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Note

Striking a Balance: An Open Courts Analysis of the Uniform Emergency Volunteer Health Practitioners Act

*Lindsey J. Hopper**

On August 29, 2005, Hurricane Katrina struck southeast Louisiana and caused catastrophic damage along the Gulf Coast.¹ More than one thousand individuals lost their lives, approximately three hundred thousand homes were destroyed, and the “wave of destruction” created serious environmental and health hazards.² Volunteers responded to the emergency, but many were delayed or unable to provide much-needed medical services because of “red tape” and confusion regarding the interstate recognition of their licenses and credentials.³

Natural disasters are increasing in intensity and frequency,⁴ and concerns regarding the response to Hurricane Katrina,

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1. See NOAA Home Page—Hurricane Katrina, <http://www.katrina.noaa.gov> (last visited Apr. 27, 2008).

2. See FRANCES FRAGOS TOWNSEND ET AL., THE FEDERAL RESPONSE TO HURRICANE KATRINA 7–9 (2006), <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf>.

3. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 2–3 (2007). The model act is available upon request from the National Conference of Commissioners on State Laws or on the Act’s website. See UEVHPA, UEVHPA (2007) <http://www.uevhpa.org/DesktopDefault.aspx?tabindex=1&tabid=69> (last visited Apr. 27, 2008).

4. See DANIEL A. FARBER & JIM CHEN, DISASTERS AND THE LAW: KATRINA AND BEYOND 110–13 (2006) (stating that “[c]limate change, environmental degradation, population growth, social and economic inequality, and govern-

paired with the threat of a biological terrorist attack or an influenza pandemic, have prompted a wave of emergency-preparedness legislation designed to facilitate a speedy and efficient response to disasters.⁵ Some legislative efforts have instituted civil-liability limitations in order to encourage volunteerism among health practitioners in times of emergencies.⁶

One such effort is the Uniform Emergency Volunteer Health Practitioners Act (UEVHPA). The National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted and approved this piece of model legislation during the summer of 2007.⁷ Colorado, Kentucky, and Tennessee have enacted the UEVHPA,⁸ and many more states will consider adopting it in 2008.⁹ In an effort to promote volunteerism and shield volunteer health practitioners (VHPs) from liability, the UEVHPA protects them from civil liability resulting from their negligent acts or omissions.¹⁰

This Note critiques the UEVHPA and asserts that states should modify the civil-liability-limitation section of the UEVHPA before adopting it. Section 11 of the UEVHPA eliminates negligently injured victims' means of recovery.¹¹ Many state constitutions, however, contain "open courts provisions." These provisions typically guarantee that injured persons have a right to a remedy through the state's legal system.¹² Open courts provisions are a notoriously understudied area of state

mental policy" contribute to this trend). "Natural phenomena are likely to affect more people because Earth's population has increased." *Id.* at 111.

5. See Lawrence O. Gostin et al., *The Law and the Public's Health: The Foundations*, in *LAW IN PUBLIC HEALTH PRACTICE* 25, 25 (Richard A. Goodman et al. eds., 2d ed. 2007); James G. Hodge, Jr. et al., *The Pandemic and All-Hazards Preparedness Act: Improving Public Health Emergency Response*, 297 *JAMA* 1708, 1708 (2007).

6. See, e.g., Volunteer Protection Act, 42 U.S.C. § 14503(a) (2000).

7. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 1. The NCCUSL provides states with model laws to clarify and stabilize critical areas of the law. See National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org/Update> (last visited Apr. 27, 2008).

8. See UEVHPA, Enactment Status Map, <http://www.uevhp.org/DesktopDefault.aspx?tabindex=2&tabid=67> (last visited Apr. 27, 2008).

9. See *id.*; see also Mimi Hall, *States Cutting Disaster Red Tape*, USA TODAY, Oct. 9, 2007, at 1A.

10. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11.

11. See *id.*

12. See David Schuman, *The Right to a Remedy*, 65 *TEMP. L. REV.* 1197, 1201-02 (1992).

constitutional law,¹³ yet they are found in thirty-nine state constitutions. This Note develops a novel framework by which to gauge the constitutionality of legislation that implicates open courts provisions. By eliminating a victim's right to recover for negligence or medical malpractice, the civil-liability-limitation provision of the UEVHPA conflicts with a right protected by many state constitutions. Accordingly, the UEVHPA has become a subject of debate because it implicates many of the concerns that accompany tort reform efforts.¹⁴

Part I of this Note surveys emergency public health legislation and civil-liability concerns regarding the use of VHPs. It provides a general overview of the UEVHPA and section 11, the section that limits civil liability. Part II discusses open courts provisions and describes the ways that state courts have interpreted such provisions. Part III explains the conflict between section 11 of the UEVHPA, which prevents negligently injured victims from obtaining redress, and open courts provisions. Parts III and IV examine alternative solutions to those found in section 11. Part IV proposes that states should assume liability for the negligence of VHPs so that negligently injured victims may obtain redress. Although there are other viable solutions, including a victim compensation fund and a no-fault compensation scheme, a state agreement to assume liability for the negligence of VHPs strikes the optimal balance between encouraging volunteerism and providing negligently injured victims a means of recovery.

13. See Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1317–18 (2003) (noting that open courts provisions have been virtually ignored by legal scholars).

14. Compare Letter from Kathleen Flynn Peterson, President-Elect, Am. Assoc. for Justice, to Members of the Drafting Committee, Nat'l Conference of Comm'rs on Unif. State Laws (Mar. 5, 2007), available at http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007march5_aaajarecs.pdf (expressing concerns over civil-liability limitations), with Letter from American Academy of Dermatology Association et al., to Raymond R. Pepe, Chair, UEVHPA Drafting Comm. (June 5, 2007), available at http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007june5_letter.pdf (advocating for liability limitations), and Letter from Gene W. Matthews, Senior Fellow, and Anna Wood, Legal Research Assoc., N.C. Inst. for Pub. Health, to Raymond R. Pepe, Chair, UEVHPA Drafting Comm. (July 12, 2007), available at http://www.uevhp.org/Uploads/UEVHPA_UNCIPHletter_071207.pdf (suggesting that state constitutions do not prohibit the adoption of civil-liability limitations).

I. EMERGENCY PUBLIC HEALTH LAW

Public health involves protecting, promoting, and improving the health of communities through education and disease prevention.¹⁵ Accordingly, the principles of public health “recommend natural disaster preparedness and, when a disaster has struck, early response in order to prevent and suppress public health crises.”¹⁶ Public health law, in turn, has been defined as the study of the legal powers “to assure the conditions for people to be healthy” and “the limitations on the power of the state to constrain” individual freedoms for the common good.¹⁷ Although the federal government does have a role to play, particularly during national emergencies, public health law is governed predominantly by state law.¹⁸

State and local authorities have “significant common law, statutory, and constitutional authority” to respond to public health emergencies.¹⁹ Such emergencies may involve man-made problems, as well as natural problems, which often affect the public’s health on a large scale.²⁰ Preparing for public health emergencies is a difficult task. Although no amount of planning can fully insulate the nation from a disaster, creating “an appropriate legal environment” and legal infrastructure is a crucial component of public health emergency preparedness.²¹

15. See ASPH, What Is Public Health?, <http://www.asph.org/document.cfm?page=300> (last visited Apr. 27, 2008).

16. David L. Feinberg, *Hurricane Katrina and the Public Health-Based Argument for Greater Federal Involvement in Disaster Preparedness and Response*, 13 VA. J. SOC. POL’Y & L. 596, 597–98 (2006).

17. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW 4 (2000).

18. See, e.g., *id.* at 41; Andrew D. Moulton et al., *What Is Public Health Legal Preparedness?*, 31 J.L. MED. & ETHICS 672, 675 (2003) (“Public health traditionally has been the domain of state and local governments.”); see also Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 237–39 (2006) (discussing state authority to address interstate crises). The legal authority for most public health efforts is the police power, defined as the authority of state governments to enact laws that safeguard the health of their citizens. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 24–25 (1905).

19. Daniel J. O’Brien, *Strengthening the Regional Health Care System: Legal Issues and Strategies*, 58 ADMIN. L. REV. 587, 589 (2006).

