that is one and simple. This is why a mob can also judge many things better than any single individual.<sup>404</sup>

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<sup>397</sup> See Diamond et al., *Achieving Diversity*, *supra* note 394, at 449 (showing that jury size is more significant than exercises of peremptory challenges in jury diversity).

<sup>398</sup> See *id.* at 440 ("Plaintiffs removed fewer blacks, fewer females, and wealthier jurors; in stark contrast, defense attorneys removed more blacks and poorer jurors.").

<sup>399</sup> See *id.* at 436 (describing a "tiny" effect).

<sup>400</sup> See *id.* at 443 (noting the "precipitous drop" in representation when jury size decreases).

<sup>401</sup> *Id.* at 442 tbl.6.

<sup>402</sup> *Id.* at 426.

<sup>403</sup> Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205 (1989). For empirical research on jury size, see Hans, *The Power of Twelve*, *supra* note 124, at 8 (summarizing research); Higginbotham et al., *supra* note 395, at 51–54 (summarizing arguments and evidence in favor of larger jury size).

<sup>404</sup> ARISTOTLE, POLITICS bk. III § 1286(a) at 77 (C.D.C. Reeve trans., Hackett Publ'g Co. 2017) (c. 384 B.C.E.).

In short, jurors are clearly “better by the dozen.”<sup>405</sup>

A final point in favor of larger juries is that jury service encourages civic engagement and the legal system’s legitimacy.<sup>406</sup> As Judge Higginbotham and his colleagues note: “In this era of declining jury-trial rates, we should fill every jury chair we can, every chance we get. Every empty jury chair is a missed opportunity to strengthen the bonds between the people and the courts.”<sup>407</sup> Yet many jurisdictions use juries of six or eight persons, even for high profile and significant civil cases.<sup>408</sup> The original motivation was undoubtedly one of efficiency, coupled with the belief that smaller juries were likely to be quite similar to larger juries in their fact-finding.<sup>409</sup> Smaller juries cost somewhat less to manage; fewer community members need to be summoned; and the total amounts paid out in juror fees are lower.<sup>410</sup> But the modest time savings and logistical benefits that might accrue from smaller juries are outweighed by the increased representativeness and the superior fact-finding of twelve-person juries, which has now been well-documented.<sup>411</sup> The dramatic declines that we have noted in civil jury trials suggest that whatever savings might have accrued previously from the use of smaller juries is likely even more modest today.<sup>412</sup>

Judge Higginbotham and his colleagues propose one immediate solution for the federal courts. They suggest that federal judges use

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<sup>405</sup> There is some judicial appetite at the Supreme Court for returning to twelve-person juries, at least in the criminal context. See *Khorrami v. Arizona*, No. 21-1553, 2022 WL 16726030, at \*1 (Nov. 7, 2022) (Gorsuch, J. dissenting from the denial of certiorari) (“[*Williams v. Florida*, 399 U.S. 78 (1970), upholding the use of six-person criminal juries,] was wrong the day it was decided, it remains wrong today, and it impairs both the integrity of the American criminal justice system and the liberties of those who come before our Nation’s Courts.”).

<sup>406</sup> See *supra* Section II.B.2.

<sup>407</sup> Higginbotham et al., *supra* note 395, at 53.

<sup>408</sup> See *id.* at 47, 50 (recounting the small jury size in the cases with the largest damage awards in federal courts in 2019 and identifying that “four out of every five civil juries begin[s] with nine or fewer members”).

<sup>409</sup> See, e.g., ERICA J. BOYCE, NAT’L CTR. FOR STATE CTS., *TIME TO REFLECT: HAS THE RESEARCH CHANGED REGARDING THE IMPORTANCE OF JURY SIZE?* 3 (2021) (discussing the arguments and evidence about the cost effectiveness of smaller juries).

<sup>410</sup> See *id.* (examining and challenging arguments on cost effectiveness of smaller juries).

<sup>411</sup> Higginbotham et al., *supra* note 395, at 53 (“Larger juries are better than smaller juries in ways important to the process and the product.”).

