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## A TALE OF THREE DAMAGE CAPS: TOO MUCH, TOO LITTLE AND FINALLY JUST RIGHT

*Medical malpractice damage caps have been proposed as one way of solving the medical malpractice liability crisis. After examining three different, but typical, damage caps, the Author constructs a model statute. This statute is favored because, on balance, it is more effective in solving the crisis and more fair and desirable to the interested parties: insurance companies, health care providers and medical malpractice victims. The model statute also avoids the constitutional infirmities that have befallen other damage caps.*

IN THE AREA of medical malpractice, there recently has been a myriad of tort reform measures as states across the nation have struggled to find a "cure" for the perceived liability crisis.<sup>1</sup> While legislatures have advanced many different proposals, one common reform measure has been the damage cap, which is the imposition of a limitation on the amount of damages that can be recovered as a result of a single incident of medical malpractice.<sup>2</sup> Part I of this Note considers a number of preliminary matters, including a discussion of what kind of crisis exists and, after introducing the damage cap concept, the general effectiveness of damage caps in alleviating the crisis. Part II analyzes the effectiveness, fairness and desirability of damage cap provisions as enacted in three states. Each presents a different variation on the same theme, but none is without its weaknesses. For example, the Ohio provision<sup>3</sup> would be effective, but is too burdensome for the victim; the Wisconsin provision<sup>4</sup> does not put enough of a burden on the

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1. See generally Note, *The Constitutionality of Medical Malpractice Legislative Reform: A National Survey*, 18 LOY. U. CHI. L.J. 1053 (1987) (analyzing constitutional challenges raised against a variety of medical malpractice reform measures).

2. See, e.g., Note, *Fein v. Permanente Medical Group: Future Trends in Damage Limitation Adjudication*, 80 NW. U.L. REV. 1643, 1652-55 (1987) [hereinafter Note, *Future Trends*] (reviewing several legislatively imposed caps and treatment received by the courts of several states).

3. OHIO REV. CODE ANN. § 2307.43 (Baldwin 1984).

4. WIS. STAT. ANN. § 893.55 (West Supp. 1989).

victim to be effective. Although the Washington provision<sup>5</sup> provides a unique concept for limiting damages, it is not without faults as well. In addition, each statute raises constitutional implications which will be considered in Part III.

This Note compares the damage caps enacted in these three states, exposing their weaknesses and analyzing their strengths. The purpose of the Note is to fashion from this comparison a new proposal — one that avoids the earlier attempts' failures, minimizes constitutional infirmities and strings together the effective provisions into a damage cap that is effective without being too burdensome for the victims. Whereas earlier enactments have burdened the victims *too much* or *too little*, Part IV of this Note attempts to find a proper balance between effectiveness, fairness, desirability and constitutionality that is *just right*.

## I. BACKGROUND

### A. Is There A Crisis?

Before launching into a comparison and synthesis of the various legislative attempts at capping malpractice damage awards, a few preliminary items must be considered. One must remember that these reform measures are a response to what has been called the "medical malpractice crisis."<sup>6</sup> The first consideration, then, is whether there exists a crisis necessitating the enactment of reform measures. On this point, there is much debate, and countless theories exist either to discount or to support the existence of a crisis.<sup>7</sup> One theory suggests that the insurance industry contrived the crisis as a "marvelous mechanism for the withdrawal or suspension

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5. WASH. REV. CODE ANN. § 4.56.250 (1988).

6. This term refers to problems of availability and/or affordability of malpractice insurance. Note, *The Applicability of Experience Rating to Medical Malpractice Insurance*, 38 CASE W. RES. L. REV. 255, 255 n.1 (1987) [hereinafter Note, *Experience Rating*]; see also Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 399 (1987) (no single theory can explain the causes behind the recent liability insurance crisis). This Note focuses primarily on the issue of affordability, which is central to the present debate concerning whether "the extensive mobilization of resources and implementation of reforms" can be justified. Note, *Experience Rating*, *supra*, at 259. The cost of malpractice insurance discourages doctors from practicing in high risk practices and in rural geographic areas inhabited chiefly by poorer clientele. See *infra* text accompanying note 56.

For a brief description of the history of the medical malpractice crisis, see Qual, *A Survey of Medical Malpractice Tort Reform*, 12 WM. MITCHELL L. REV. 417, 420-21 (1986).

7. See Qual, *supra* note 6, at 422 n.22.

of established [victims'] rights, and the acquisition and legitimation of new privileges."<sup>8</sup> A related theory asserts that insurance companies manipulated the market to create a crisis atmosphere that would eliminate competition among themselves.<sup>9</sup>

However, there is support for the theory that a genuine malpractice crisis exists and that the malpractice insurance industry is in need of reform. One commentator suggested that premiums increased dramatically because a number of legal developments<sup>10</sup> damaged the insurers' confidence in their ability to predict future liabilities.<sup>11</sup> Another theory points to the distinct incentives in the American tort system for injured parties to litigate their claims.<sup>12</sup> These developments forced the insurance companies to add on an "unpredictability risk premium."<sup>13</sup>

The available statistical data also indicate the existence of a "crisis" situation. For example, one source reported that the average medical malpractice award, which was \$404,726.00 in 1980,

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8. Note, *Legislative Limitations on Medical Malpractice Damages: The Chances of Survival*, 37 MERCER L. REV. 1583, 1603 (1986) [hereinafter Note, *Legislative Limitations*] (quoting Berweig, *Foreward* to T. LOMBARDI, JR., *MEDICAL MALPRACTICE INSURANCE* at xi (1978)).

9. See Qual, *supra* note 6, at 422. Proponents of these related theories point to the fact that the insurance industry is essentially exempt from federal antitrust laws and can therefore avoid price competition and raise rates above competitive levels. Abraham, *supra* note 6, at 401.

10. These developments include: retroactive strict liability for product defects that were unknown at the time that a warning could have been given, an increased scope of joint and several liability among tortfeasors, and the awarding of non-economic damages to victims exposed to danger prior to any signs of physical harm. Abraham, *supra* note 6, at 406-07.

11.

Because many of the expansions of tort liability . . . were not anticipated by insurers, they have become wary of their ability to predict future expansion. The role played by this kind of wariness should be emphasized, even though it cannot be documented statistically and sometimes seems unwarranted. Insurance underwriters have become highly distrustful of courts and juries. This distrust can often obscure relevant distinctions between states with narrow and those with liberal rules of recovery, and between standards adopted by obscure trial courts and those endorsed at the appellate level. There is little, aside from several years without major legal surprises, that is likely to neutralize this wariness.

*Id.* at 406.

12. *Id.* at 409. The theory points to three features of the American tort system that create distinctive incentives to litigate: the availability of contingent fees for plaintiffs' attorneys, the "American rule" that a losing party is not obligated to pay his adversary's costs, and the absence of the widespread, generous forms of social insurance prevalent in other Western democracies. *Id.*

13. *Id.* at 405.

had risen to \$1,478,028.00 by 1986.<sup>14</sup> Another source revealed that the cost of medical malpractice premiums increased over the previous year's costs by 55.2 percent in 1985 and by 29 percent in 1986.<sup>15</sup> The recoveries drive up the premiums,<sup>16</sup> and, it seems safe to conclude that, the premiums increase the costs of medical practices, especially those that involve the most risk.<sup>17</sup>

Since this Note is about the desirability and feasibility of damage caps, a final determination about the existence of a crisis is outside its scope. Therefore, this Note assumes that legislatures discovered sufficient evidence of a crisis to warrant adoption of reform measures.

## B. The Response of the Legislatures

Legislatures have responded to the malpractice crisis in several ways.<sup>18</sup> Wisconsin, for example, has mandated the use of pre-trial screening panels to eliminate non-meritorious claims.<sup>19</sup> Evidentiary and procedural requirements, such as the collateral source rule,<sup>20</sup> and the qualification of expert witnesses<sup>21</sup> have been modified. Also, in order to shift the costs and burdens of litigation, restrictions have been placed on the award of attorney's fees.<sup>22</sup>

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14. Note, *Experience Rating*, *supra* note 6, at 260 n.37. In 1980, the verdicts in medical malpractice cases ranged from \$1,708 to nearly \$6.7 million. By 1986, the awards ranged from \$2,500 to almost \$16 million. *Id.*

15. Mooney, *The Liability Crisis - A Perspective*, 32 VILL. L. REV. 1235, 1242 (1987).

16. *See generally id.* at 1241-44 (arguing that the liability insurance crisis, consisting of increases in the price of premiums and decreases in the availability of commercial liability insurance, is caused largely by the expansion of tort law).

17. It seems, then, that the consequences of this crisis might extend beyond the alarming increase in medical malpractice premiums and the resulting increase in medical costs to consumers: assuming that doctors act at least in part as rational economic beings, in order to avoid risk, and to increase profits, doctors will tend to abandon high risk, and thus more costly, practices. Such practices are still, nevertheless, a necessary part of the nation's health care system. Therefore, increases in insurance premiums arguably cause a crisis in the medical industry as well. Moreover, a risk-averse medical profession could slow the advance of the medical sciences and stunt innovation.

Additionally, the crisis, in terms of the availability and affordability of liability insurance, is inhibiting the provision of medical services in rural areas. *See infra* text accompanying note 56.

18. For a detailed description of numerous tort reform measures adopted by legislatures, see Qual, *supra* note 6, at 427-38.

19. *Id.* at 430 n.56.

20. *Id.* at 433-34.

21. *Id.* at 436-37.

22. *Id.* at 432-33.

The reform strategy under focus here though, is the imposition of limits, or caps, on the amount of damages awarded. Although this is a common solution, significant differences exist in the particular forms the caps take. Predictably, the legislatures have adopted different dollar levels at which the caps take effect.<sup>23</sup>

Besides those obvious differences, other significant differences can be found. This Note considers which damage cap provisions are *more* or *less* effective while assuming that damage caps in general are an effective means of addressing the malpractice insurance crisis. The widespread use of this particular reform measure indicates that legislatures believe damage caps will be effective. Statistical evidence indicates that this faith has not been misplaced. One study indicated that "the average impact of statutes [limiting] all or part of the plaintiff's recovery has been to reduce average severity by 23%."<sup>24</sup> An independent statistical analysis of the effectiveness of damage caps, however, is beyond the scope of this Note. The comparison and synthesis done in this piece assumes both that a crisis exists, and that damage caps are an effective means of addressing the crisis.<sup>25</sup>

The final preliminary consideration concerns a determination of what kinds of damages should be capped. For instance, some statutes limit total medical malpractice liability<sup>26</sup> while others limit only noneconomic damages.<sup>27</sup> "Because so many courts con-

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23. Compare OHIO REV. CODE ANN. § 2307.43 (Baldwin 1984) (\$200,000 limit on total liability) with WIS. STAT. ANN. § 893.55 (West Supp. 1989) (\$1,000,000 damage limitation on total noneconomic damages).

24. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987).

25. See *An Update on the Liability Crisis: Tort Policy Working Group*, 10 AM. J. TRIAL ADVOC. 213, 243 (1986) [hereinafter *An Update on the Liability Crisis*] (arguing that a properly formulated damage cap will expedite settlements, reduce the costs of the tort system and eliminate a lack of uniformity in awards for similar injuries).

26. See, e.g., IND. CODE ANN. § 16-9.5-2-2(a) (West Supp. 1989) (total recovery for injury or death in a medical malpractice case is limited to \$500,000; for acts of malpractice after January 1, 1990, the limit is \$750,000).