20. See Gene W. Matthews et al., *Legal Authorities for Interventions in Public Health Emergencies*, in LAW IN PUBLIC HEALTH PRACTICE, *supra* note 5, at 262, 263.

21. James G. Hodge, Jr., *Legal Triage During Public Health Emergencies and Disasters*, 58 ADMIN. L. REV. 627, 628 (2006). Public health-emergency preparedness is a new term born in the context of “potentially massive public health emergencies.” Moulton et al., *supra* note 18, at 673.

A. THE PUBLIC HEALTH-EMERGENCY LAW MOVEMENT AND VOLUNTEER HEALTH PRACTITIONERS

Dramatic public health events in the beginning of the twenty-first century raised serious questions in the minds of public health stakeholders²² concerning the public health infrastructure,²³ a need for the modernization of public health statutes,²⁴ and emergency preparedness.²⁵ Although the rise of these concerns was not a new phenomenon,²⁶ the September 11, 2001 terrorist attacks, the 2001 anthrax attacks, the emergence of severe acute respiratory syndrome (SARS), the looming influenza pandemic, and the 2005 hurricane season spurred federal and state governments to reassess the need for emergency public health legislation.²⁷ In particular, the troubling response to Hurricane Katrina²⁸ demonstrated that emergency public health laws must be enacted or modified to facilitate the joint efforts of state and local health departments, nonprofit entities, health care providers, and federal agencies.²⁹

22. See *Preface to the First Edition* of LAW IN PUBLIC HEALTH PRACTICE, *supra* note 5, at x (stating that public health stakeholders include “health officers, epidemiologists, public health lawyers, educators, and legislators”).

23. See, e.g., John Hopkins Bloomberg School of Public Health, Katrina Health Concerns, http://www.jhsph.edu/katrina/public_health_infrastructure.html (last visited Apr. 27, 2008).

24. See, e.g., MODEL STATE PUB. HEALTH ACT prefatory note (Turning Point Pub. Health Statute Modernization Collaborative 2003), http://www.turningpointprogram.org/Pages/pdfs/statute_mod/phsm_TP_model_state_ph_act.pdf.

25. See Elizabeth A. Weeks, *Lessons from Katrina: Response, Recovery and the Public Health Infrastructure*, 10 DEPAUL J. HEALTH CARE L. 251, 253–58 (2007) (discussing the myriad challenges arising from a single-episode crisis).

26. See, e.g., INST. OF MED., THE FUTURE OF PUBLIC HEALTH 19 (1988).

27. See Gostin et al., *supra* note 5, at 25, 43; Matthews et al., *supra* note 20, at 262; Dorothy Puzio, *An Overview of Public Health in the New Millennium* [sic]: Individual Liberty vs. Public Safety, 18 J.L. & HEALTH 173, 174 (2004); Weeks, *supra* note 25, at 251. Federal plans regarding legal preparations for public health emergencies have been incorporated into homeland security initiatives. See Wendy E. Parmet, *Unprepared: Why Health Law Fails to Prepare Us for a Pandemic*, 2 J. HEALTH & BIOMEDICAL L. 157, 191–92 (2006) (“[P]reparedness has become the watchword of the day.”).

28. See, e.g., FARBER & CHEN, *supra* note 4, at 53 (“By most accounts, the federal and state agencies charged with coordinating the response to Hurricane Katrina performed abysmally.”).

29. See Weeks, *supra* note 25, at 256 (“Emergency response calls for coordination among different levels of federal, state, and local governments and private actors.”).

The resulting public health emergency preparedness movement spawned state and federal legislation to increase emergency preparedness.³⁰ Several model laws were enacted to provide a framework for facilitating the “detection, management, and containment of public health emergencies.”³¹ Major topics of interest surrounding such legislation included the licensing and registration of VHPs, as well as liability concerns surrounding their use.³²

Public health emergencies frequently demand the use of VHPs to supplement the existing health care workforce.³³ Natural disasters and other emergencies that “threaten the health and safety of the population consistently feature the assistance and support of VHPs.”³⁴ VHPs may include individuals from a wide range of health professions, such as doctors, nurses, pharmacists, and psychologists, including those from the public, private, and nonprofit sectors.³⁵ In the event of a large-scale disaster, health officials will likely need the help of VHPs from other jurisdictions.³⁶

30. See, e.g., Public Health Improvement Act, Pub. L. No. 106-505, 114 Stat. 2314 (2000) (containing the Public Health Threats and Emergencies Act of 2000); ASSEMBLY ON FED. ISSUES HEALTH COMM., NAT'L CONFERENCE OF STATE LEGISLATURES, SUMMARY: PUBLIC HEALTH THREATS & EMERGENCIES ACT (2002), <http://www.ncsl.org/statefed/health/phtreas.pdf>.

31. Lawrence O. Gostin et al., *The Model State Emergency Health Powers Act: Planning for and Response to Bioterrorism and Naturally Occurring Infectious Diseases*, 288 JAMA 622, 625 (2002). Model laws serve as tools for legislatures to assess preparedness and adopt legislation that implements coordinated disaster and emergency responses. See *id.*

32. See William C. Nicholson, *Preparedness for Public Health Emergencies*, in A LEGAL GUIDE TO HOMELAND SECURITY AND EMERGENCY MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS 59, 59 (Ernest B. Abbott & Otto J. Hetzel eds., 2005).

33. See James G. Hodge, Jr. et al., *The Legal Framework for Meeting Surge Capacity Through the Use of Volunteer Health Professionals During Public Health Emergencies and Other Disasters*, 22 J. CONTEMP. HEALTH L. & POL'Y 5, 7-8 (2005) [hereinafter Hodge, *Legal Framework*]; see also James G. Hodge, Jr. et al., *Risk Management in the Wake of Hurricanes and Other Disasters: Hospital Civil Liability Arising from the Use of Volunteer Health Professionals During Emergencies*, 10 MICH. ST. J. MED. & L. 57, 62-64 [hereinafter Hodge, *Risk Management*] (discussing hospitals' need for VHPs in emergencies).

34. Hodge, *Legal Framework*, *supra* note 33, at 8.

35. See *id.* at 8-9.

36. See Kenneth De Ville, *Legal Preparation and Pandemic Influenza*, 13 J. PUB. HEALTH MGMT. PRAC. 314, 316 (2007).

Although VHPs play an important role in public health emergency response,³⁷ their use by private and public entities implicates issues of civil liability.³⁸ In this context, civil liability refers to the potential liability of VHPs for acts or omissions that result in injuries to others.³⁹ VHPs expose themselves to suits for intentional torts, negligence, privacy violations, and breach of contract claims.⁴⁰

In particular, there is some concern that issues of civil liability may chill the volunteer response to public health emergencies.⁴¹ Many public health preparedness efforts have suggested that potential legal issues may hinder an effective response to an emergency.⁴² For example, although “an enormous amount of good was done by a group of people who wanted to help” in the aftermath of Hurricane Katrina, some commentators have argued that doctors may have hesitated to volunteer “out of fear of facing some kind of legal action.”⁴³ Policy-makers realized the potential chilling effect of civil liability upon volunteerism.⁴⁴ Accordingly, the federal government and

37. See Hodge, *Legal Framework*, *supra* note 33, at 13–14.

38. See, e.g., Interview by Office of Communications and Public Affairs, Johns Hopkins Bloomberg Sch. of Pub. Health with James G. Hodge, Jr., Associate Professor, Bloomberg Sch. Dep’t of Health Policy and Mgmt. (Dec. 11, 2006), http://www.jhsph.edu/publichealthnews/articles/2006/hodge_volunteers.html.

39. See Cheryl A. Peterson, *Be Safe, Be Prepared: Emergency System for Advance Registration of Volunteer Health Professionals in Disaster Response*, 11 ONLINE J. ISSUES NURSING (2006), http://nursingworld.org/MainMenuCategories/ANAMarketplace/ANAPeriodicals/OJIN/TableofContents/Volume112006/Number3/tpc31_216083.aspx.

40. See, e.g., James G. Hodge, Jr. et al., *Scope of Practice for Public Health Professionals and Volunteers*, 33 J.L. MED. & ETHICS 53, 54 (2005) (“Civil actions that may be brought against medical volunteers include negligence, intentional torts, privacy violations, misrepresentation, discrimination, or breach of contract.”).