<sup>412</sup> See BOYCE, *supra* note 409, at 3 (examining and then challenging prior research on cost effectiveness of smaller juries).

their discretion to seat twelve-person juries, pointing out that Rule 48 of the Federal Rules of Civil Procedure allows judges latitude in the size of the civil jury that will hear the case: “A jury must begin with at least 6 and no more than 12 members . . . .”<sup>413</sup> Judges need not obtain agreement from the parties to seat larger juries.<sup>414</sup> The preferences of litigants, while certainly important, should not be given automatic priority over the systemic interests of the court’s legitimacy.<sup>415</sup> In some state courts, judges may have no discretion if state court rules specify civil juries of a particular size.<sup>416</sup> We urge the legal community and lawmakers to act now to change laws, rules, and practices to once again mandate twelve-person civil juries. A change to larger juries is a straightforward and effective way to underscore a commitment to the importance of diversity and inclusion in the legal system.

3. *Adopt Active Jury Reforms.* Civil jury trial procedures currently seem to be based on an image of the jury as a quiescent, passive group of citizens. Jurors are instructed to refrain from talking to one another about the case and from reaching premature conclusions until all the evidence is presented.<sup>417</sup> At the end of evidence presentation, the judge then instructs the jury, and the members adjourn to the deliberation room, relying on one another’s memories to assess the evidence and reach a decision.<sup>418</sup> The assumption seems to be that a passive role is essential to

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<sup>413</sup> See *id.* at 47–48 (quoting FED. R. CIV. P. 48(a)).

<sup>414</sup> See *id.* at 49 (“Whether to empanel six or 12 or some number in between is a choice for the judge to make.”).

<sup>415</sup> See, e.g., *id.* at 55 (indicating that jurors “consistently say that the experience makes them more appreciative and more trustful of the court system”)

<sup>416</sup> See, e.g., VA. CODE ANN. § 8.01-359(A) (2022) (establishing five-person juries as the default and only allowing twelve-person juries in special circumstances).

<sup>417</sup> See, e.g., MASS. SUPERIOR CT. MODEL JURY INSTRUCTION COMM., MODEL CIVIL JURY PRECHARGE 5, 8 (Oct. 1, 2021) [hereinafter MODEL CIVIL JURY PRECHARGE], <https://www.mass.gov/doc/superior-court-model-civil-jury-instructions-precharge-script-pdf> (exhorting jurors to “[a]void drawing conclusions until the end of the case” and “not discuss the evidence . . . until you start your formal deliberations”).

<sup>418</sup> See, e.g., MASS. SUPERIOR CT. MODEL JURY INSTRUCTION COMM., CIVIL JURY INSTRUCTION TEMPLATE 10 (Oct. 1, 2021), <https://www.mass.gov/doc/superior-court-model-civil-jury-instructions-final-charge-script-master-template-pdf> (instructing jurors to “rely on their own memory” during deliberation).

impartiality in the adversary system.<sup>419</sup> Therefore, jurors asking questions and talking to one another as the case proceeds are discouraged or outright forbidden.<sup>420</sup>

This approach is badly mistaken. Research on jury decision-making confirms that although jurors may be sitting quietly, they are actively interpreting evidence as it is presented and integrating it into a coherent narrative of what happened in the case.<sup>421</sup> When we consider ways to promote high quality jury decision-making, we need to take into account the active approach of the jury to its decision-making task.<sup>422</sup> By giving substantive preliminary legal instructions at the start of the trial, jurors will know in advance the law that they will need to apply and can help guide them to attend to the most relevant evidence.<sup>423</sup> Allowing jurors to take notes, pose questions, and engage with one another in discussing the case as it is proceeding can help jurors avoid misunderstandings and mistakes in interpreting the evidence.<sup>424</sup>

A substantial body of research has tested these “active jury” reforms, finding some positive effects and little-to-no negative consequences when they are implemented.<sup>425</sup> For instance, in a Seventh Circuit research project examining the impact of preliminary substantive legal instructions in jury trials, more than eighty percent of the jurors said that hearing these instructions

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<sup>419</sup> See, e.g., B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1235 (1993) (summarizing the historical development of juries through the achievement of “almost total jury passivity” in seventeenth-century America).