27. See, e.g., WIS. STAT. ANN. § 893.55(4)(d) (West Supp. 1989) (total recovery for noneconomic damages for bodily injury or death is limited to \$1,000,000 for actions filed after June, 1986, with adjustments made to reflect changes in the consumer price index for urban consumers); WASH. REV. CODE ANN. § 4.56.250 (1988) (total recovery for noneconomic damages for personal injury or death limited to an amount "determined by multiplying .043 by the average annual wage and by the life expectancy of the" victim). The Washington statute was declared unconstitutional by the Washington Supreme Court in *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 771 P.2d 711 (1989), which is discussed in more detail *infra*, notes 163-75 and accompanying text. A comparison of noneconomic damages and economic damages is made *infra*, notes 29-37 and accompanying text.

sidered it harsh that a seriously injured patient may not recover his total economic losses [it has been suggested that] only a cap on noneconomic damages should be sought."<sup>28</sup> Hospital bills, doctors' fees, medication fees and rehabilitation costs provide an objective means to measuring economic damages. Some consider these losses to be "the most basic building block in the remedial process."<sup>29</sup>

Noneconomic damages, on the other hand, are not measured by an objective standard.<sup>30</sup> Although plaintiff's attorneys try to make the determination as objective as possible, these losses are not readily quantifiable in pecuniary terms.<sup>31</sup> When compared with economic damages, noneconomic damages remain speculative in nature and susceptible to manipulation by juries motivated to overcompensate a sympathetic plaintiff. Consequently, noneconomic damages are the most likely target for the imposition of a cap.<sup>32</sup>

Although some consider capping noneconomic damages as more favorable than capping economic damages, it is important to remember that noneconomic damages are as genuine as economic damages.<sup>33</sup> As stated in one authority, given that there is "good reason for legal redress against another because of the way in which an injury occurred, the legal system falls short of its mission of doing justice if it redresses only economic harm."<sup>34</sup> Coinciding with the authenticity of noneconomic damages is the fact that noneconomic damage awards maintain great value as a

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28. Comment, *Medical Malpractice: Constitutional Implications of a Cap on Damages*, 7 N. ILL. U.L. REV. 61, 85 (1986) [hereinafter Comment, *Constitutional Implications*] (footnote omitted) (discussing the concern that a limit may prevent an injured person from recovering even his or her medical expenses).

29. Note, *A Proposal to Cap Tort Liability: Avoiding the Pitfalls of Heightened Rationality*, 20 J.L. REFORM 1215, 1233 (1987) [hereinafter Note, *A Proposal to Cap*].

30. See Wade, *An Evaluation of the "Insurance Crisis" and Existing Tort Law*, 24 HOUS. L. REV. 81, 88 (1987) (pain and suffering and emotional distress are similar to punitive damages in that no objective standard exists for setting the amount of the award).

31. *Id.* Historically, western society has attempted "to convert all our inquiries into money. It would be nice if we could find some other way of taking care of pain and emotional distress, but we have not found it yet." *Id.*

32. Note, *Future Trends*, *supra* note 2, at 1671.

33. Note, *Medical Malpractice - \$250,000 Cap on Pain and Suffering Cal. Civ. Code § 333.2 - Does the Statute Meet its Constitutional Burden and Legislative Goals?* 8 WHITTIER L. REV. 601, 605 (1986) [hereinafter Note, *Medical Malpractice*].

34. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 358 (2d printing 1965).

source of compensation for an affront to one's dignity.<sup>35</sup> They ensure placement of responsibility upon a wrongdoer<sup>36</sup> and provide a source for attorneys fees.<sup>37</sup>

Given the authenticity and value of such awards, limiting them must be done with care. The administrative difficulty in determining the proper limit is a weak excuse for foregoing the effort.<sup>38</sup> What follows is an examination of the strengths and weaknesses of the attempts made by the states of Ohio, Wisconsin and Washington to limit damages.

## II. STATUTORY ANALYSIS

The following is a detailed analysis of three different versions of a cap on noneconomic damages. Each provision will be evaluated on its effectiveness in alleviating the crisis, as well as its fairness and desirability to the insurance companies, the health care providers and the victims of medical malpractice.

### A. The Ohio Provision

The Ohio statute provides in pertinent part: "In no event shall an amount recovered for general damages in any medical claim . . . not involving death exceed the sum of two hundred thousand dollars."<sup>39</sup> The provision's most obvious shortcoming is the ambiguity of the term "general damages." This ambiguity has given rise to a debate regarding the precise subject of the limitation. Some distinguish between a statute limiting general damages and one which limits noneconomic damages.<sup>40</sup> Under this theory,

35. *Id.*

36. *Id.* at 359; see also Note, *Medical Malpractice*, *supra* note 33, at 605 ("a wrongdoer should bear the cost for all the losses resulting from his negligence").

37. Note, *Medical Malpractice*, *supra* note 33, at 605.

38. R. KEETON & J. O'CONNELL, *supra* note 34, at 359.

39. OHIO REV. CODE ANN. § 2307.43 (Baldwin 1984).

"Medical claim," as used in the limitation provision, is currently defined as "any claim asserted in any civil action against a physician, podiatrist, or hospital . . . that arises out of the medical diagnosis, care, or treatment of any person." OHIO REV. CODE ANN. § 2305.11 (Baldwin Supp. 1989). It also includes "derivative claims for relief that arise from the medical diagnosis, care, or treatment of a person." *Id.*

40. See *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 28, 495 N.E.2d 51, 56 (C.P. 1985) (quoting 30 OHIO JUR. 3d *Damages* § 165 (1981)) (since Ohio's provision limiting general damages is defined as limiting all damages "necessarily result[ing] from the injury complained of," authority relating to noneconomic damage cap is inapplicable); see also Note, *Future Trends*, *supra* note 2, at 1653 (distinguishing statutes with a general damage provision from statutes with a damage limitation that is purely



a general damage limitation could conceivably include economic as well as noneconomic losses.

Other sources, however, find the term "general damages" to be synonymous with "noneconomic damages."<sup>41</sup> This appears to be a more tenable position. "The distinguishing characteristic of general damages is the lack of corroboration - the lack of specific evidence - of a specific monetary loss."<sup>42</sup> Since noneconomic damages also cover losses which cannot be objectively measured, such as pain and suffering, and physical disability,<sup>43</sup> the two terms should be considered to be synonymous.

Although the term, "general damages," logically refers only to noneconomic damages, the confusion among courts and others remains. Because of the basic difficulty in determining which damage figures are subject to the limitation, administration of the cap is difficult. This ambiguity has created problems when the courts have considered the validity of the cap.<sup>44</sup> Such a problem could be avoided if greater care is taken in drafting the statute to define more clearly which losses are subject to limitation.

### 1. Effectiveness

As mentioned above, one theory used to explain the medical malpractice crisis is the inability of the insurance industry to predict liabilities in the face of the liberalization of tort principles.<sup>45</sup>

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noneconomic).

41. See Leatherberry, *No-Fault Automobile Insurance: Will the Poor Pay More Again?* 26 CASE W. RES. L. REV. 101, 106 n. 19 (1975) (" '[n]oneconomic loss' is another frequently used . . . phrase" that is synonymous with general damages). Cf. R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 6.14, at 149-50 (1977) (acknowledges that "[s]uch losses . . . [may] have no pecuniary dimension," but objects to use of the phrase "noneconomic losses" since there is true economic loss).

42. Leatherberry, *supra* note 41, at 105-06 n.19 (quoting W. ROKES, *NO-FAULT INSURANCE* 209 (1971)).

43. See *supra* notes 30-32 and accompanying text.

44. In *Duren*, for example, an Ohio court was confronted with a challenge to the statute's validity. Because the Ohio provision limited "general damages," the court found no relevance in the validation of a cap on "noneconomic damages" by the California Supreme Court in *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985). *Duren*, 24 Ohio Misc. 2d at 28, 495 N.E.2d at 56. Instead, the *Duren* court struck down the provision by applying the logic of the New Hampshire Supreme Court, which invalidated a noneconomic cap similar to the California provision: "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." *Duren*, 24 Ohio Misc. 2d at 28-29, 495 N.E. 2d at 56 (quoting *Carson v. Maurer*, 120 N.H. 925, 942, 424 A.2d 825, 837 (1980)).

45. See *supra* notes 10-11 & 13 and accompanying text.

Insurance companies are forced to charge an "unpredictability risk premium" in response.<sup>46</sup> An evaluation of the validity of this argument, however, is not possible "without psychoanalyzing those responsible for the actuarial calculations that precede rate-setting."<sup>47</sup>

Assuming this theory is valid, Ohio's \$200,000 limitation should be very effective. The cap removes one unpredictable aspect of actuarial calculation by establishing the maximum liability to which an insurance company could be subjected.<sup>48</sup> However, Ohio's cap is not as "absolute" as it could be. A single incident of medical malpractice not only gives a cause of action to the victim, but could also create derivative claims.<sup>49</sup> The Ohio statute applies a separate \$200,000 limit to each claim.<sup>50</sup> Rather than being able to count on their exposure being limited to \$200,000 for each incident of malpractice, the insurance companies must try to guess how many derivative suits might be filed with a victim's claim. Arguably, predictability could be enhanced further by adding to the statutory cap a "per occurrence" provision, applying a single limit to all the claims arising from that single incident.<sup>51</sup> Although Ohio does not have a "per occurrence" provision, the fact that each derivative claim is limited to \$200,000 aids predictability more so than if the cap only applied to the victim's claim and derivative claims were unlimited.<sup>52</sup> Restoration of predictability should alleviate the need for a "risk premium," thereby reducing, or at least curbing, increases in malpractice insurance premiums.<sup>53</sup>

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46. Abraham, *supra* note 6, at 405.

47. *Id.* at 408.

48. See Commentary, *Medical Malpractice: The Second Wave of "Reform"*, 37 ALA. L. REV. 419, 427 (1986).

49. For example, negligent injury to a husband could be grounds for a wife's loss of consortium suit.

50. The Ohio statute limits "any medical claim" to the \$200,000 limit. OHIO REV. CODE ANN. § 2307.43 (Baldwin 1984) (emphasis added). A derivative claim is considered a separate "medical claim" under Ohio law. See *supra* note 39.

51. See *An Update on the Liability Crisis*, *supra* note 25, at 244. For further discussion of a "per occurrence" application of damage caps, see the discussion of the Wisconsin statute, *infra* text accompanying notes 69-71, and the Washington statute, *infra* text accompanying notes 91-92 & 94-99.

52. But see *An Update on the Liability Crisis*, *supra* note 25, at 244 (arguing that any cap without a "per occurrence" provision can be defeated by a victim's attorney encouraging as many family members as possible to file separate derivative suits).

53. See Commentary, *supra* note 48, at 427.

Industry-initiated alternatives, though outside the scope of this Note, provide another option for addressing the crisis. Arguably, if the insurance companies are concerned about predictability, they could impose policy limits. Health care providers, however, would still

Even without the premium for unpredictability, increases in the aggregate payout in malpractice cases also affect premiums. Relative to a situation without damage limits, imposition of the Ohio cap should reduce the total amount of payout because each claim is limited to \$200,000. Although derivative claims arising from a single incident of malpractice are considered separately for purposes of the Ohio cap, payout should still be reduced.<sup>54</sup> Assuming that the resultant savings to the insurance companies would be passed on to policyholders, a reduction in payout should reduce premiums as well.

## 2. Fairness and Desirability

Insurance companies likely see caps as an effective means of alleviating the crisis. Caps should make awards easier to predict and simplify the actuarial calculation process.<sup>55</sup> The savings that result from the decrease in total payouts may also benefit the companies. At the very least, a \$200,000 cap probably lessens the "squeeze" insurers suffer as a result of paying exorbitant awards while trying to maintain competitive and affordable premiums.

If rates were to stabilize or decline, health care providers would likely also favor Ohio's \$200,000 absolute cap. The statute's effect on rates carries several positive ramifications. If rates decrease, for example, the individual provider's practice will become more profitable. Lower, more stable rates enable providers both to remain in particularly risky areas of practice and to con-

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be subject to the same excessive verdicts and settlements, and would consequently be exposed to personal liability for the amount a verdict exceeded their coverage. Providers would therefore be faced with the difficult choice of practicing without sufficient insurance, or abandoning an established practice to assume practice in a less risky medical area. See *infra* note 56 and accompanying text.