41. See 42 U.S.C. § 14501(a)(1) (2000); Kenneth De Ville, *Legal Fears, Legal Protections, and Responsible Behavior During Public Health Emergencies*, 13 J. PUB. HEALTH MGMT. PRAC. 530, 530 (2007) (“[T]he number of volunteers available during and after Hurricane Katrina was adversely affected by unresolved liability fears.”).

42. See, e.g., De Ville, *supra* note 41, at 530; Hodge, *Legal Framework*, *supra* note 33, at 10 (“[T]he use of VHPs during emergencies raises significant legal questions that impact volunteers . . .”).

43. C.W. Nevius, *State Laws Become Roadblock to Medical Response in Crisis*, S.F. CHRON., Sept. 2, 2006, at A2.

44. See O’Brien, *supra* note 19, at 590 (“[A]ppportioning risk and providing worker protections . . . may, in some measure, affect the resilience and responsiveness of the health care workforce.”).

many states enacted legislation limiting the potential legal liability of VHPs.⁴⁵

One such example of federal legislation is the Volunteer Protection Act of 1997 (VPA), which provides civil-liability protection for nonprofit or government volunteers if the “volunteer was acting within the scope” of his responsibilities and area of expertise, was properly licensed, and did not cause harm by “willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer.”⁴⁶ Protection under the VPA is not limited to medical volunteers, and it protects volunteers outside the realm of public health emergencies.⁴⁷ The VPA, however, may not provide coverage to VHPs who volunteer outside their own professional practice areas.⁴⁸ Thus, confusion may arise on the part of VHPs with respect to where they may volunteer and receive some protection from civil liability.⁴⁹

In addition, the Emergency Management Assistance Compact (EMAC) permits any state to supply government personnel, equipment, and supplies to states experiencing a public

45. See, e.g., 42 U.S.C. § 14503; CAL. CIV. CODE § 1714.2 (West 2004); MINN. STAT. § 604A.01 (2006); see also Health Resources and Services Administration, Emergency System for Advance Registration of Volunteer Health Professionals, <http://www.hrsa.gov/esarvhp/> (last visited Apr. 15, 2008) (“Congress recognized the need to make optimum use of volunteer health personnel in an emergency and authorized the development of an Emergency System for Advance Registration of Health Professions Volunteers . . .”). The Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP) program is composed of state-based systems that seek to provide information about volunteers’ identity and credentials, which allows states to “better utilize health professional volunteers in emergencies.” *Id.*

46. 42 U.S.C. § 14503. The VPA was enacted to “clarif[y] and limit[] the liability risk assumed by volunteers” because of the “national scope of the problems created by the legitimate fears of volunteers about frivolous, arbitrary, or capricious lawsuits.” *Id.* § 14501(a)(7).

47. Cf., e.g., Kenneth W. Biedzynski, *The Federal Volunteer Protection Act: Does Congress Want to Play Ball?*, 23 SETON HALL LEGIS. J. 319, 325 (1999) (discussing the VPA as applied to youth and amateur sports volunteers).

48. See RAYMOND P. PEPE, KIRKLAND & LOCKHART PRESTON GATES ELLIS LLP, UNIFORM EMERGENCY VOLUNTEER HEALTHCARE PROVIDERS ACT 20, 41 (2007), <http://www.nccusl.org/uevhpa/Uploads/RP-UEVHPA-sept07.ppt>.

49. “Assessing potential civil liability in advance may help avoid uncertainty” on the part of VHPs and hospitals that use VHPs. DEPT OF HEALTH & HUMAN SERVS., EMERGENCY SYSTEM FOR ADVANCE REGISTRATION OF VOLUNTEER HEALTH PROFESSIONALS—LEGAL AND REGULATORY ISSUES 41 (2006), ftp://ftp.hrsa.gov/bioterror/May_06_Legal_Report.pdf.

health emergency.⁵⁰ All fifty states have passed EMAC legislation.⁵¹ EMAC allows for licensed health practitioners employed by state and local governments to be deployed to other jurisdictions.⁵² If VHPs are registered under EMAC, EMAC provides for licensure recognition, protection from civil liability for VHPs, and immunity for state actors.⁵³

While EMAC provides for licensure recognition and certain protections from civil liability, it only applies to state and local government employees who are recognized as state actors under mutual aid agreements between states.⁵⁴ Accordingly, some VHPs may be exposed to civil liability for negligent actions and may not be protected by EMAC or the VPA. Although states may provide some civil-liability limitations for VHPs, coverage varies widely by jurisdiction.⁵⁵ Therefore, model legislation is necessary to unify the procedures used to authorize and regulate the deployment of VHPs in response to emergencies.⁵⁶

B. THE UNIFORM EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT

In response to the concerns of civil liability surrounding the use of VHPs and in an attempt to fill the gaps left by federal and disparate state legislation, the NCCUSL drafted the UEVHPA.⁵⁷ At least twenty states are considering adopting legislation modeled after the UEVHPA in 2008.⁵⁸ The UEVHPA

50. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-854, ENHANCING EMAC'S COLLABORATIVE AND ADMINISTRATIVE CAPACITY SHOULD IMPROVE NATIONAL DISASTER RESPONSE 1 (2007), <http://www.gao.gov/htext/d07854.html>

51. See *id.*

52. See DEP'T OF HEALTH & HUMAN SERVS., *supra* note 49, at 48.

53. See *id.* at 48–49.

54. See Nicholson, *supra* note 32, at 67.

55. For example, many states have passed “Good Samaritan” statutes that limit a rescuer’s liability for negligence. See, e.g., CAL. CIV. CODE § 1714.2 (West 2004); LA. REV. STAT. ANN. § 9:2793 (1997); MONT. CODE ANN. § 27-1-714 (2007). Although “Good Samaritan provisions provide some level of immunity from civil liability, the applicable conditions and standards of negligence vary widely.” DEP'T OF HEALTH & HUMAN SERVS., *supra* note 49, at 46. Good Samaritan statutes may not apply to practitioners that have a preexisting duty to render aid and may not apply to services provided in a hospital. See *id.*

56. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 2–3 (2007) (noting that during Hurricanes Katrina and Rita, no uniform system existed to link the various public and private sector programs, which kept hundreds of volunteers from caring for survivors).

57. See *id.*

58. Hall, *supra* note 9.

authorizes VHPs to provide services for the duration of an emergency⁵⁹ if they are registered with a volunteer practitioner registration system.⁶⁰ The UEVHPA defines a VHP as a health practitioner “who provides health or veterinary services, whether or not the practitioner receives compensation for those services.”⁶¹ Among other goals, the UEVHPA seeks to facilitate the registration and deployment of VHPs, while regulating their use and reducing confusion regarding the types of services that they may provide.⁶² The VHPs must comply with limitations on the scope of their practice and with restrictions levied by the host state.⁶³

To that end, section 11 of the UEVHPA, which addresses the civil liability of VHPs and vicarious liability, provides two alternatives for states that adopt the uniform law.⁶⁴ Alternative A states that a VHP who provides services pursuant to the UEVHPA is “not liable for damages for an act or omission of the practitioner in providing those services.”⁶⁵ A VHP may still be found liable for willful or wanton, grossly negligent, reckless, or criminal conduct, an intentional tort, or breach of contract.⁶⁶ Alternative A also provides that “[n]o person is vicariously liable for damages for an act or omission of a volunteer health practitioner if the practitioner is not liable for the damages under subsection (a).”⁶⁷ Essentially, Alternative A states that VHPs are not liable for damages resulting from ordinary negligence, and a person is not vicariously liable for damages resulting from the ordinary negligence of VHPs.

Alternative B provides similar coverage for a VHP who is not paid more than five hundred dollars per year for services

59. An emergency is initiated by a declaration pursuant to state law. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 2(3). Almost all states have instituted a legal framework for declaring a state of emergency. See DEP'T OF HEALTH & HUMAN SERVS., *supra* note 49, at 24. Additionally, some states have different procedures for declaring a public health emergency. See, e.g., FLA. STAT. § 381.00315 (2007); S.C. CODE ANN. § 44-4-130 (2007).

60. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 5.

61. *Id.* § 2(15).