<sup>420</sup> See, e.g., MODEL CIVIL JURY PRECHARGE., *supra* note 417, at 8 (limiting discussion among jurors).

<sup>421</sup> See Dann, *supra* note 419, at 1242 (showing that jurors “mold information into a plausible ‘story’ or ‘schema’” during the trial).

<sup>422</sup> See *id.* (“The rate of predeliberation judgments or decisions by jurors is high.”).

<sup>423</sup> See *id.* at 1249 (bemoaning the lack of preliminary instructions, which “wastes a real opportunity to better inform the jury and improve the quality of the trial and verdict”).

<sup>424</sup> See *id.* at 1265 (promoting “limited discussions of the evidence among jurors” to enhance the quality of jury decision-making).

<sup>425</sup> For summaries of active jury reforms and related research on their effectiveness, see JURY TRIAL INNOVATIONS 113–37 (G. Thomas Munsterman, Paula L. Hannaford-Agor & G. Marc Whitehead eds., 2d ed. 2006); B. Michael Dann & Valerie P. Hans, *Recent Evaluative Research on Jury Trial Innovations*, 41 CT. REV. 12, 12–18 (2004); Valerie P. Hans, *Empowering the Active Jury: A Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 39, 55–70 (2008); Valerie P. Hans & Michael J. Saks, *Improving Judge & Jury Evaluation of Scientific Evidence*, 147 DAEDALUS 164, 164–75 (2018).

helped them better understand the case.<sup>426</sup> Most judges and lawyers agreed that these instructions increased the jurors' comprehension of the law.<sup>427</sup> As then-Chief Judge James Holderman stated, "I have found that preliminary instructions helped to orient the jurors to the case and allowed the jurors to start making connections between the evidence and the disputed issues in the case more quickly."<sup>428</sup> With respect to notetaking, jurors express greater satisfaction when they are permitted to take notes; and some studies show that notetaking leads to significant improvements in evidence comprehension, memory, and decision-making.<sup>429</sup> Similarly, jurors who are permitted to ask questions of the witnesses under carefully controlled circumstances "report feeling significantly better informed" and say their questions clarified the evidence.<sup>430</sup> Allowing jurors to discuss the case throughout the trial, rather than waiting until the deliberation, is more controversial, as some fear that jurors might prematurely judge the case.<sup>431</sup> Field experiments with real jury trials in which civil juries were randomly assigned to either allow or not allow trial discussions, however, showed no evidence of prejudgment.<sup>432</sup> In fact, jurors in one study noted that trial

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<sup>426</sup> SEVENTH CIRCUIT AMERICAN JURY PROJECT, FINAL REPORT 28 (2008), [https://www.uscourts.gov/sites/default/files/seventh\\_circuit\\_american\\_jury\\_project\\_final\\_report\\_0.pdf](https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report_0.pdf) ("Over eighty percent (80%) of the jurors reported that interim statements of counsel were helpful.").

<sup>427</sup> *See id.* at 27–28 ("Over eighty-five percent (85%) of the participating judges thought the use of interim statements increased the jurors' understanding and said they would permit interim statements during trials in the future.").

<sup>428</sup> *Id.* at 28.

<sup>429</sup> Research studies on notetaking include Lynne ForsterLee, Irwin A. Horowitz & Martin Bourgeois, *Effects of Notetaking on Verdicts and Evidence Processing in a Civil Trial*, 18 L. & HUM. BEHAV. 567, 574–75 (1994); Larry Heuer & Steven D. Penrod, *Juror Notetaking and Question Asking During Trials: A National Field Experiment*, 18 L. & HUM. BEHAV. 121, 135–40 (1994); David L. Rosenhan, S. L. Eisner & R. J. Robinson, *Notetaking Can Aid Juror Recall*, 18 L. & HUM. BEHAV. 53, 59–60 (1994) (identifying benefits of note taking).

<sup>430</sup> Heuer & Penrod, *supra* note 429, at 142.