Society in general would also suffer as a result. In many cases, victims would not have an adequate source of compensation for their injuries should a defendant be insolvent. It is also conceivable that availability of health care in the high-risk medical areas would decrease. See *supra* note 17 and accompanying text. Industry-initiated policy limits might solve the problem of skyrocketing insurance premiums, but at an unacceptable cost.

54. Even if a wife, for example, is successful in recovering directly for her injuries, while at the same time her husband receives a derivative damage award, the insurance company's total exposure is limited to only \$400,000 under the Ohio statute. If there were no limit, the insurance company's exposure from the wife's claim alone could easily amount to more than \$400,000, since the average award is nearly \$1.5 million. See *supra* note 14 and accompanying text. Still, payout is not as reduced as it could be were a "per occurrence" provision added. See *supra* note 51.

55. See *supra* note 24 and accompanying text.

tinue practicing in less populous, rural regions of the country.<sup>56</sup> For these reasons, a \$200,000 cap on malpractice damage awards should gain their support.

The Ohio scheme, though, does not adequately protect the interests of the victims whose valid claims for damage awards would be artificially limited to \$200,000. Although proponents of the caps justify the absolute cap by arguing that the vast majority of claims fall below the limit and are not affected,<sup>57</sup> this argument simply does not square with the facts in Ohio: Ohio's cap, as construed by its courts<sup>58</sup> is substantially below the average award.<sup>59</sup> Moreover, over time, inflation will cause the cap to affect an increasing number of victims. Even if the cap does curb damage awards without affecting the claims of a majority of the victims of malpractice, it must be solving the crisis at the expense of the minority of victims who are the most seriously injured. It is conceivable that the more seriously injured person often will have the greater pain and suffering and psychological injury.<sup>60</sup> Since such losses do not lend themselves to easy economic valuation, they are just the kinds of losses that would be limited by a noneconomic cap. In essence, this places the burden of supporting the health care industry squarely upon the shoulders of those most in need of compensation.<sup>61</sup> These individuals deserve more protection than the Ohio statute provides. The \$200,000 maximum recovery is far

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56. *ABC World News Tonight: The American Agenda* (ABC television broadcast, January 12, 1989).

In its "American Agenda" segment, ABC News presented the plight of one doctor practicing in a rural area of Montana. Because this doctor delivered babies, he had to pay malpractice premiums of over \$50,000 each year. With the "limited patient load" of a "small town practice," and after paying these high premiums, the doctor was left with an annual income of only \$30,000. He could no longer afford the high rates, and was forced to choose between dropping high risk practices or moving to a more urbanized area in Montana where he could maintain a larger patient load. He chose the latter. *Id.*

57. See Note, *A Proposal to Cap*, *supra* note 29, at 1239; see also Martin, *Limiting Damages for Pain and Suffering: Arguments Pro and Con*, 10 AM. J. TRIAL ADVOC. 317, 337 (1986) (cap proponents argue that "only the most seriously-injured tort victims will be denied full compensation for their pain and suffering if ceilings are imposed upon noneconomic damages"); Note, *Legislative Limitations*, *supra* note 8, at 1603 ("some courts have indicated that the vast majority of malpractice claims fall under the damage limits set by various statutes").

58. See *supra* note 40 and accompanying text.

59. See *supra* note 14 and accompanying text.

60. See R. KEETON & J. O'CONNELL, *supra* note 34, at 46.

61. This point was noted in *Carson v. Mauer*, 120 N.H. 925, 942, 424 A.2d 825, 837 (1980); see also Martin, *supra* note 57, at 337 (the most seriously injured, who need larger awards, will be the only individuals to be denied full compensation for pain and suffering).

too low to ensure fair compensation to victims.

Compensation and insurability in the liability insurance context are essentially two sides of the same coin.<sup>62</sup> To solve the crisis, then, the insurance industry, the health care providers and the victims must share the burden. Under the Ohio provision, the victim is burdened *too much*.

### B. The Wisconsin Provision

The Wisconsin provision provides: "The limit on total noneconomic damages for each occurrence . . . shall be \$1,000,000 . . . and shall be adjusted . . . to reflect changes in the consumer price index."<sup>63</sup> The statute defines noneconomic damages as "moneys intended to compensate for pain and suffering; humiliation . . . noneconomic effects of disability . . . loss of consortium . . . or loss of love and affection."<sup>64</sup> The limit is applicable to "each occurrence from all health care providers . . . who are found negligent . . . for any action filed . . . before January 1, 1991."<sup>65</sup> If the malpractice action is before a jury, "the jury shall make a finding as to noneconomic damages without regard to the limit."<sup>66</sup> To facilitate the administration of the provision, each damage award is to specify the amount of money awarded for each category of damages, such as: pain and suffering, loss of consortium, lost earnings, medical expenses, and "[o]ther economic injuries and damages."<sup>67</sup>

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62. See Abraham, *supra* note 6, at 411. Abraham suggests that new forms of compensation need to be developed outside the existing tort system. *Id.* at 410-11. He argues that a fundamental conflict exists between the risk-reducing and cost-spreading goals of the modern tort system and the predictability of pay-outs that insurers rely upon to set liability insurance rates. Consequently, absent alternative forms of compensation, he concludes that some reasonable limits on tort liability are essential to combat the uncertainty that leads to spiraling premium increases and reduced availability of liability insurance coverage. *Id.*

63. WIS. STAT. ANN. § 893.55(4)(d) (West Supp. 1988).

64. *Id.* § 893.55(4)(a).

65. *Id.* § 893.55(4)(b).

66. *Id.* § 893.55(4)(c). If the jury finds that its initial determination of noneconomic damages (made without regard to the cap on liability) exceeds the limit, "the jury shall make any reduction required under [§ 895.045 and the court shall award as noneconomic damages the lesser of the reduced amount or the limit." *Id.*

67. *Id.* § 893.55(5). The complete provision reads:

Every award of damages under ch. 655 shall specify the sum of money, if any, awarded for each of the following for each claimant for the period from the date of injury to the date of award and for the period after the date of the award, without regard to the limit under sub. (4)(d):

(a) Pain, suffering and noneconomic effects of disability.

(b) Loss of consortium, society and companionship or loss of love and

In two ways, this provision is superior to Ohio's: it expressly limits noneconomic damages and it explicitly defines this term. This makes it easier to administer than Ohio's "general damage" limitation<sup>68</sup> because it is less confusing, and because the jury award must specify the noneconomic elements.

### 1. Effectiveness

Because the measure limits damages "for each occurrence,"<sup>69</sup> any claims of the victim's spouse, parents or children would appear to be aggregated with the victim's own claim into a single \$1,000,000 limit.<sup>70</sup> The limit also represents the entire amount recoverable against all health care providers responsible for the occurrence.<sup>71</sup>

By treating all of the possible derivative claims as one with the victim's, the "per occurrence" provision theoretically enhances predictability more than an absolute cap without a "per occurrence" provision. The Ohio provision attempted to check the rampant increase in derivative claims by subjecting each derivative claim to a separate \$200,000.<sup>72</sup> Since the Ohio provision lacks a "per occurrence" provision, victims could avoid the effect of the cap by filing as many separate claims as possible.<sup>73</sup> Each individual derivative claim would open the insurance company to additional liability of \$200,000. The company would have no way to predict whether a single incident of malpractice would lead to one damage award of \$200,000 or, for example, seven awards with a total potential exposure of \$1,400,000.

The Wisconsin "per occurrence" provision goes one step further towards limiting derivative claims than its Ohio counterpart — it places all claims under a single limit. Consequently, the in-

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affection.

(c) Loss of earnings or earning capacity.

(d) Each element of medical expenses.

(e) Other economic injuries and damages.

*Id.*

68. See *supra* notes 39-44 and accompanying text.

69. WIS. STAT. ANN. § 893.55(4)(b) (West Supp. 1988) (emphasis added).

70. Saichek, *A Summary of the New Statutes Governing Medical Malpractice*, WIS. BAR BULL., Oct. 1986, at 8, 10.

71. *Id.*

72. This conclusion follows from the fact that the term "medical claim" includes derivative claims and that the statutory limit applies to any "medical claim." See *supra* notes 50-51 and accompanying text.

73. See *An Update on the Liability Crisis*, *supra* note 25, at 244.

insurance company knows its maximum exposure for a single act of malpractice is \$1,000,000. This theoretically makes the "risk premium" even less necessary and should help stabilize premium rates.

The total payout under Wisconsin's "per occurrence" provision could be less than under the Ohio provision. Although the Ohio statute limits the victim's recovery to \$200,000, the insurance companies are exposed to possible liability for multiple claims of \$200,000 each. Given the unlikely situation that more than five separate claims arise from a single incident of malpractice, the absence of a per occurrence provision would permit total liability to exceed \$1,000,000. In Wisconsin, however, companies avoid such exposure because all claims fall under a single limit. Maximum payout in Wisconsin, then, could theoretically be less than that in Ohio, though this is unlikely.

Other aspects of the Wisconsin statute may stabilize malpractice insurance premiums as well. Jurors are required to establish the damage award without regard to the damage cap.<sup>74</sup> Then if the jury finds that noneconomic damages exceed the limit, it must make the required reduction.<sup>75</sup> This prevents the damage limitations from being used by the jury as a floor instead of a ceiling, and it avoids the increases in noneconomic damage awards that might result from such a use.<sup>76</sup> Total payout should be reduced as a result. The sunset provision<sup>77</sup> should encourage the insurance companies to stabilize rates: insurers must realize that in order for the cap to be reenacted after January 1, 1991, rates must stabilize or decrease.<sup>78</sup> Assuming insurers and providers favor the cap, they will work to end the rapid premium increases in order to secure the reenactment of the damage cap statute.

Certain provisions in the Wisconsin statute are theoretically effective; however, the cap itself is fatally flawed. The \$1,000,000 limit is too high. Since most damage awards will fall beneath the

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74. WIS. STAT. ANN. § 893.55(4)(c) (West Supp. 1988).

75. See *id.*

76. See *An Update on the Liability Crisis*, *supra* note 25, at 244 (suggesting that damage caps set too high might encourage juries to raise noneconomic damage awards in individual cases and thus result in increases in overall damage awards).

77. WIS. STAT. ANN. § 893.55(4)(b) (West Supp. 1988). The subsection provides that the damage cap applies only to those actions "filed on or after June 14, 1986 and before January 1, 1991." *Id.* (emphasis added).

78. See Comment, *Constitutional Implications*, *supra* note 28, at 85.

limit, the cap will affect too few cases.<sup>79</sup> As a result, there will be little, if any, impact on predictability or payout. Even if insurers would favor this provision, the high limit prevents them from doing much to alleviate the crisis. However, the effectiveness of the "per occurrence," jury, and sunset provisions found in the Wisconsin statute merit their inclusion in a model statute.

## 2. Fairness and Desirability

Insurance companies would favor the "per occurrence," jury, and sunset provisions in the Wisconsin statute because of the favorable effects on predictability and payout. They would likely not favor the particular Wisconsin limit of \$1,000,000, however, because it probably affects too few cases to be effective. The \$1,000,000 limit leaves a large range of potential awards, which likely will do little to enhance predictability. Furthermore, it is questionable whether the \$1,000,000 limit can produce the savings benefits from lower payouts. Because they are unlikely to receive any significant relief from the crisis, insurance companies will not likely favor the Wisconsin cap.