62. See *id.* prefatory note 4–5.

63. See *id.* at 5.

64. See *id.* § 11.

65. *Id.* § 11, Alternative A, subsec. (a), at 39.

66. *Id.* § 11, Alternative A, subsec. (c), at 39.

67. *Id.* § 11, Alternative A, subsec. (b), at 39. The UEVHPA defines “person” broadly so as to include individuals, corporations, businesses, governmental agencies, and any other legal entities. *Id.* § 2(11).

provided pursuant to the UEVHPA,⁶⁸ thus limiting the liability for VHPs who are “nominally compensated.”⁶⁹ As in Alternative A, a VHP is not liable for “an act or omission of the practitioner in providing those . . . services” that amounts to ordinary negligence.⁷⁰ Alternative B, however, makes no mention of vicarious liability, but the fact that it “does not expressly provide immunity for vicarious liability should not raise an implication that such liability exists.”⁷¹ Neither Alternative A nor Alternative B provides a substitute remedy for victims injured by a VHP’s negligence.⁷²

The drafters of the UEVHPA do not advocate that states adopt one alternative over the other.⁷³ Instead, states are instructed to select the alternative that best suits their needs based on state tort law, policy considerations, and the experiences of VHPs within their jurisdiction.⁷⁴ The civil liability of VHPs is limited under both alternatives.⁷⁵ If VHPs respond to an emergency in a state that has adopted the UEVHPA, they will not be liable for ordinary negligence.

II. INTERPRETATIONS OF OPEN COURTS PROVISIONS AND PROVIDING REDRESS TO VICTIMS

A. MEDICAL MALPRACTICE AND NEGLIGENCE CLAIMS

There is “no serious question” that medical negligence occurs at a significant rate.⁷⁶ “In the United States, more people are killed each year as a result of medical malpractice than die in car accidents and workplace accidents combined.”⁷⁷ A Harvard University study concluded that approximately “one out of every 100 patients” admitted to hospitals had a viable medical malpractice claim based on negligence.⁷⁸ These claims are filed

68. *Id.* § 11, Alternative B, subsec. (a), at 40.

69. *See id.* § 11 cmt. 1 at 42.

70. *See id.* § 11, Alternative B, subsec. (a), at 40.

71. *Id.* § 11 cmt. 5 at 47.

72. *Cf. id.* § 11.

73. *Id.* § 11 cmt. 1 at 42.

74. *See id.*

75. *See id.* § 11.

76. Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries, and Social Policy*, 38 LOY. L.A. L. REV. 1217, 1222 (2005).

77. Patrick A. Salvi, *Why Medical Malpractice Caps Are Wrong*, 26 N. ILL. U. L. REV. 553, 560–61 (2006).

78. Vidmar, *supra* note 76, at 1220–21.

against one in seven doctors per year,⁷⁹ and account for approximately eighteen percent of the total number of cases that proceed to trial every year in the United States.⁸⁰ Nearly all medical malpractice claims are based on negligence and tort law.⁸¹ Victims of medical malpractice frequently suffer severe economic and noneconomic losses.⁸² The substantial rate of negligence among the general medical community indicates that patients injured through medical negligence need a mechanism to seek compensation for their losses.⁸³

Although there are no data available regarding the rate of negligence by VHPs, there is no reason to suspect that the rate is lower than that exhibited by the general medical community. In fact, given the suboptimal conditions found in the aftermath of disasters in which VHPs must dispense care,⁸⁴ the rate of negligence may well be higher. Notably, studies have demonstrated that the rate of negligence among emergency care physicians is higher than the rate among the general medical community.⁸⁵

Further, the use of VHPs in the responses to the September 11, 2001 attacks⁸⁶ and Hurricane Katrina⁸⁷ is too recent to have generated quantifiable data regarding the rate of negligence or the incidence of malpractice claims. Individuals often do not discover that they have been the victims of medical negligence until they seek follow-up care.⁸⁸ Additionally, once a

79. MARK A. HALL ET AL., *MEDICAL LIABILITY AND TREATMENT RELATIONSHIPS* 284 (2005).

80. David M. Studdert et al., *Beyond Dead Reckoning: Measures of Medical Injury Burden, Malpractice Litigation, and Alternative Compensation Models from Utah and Colorado*, 33 IND. L. REV. 1643, 1646 (2000).

81. See HALL ET AL., *supra* note 79, at 374 (suggesting that although the contractual theory of liability can apply in such cases, its use is rare).

82. See Vidmar, *supra* note 76, at 1223–24.

83. See *id.* at 1220–29 (setting forth the incidence and costs of medical negligence).

84. See, e.g., Jodie Escobedo, *Volunteer Doctor's Report from Baton Rouge*, BAY AREA RADICAL HEALTH COLLECTIVE, Sept. 26, 2005, <http://barhc.w2c.net/blog/index.php?/archives/52-Volunteer-Doctors-Report-from-Baton-Rouge.html#extended>.

85. Studdert et al., *supra* note 80, at 1661 (“This is likely a result of the challenging environment in the emergency department.”).

86. See Weeks, *supra* note 25, at 257 (noting that there were “no victims to treat, only bodies to be recovered and identified”).

87. See, e.g., Christina Siderius & Janet Tu, *Volunteer Doctor Likens City to Third World*, SEATTLE TIMES, Sept. 10, 2005, at A12.

88. Cf. David A. Bernstein, Note, *The Medical Injury Compensation Reform Act (MICRA), Pharmaceutical Malpractice, and Their Detrimental Effects on a*

negligence claim is made, it usually takes between three and six years before it is settled.⁸⁹

B. LEGISLATIVE TORT REFORM EFFORTS

Legislative tort reform efforts, which are generally motivated by concerns regarding the cost and availability of malpractice liability insurance,⁹⁰ are “designed to reduce the level of tort litigation and hence minimize exposure of persons to tort liability,” but may “adversely affect those who most deserve and need compensation.”⁹¹ Medical malpractice liability has played a significant role in the tort reform movement.⁹²

Because tort reform efforts have increased in recent years,⁹³ litigants have attempted to use open courts provisions of state constitutions, with varying degrees of success, to counteract efforts by legislatures to modify, restrict, or eliminate causes of action and remedies.⁹⁴ Thirty-nine state constitutions contain open courts provisions,⁹⁵ alternatively known as “right

Little Girl, 21 WHITTIER L. REV. 259, 279 (1999) (“Modern medicine is highly complex and technical, creating a significant lag time between the occurrence of wrongful conduct and the date an injury is detected.”).

89. Vidmar, *supra* note 76, at 1248.

90. F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 438 (2006).

91. Jeffrey O’Connell & David F. Partlett, *An America’s Cup for Tort Reform? Australia and America Compared*, 21 U. MICH. J.L. REFORM 443, 448–49 (1988).

92. See Hubbard, *supra* note 90, at 517–20.

93. *Cf. id.* at 470–71 (noting that the late 1990s ushered in a new wave of tort reforms).

94. Litigation involving open courts provisions frequently involves “workers’ compensation schemes, no-fault insurance plans, medical malpractice damage caps, and product liability statutes of repose.” Schuman, *supra* note 12, at 1199.

95. See ALA. CONST. art. I, § 13; ARIZ. CONST. art. 18, § 6; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights, § 18; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. art. 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4, ch. II, § 28; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8. The Supreme Court of New Mexico has recognized an implicit right of access to the courts.

to a remedy” provisions.⁹⁶ These provisions typically guarantee that “for injuries of a certain type, a person shall have access to a remedy through the state’s legal apparatus.”⁹⁷ Although some argue that such provisions set forth a fundamental right,⁹⁸ the United States Constitution does not contain an open courts provision.⁹⁹ The Supreme Court has suggested that a state legislature’s attempt to eliminate a common law cause of action without providing a substitute remedy would violate the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ The general rule now, however, appears to be that “the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law.”¹⁰¹ Therefore, the balance between tort reform efforts and providing redress to individuals is one that must be struck at the state level.

Interpretations of open courts provisions by state courts fall into two distinct groups. First, some courts have held that open courts provisions do not serve as substantive checks against tort reform efforts (nonsubstantive-check courts).¹⁰²

See Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153, 1161 (N.M. 1988), *overruled by* Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998).