<sup>431</sup> *See* Diamond et al., *Juror Discussions*, *supra* note 132, at 74 (noting concerns that "jurors permitted to discuss the evidence would use the breaks during trial to arrive at premature group decisions on verdicts before hearing all of the evidence and the instructions").

<sup>432</sup> *Id.* at 74–76; *see also* Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 378 (2000) (noting that allowing earlier discussion reduces the degree of uncertainty jurors feel at the start of deliberation).

discussions with other jurors helped to correct misunderstandings of the evidence.<sup>433</sup>

We recommend specific reforms that have been tested and vetted in real-world cases: (1) preliminary substantive legal instructions; (2) notetaking; (3) question asking; and (4) engaging in trial discussions. Research with preliminary instructions in the law that applies to the case at hand helps jurors know what legal requirements apply as they hear trial evidence. Allowing jurors to take notes, ask questions of witnesses under controlled circumstances, and permitting jurors to discuss the case during trial breaks have all proved their worth in the jurisdictions and courts that use them. These research-based reforms can further strengthen jury decision-making in civil cases as well as help the civil jury cope in cases with extremely complex evidence. In doing so, they may make the jury a more desirable form of dispute resolution and so increase the number of jury trials.

## V. CONCLUSION

The twenty-first century finds America at a dangerous crossroad. Commitment to democratic principles is waning, and in its place is extreme partisanship—a shift that has already resulted in multiple instances of violence and death across the country. The future of American democracy is in greater peril than we have ever experienced in our lifetimes, and it is coinciding with the nation's slow emergence from the ravages of a life-changing and deadly pandemic. As strategies are adopted and efforts are made to redirect the Republic back toward its liberal commitments, the civil jury should not be overlooked as a meaningful locus of democratic action and power.

While the institution has been subject to criticism and successful attacks over the last hundred years, which have driven it to a minor role in the judiciary today, the institution's sociopolitical importance and potential have not dissipated. Jury service still provides a forum for public participation and grassroots governance, which since the Founding has been recognized as just as important as voting, if not more so, in maintaining the Republic. The history of and current procedures designed to exclude the populace from this meaningful form of public participation must be scrutinized and, as

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<sup>433</sup> Diamond et al., *Juror Discussions*, *supra* note 132, at 74–75.

necessary, removed to restore the institution. William Blackstone warned nearly two and a half centuries ago of “secret machinations, which may sap and undermine [the jury]” and cautioned that no matter how “convenient these may appear at first . . . delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty.”<sup>434</sup> Americans should heed these words now more than ever.

The six jury recommendations offered here can help America back on the path toward democratic renewal. Simple changes can be adopted to remove barriers to jury trials, making them more likely to occur when the parties desire them. And efforts can be made to ensure that jurors are given the tools necessary to reach more often fair and accurate resolutions of those disputes with which they are presented. Creative thinking and other strategies, too, might be motivated toward these ends.<sup>435</sup> Deliberate action must be taken to ensure that the promise of the Seventh Amendment is maintained, and that lay judicial participation is restored to its central role in our judiciary, our democratic spirit, and our governance structure.

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<sup>434</sup> BLACKSTONE, *supra* note 62, at \*349.

<sup>435</sup> See e.g., Christopher T. Robertson & Michael Shammas, *The Jury Trial Reinvented*, 9 TEX. A&M L. REV. 109, 110, 146–48 (2021) (proposing a number of radical recommendations such as a national jury pool for national civil cases and vote-aggregation without deliberation); Andrew S. Pollis, *Busting Up the Pretrial Industry*, 85 FORDHAM L. REV. 2097, 2098–99 (2017) (arguing that a legal practice model of “extracting settlement and maximizing billable hours” have given rise to a pretrial industry, and urging a return to a “trial model” of the judiciary); Dmitry Bam, *Restoring the Civil Jury in a World Without Trials*, 94 NEB. L. REV. 862, 908 (2016) (proposing “hybrid judicial panels” in which jurors would deliberate alongside judges); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1625–26 (2006) (arguing in favor of a more empowered and active decision-making role for the jury); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1178, 1186–87 (1995) (offering a number of reforms including limiting the opportunities for individuals to be excused from service and increasing social education about the institution).