The health care industry in all probability will not favor the Wisconsin provision. It seems unlikely that premiums will stabilize or decline because of the limited impact such a high cap will have on predictability and total payout.<sup>80</sup> Without a decrease in premiums, providers will continue to experience decreasing profits unless they continue to raise the price for medical care. Again, many may be forced to leave particular practice areas or regions of the country.<sup>81</sup> Because these problems are solved by the Ohio provision, the health care providers would likely favor the Ohio provision over the one in Wisconsin.

While the provision is deficient in terms of effectiveness and desirability among insurers and health care providers, it is generous in terms of fairness and desirability to victims. Contrary to the Ohio cap, which remains stagnant, Wisconsin provides for an annual adjustment to the limit to compensate for the effects of inflation.<sup>82</sup> As a result, future victims will not be subjected to a lower cap in real dollar terms during inflationary periods.

Although the Wisconsin statute burdens only the victims who

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79. See *supra* note 14 and accompanying text.

80. See *supra* text accompanying note 79.

81. See *supra* text accompanying note 56.

82. See WIS. STAT. ANN. § 893.55(4)(d) (West Supp. 1989).



are most likely to have been the most severely injured (those victims with awards above \$1,000,000) the burden is not as egregious as the burden imposed by the Ohio plan simply because the \$1,000,000 limit will not reduce as many awards as the \$200,000 cap. In addition, any reduction will not be as drastic since the award only has to be reduced to \$1,000,000 instead of \$200,000. Victims make a much smaller sacrifice, but since the cap will be ineffective in bringing about a more stable, workable insurance system,<sup>83</sup> the sacrifice is for naught. Like the Ohio statute, the Wisconsin provision attempts to balance compensation and insurability, but it fails to do so satisfactorily: the limit is simply too high to have any significant impact. In contrast to the victims in Ohio who bear *too much* of the burden, victims in Wisconsin sacrifice *too little*.

### C. The Washington Provision

The Washington statute defines noneconomic damages as "subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement . . . emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship."<sup>84</sup>

The operative provision of the damage limitation is constructed as follows:

In no action seeking damages for personal injury or death may a claimant recover a judgment for noneconomic damages exceeding an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages . . . . The limitation contained in this subsection applies to all claims for noneconomic damages made by a claimant who incurred bodily injury. Claims for loss of consortium, loss of society and companionship, destruction of the parent-child relationship, and all other derivative claims asserted by persons who did not sustain bodily injury are to be included within the limitation on claims for noneconomic damages arising from the same bodily injury.<sup>85</sup>

The statute further provides that, "[i]f a case is tried to a jury,

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83. See *supra* text accompanying note 79.

84. WASH. REV. CODE ANN. § 4.56.250(1)(b) (1988).

85. *Id.* § 4.56.250(2).

the jury shall not be informed of the limitation.”<sup>86</sup>

Like the Wisconsin provision,<sup>87</sup> the Washington statute expressly limits noneconomic damages and explicitly defines the term. In this respect, then, this provision is superior to Ohio’s “general damages” provision because it is less confusing and easier to administer.<sup>88</sup>

### 1. Effectiveness

Some commentators concede that the Washington scale may improve predictability.<sup>89</sup> The legislature apparently had this goal in mind,<sup>90</sup> and some of the provisions serve this goal effectively. Like its Wisconsin counterpart, the Washington statute includes a “per occurrence” provision<sup>91</sup> which should enhance predictability.<sup>92</sup>

Gauging the limitation to the state average annual wage,<sup>93</sup> however, has its drawbacks. Insurance companies, for example, are in the business of predicting loss, but now must predict rising incomes as well. Furthermore, the flexible nature of the sliding scale (varying with average annual salary and life expectancy) inhibits companies from determining their maximum exposure. In this regard, the \$200,000 absolute cap is a much better measure to enhance companies’ ability to predict liability.

The effect of the scale on payout is mixed. On one hand, the “per occurrence” provision is likely to reduce total payout.<sup>94</sup> Also,

86. *Id.* § 4.56.250(3).

87. *See supra* note 64 and accompanying text.

88. *See supra* notes 39-44 and accompanying text.

89. *See* Wiggins, Harnitiaux & Whaley, *Washington’s 1986 Tort Legislation and the State Constitution: Testing the Limits*, 22 GONZ. L. REV. 193, 231 (1986-87) (arguing that any cap may square with predictability, but regardless of the yardstick used, *i.e.*, the average annual wage or the Dow Jones average, cutting off a jury award does not square with the state Constitution).

90. *See* Note, *A Proposal to Cap*, *supra* note 29, at 1219 (one stated goal of the Washington Legislature was “to provide an objective standard by which insurance companies could predict potential risks with great accuracy when establishing their premium rates”).

91. *See supra* text accompanying note 85.

92. *See generally supra* text accompanying notes 71-73 (explaining how “per occurrence” provisions relate to predictability).

93. The average annual wage is “the quotient derived by dividing total remuneration reported by all employers [in Washington] by the average number of workers reported for all months . . . rounding the result to the next lower multiple of one dollar.” WASH. REV. CODE ANN. § 50.04.355 (1990).

94. *See generally supra* text accompanying notes 51-54 (discussing “per occurrence” provision effects on total payouts).

in certain cases, payout will be even less than a \$200,000 absolute limit.<sup>95</sup> Furthermore, since juries are not informed of the damage limitation,<sup>96</sup> the cap will not create the "floor" effect discussed earlier.<sup>97</sup> On the other hand, the maximum possible payout for an injury may still be too high to significantly affect the total payout to which the companies are exposed. In 1985, the maximum damage award that a person could receive was \$569,513.57.<sup>98</sup> This problem dissipates, however, as life expectancy decreases. Perhaps the major shortcoming with respect to payout is the fact that, by tying the sliding scale to life expectancy, the provision assumes that all claimants will experience lifelong suffering.<sup>99</sup> By compensating people who may never experience the amount of pain and suffering provided for in the statute, Washington's plan increases total payout unnecessarily and lessens the impact on premiums as a result.

## 2. Fairness and Desirability

As with the Wisconsin approach, the insurance companies will favor many of the provisions that make up the Washington damage cap. They will not support, however, the particular sliding scale provision. Determining what a limit will be is more difficult under a scale provision than it would be under an absolute cap.<sup>100</sup> The scale provision does not simplify the actuarial calculation process as much as would an absolute cap. Therefore, the necessity of a risk premium remains. Since the provision unnecessarily provides for lifelong noneconomic damage awards to people whose pain and suffering may not last that long,<sup>101</sup> the insurers may object to the superfluous exposure. Finally, since the sliding scale is

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95. For example, in 1985 the average annual wage in Washington was \$18,699. See *Development in the Law — The 1986 Washington Tort Reform Act*, 23 WILLIAMETTE L. REV. 211, 217 n.8 (1987) [hereinafter *Development in the Law*]. A person with a life expectancy of twenty years would be able to recover a maximum of \$160,811.40 [(43 X 18,699) X 20] in Washington as compared to a maximum of \$200,000 in Ohio.

96. WASH. REV. CODE ANN. § 4.56.250(3) (1988).

97. See *supra* notes 74-76 and accompanying text.

98. *Development in the Law*, *supra* note 95, at 217.

99. *Id.* at 219.

100. Under an absolute cap, the most important figure that insurance companies need to predict is the number of claims. With this figure, and assuming a "per occurrence" limitation, insurers need only multiply their prediction times the cap to determine the total potential payout. Under Washington's provision, however, they must also factor in a prediction of wage increases and the average life expectancies of the victims.

101. See *supra* note 99 and accompanying text.

not as effective as the absolute cap in improving predictability and reducing total payout, insurers simply will prefer the absolute cap.

Given the limited effect the Washington statute will have on premiums, health care providers will prefer an absolute cap like Ohio's as well. Without the reduction in premiums, providers' profits may be reduced. As a result, there will be less encouragement for doctors to remain in particular regions of the country. Premium rates to cover high risk procedures will dissuade practice in these "higher risk" areas of practice. The Washington statute may be a better alternative than no limit at all, but an absolute cap such as Ohio's is even more favorable to the medical provider.

One positive aspect for victims in the Washington scheme is that it provides for inflationary adjustments because the scale is gauged to the state average annual wage.<sup>102</sup> Unlike the Ohio statute, then, future victims of medical malpractice will not be subjected to a damage cap that increasingly restricts the amount, in real dollar terms, of damages to which the victim is entitled.

Since a sliding scale allows for some flexibility in awards, victims might prefer it to an absolute cap; however, the Washington scale is not the most favorable way to achieve such flexibility. One major shortcoming is its failure to differentiate between victims with respect to the type of injury or the severity of suffering.<sup>103</sup> For example, compare the effects the Washington provision would have on two people, with equal life expectancies of twenty years, who are injured from medical malpractice. The jury's award for a person who loses a finger may easily exceed the \$160,811.40 cap imposed by the sliding scale.<sup>104</sup> Since a person who lost sixty percent of her breathing capacity would be subject to the same calculation with the exact same figures, she also would be limited to the same recovery. Her quality of life, however, obviously would be substantially worse than the victim who lost the finger.

While tying the scale to the average annual wage is not the most equitable or the most desirable approach from the victim's perspective, compared with a low absolute cap like the one used in Ohio, the flexible standard is preferable. Incorporating a more wisely constructed scale in a damage limitation could avoid the downfalls of the overly restrictive absolute cap used in Ohio, and the overly generous absolute cap used in Wisconsin, thereby strik-

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102. *See Development in the Law, supra* note 95, at 219.

103. *Id.*

104. *See supra* note 95.

ing the proper balance between compensation and insurability and alleviating many of the problems posed by the crisis.

### III. CONSTITUTIONAL IMPLICATIONS OF DAMAGE CAPS

A consideration of a damage cap's effectiveness in alleviating the medical malpractice crisis and its fairness and desirability among the affected parties is not the end of the legislative inquiry when drafting a limitation statute. Because the enactment of damage caps has raised both federal and state constitutional issues, a legislature must also consider the constitutional implications.

#### A. Equal Protection Challenges

One prevalent challenge has been that damage caps violate the concept of equal protection under the law.<sup>105</sup> The fourteenth amendment, in part, states "[n]o State shall . . . deny to any person . . . the equal protection of the laws."<sup>106</sup> In interpreting this provision, the courts apply various levels of scrutiny depending on the nature of the legislation involved. Legislation that discriminates against suspect classes, such as race, receives strict scrutiny. This test requires that the legislative scheme in question be "necessary to promote a *compelling* governmental interest."<sup>107</sup> The courts apply an intermediate level of scrutiny to statutes which classify according to gender<sup>108</sup> and alienage.<sup>109</sup> This standard requires that the legislative classification "serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>110</sup>

The third level of scrutiny, rational basis, requires that a clas-

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105. See generally Richards, *Statutes Limiting Medical Malpractice Damages*, 32 FED'N INS. COUNS. Q. 247 (1982) (summarizing several equal protection challenges to medical malpractice damage caps and concluding that challenges may be more strictly scrutinized under state constitutions than under the Federal constitution); Note, *A Proposal to Cap*, *supra* note 29, at 1216 (legislators' attempts to limit malpractice awards are often declared violative of the equal protection clause of the fourteenth amendment).

106. U.S. CONST. amend. XIV, § 1.

107. *Coburn v. Agustin*, 627 F. Supp. 983, 987 (D. Kan. 1985) (emphasis in original) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969)); see, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down miscegenation statute preventing interracial marriages).

108. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (striking down statute which provided preferential treatment to male administrators of estates).

109. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that school-age illegal aliens may not be charged a special fee to receive a public school education).

110. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

sification be rationally related to a legitimate state purpose.<sup>111</sup> Under this test, courts have demonstrated significant deference both to the legislature's purpose in enacting the provision and to its selection of a given alternative among a variety of means.<sup>112</sup>

In recent cases involving socio-economic legislation, where the Supreme Court of the United States has historically applied rational basis scrutiny, the Court has appeared to alter the traditional rational basis scrutiny, applying a more stringent application of the test.<sup>113</sup> While there is a lack of openly acknowledged criteria used by the Court in this heightened scrutiny test,<sup>114</sup> several considerations appear to be addressed. These include: (1) whether there is a factual foundation for the policies offered in support of the legislation;<sup>115</sup> (2) whether there is a sufficiently tailored fit between the legislative goals and the means chosen;<sup>116</sup> and (3) whether the ends rationally justify the means.<sup>117</sup>

The movement to a heightened rational basis level of scrutiny apparently suggests the Court's realization that not every case involving economic or social welfare legislation can be forced into the traditional rational basis test without sacrificing fundamental fairness.<sup>118</sup> Arguably, medical malpractice statutes necessitate this heightened scrutiny. For example, in its application of the heightened rational basis scrutiny to a medical malpractice statute, the court in *Coburn v. Agustin*<sup>119</sup> noted that although the right to recover for personal injuries is not fundamental, it is a significant right.<sup>120</sup> Consequently, the court stated that medical malpractice

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111. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-3, at 1444 (2d ed. 1988) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985)).

112. *See id.* § 16-2, at 1440 ("courts have traditionally exhibited extreme deference to the legislative definition of 'the general good,' either out of judicial sympathy for the difficulties of the legislative process, or out of a belief in judicial restraint" (footnote omitted)).

113. *See Coburn v. Agustin*, 627 F. Supp. 983, 988-89 (D. Kan. 1985) (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446 (1985) and *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985)); *see also* L. TRIBE, *supra* note 111, § 16-3, at 1444 (in numerous recent "rational basis" cases, the Court's inquiry has taken on a "more penetrating character").

114. L. TRIBE, *supra* note 111, § 16-3, at 1445.

115. *Id.* § 16-3, at 1444.

116. *Id.*

117. *See Coburn v. Agustin*, 627 F. Supp. 983, 989 (D. Kan. 1985) (stating that the Supreme Court has started to focus on the ends and the means of the legislation under a rational basis level of scrutiny).

118. *Coburn*, 627 F. Supp. at 990.

119. 627 F. Supp. 983 (D. Kan. 1985).

120. *Id.* at 994.

victims were entitled to heightened review because they were considered a "sensitive" class.<sup>121</sup>

Against this background, the treatment of noneconomic medical malpractice damage caps that have been challenged on equal protection grounds has been mixed. In *Fein v. Permanente Medical Group*,<sup>122</sup> the California Supreme Court upheld a cap on noneconomic damages of \$250,000 against an equal protection challenge, applying a minimum rationality standard.<sup>123</sup> In reaching its decision, the court noted that the statute in no way limited a victim's recovery of economic losses.<sup>124</sup> Because the statute allowed for a complete recovery of pecuniary losses, the court agreed with the California Legislature that "it was in the public interest to . . . obtain some cost savings by limiting noneconomic damages"<sup>125</sup> since such damages are much more speculative in

121. *Id.* at 995. Several characteristics indicate the presence of a sensitive class: "a group that has suffered a history of prejudice . . . or a group that has inadequate representation from significant socio-political barriers to interest group formation . . . or a classification based on an inherent trait over which . . . members have no control, which trait is the subject of the legislation." *Id.* at 994 (citations omitted). The court stated that members of the "medical malpractice victim" class are "sensitive" because they cannot control either the inception of a medical condition or the malpractice imposed upon them, and because they often lack both the physical and financial means to challenge laws that limit their rights. *Id.* at 994-95.

122. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985), *appeal dismissed*, 474 U.S. 892 (1985).

123. *Id.* at 162, 695 P.2d at 683, 211 Cal. Rptr. at 386. The court noted that "the Legislature clearly had a *reasonable basis* for drawing a distinction between economic and noneconomic damages." *Id.* (emphasis added).

124. *Id.* at 159, 695 P.2d at 680, 211 Cal. Rptr. at 383.

125. *Id.* at 160, 695 P.2d at 681, 211 Cal. Rptr. at 384. The court pointed out that "in the absence of some cost reduction, medical malpractice plaintiffs might as a realistic matter have difficulty collecting damages for *any* of their damages." *Id.*

While some courts have struck down damage caps as an illegitimate means to control the medical malpractice crisis, most courts have recognized the goal of alleviating the crisis as a legitimate purpose for legislative action. *See, e.g., id.* at 158, 695 P.2d at 679, 211 Cal. Rptr. at 382 ("policy determinations as to the need for, and the desirability of, the enactment are for the Legislature" (quoting *American Bank & Trust Co. v. Community Hosp.*, 36 Cal. 3d 359, 369, 683 P.2d 670, 676, 204 Cal. Rptr. 671, 677 (1984))); *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 594 (Ind. 1980) ("we [the court] do not sit to judge the wisdom or rightness of [the statute's] underlying policies"); *Pendergast v. Nelson*, 256 N.W.2d 657 (Neb. 1977) ("[T]here was an imminent danger that a drastic curtailment in the availability of health care services could occur. . . . No one can question the Legislature's power to deal with the problem."); *Carson v. Maurer*, 120 N.H. 925, 933, 424 A.2d 825, 831 (1980) ("[The court] will not independently examine the factual basis for the legislative justification for the statute . . . . [C]ourts will not second-guess the legislature as to the wisdom of or necessity for legislation."); *Duren v. Suburban Community Hosp.*, 24 Ohio Misc. 2d 25, 28, 495 N.E.2d 51, 56 (C.P. 1985) ("various decisions which have held damage limitations statutes in medical malpractice cases as unconstitutional initially

nature.<sup>126</sup>

On the other hand, the New Hampshire Supreme Court struck down a \$250,000 statutory cap on damages for malpractice victims.<sup>127</sup> The court first recognized that the ability to recover for personal injury is "an important substantive right."<sup>128</sup> The court then proceeded to apply an intermediate level of scrutiny,<sup>129</sup> even though the Supreme Court of the United States had restricted application of the intermediate test to classifications such as gender. The court stated that "it is not confined to federal constitutional standards and [is] free to grant individuals more rights than [sic] the Federal Constitution requires."<sup>130</sup>

The *Coburn* analysis exacts a wiser, more equitable approach and, compared to *Fein* or *Carson*, is arguably a more appropriate way to analyze damage caps. The *Fein* decision is not rigorous enough, providing victims of medical malpractice insufficient protection of their rights to equal protection of the laws. The *Carson* decision, on the other hand, is too rigorous and affords these victims too little protection. Perhaps if the New Hampshire Supreme Court had the benefit of having the *Coburn* decision to refer to, it may have realized that it could reach the same result by applying *Coburn's* heightened rationality standard, thereby eliminating the need for using intermediate level scrutiny.

It is clear that drafters of caps must consider both federal and state constitution equal protection clauses. Assuming the state courts do *not* apply a constitutional analysis that is different from the federal analysis, a properly designed malpractice damage cap that limits only noneconomic awards should be able to avoid constitutional infirmities based on the equal protection clause. If the courts recognize the existence of a crisis and the need for reform, they should also recognize that this type of reform must necessarily deny full recovery to some.<sup>131</sup> The more seriously injured vic-

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recognize this type of legislation as being a proper subject for legislative action").

126. See generally *Fein*, 38 Cal. 3d at 159, 695 P.2d at 680-81, 211 Cal. Rptr. at 383-84 (noting that legal scholars have long questioned the awarding of damages for pain and suffering, given the difficulties in placing monetary values on those types of losses).

127. *Carson v. Maurer*, 120 N.H. 925, 941, 424 A.2d 825, 836 (1980).

128. *Id.* at 931-32, 424 A.2d at 830.

129. The court noted that the statutory classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Id.* at 932, 424 A.2d at 831 (emphasis in original) (citations omitted) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

130. *Id.* (citations omitted).

131. Comment, *An Analysis of State Legislative Responses to the Medical Mal-*



tims forfeit some of their noneconomic damages to preserve compensation for the rest of the victims and to ensure the continued availability of medical care.

An analysis of the Ohio, Wisconsin, and Washington statutes provides insight into how a damage cap should be designed to hurdle equal protection barriers. Ohio courts are sharply divided over the constitutionality of the \$200,000 cap.<sup>132</sup> The most recent decision, *Duren v Suburban Community Hospital*,<sup>133</sup> invalidated the measure. *Duren* involved a woman who was "uniquely dependent" upon her husband because of a birth defect.<sup>134</sup> He died while being treated at the hospital, and she brought an action for medical malpractice.<sup>135</sup> Mrs. Duren's survivorship claim resulted in a judgment against the hospital of \$1,000,000 for pain and suffering, and \$2,554 for funeral expenses.<sup>136</sup>

The Ohio Court of Common Pleas in Cuyahoga County refused to apply the \$200,000 cap, declaring it violative of state and federal constitutional provisions. By concentrating on the classification scheme of the legislation, the court appeared to base its decision on equal protection grounds. It cited *Carson v Maurer*<sup>137</sup> as the best statement of the basis for invalidating the cap: "It is simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation."<sup>138</sup> The court further attacked the legislative scheme calling

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*practice Crisis*, 1975 DUKE L.J. 1417, 1419 [hereinafter Comment, *State Legislative Responses*].

132. See generally *Duren v. Suburban Community Hospital*, 24 Ohio Misc. 2d 25, 27, 495 N.E.2d 51, 55 (C.P. 1985) (listing conflicting authority in Ohio and in other states).

133. 24 Ohio Misc. 2d 25, 495 N.E.2d 51 (C.P. 1985).

134. *Id.* at 26, 495 N.E.2d at 54.

135. See *id.* at 27, 495 N.E.2d at 54-55. The facts of the *Duren* case are as follows. The death occurred after Mr. Duren was admitted to the defendant hospital with complaints of nausea, stomach pains, and vomiting. The admitting physician ordered several tests. However, the results of one test were not available until after Duren's death; another test was never performed. The physician ordered the administration of insulin as a result of a third test, but none was administered. Although Duren was in great pain and in critical condition, the hospital staff virtually ignored him. Although the doctor had been called two hours earlier, and was nearby, he did not arrive until minutes before Mr. Duren died. See *id.* at 26-27, 495 N.E.2d at 54.

136. *Id.* at 25, 495 N.E.2d at 53.

137. 120 N.H. 925, 424 A.2d 825 (1980).

138. *Duren*, 24 Ohio Misc. 2d at 28-29, 495 N.E.2d at 56 (quoting *Carson*, 120 N.H. at 942, 424 A.2d at 837).

it, "shocking to this court's conscience"<sup>139</sup> to shift responsibility for loss from a more affluent segment of society to a group of terribly injured individuals who are least able to bear the burden.<sup>140</sup>

The level of scrutiny applied by the court to the damage limit's classification scheme is difficult to determine. Although it embraced the *Carson* rationale, the court failed to apply an intermediate scrutiny: it failed to address whether the classification was substantially related to the achievement of an important governmental objective.<sup>141</sup> The court did not deferentially validate the classification; instead it scrutinized the legislative scheme and labelled it "inconceivable" and "shocking."<sup>142</sup> In addition to scrutinizing the means, the court also considered the propriety of the legislative goals.<sup>143</sup> This indicates the absence of intermediate scrutiny and the application of a heightened rationality standard consistent with the principles in *Coburn*.<sup>144</sup>

There has been no equal protection challenge to the Wisconsin provision; however, the Wisconsin cap would probably be validated under a heightened rationality standard. Its goal of alleviating the malpractice crisis is a permissible one.<sup>145</sup> Moreover, a \$1,000,000 cap seems to be a more rational means to achieve this goal: although it may be argued that the cap unduly burdens the most seriously injured victims, compared to a \$200,000 cap, \$1,000,000 goes much further towards compensating injuries. Because victims are more fairly compensated under the higher cap, the means chosen have a closer relationship to the goal of alleviating the malpractice crisis.