96. *See* Robert S. Peck & Ned Miltenberg, *Challenging the Constitutionality of Tort “Reform,”* in 3 ATLA’S LITIGATING TORT CASES § 29.15 (Roxanne B. Colin & Gregory S. Cusimano eds., 2003). *But see* Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1316 (1995) (suggesting that open courts provisions were not intended to be remedies clauses).

97. Schuman, *supra* note 12, at 1201–02. This guarantee is not unique to the American system of government. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *140–41 (stating that seeking redress in court was a fundamental right of Englishmen).

98. *See, e.g.,* Kloss v. Edward D. Jones & Co., 54 P.3d 1, 13 (Mont. 2002) (Nelson, J., concurring) (arguing that the right of access to the courts is a fundamental right).

99. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 6.1 n.1 (3d ed. 2000). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”). The most analogous provision in the U.S. Constitution may be the Petition Clause. *See* U.S. CONST. amend. I. *But see* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002) (distinguishing a right of access from a right to petition).

100. *Cf.* Wilson v. Iseminger, 185 U.S. 55, 62–63 (1902).

101. Silver v. Silver, 280 U.S. 117, 122 (1929). *But see* Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 88 (1978) (noting that it is unclear whether the Due Process Clause requires that a legislatively enacted compensation scheme either duplicate the remedy at common law or provide a reasonable substitute remedy).

102. *See, e.g.,* Crier v. Whitecloud, 496 So. 2d 305, 309–10 (La. 1986); Lamb

The second group of courts has held that open courts provisions impose substantive checks on a legislature's ability to restrict or eliminate causes of action and remedies (substantive-check courts).¹⁰³

1. Nonsubstantive-Check Courts' Interpretations of Open Courts Provisions

Nonsubstantive-check courts provide different rationales for their interpretations of open courts provisions. Some courts interpret open courts provisions as guaranteeing access to and availability of the judicial process but not as limiting the legislature's ability to modify substantive rights.¹⁰⁴ Other courts have stated that open courts provisions permit the legislature to eliminate any causes of action that are not vested.¹⁰⁵ Lastly, some courts do not recognize state constitutional limitations upon the power of the legislature to alter or abolish common law causes of action or remedies.¹⁰⁶ Ultimately, in most situa-

v. Wedgewood S. Corp., 302 S.E.2d 868, 882 (N.C. 1983); *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978).

103. See, e.g., *Smith v. Dep't of Ins.*, 507 So. 2d 1080, 1088–89 (Fla. 1987) (invalidating a cap on noneconomic damages in medical malpractice cases); *Lucas v. United States*, 757 S.W.2d 687, 692 (Tex. 1988) (holding that a cap on damages in medical malpractice cases violated Texas's open courts provision); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985) (stating that the elimination of a common law remedy must be accompanied by "an effective and reasonable alternative remedy"). "[W]e are dealing with a constitutional right which may not be restricted simply because the legislature deems it rational to do so." *Smith*, 507 So. 2d at 1089.

104. See, e.g., *Pinnick v. Cleary*, 271 N.E.2d 592, 600 (Mass. 1971) (finding that the open courts provision preserves procedural but not substantive rights); Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damage Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 518 (2005) (reviewing interpretations of open courts provisions). Damage caps or a requirement that a litigant satisfy an administrative process or undergo alternative dispute resolution have been upheld under this interpretation because these requirements do not actually prevent a litigant from filing a case in court. See, e.g., *Arceo v. Tolliver*, 949 So. 2d 691, 697 (Miss. 2006) ("All that is required is a reasonable right of access to the courts—a reasonable opportunity to be heard." (quoting *Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 403 (5th Cir. 1984))); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 906 (Mo. 1992) (holding that a cap on damages does not violate the open courts provision).

105. See, e.g., *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 501 (Mont. 1989); *Harrison*, 569 S.W.2d at 827 (explaining that the open courts doctrine is "a mandate to the judiciary" and not "a limitation upon the legislature"). The legislature "has the power to create new rights and abolish old ones so long as they are not vested." *Dunn v. Felt*, 379 A.2d 1140, 1141 (Del. Super. Ct. 1977).

106. See, e.g., *Crier*, 496 So. 2d at 309–10 (stating that the state constitution does not restrict the legislature's ability to modify causes of action); *Lamb*,

tions, nonsubstantive-check courts' interpretations of open courts provisions provide no protection to individuals seeking redress.

2. Substantive-Check Courts' Interpretations of Open Courts Provisions

In other states, open courts provisions may act as a check against tort reform. Of these, most courts interpret such provisions as restricting the legislature's ability to change or eliminate a common law remedy but not a statutorily created remedy.¹⁰⁷ Courts have reasoned that if a cause of action was created by the legislature and not recognized at common law, any legislative abrogation of that cause of action does not implicate a constitutional right.¹⁰⁸

Such courts frequently employ one of two tests to evaluate the actions taken by the legislature. Under the first, a *quid pro quo* test,¹⁰⁹ courts require that a legislature provide a substitute remedy "to justify legislative change."¹¹⁰ If a legislature fails to do so, the law will be declared unconstitutional.¹¹¹ Under the second, a balancing test,¹¹² courts "inquire into the public necessity for a statute that limits access to courts, or whether the statute provides plaintiffs with some replacement remedy or 'commensurate benefit,' or both."¹¹³ Courts may re-

302 S.E.2d at 882 ("The legislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not.").

107. See Kelly & Mello, *supra* note 104, at 518 (noting that "mere modification to an existing cause of action" is a "constitutionally-permissible legislative act in most states"). *But see* Neher v. Chartier, 879 P.2d 156, 161 (Or. 1994) ("[T]he distinction between a statutory claim and a common law claim was abandoned . . .").

108. See, e.g., Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 355 (Tex. 1990).

109. E.g., Phillips, *supra* note 13, at 1335.

110. *Id.*

111. See, e.g., Smothers v. Gresham Transfer, 23 P.3d 333, 356 (Or. 2001) ("The legislature may abolish a common-law cause of action, so long as it provides a substitute remedial process.").

112. See, e.g., Haney v. Int'l Harvester Co., 201 N.W.2d 140, 146 (Minn. 1972) (explaining that the legislature need not provide a substitute remedy if the remedy was eliminated pursuant to a "permissible legislative objective").

113. Kelly & Mello, *supra* note 104, at 518-19; see Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424 (Fla. 1992) ("[T]he legislature may abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an overpowering public necessity for the abolishment of the right, *and* finds that there is no alternative method of meeting such public necessity."); Strahler v. St. Luke's Hosp., 706 S.W.2d 7, 11-12 (Mo. 1986) (en banc) (declaring a medical malpractice

quire a substantially equal alternative to the cause of action or remedy modified or eliminated by the legislature, unless the legislature acted in response to overwhelming or overpowering public necessity.¹¹⁴ The legislature must provide evidence that tort reform is necessary in order to demonstrate that overwhelming public need exists.¹¹⁵ For example, when the Florida legislature abolished the cause of action for alienation of affections, it justified its actions by demonstrating that the cause of action had become "an instrument of extortion and blackmail."¹¹⁶ This satisfied the overwhelming public necessity requirement.¹¹⁷

Unfortunately, confusion concerning the scope of open courts provisions has produced widely disparate state court interpretations.¹¹⁸ Further, courts have failed to consistently apply the open courts provision within their own jurisdiction.¹¹⁹ This confusion raises the question of how state legislatures should balance tort reform efforts that encourage volunteerism among health practitioners with the need to provide negligently injured victims with redress.

This Note examines the civil-liability limitations set forth by section 11 of the UEVHPA under the most common open courts tests and demonstrates that some enacting state legislatures will need to modify section 11 in order for the UEVHPA to survive constitutional challenges based on open courts provisions. Considering the demands of open courts provisions and general policy considerations, this Note argues that states should consider adopting an option different from the two alternatives presented by the UEVHPA in section 11 to encourage VHPs to respond to a public health emergency. The alternatives, which include the state assuming liability for the negligence of VHPs, limit the civil liability of VHPs yet still provide negligently injured victims with a means of recovery.

statute of repose unconstitutional because the cost outweighed the social benefit).

114. See, e.g., *Siegel*, 610 So. 2d at 424 (discussing a showing of overwhelming public necessity).

115. See *Kluger v. White*, 281 So. 2d 1, 4-5 (Fla. 1973).

116. *Rotwein v. Gersten*, 36 So. 2d 419, 421 (Fla. 1948) (en banc).

117. See *id.*

118. E.g., *Kelly & Mello*, *supra* note 104, at 518.

119. See, e.g., *Hale v. Port of Portland*, 783 P.2d 506, 518 (Or. 1989) (Linde, J., concurring) ("This court has written many individually tenable but inconsistent opinions about the remedy clause . . ."), *overruled by Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333 (Or. 2001).

III. THE CONFLICT BETWEEN ENCOURAGING VOLUNTEERISM AMONG HEALTH PRACTITIONERS AND PROVIDING VICTIMS A MEANS OF OBTAINING REDRESS

Because courts interpret open courts provisions in disparate ways, the lack of a substitute remedy for negligently injured victims in section 11 of the UEVHPA may render it unconstitutional without modification in some states. Subsequent Sections of this Note address the constitutionality of section 11 of the UEVHPA pursuant to the ways that courts have interpreted open courts provisions. Considering the demands of open courts provisions and general policy considerations, this Note argues that states should consider adopting an option different from the two alternatives presented by the UEVHPA in section 11 to encourage VHPs to respond to a public health emergency.

A. SECTION 11 OF THE UEVHPA IS LIKELY CONSTITUTIONAL AS WRITTEN IF INTERPRETED BY NONSUBSTANTIVE-CHECK COURTS

In states where courts construe open courts provisions to preserve only procedural rights, not substantive rights,¹²⁰ the UEVHPA almost certainly would be found constitutional. Legislation that endeavors to impact procedural rights is “aimed at some characteristic of the litigation process itself, regardless of its substantive content.”¹²¹ For example, in these states, plaintiffs may base attacks against statutes of limitations or statutes of repose on provisions because such legislation impacts procedural rights.¹²² Section 11, however, does not limit procedural rights.¹²³ Additionally, although some commentators have likened an open courts analysis to a due process analysis,¹²⁴ section 11 does not implicate traditional due process concerns like fair notice and “arbitrary deprivation of property.”¹²⁵ Since section 11 does not create procedural limitations on judicial access, nonsubstantive-check courts would probably declare it constitutional.

120. See, e.g., *Pinnick v. Cleary*, 271 N.E.2d 592, 600 (Mass. 1971); *Kelly & Mello*, *supra* note 104, at 518.

121. *Schuman*, *supra* note 12, at 1203.

122. *Id.*

123. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11 (2007).

124. *Cf.*, e.g., *Saultz v. Funk*, 410 N.E.2d 1275, 1281 (Ohio Ct. App. 1979).

125. See Mark Geistfeld, *Constitutional Tort Reform*, 38 LOY. L.A. L. REV. 1093, 1103 (2005).

Courts that construe open courts provisions as permitting the legislature to eliminate any causes of action that are not vested¹²⁶ would also likely find section 11 constitutional. A cause of action is not vested "until injury actually occurs."¹²⁷ Assuming that a legislature passed the UEVHPA before an emergency situation involving the use of VHPs arose, section 11 would not violate the open courts provision because individuals would not be exposed to the negligence of VHPs before the passage of the UEVHPA.

Finally, section 11 of the UEVHPA would almost certainly be constitutional in those states whose courts recognize no constitutional limitation upon the legislative power to alter or abolish causes of action or remedies based on open courts provisions.¹²⁸ Subsequent Sections of this Note, however, argue that section 11 is likely unconstitutional in substantive-check courts. Additionally, this Note highlights some of the policy concerns implicated by eliminating a victim's right to recover for negligence. It maintains that other alternatives exist to encourage volunteerism, limit the liability of VHPs, and provide victims with a means of obtaining redress.

B. SECTION 11 OF THE UEVHPA IS LIKELY UNCONSTITUTIONAL IN SUBSTANTIVE-CHECK COURTS

In order to ascertain whether section 11 violates open courts provisions as interpreted by substantive-check courts, one must first ask whether the civil-liability limitations implicate a common law cause of action. It is virtually undisputed that "victims of medical negligence have a well-defined common law cause of action to sue for injuries" inflicted upon them as a result of negligent acts or omissions.¹²⁹ Medical malpractice litigation has its roots in early English and American law.¹³⁰ It is a common law cause of action grounded in tort law.¹³¹ The law

126. See, e.g., *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978).

127. *Mathis v. Eli Lilly & Co.*, 719 F.2d 134, 141 (6th Cir. 1983).

128. See, e.g., *Crier v. Whitecloud*, 496 So. 2d 305, 309-10 (La. 1986).

129. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988); see also *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1072 (Ill. 1997).

130. See Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 550 (1959) (noting that the first recorded cases of medical malpractice date to 1374). The earliest recorded American case is *Cross v. Guthery*, 1 Am. Dec. 61 (1794), in which a husband sued a surgeon for damages caused by an unskillful operation on his wife.

131. See RESTATEMENT (SECOND) OF TORTS § 299A (1965) ("[O]ne who undertakes to render services in the practice of a profession or trade is required

of negligence forms the basis for medical malpractice suits,¹³² and the civil liability of health care providers, including VHPs, “is governed by general negligence principles.”¹³³ In order for a plaintiff to recover against a medical practitioner for negligence, the plaintiff must prove that the practitioner owed a duty to the plaintiff, that the practitioner breached that duty, that the breach caused an injury to the plaintiff, and that the plaintiff suffered damages.¹³⁴ Negligence liability may arise from either action or inaction, if either fails to meet the standard of care.¹³⁵

Section 11 of the UEVHPA eliminates a victim’s ability to sue a VHP for a negligent act or omission.¹³⁶ Alternative A of section 11 also bars a victim from recovering from a VHP’s host agency or the state through vicarious liability.¹³⁷ Because the UEVHPA eliminates a victim’s right to sue for negligence, the UEVHPA implicates the right to recover under a common law cause of action.¹³⁸ Therefore, substantive-check courts would likely hold that section 11 of the UEVHPA triggers an open courts provision analysis. This Note evaluates section 11 under the two tests that substantive-check courts most frequently employ.

to exercise the skill and knowledge normally possessed by members of that profession or trade.”).

132. See Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1193.

133. BARRY R. FURROW ET AL., HEALTH LAW 264 (2000).

134. Cf. Frank A. Sloan, *Setting the Stage*, in FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 1, 5–6 (1993) (discussing the differences and similarities between medical malpractice and other forms of liability).

135. See FRANK P. GRAD, THE PUBLIC HEALTH LAW MANUAL 270 (3d ed. 2005).

136. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11 (2007).

137. See *id.*

138. Cf. *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988) (holding that a statutory limitation on medical malpractice damages violated open courts provision of the Texas Constitution where medical negligence was a well-defined common law cause of action and the litigant was able to show that the restriction was “unreasonable or arbitrary when balanced against the purpose and basis of the statute”); see also *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1072 (Ill. 1997) (“[T]he right to recover for injuries arising from medical malpractice existed at common law.”).

1. Section 11 of the UEVHPA Is Likely Unconstitutional Under a Quid Pro Quo Test

When analyzing a claim under open courts provisions, courts employing a quid pro quo test must first determine whether the common law recognized a cause of action for the alleged injury.¹³⁹ As stated above, at common law, individuals had a cause of action to sue if they were negligently injured by health care practitioners.¹⁴⁰ Therefore, if a state legislature adopts the UEVHPA in its model form, it eliminates a negligently injured victim's right to recover under the common law cause of action of negligence. Under a quid pro quo test, courts then ask whether the legislature provided a "constitutionally adequate substitute remedy" in place of the abolished cause of action.¹⁴¹ Despite the fact that the UEVHPA eliminates a negligently injured victim's right to recover against a VHP, it does not propose a substitute remedy.¹⁴² For instance, it does not suggest that states consider adopting a remedial process to provide redress to negligently injured individuals.¹⁴³

The comments to section 11 indicate that the drafters believed that by adopting civil-liability limitations for VHPs, emergency medical services would be "more readily available."¹⁴⁴ Although section 11 might prompt a larger response by VHPs, the greater availability of medical care does not serve as a substitute for a cause of action for negligence. It does not compensate victims or provide them with a means of obtaining redress.