It is unclear whether Washington's sliding scale provision offends equal protection principles.<sup>146</sup> Under the heightened ration-

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139. *Id.* at 28, 495 N.E.2d at 56.

140. *Id.*

141. *See id.* at 28-29, 495 N.E.2d at 56.

142. *Id.* at 28, 495 N.E.2d at 56.

143. *Id.* ("various decisions which have held damage limitation statutes in medical malpractice cases as unconstitutional initially recognize this type of legislation as being a proper subject for legislative action").

144. *See supra* notes 113-21 and accompanying text.

145. *See supra* note 125.

146. For a discussion of the constitutionality of the provision and a conclusion that the statute poses no genuine equal protection problem, see *Development in the Law, supra* note 95, at 233. For the opposing view that the statute is violative of equal protection, see Wiggins, Harnitiaux & Whaley, *supra* note 89, at 232-35 (arguing that the ceiling for non economic damages violates the Washington constitution's privileges or immunities provision); see also Talmadge & Neugebauer, *A Survey of Washington Medical Malpractice*

ality analysis of *Coburn*, the purpose of the act would be legitimate.<sup>147</sup> Determining whether the means are appropriate, however, is difficult because of the unique scale. At least one court has found it "shocking" to the conscience that legislators are shifting the burden of malpractice liability from the relatively affluent members of the medical profession to the most severely injured victims of medical malpractice.<sup>148</sup> A sliding scale is less arbitrary than an absolute cap because it allows a range of possible awards. Because there are some circumstances under which Washington's sliding scale will impose on the severely injured victims *less* of a burden than that which would follow from an absolute cap,<sup>149</sup> it might be less shocking to a court's conscience. In theory, the sliding scale is an attractive alternative to absolute caps, but the particular scale adopted by Washington is questionable.

The Washington provision gauges the scale to the average annual wage.<sup>150</sup> In some cases the most severely injured are comparatively less burdened than under a cap such as Ohio's.<sup>151</sup> At several points along the scale, however, the severely injured are burdened a great deal more.<sup>152</sup>

While the constitutionality of Washington's statute remains questionable, the provision's sliding scale concept is noteworthy. If the scale related more directly to the amount of noneconomic damages incurred and allocated the burden more wisely, there would be a better fit between legislative goals and means, and there would be a better chance that the sliding-scale limitation would survive a constitutional challenge based on the equal pro-

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*Law*, 23 GONZ. L. REV. 267, 303 n. 158 (1987-88) (stating that the limitation was invalidated on equal protection grounds in an unreported case).

147. See *supra* note 125.

The historical note to WASH. REV. CODE ANN. § 4.16.160 (1988) provides the preamble to chapter 305, which states that "it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available." *Id.* § 4.16.160 historical note.

148. *Duren*, 24 Ohio Misc. 2d at 28, 495 N.E.2d at 56.

149. See *infra* notes 150-51 and accompanying text.

150. See *supra* notes 85 & 93 and accompanying text.

151. In Ohio, the cap on damages is uniformly \$200,000. OHIO REV. CODE ANN. § 2307.43 (Baldwin 1984). Whenever a Washington plaintiff would receive more than \$200,000 under the sliding scale cap, they are less burdened.

152. For example, a person with a life expectancy of twenty years would be able to recover a maximum \$200,000 in Ohio, but the maximum noneconomic damages that could be recovered under Washington's sliding scale is \$160,811.40 [(.43 x 20) x 18,699]. If other damages were low (i.e., less than \$39,188.60), a person would be limited to a recovery of less than \$200,000 simply because she does not have a long life expectancy.

tection clause.

### B. Right to Trial by Jury Challenges

In addition to equal protection scrutiny, opponents of damage caps have raised the issue of a person's right to a jury trial.<sup>153</sup> These challenges, however, are inconsistent with recent interpretations of the jury trial provision of the seventh amendment. In *Tull v. United States*,<sup>154</sup> the Supreme Court of the United States alluded to this issue when it stated, "[n]othing in the Amendment's language suggests that the right to a jury trial extends to the remedy phase of a civil trial."<sup>155</sup> Other federal courts have found this reasoning instructive in dismissing seventh amendment jury trial challenges to damage caps.<sup>156</sup>

Several arguments support the conclusions of these courts. The first involves consideration of the proper role of the jury. The Fourth Circuit Court of Appeals stated:

[I]t is the role of the jury as factfinder to determine the extent of a plaintiff's injuries. . . . [I]t is not the role of the jury to determine the legal consequences of its factual findings. [This] is a matter for the legislature . . . . [O]nce the jury has made findings of fact with respect to damages, it has fulfilled its constitutional function; it may not also mandate compensation as a matter of law.<sup>157</sup>

Damage caps do not violate the right to trial by jury because the jury's function ends before the damage cap is imposed: this is consistent with the principle that "a legislature may completely abolish a cause of action without violating the right to trial by

153. See, e.g., *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989) (holding that Virginia's statutory cap on recovery in medical malpractice action did not violate the right of jury trial under the seventh amendment); see also Note, *Reforming Tort Reform: Is There Substance To The Seventh Amendment?*, 38 CATH. U.L. REV. 737, 738-39 (1989) (noting that the Amicus Curiae Committee of The Association of Trial Lawyers of America intends to challenge damage caps on federal and state jury trial grounds).

154. 481 U.S. 412 (1987).

155. *Id.* at 426 n.9. *Tull*, which involved a question about the assessment of a civil penalty under the Clean Water Act, did not deal directly with the right to jury trial. Footnote nine of the opinion, however, has been cited in subsequent cases which involve the determination of damages. See *infra* note 156 and accompanying text.

156. See, e.g., *Boyd*, 877 F.2d at 1196 n.5 (citing *Tull* in upholding Virginia's cap on recovery); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1334 (D. Md. 1989) (noting that *Tull* supports the proposition that legislatures may "limit recoverable damages without offending the seventh amendment").

157. *Boyd*, 877 F.2d at 1196 (citations and footnotes omitted).

jury."<sup>158</sup> With this power, a legislature may also limit the damages which may be recoverable for a certain cause of action.<sup>159</sup> Similarly, damage caps do not violate the seventh amendment because the existence of a remedy is a matter of law and not fact.<sup>160</sup> Therefore, a damage cap merely sets the outer limits of a remedy provided by a legislature.<sup>161</sup>

The history behind the seventh amendment gives further support to the argument that damage caps do not abridge the right to a jury trial. Civil juries were provided for in the seventh amendment to protect "against the abuse of *judicial*, as distinct from *legislative*, power."<sup>162</sup> Since damage caps are enacted by legislatures, abuse of judicial power is not at issue and seventh amendment protections are unnecessary.

Given the analyses contained in the latest jury trial cases, damage caps will most likely clear the seventh amendment hurdle; however, these statutes have been, and may continue to be, challenged on the basis of similar jury trial provisions contained in state constitutions. For example, in *Sofie v. Fibreboard Corp.*,<sup>163</sup> the Washington Supreme Court, in a 6-3 decision, held that the Washington damage cap violated the jury trial provision of the state constitution. The court based its decision on purely state grounds: using an historical analysis, it found that juries in Washington had consistently been looked to for the determination of damages.<sup>164</sup>

While each state's constitution may offer varying amounts of protection for cap victims, the *Sofie* decision is flawed for many of the same reasons that the seventh amendment does not bar the use of damage caps. In the first place, by extending the jury's purview beyond its fact-finding mission, the *Sofie* definition of the jury's role is inconsistent with many other decisions. For example, in *Etheridge v. Medical Center Hospitals*,<sup>165</sup> the Virginia Su-

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158. *Id.*

159. *Id.*; see also *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1331 (D.Md. 1989) ("power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action").

160. *Franklin*, 704 F. Supp. at 1333 (citing *Etheridge v. Medical Center Hosps.*, 376 S.E.2d 525, 529 (Va. 1989) (Virginia Supreme Court upheld a \$750,000 damage cap)).

161. *Franklin*, 704 F. Supp. at 1333.

162. *Davis v. Omitowaju*, 883 F.2d 1155, 1164 (3d Cir. 1989) (emphasis in original).

163. 112 Wash. 2d 636, 771 P.2d 711 (1989).

164. *Id.* at 648, 771 P.2d at 718-719.

165. 376 S.E.2d 525 (Va. 1989).

preme Court found that "the jury's fact-finding function extends to the assessment of damages. Once the jury has ascertained the facts and assessed the damages, however, the constitutional mandate is satisfied. Thereafter, it is the duty of the court to apply the law to the facts."<sup>166</sup> The court further reasoned that since a damage remedy is a legal matter, rather than a factual one, there is "no right to have a jury dictate, through an award, the legal consequences of its assessment."<sup>167</sup>

*Sofie* is weakened by additional flaws. It ignored a basic fact about legislative power. Because legislatures have the power to amend or abolish common law causes of action, it seems only logical that they have the ability to limit or abolish recoveries.<sup>168</sup> *Sofie* frustrates the legislative purpose of the cap, which is to solve the medical malpractice crisis, without finding any support in reason.

An additional flaw is the *Sofie* court's mistaken interpretation of authority. It relied on the district court's opinion in *Boyd v. Bulala*,<sup>169</sup> following the opinion as support for ignoring the Supreme Court of the United States' direction in *Tull*.<sup>170</sup> The *Boyd* opinion, however, was reversed by the fourth circuit, which noted *Tull* in passing.<sup>171</sup> Also, the *Sofie* court found it "highly persuasive"<sup>172</sup> that courts in Kansas, Texas, Ohio, and Florida have held that damage caps to be violative of the right to jury trial, especially since "the operative language of the right to jury trial provisions in those states' constitutions is nearly identical to our own."<sup>173</sup> The support which the *Sofie* court finds in this authority is waning. A Kansas court has since upheld a damage limit in a personal injury action against a challenge based on the right to a

166. *Id.* at 529 (citations omitted).

167. *Id.* at 529; see also *Sofie*, 112 Wash. 2d at 684, 771 P.2d at 736 (Dolliver, J., dissenting) (noting that "the majority . . . [failed] to distinguish between the damages a jury finds and the judgment which the court grants").

168. See Note, *The Constitutional Attack on Virginia's Medical Malpractice Cap: Equal Protection and the Right to Jury Trial*, 22 U. RICH. L. REV., 95, 117 (1987) (Virginia General Assembly has the power to establish damage limits because it has the power to amend or abolish causes of action); see also *Sofie*, 112 Wash. 2d at 686, 771 P.2d at 737 (Dolliver, J., dissenting) (arguing that the power to abolish causes of action includes the power to limit recoveries).

169. 672 F. Supp. 915 (W.D. Va 1987) (reaffirming a previous holding that a Virginia damage limit violated the seventh amendment), *rev'd*, *Boyd*, 877 F.2d 1191.

170. *Sofie*, 112 Wash. 2d at 663, 771 P.2d at 725.

171. *Boyd*, 877 F.2d at 1196.

172. *Sofie*, 112 Wash. 2d at 658, 771 P.2d at 723.

173. *Id.*

jury trial.<sup>174</sup> The *Sofie* majority also ignored the fact that the United States District Court for the District of Maryland upheld a damage cap against a jury trial provision that was almost identical to the Washington constitutional provision.<sup>175</sup>

Given the above discussion, the analysis contained in *Etheridge*, *Boyd* and *Franklin*, is more persuasive than the analysis provided by the court in *Sofie*. Although each individual state has the power to grant its citizens greater constitutional rights than provided in the federal constitution, an extension of the right to jury trial in this circumstance should be discouraged.

The reasons to discourage such extension may be reduced to a simple comparison of the marginal benefits that society reaps from a damage limitation with the benefits derived from defining a right to jury to include the right to have a jury establish the amount of damages to be awarded in a given case. Damage caps can insure the availability of resources to compensate malpractice victims by decreasing compensation to nonmeritorious — although sympathetic — claims. To the extent that damage caps reduce malpractice insurance premiums, or make liability insurance more readily available, society will benefit from increased availability of health care services in high risk practices and rural communities.<sup>176</sup> Clearly, benefits emanating from effective and fair damage caps pervade society as a whole, including patients, health care providers and the insurers. The expansion of the right to a jury trial in this type of case simply cannot match the damage cap in terms of societal benefit.

#### IV. A NEW PROPOSAL

Having analyzed the effectiveness, fairness and desirability and the constitutional implications of the Ohio, Wisconsin and Washington statutes, it is possible to formulate a statute that combines the best features of each approach, is effective, does not violate constitutional requirements, and fairly allocates the burden

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174. *Samsel v. Wheeler Transp. Servs.*, 244 Kan. 726, 771 P.2d 71 (1989).

175. In *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989), decided nearly three months before *Sofie*, the court held that a damage cap did not violate that portion of Maryland's Constitution that provided that the right to a jury trial "shall be inviolably preserved." *Id.* at 1335 (quoting MD. DECLARATION OF RIGHTS art. 23). The *Sofie* decision rested on the court's construction of a provision providing that "[t]he right to trial by jury shall remain inviolate." *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 644, 771 P.2d 711, 716 (1989) (quoting WASH. CONST. art. 1, § 21).

176. See *supra* text accompanying note 17.

of reforming the malpractice insurance crisis.

### A. Preliminary Considerations

For the purpose of drafting the new proposal, it is assumed that strong factual support has been gathered to evidence a crisis in a particular state.<sup>177</sup> With that assumption in mind, an additional reform option must be mentioned, namely, the adoption of no-fault liability. The drafter can choose between modifying the existing liability system by adding a damage cap that applies only in medical malpractice cases or adopting no-fault liability as a new system. Since this Note compares various approaches to the damage cap reforms, a consideration of the pros and cons of making a wholesale change to a no-fault system of liability is beyond its scope. Consequently, for the purposes of the legislative proposal which follows, it is assumed that the medical malpractice crisis can be, and should be, addressed with an amendment to, rather than an abandonment of, the fault system.<sup>178</sup>

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177. See Comment, *Constitutional Implications*, *supra* note 28, at 82 (establishing strong evidence of a medical malpractice crisis is thought to be significant in assuring the constitutional validity of the cap).

178. Recently, there has been an accelerated movement in the tort system toward the adoption of no-fault liability. See TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 30 (1986). In the medical malpractice area, for example, some advocate the adoption of a no-fault plan similar to the worker's compensation system in exchange for limits on noneconomic damages. Comment, *Constitutional Implications*, *supra* note 28, at 86 and n.141. Such an exchange would be consistent with the *quid pro quo* doctrine, which requires that legislatures institute a just substitute when they abrogate a common law right. *Id.* at 75.

Some government agencies advocate a return to the traditional fault basis for liability. See generally TORT POLICY WORKING GROUP, *supra* (working group consisting of representatives from ten federal agencies and the White House recommending return to fault-based liability as one reform that will lead to the alleviation of the crisis in the availability and affordability of liability insurance). The Tort Policy Working Group argues that the trend towards no-fault liability is undermining traditional tort principles: "The long-term effect of this development has been less to promote a more efficient or sensible tort system, than to undermine the importance of fault." *Id.* at 31.

In light of this debate, it seems that the fault system should remain for two reasons. First, if the no-fault approach fails to promote greater efficiency in the final analysis, there is no reason to adopt it. The Tort Policy Working Group recognized that risk spreading for all injuries through a no-fault tort system would be anti-consumer, since consumers would ultimately pay the higher costs caused by inefficiencies: "[B]ecause of the extraordinarily high transaction costs of the tort system, such compulsory insurance through the tort system would be among the most inefficient and costly ways for consumers to purchase insurance . . . . [F]or every \$1 of compensation, the tort system requires the consumer to pay approximately \$3 in premiums." *Id.* at 31 n.24. Indeed, many feel that the fault system is not untenable. R. KEETON & J. O'CONNELL, *supra* note 34, at 220.



In addition, this proposal assumes, as concluded above, that a cap is likely to be effective in alleviating the crisis,<sup>179</sup> and, if limited to noneconomic damages, an appropriate mode of reform.<sup>180</sup>

## B. Statutory Provisions

Upon consideration of the attributes and shortcomings of the reform measures in Ohio, Wisconsin, and Washington, the following proposal is suggested to alleviate the malpractice crisis in an effective yet equitable manner:

§ 100: Limitation of noneconomic damages in medical malpractice actions.

(1) "Noneconomic damages" as used in this section means nonpecuniary, subjective losses including, but not limited to pain, suffering, disability or disfigurement, emotional distress, loss of consortium, loss of society and companionship, and destruction of the parent-child relationship.

(2) The total recovery for noneconomic damages may not exceed the amount determined in paragraph (4) for each occurrence from all health care providers who are found negligent in providing health care services. The limit applies to any action filed on or after (*insert date*) and before (*insert later date*).

(3) If any action subject to this section is tried before a jury, the jury shall not be informed of the limitation in paragraph (4) of this section.

(4) In no action subject to this section may a claimant recover a judgment for noneconomic damages exceeding the amount determined as follows:

(a) Any judgment for noneconomic damages not in excess of \$250,000<sup>181</sup> shall be fully compensated.

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An additional reason to retain the fault system is that so much of the structure and process of tort law is dependent upon it. TORT POLICY WORKING GROUP, *supra*, at 32. For example, the traditional purposes for imposing tort liability are twofold: deterrence and compensation. *Id.* at 30. A no-fault system would directly thwart this most basic goal of the tort system — deterrence — since liability would incur from both wrongful and beneficial conduct. *Id.* at 32. Thus, an important tool for educating the public to distinguish between beneficial and wrongful conduct (the punishment of wrongdoers) would no longer be available to the legal system. *Id.*

Because the fault concept is deeply rooted in the present tort system and will not be cast aside easily, R. KEETON & J. O'CONNELL, *supra* note 34, at 271, reformers attempting to resolve the malpractice crisis should devise proposals that improve upon the existing fault system.

179. See *supra* notes 24-25 and accompanying text.

180. See *supra* notes 26-38 and accompanying text.

181. The exact base amount remains with the discretion of legislatures. It must be

(b) Any judgment in excess of \$250,000 shall be limited by adding to the \$250,000 base amount 30 percent<sup>182</sup> of the difference between the actual judgment and the \$250,000 base amount.

(5) The limitation in paragraph (4) of this section applies to all claims for noneconomic damages made by the claimant who incurred bodily injury as a result of medical malpractice. All derivative claims are likewise included within the same limitation.

(6) The base amount in paragraph (4) of this section shall be adjusted annually by the (*insert appropriate official*) to reflect changes in the (*insert appropriate index for inflation*).

(7) Every award of damages within the section shall specify, without regard to limit, the sum of money, if any, awarded for noneconomic damages as defined in paragraph (1) of this section.

## V. ANALYSIS

Evaluating the merits of the proposal warrants a comparison of its features with those of the Ohio, Wisconsin and Washington provisions. Before examining the proposal's effectiveness, fairness and desirability, and constitutionality in light of the shortcomings and successes of the previously discussed statutes, a brief word on the administration of the proposal is necessary. Notably, subsection (1) explicitly defines the limitation on noneconomic damages. This specificity makes the proposal less confusing and easier to administer than would a limit defined in vague terms such as Ohio's limit on "general damages."<sup>183</sup> The proposal further facilitates administration by mirroring the Wisconsin requirement that the jury award must specify noneconomic elements<sup>184</sup> in paragraph (7).

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low enough, however, to permit the scale provision in subsection 4(b) to operate effectively.

182. Arriving at the 30 percent figure was purely arbitrary on the author's part. A statistical determination of the appropriate percentage is beyond the scope of this Note, and the ken of this author. It is assumed that the percentage will vary depending on the severity of the crisis in a particular jurisdiction. The percentage should be set at that point where the balance is struck between the interested parties, *i.e.*, the insurance companies, the providers of health care and the victims of medical malpractice. To avoid the problems with the Ohio and Wisconsin provisions, that percentage must not be too low or too high.

183. See *supra* notes 39-44 and accompanying text.

184. See *supra* notes 66-67 and accompanying text.

### A. Effectiveness

Compared to the previously discussed caps, the proposal strikes a middleground with respect to effectiveness. It is not as effective as Ohio's \$200,000 absolute cap at increasing the predictability of payouts for insurers.<sup>185</sup> The "per occurrence" provision (paragraph (5)), however, aids in the prediction of the highest potential liability incurred from a single incident of malpractice, because it subjects all the claims, direct and derivative, that might arise from that incident to a single limit.

With regard to the Wisconsin and Washington measures, the proposal offers greater relief to insurers and the medical industry. Unlike the Wisconsin statute, by acting on all claims above \$250,000, the proposal will have a much more significant impact on the system than Wisconsin's \$1,000,000 limit, which would necessarily affect far fewer claims. Unlike the Washington statute, it is not necessary to predict rising incomes under the new proposal.<sup>186</sup> The predictability process, therefore, is simplified. The proposal enhances predictability, then, because of the "per occurrence" provision, the number of claims affected, and the simplification of the actuarial process. The "risk premium" should be less necessary, and premiums should stabilize as a result.

The proposal should also help eliminate the crisis because total payout is likely to decrease. Although Ohio's lower absolute cap might better decrease the payout with respect to individual claims, if Ohio had adopted a "per occurrence" provision in addition to the low, absolute cap, the dichotomy between the new proposal and Ohio's statute would be even greater. Since the proposal includes a "per occurrence" provision, it can possibly reduce the total payout arising from a single incident better than Ohio's plan. Despite any shortcomings the proposal may have compared to the Ohio statute, the proposal should in most cases reduce total payout much better than Wisconsin's \$1,000,000 limit.<sup>187</sup> Moreover,

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185. See *supra* notes 45-54 and accompanying text.

186. Although companies must still make predictions under this proposal, it is losses that must be calculated, instead of rising incomes. Since the prediction of losses is intimately related to insurance companies' operations (at least much more so than the projection of rising incomes), the proposal's sliding scale sacrifices less predictability. The proposal decreases the range of possible losses. It therefore enhances predictability by gauging the cap mechanism to the figure to which existing actuarial processes are geared.

187. Both the proposal (paragraph (5)) and the Wisconsin statute, see *supra* notes 69-73 and accompanying text, contain "per occurrence" provisions limiting total payout for all direct or derivative claims to one amount. They differ, of course, in the amount of the

the proposal is gauged to the actual jury award and not the average wage and life expectancy of the victim. Because it is more efficient than the Washington provision,<sup>188</sup> the proposal can better reduce total payout. It should also be remembered that, under the proposal, legislatures are able to adjust the operational percentage within the formula to reduce the payout to the extent necessary to alleviate the crisis.<sup>189</sup>

The sunset provision in paragraph (2) may also enhance effectiveness. Threatened with the expiration of their statutory protection, insurers will likely make a sincere effort to assure lower, more stable premiums. Unlike Wisconsin statute,<sup>190</sup> the proposal will affect enough cases to enable companies to be successful in such an endeavor. Finally, the proposal follows the Wisconsin and Washington provisions and avoids the "floor effect" of caps<sup>191</sup> by requiring juries to determine awards without knowledge of the limitation.