Therefore, under the quid pro quo test, section 11 of the UEVHPA is almost certainly unconstitutional. Enacting legislatures, however, could modify section 11 and insert their own substitute alternative remedy. Alternatives that limit the liability of VHPs for negligence and, accordingly, encourage vol-

139. See, e.g., *Smother v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001).

140. See, e.g., *Lucas*, 757 S.W.2d at 690; see also *Taylor Mach. Works*, 689 N.E.2d at 1072.

141. *Smother*, 23 P.3d at 356-57.

142. Cf. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11.

143. The workers' compensation system is one example of a remedial process. It substitutes recovery from a fund for the common law cause of action of negligence against an employer for work-related injuries. See MARK A. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 405-06 (1994).

144. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11 cmt. 2 at 43.

unteerism, yet still make a means of redress available to negligently injured victims, are set forth below.

2. Section 11 of the UEVHPA Is Likely Unconstitutional Under a Balancing Test

The UEVHPA does not propose any alternatives, let alone *reasonable* alternatives, to provide redress for injuries.¹⁴⁵ Therefore, in order for section 11 to pass constitutional muster under the balancing test, the legislature must demonstrate that an overpowering public necessity prompted the passage of this legislation and that no reasonable alternatives exist that would meet the necessity and provide negligently injured victims with a remedy.¹⁴⁶

a. No Overwhelming Public Necessity Justifies Barring Recovery for an Individual Negligently Injured by a VHP

One stated purpose of the UEVHPA is “to establish a robust and redundant system to quickly and efficiently facilitate the deployment and use of licensed practitioners to provide health and veterinary services in response to declared emergencies.”¹⁴⁷ While promoting volunteerism is a laudable goal, limiting the civil liability of VHPs by eliminating a negligently injured victim’s mean of recovery is not an overwhelming public necessity.

Some proponents of the UEVHPA claim that unless civil-liability limitations are put in place to protect VHPs, “the country runs the very real risk that there will not be sufficient healthcare volunteers to provide the necessary medically-related care” in the event of an emergency.¹⁴⁸ Reports suggest, however, that the volunteer response to Hurricane Katrina was overwhelming.¹⁴⁹ Indeed, the drafters of the UEVHPA noted

145. *Cf. id.* § 11.

146. *E.g. Kluger v. White*, 281 So. 2d 1, 4–5 (Fla. 1973).

147. *See* UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 1.

148. Letter from William F. Causey, Assistant Gen. Counsel, Am. Red Cross, and Gene W. Matthews, Senior Fellow, N.C. Inst. for Pub. Health, to Raymond R. Pepe, Chair, UEVHPA Drafting Comm. (July 11, 2007), *available at* http://www.uevhp.org/Uploads/UEVHPA_CuaseyMatthewComments_071110.pdf.

149. *See, e.g., Hodge, supra* note 21, at 633 (stating that “[f]ortunately, volunteer health personnel were available” to respond to Hurricane Katrina); Marilyn Marchione, *Red Tape Delays Volunteer Doctors*, SEATTLE TIMES, Sept. 5, 2005, at A9.

that data was unavailable to determine “the actual impact of liability concerns upon rates of volunteerism” in response to Hurricane Katrina.¹⁵⁰ Individuals responded from around the country to provide much-needed services.¹⁵¹ Although some may have hesitated to help for fear of being sued,¹⁵² many VHPs responded to the emergency but were prevented from rendering emergency medical services because of uncertainty regarding licensure and registration requirements.¹⁵³ Additionally, some health practitioners wanted to respond but were not deployed because of coordination problems.¹⁵⁴ Medical schools attempted to send volunteers to the Gulf Coast, but the federal government failed to utilize their proffered contributions.¹⁵⁵ Their reports suggested that barriers posed by bureaucracy and failed communication, not concerns regarding the civil liability of VHPs,¹⁵⁶ hampered the volunteer response.

Second, despite the fact that the emergency-care challenges posed by Hurricane Katrina in large part instigated the drafting of the UEVHPA, the media has not widely reported accounts of VHPs being sued for negligence in the context of providing emergency medical services to the hurricane victims.¹⁵⁷ Although plaintiffs have filed a cascade of lawsuits against insurance companies in connection with property damage caused by the hurricane,¹⁵⁸ relatively few suits have been filed against

150. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 7.

151. See Crystal Franco et al., *Systemic Collapse: Medical Care in the Aftermath of Hurricane Katrina*, 4 *BIOSECURITY & BIOTERRORISM* 135, 135 (2006); Season Cooley, *First-Time Volunteer Calls Experience “Above Expectations,”* AM. RED CROSS NEWS, Sept. 28, 2005, http://www.redcross.org/article/0,1072,0_272_4673,00.html.

152. Nevius, *supra* note 43; see also Interview with James G. Hodge, Jr., *supra* note 38 (stating that VHPs “want to know if they will be held personally responsible if something goes wrong while providing emergency aid”).

153. See Marchione, *supra* note 149 (noting that some offers of help were turned away due to red tape and bureaucracy).

154. Franco et al., *supra* note 151, at 139.

155. See *id.* at 140.

156. The UEVHPA provides, at best, anecdotal evidence that concerns regarding civil liability hampered the volunteer response. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 6–7 (2007).

157. In a rare case, a doctor and two nurses were arrested in connection with the deaths of elderly patients in the aftermath of the hurricane. Rick Jarvis, *Charges Against La. Doctor Dropped*, USA TODAY, July 25, 2007, at 3A. The UEVHPA would not have afforded them protection because it only limits the civil liability of VHPs, not regular hospital staff. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11.

158. See, e.g., Laura Parker, *After Katrina, Courts Flooded by Lawsuits*,

health practitioners. Notably, the drafters of the UEVHPA determined that data are not available to determine “whether and to what extent volunteer health practitioners have actually been subject to liability claims.”¹⁵⁹ Most of the hurricane-related wrongful-death suits that have been filed named only hospitals,¹⁶⁰ nursing homes,¹⁶¹ and corporations as defendants,¹⁶² not individual VHPs. Most of these claims are grounded in alleged corporate negligence and a failure to evacuate and provide transportation.¹⁶³ In fact, the most highly publicized account of alleged negligence implicates caregivers, not VHPs.¹⁶⁴

Third, many of the concerns voiced about the use of VHPs in the aftermath of Hurricane Katrina revolved around licensing and registration issues, not civil-liability issues.¹⁶⁵ Many volunteers were already registered through the Emergency System for Advanced Registration of VHPs program.¹⁶⁶ Nevertheless, in an attempt to encourage volunteerism, the U.S. Department of Health and Human Services (HHS) created a registration website, which confused some VHPs.¹⁶⁷ Other websites were established to facilitate registration and licensure verification, but VHPs were delayed while HHS verified

USA TODAY, Jan. 15, 2006, at 1A.

159. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 7.

160. See, e.g., *Preston v. Tenet Healthsys. Mem'l Med. Ctr., Inc.*, 485 F.3d 793 (5th Cir. 2007); *Vucinovich v. Chalmette Med. Ctr., Inc.*, No. 06-7371, 2007 WL 2710830 (E.D. La. Sept. 12, 2007).

161. See Peter Whoriskey, *Nursing Home Owners Acquitted in Katrina Deaths*, WASH. POST, Sept. 8, 2007, at A3.

162. See, e.g., *Preston*, 485 F.3d 793; *Vucinovich*, 2007 WL 2710830; *La-Coste v. Pendleton Methodist Hosp.*, 966 So. 2d 519 (La. 2007).

163. See *Louisiana Hurricane Katrina Wrongful Death Lawsuit Not Considered Medical Malpractice Case*, USLEGAL REP., Sept. 7, 2007, <http://reporter.uslegal.com/category/wrongful-death/>. Corporate negligence is a theory “based on the assumption that hospitals are responsible for the general care and treatment of their patients.” Hodge, *Risk Management*, *supra* note 33, at 70.