### B. Fairness and Desirability

Ultimately, the insurance companies would probably favor a low, absolute cap similar to the one contained in the Ohio statute. However, such a cap is not a realistic alternative because the burdens imposed on the victims by a low, absolute cap are too great. The proposed limitation is a more desirable alternative than either the Wisconsin or Washington provisions. One reason is because

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cap on noneconomic damages. Given that the average medical malpractice award in 1986 was, approximately, \$1.5 million, *see supra* note 14 and accompanying text, and assuming for illustration purposes that one hundred percent of that average represents noneconomic damages, the proposal would reduce payout more than the Wisconsin statute. Wisconsin's \$1,000,000 cap will reduce the average award by \$500,000. The proposal, however, will reduce the average award by \$875,000. (Under the proposal's sliding scale, the cap would equal \$250,000 plus 30 percent of the difference between \$1.5 million and \$250,000, or \$625,000.) Of course, some awards are so large, *see supra* note 14, that the proposal cap would be higher than Wisconsin's. But these extremes are rare, and until the average award for noneconomic damages increases to a great extent, the proposal cap will continue to be more effective at reducing total payout.

188. Because the Washington scale is based on the average wage and the victim's life expectancy, it could conceivably permit greater recovery than the injury warrants. *See supra* text accompanying note 99. Assuming that the jury award reflects the actual injury more accurately than the product of average income and life expectancy, basing the limit on the jury award better assures that the victim will receive what he is due, and no more. The proposal is less arbitrary than Washington's limit which ignores actual injury and looks solely to average wage and life expectancy.

189. *See supra* note 182.

190. *See supra* text accompanying note 79.

191. *See supra* notes 76 & 86 and accompanying text.

the proposal will affect enough cases to have an impact on the crisis. While it is possible that predictability is not improved as much as it is under Ohio's approach, it is definitely improved more under the proposal than it is under either Wisconsin's or Washington's plan. Insurance companies can actually reap the benefits of the "per occurrence" and jury provisions that are only theoretically possible under the high absolute cap used in Wisconsin.<sup>192</sup> Actuarial calculations are simpler than in Washington because companies do not have to predict rising incomes. Companies may also reap financial benefits through decreased payout and benefit to an even greater extent from the avoidance of the inefficiencies of the Washington scale. Although an absolute cap is the most favorable measure, companies should also favor the present proposal. Such a measure should affect predictability and payout sufficiently to relieve them of the "squeeze" imposed by the crisis.

The medical industry would likely favor the low absolute cap as well because malpractice insurance premiums are more likely to be reduced. However, the present proposal should also adequately meet the concerns raised by the medical profession. Its effect on predictability and payout should result in lower, more stable premiums. This in turn allows for greater profitability in a medical practice, enabling health care providers to remain in certain areas of practice as well as in certain regions of the country.<sup>193</sup> Although the benefits are not as great as with a low absolute cap, the health care industry should prefer the present proposal over the Wisconsin or Washington provisions.

Of all the reform measures discussed in this Note, the preferred choice for the victim would be the \$1,000,000 Wisconsin cap because the burden is so small and it consequently affects fewer cases than the other provisions would. Because a high absolute cap is an unacceptable reform because it does little to solve the malpractice crisis, victims must sacrifice more than the Wisconsin statute requires. Victims will prefer the present proposal over the Ohio alternative. Unlike Ohio, the present proposal does not remain stagnant: it increases with inflation, pursuant to paragraph (6). Therefore, future victims will not be subjected to a

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192. Although the "per occurrence," and jury provisions in the Wisconsin statute are beneficial to insurance companies, the severe limitation in the Wisconsin scheme represented by the \$1,000,000 limit overshadows their effectiveness. *See supra* note 79 and accompanying text.

193. *See supra* notes 17 & 56.

lower limit in real dollars. Victims enjoy a flexibility in awards that an absolute cap does not offer,<sup>194</sup> and the burden on the individual is far less egregious than it is in Ohio.<sup>195</sup>

The sliding scale provision is also better tailored to compensate the victim than is the Washington statute. The base amount in subparagraph (4)(a) of the proposal protects the severely injured from the affects of the factors in the variable sliding-scale portion of the cap.<sup>196</sup> The present proposal, unlike the Washington statute, differentiates between victims with respect to the type of injury and the severity of the suffering because the scale directly relates *only* to the jury award, which is likely to be the best available tool to account for these variables.<sup>197</sup> Presumably, the fact-finder will have at its disposal all relevant facts with respect to the malpractice incident. In determining the award, the jury must account for the individual's characteristics, the type of injury suffered, and the severity of the injury. The jury award may not be a foolproof way to determine noneconomic loss. It is far superior in gauging such losses, however, than the arbitrary annual wage figure.

### C. Constitutional Implications

#### 1. Equal Protection

Under the heightened rationality standard of review that has been applied in some equal protection cases in which a damage cap was challenged,<sup>198</sup> this proposal should pass constitutional muster. Like the three preceding statutes, the goal of this proposal is to alleviate the medical malpractice crisis. Such a goal is legitimate.<sup>199</sup> As a legislative means to achieve this goal, this proposal

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194. Subparagraph (4)(b) allows at least 30 percent of the amount of the award cut by the damage cap. An absolute cap, of course, precludes recovery of *any* award above the limit.

195. The proposal contains a minimum cap of \$250,000 (subparagraph (4)(a)) as compared to an absolute \$200,000 cap in Ohio.

196. Compare, for example, how low a cap can go under the Washington provision when low annual wage and life expectancy figures are used to calculate the damage limit. *See supra* notes 103-05 and accompanying text.

197. Legislators in Washington have been criticized for basing the damage cap at least in part on a factor, the state's average annual wage, that is irrelevant to the severity of a victim's injuries and suffering. *See Note, Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 673 (1988) [hereinafter Note, *Constitutional Challenges*].

198. *See supra* notes 113-21 and accompanying text.

199. *See supra* note 125 and accompanying text.

should be constitutional. Courts that have invalidated previous caps seemed most concerned that such schemes unduly burdened the most seriously injured victims.<sup>200</sup> These courts found it "shocking" and "inconceivable" to force the victims to shoulder the entire burden of supporting the medical industry.<sup>201</sup> The proposal avoids this pitfall by reducing the burden that is imposed upon the most seriously injured.

First, it is superior to the Ohio provision because a victim who incurs noneconomic damages greater than \$250,000 does not sacrifice the entire amount in excess of the base amount. While the Ohio cap would cut off *all* recovery at the arbitrary limit,<sup>202</sup> under the proposed statute the victim receives some percentage of that portion of the jury's damage award that exceeds the base amount.<sup>203</sup> Second, the proposal is superior to Washington's sliding scale because the severity of the victim's injury remains a factor affecting the ultimate damage award, whereas by considering only the victim's life expectancy and the average wage, the Washington provision completely ignores the severity of the injury.<sup>204</sup> Under this proposal, however, the victim's damage award is adjusted upward in accordance with the amount of injury, as reflected in the jury's determination of the damages, which is made without knowledge of the cap.

In considering the propriety of the legislative means, courts must remember that damage limitations must necessarily prevent some victims from full recovery.<sup>205</sup> Reducing those with awards in excess of \$250,000 is justifiable because claims in this category appear to be the cause of the rapid growth in malpractice settlements and verdicts.<sup>206</sup> By reflecting the severity of the injury in the ultimate award, the fit between means and ends may be tight enough to satisfy the heightened rationality standard.<sup>207</sup> Because

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200. See *supra* notes 132-40 and accompanying text.

201. See, e.g., *supra* text accompanying note 139.

202. See *supra* note 39 and accompanying text.

203. See subparagraph (4)(b), *supra* note 182 and the accompanying text.

204. See *supra* note 197 and accompanying text.

205. See Comment, *State Legislative Responses*, *supra* note 131, at 1419.

206. See *An Update on the Liability Crisis*, *supra* note 25, at 243.

207. The most successful equal protection challenges have been against statutes that imposed absolute caps. See, e.g., *Carson v. Maurer*, 120 N.H. 925, 930, 424 A.2d 825, 829 (1980) (invalidating a \$250,000 absolute limit); *Arneson v. Olson*, 270 N.W.2d 125, 128 (N.D. 1978) (invalidating a \$300,000 absolute cap); *Duren v. Suburban Community Hosp.*, 24 Ohio Misc.2d 25, 27, 495 N.E.2d 51, 55 (C.P. 1985) (invalidating a \$200,000 absolute cap). The proposed limitation in this Note is distinguishable from these other, less

recoveries in this proposal are carefully limited to avoid the imposition of an undue burden on any of the parties involved, the proposal is much wiser and much more likely to survive an equal protection challenge.

## 2. Right to Trial by Jury

The proposed cap should not run afoul of federal or state jury trial guarantees.<sup>208</sup> Even if state courts follow Washington's lead and decide to extend the protection of the right beyond the protection that courts have given under the seventh amendment to the United States Constitution, or by the constitutions of other states,<sup>209</sup> the proposed cap should still pass muster.

The arguments advanced by critics of the Washington cap are remedied by the proposal. One fear of these critics was that the right to jury trial would be abridged by the damage limitations: "It is of fundamental importance that this institution of the 'common man' survive to judge the rights and liabilities attaching to tortious conduct."<sup>210</sup> The critics have argued that the damage cap ignored the facts proven at the trial,<sup>211</sup> and therefore invaded "the province of the jury."<sup>212</sup>

successful legislative efforts because it employs a sliding-scale methodology to establish the limit in each case. More importantly, however, the sliding scale itself is designed to be a narrowly tailored means to execute a legitimate, *see supra* note 125, government end: It avoids the uniform application of an arbitrary and static legislative limit, allowing instead the magnitude of the jury's award to be reflected in each case. Moreover, it avoids the harsh results that might be experienced with the Washington sliding scale, *see supra* note 95 and accompanying text.

A consistent theme echoed by courts striking down damage limitations on equal protection grounds is that it is "simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation." *Duren*, 24 Ohio Misc.2d at 28-29, 495 N.E.2d at 56 (quoting *Carson*, 120 N.H. at 942, 424 A.2d at 837); *see also Arneson*, 270 N.W.2d at 136 ("Restrictions on recovery may encourage physicians to enter into practice and remain in practice, but do so only at the expense of claimants with meritorious claims."). The cap proposed herein definitively leaves the decision as to which claims are meritorious where it belongs: with the jury. By granting 30 percent of the award for noneconomic damages above the \$250,000 minimum cap, the proposal reflects the severity, as determined by the jury, of the plaintiff's claim.

208. *See supra* notes 153-76 and accompanying text.

209. *See, e.g., supra* text accompanying notes 163-64.

210. Wiggins & Caldwell, *Liability-Limiting Legislation: An Impermissible Intrusion Into the Jury's Right to Decide*, 36 *DRAKE L. REV.* 723, 732 (1986-87).

211. *See, e.g., Note, Constitutional Challenges, supra* note 197, at 673 (arguing that taking into account only the age and the state average wage fails to reflect the seriousness of the injury).

212. *Id.* at 674 (quoting *Boyd v. Bulala*, 674 F. Supp. 781, 789 (W.D. Va. 1986)).



The proposed cap should first alleviate fears of the disappearance of "the common man." At the center of the proposal is the traditional American jury. The jury determines the severity of the injuries when, without being informed of the limitation on damages, it sets the damage award. That determination of severity remains after operation of the statute because each damage determination is reduced by an equal percentage. The proposal allows legislatures to exercise their powers to limit the remedies available in causes of action, and at the same time it assures the continued importance of the jury system in American jurisprudence.

#### CONCLUSION

Establishing damage limitations necessarily involves a balance between insurability and compensation. To alleviate the crisis wisely, each interested party must make some sacrifices. Under the present proposal, the insurance and health care industries sacrifice some of the effects that an absolute cap has on predictability and payout. The victims sacrifice the ability to recover unlimited damage awards. In striking this balance, the present proposal does not burden the victim too much or too little. Instead it establishes a compromise between the interested parties that is finally, *just right*.

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