164. See Shaila Dewan & Al Baker, *Owners of Nursing Home Charged in Deaths of 34*, N.Y. TIMES, Sept. 14, 2005, at A1.

165. See Nevius, *supra* note 43.

166. Franco et al., *supra* note 151, at 140.

167. See *id.*

their credentials.¹⁶⁸ The UEVHPA resolves these licensing and registration issues.¹⁶⁹

In sum, while it is important to encourage volunteerism and a speedy and efficient response to emergency situations, concerns regarding the potential civil liability of VHPs do not rise to the level of overwhelming public necessity that would justify eliminating a negligently injured victim's means of recovery. While "[v]irtually all public health action in any context burdens some individual or group of individuals,"¹⁷⁰ state legislatures should seek to strike a balance by enacting legislation that both limits the civil liability of VHPs and minimizes the burden placed on negligently injured victims.

The subsequent Section of this Note explains that tort reform efforts that eliminate a means of recovery for negligently injured victims likely have a disproportionate, undesirable impact on vulnerable populations. Even if overwhelming public necessity exists, legislatures should be aware of the potential negative implications of eliminating an injured victim's right to recover for negligence.

b. Legislatures Should Enact the UEVHPA with Significant Changes to Section 11

Disasters affect entire communities, but certain demographic groups bear a disproportionate share of the burden.¹⁷¹ For instance, race and class served as reliable indicators for who suffered most of the devastating effects of Hurricane Katrina.¹⁷² In particular, disasters "disproportionately hit" the poor.¹⁷³ When Hurricane Katrina struck, most of the people left behind in New Orleans were poor, black individuals who lacked transportation to leave the city.¹⁷⁴ Those who are most vulner-

168. Cf. HHS to Seek Hospitals' Help in Staffing Emergency Medical Centers, AHA NEWS, Sept. 30, 2005, http://www.ahanews.com/ahanews_app/hospitalconnect/search/article.jsp?dcrpath=AHANEWS/AHANewsNowArticle/data/ann_050831_HHS&domain=AHANEWS.

169. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 5 (2007).

170. De Ville, *supra* note 36, at 317.

171. See FARBER & CHEN, *supra* note 4, at 109–10.

172. CTR. FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA 34–35 (2005), http://www.progressivereform.org/Unnatural_Disaster_512.pdf.

173. FARBER & CHEN, *supra* note 4, at 112; see also Jonathan Alter, *The Other America*, NEWSWEEK, Sept. 19, 2005, at 42.

174. See WALTER M. BRASCH, 'UNACCEPTABLE': THE FEDERAL RESPONSE TO HURRICANE KATRINA 13, 50 (2006); Jason DeParle, *What Happens to a Race*

able—that is, least able to prepare for and recover from a natural disaster—are most at risk for devastating injury to life and limb.¹⁷⁵ Additionally, over sixty percent of the bodies recovered after Hurricane Katrina were individuals over sixty years old and many were found in nursing homes and hospitals.¹⁷⁶

Those vulnerable individuals are, accordingly, more likely to be negligently injured while receiving care from a VHP because they are more likely to need the services of VHPs. Legislation that shapes “public health policy and practice should never occur without careful consideration of the burden such policies would have for the rights of individuals.”¹⁷⁷ State legislatures should consider whether eliminating a right to recover for negligence is a prudent option, in light of what is known about social vulnerability and natural disasters. In this case, public policy concerns are particularly compelling because other alternatives exist to encourage volunteerism, protect VHPs from negligence liability, and provide redress for victims.

Although encouraging volunteerism among health practitioners may benefit the health of a community impacted by a disaster or emergency, limiting a negligently injured victim’s means of recovery adversely affects the individual *and* the community.¹⁷⁸ Unless they have a means of obtaining redress, victims will likely require increased economic and medical support from their communities.¹⁷⁹ Because opportunities exist to lessen the negative impacts on public health and meet the needs of VHPs, legislatures in both substantive-check and non-substantive-check states should carefully consider the alternatives set forth below in the solution Section.

Further, because state courts interpret open courts provisions inconsistently and in disparate ways, state legislatures may be unsure about the approach their courts will take to evaluate section 11. It is sound public policy to promote volunteer-

Deferred, N.Y. TIMES, Sept. 4, 2005, § 4, at 1.

175. See BRASCH, *supra* note 174, at 36.

176. See Robert A. Mead, *St. Rita’s and Lost Causes: Improving Nursing Home Emergency Preparedness*, 7 MARQ. ELDER’S ADVISOR 153, 154 (2006).

177. Ronald Bayer, *Tom Stoddard, Public Health, and Civil Liberties: A Remembrance*, 72 N.Y.U. L. REV. 1034, 1036 (1997).

178. See GOSTIN, *supra* note 17, at 12 (“A direct relationship exists between the health of each individual and the health of the community at large. After all, the well-being of the whole may be accomplished by little more than assuring the health of each individual.”).

179. Cf. John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1064–68 (2003) (explaining social disparities and distributive justice).

ism among VHPs. As set forth below, however, both the need to encourage volunteerism and the need to offer negligently injured victims a means of recovery may be accommodated.

c. Even if Overwhelming Public Necessity Exists, Alternative Methods Exist to Meet Such Necessity

This Note sets forth and examines three alternative solutions that limit the civil liability of VHPs yet still provide negligently injured victims with a means of recovery. Each option could serve as an alternative to the options set forth in section 11 for states adopting the UEVHPA. Because the UEVHPA is a model act designed to be adopted by state legislatures, these proposed alternatives are directed towards policymakers responsible for drafting state legislation based on the UEVHPA. This Note suggests that although each alternative is viable, the third alternative—state assumption of liability for the negligence of VHPs—is the most attractive option available to state legislatures seeking to balance the needs of victims and VHPs.

i. Limited Recovery Under a Victim Compensation Fund

Some commentators have proposed that victims of public health disasters such as Hurricane Katrina and the Minneapolis I-35 bridge collapse be compensated through the administration of victim compensation funds.¹⁸⁰ One example of such a fund is the September 11, 2001 Victim Compensation Fund (the Fund), which Congress established to “provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001.”¹⁸¹ Initial plans for the Fund capped recovery for victims at the amount of liability insurance held by the airlines. Some members of Congress, however, argued that “Congress could not limit the rights of the victims *without providing an alternative remedy*.”¹⁸² In its final form, the Fund dispensed substantial damages to victims

180. Pam Louwagie, *How Should State Help Rebuild Lives?*, STAR TRIB. (Minneapolis, Minn.), Oct. 26, 2007, at A1; Jennifer Barrett, ‘A Right to Rebuild,’ NEWSWEEK, Jan. 13, 2006, <http://www.newsweek.com/id/47297/page/1>.

181. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001) (codified as amended at 49 U.S.C. § 40101 (Supp. II 2002)). See generally Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135 (2005).

182. Ackerman, *supra* note 181, at 143 (emphasis added).

through a speedy, no-fault administrative compensation process.¹⁸³

Individuals who suffered physical harm or death and families of those who died were eligible for compensation.¹⁸⁴ Fund claimants waived the right to sue “for injuries sustained in the September 11th tragedy.”¹⁸⁵ Ninety-seven percent of “those eligible to file death claims with the Fund” chose to do so.¹⁸⁶ Victims who presented claims to the Fund in a timely fashion and followed procedures were virtually assured some means of recovery.¹⁸⁷ Individuals who attempted to pursue a remedy in the courts may not fare as well.¹⁸⁸

Although there are benefits to allowing limited recovery under a no-fault fund, some commentators maintained that the Fund involved a backdoor effort at tort reform because it was constructed to curtail litigation.¹⁸⁹ The Fund was also criticized because it did not provide a mechanism for review of determinations or awards made by the Fund administrator.¹⁹⁰

Even though the Fund appears to have worked relatively well, as evidenced by the high rate of participation,¹⁹¹ Congress is unlikely to institute a fund to provide compensation for victims of disasters and public health emergencies.¹⁹² Although some commentators have suggested otherwise and maintained that the Fund could be used as a model for future disaster relief,¹⁹³ the Fund was the product of unique circum-

183. *Id.* at 144.

184. *Id.*

185. *Id.* at 145.

186. *Id.* at 137.

187. See Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. PA. L. REV. 1605, 1617–18 (2007) (describing the Special Master’s strategy of approximating tort remedies in the administration of the Fund).

188. Individual plaintiffs “(assuming that they can recover in tort) will have to share that coverage with other claimants, including personal injury victims not eligible for relief from the Fund.” Ackerman, *supra* note 181, at 190.

189. See, e.g., A. David E. Balahadia, Note, *Preparations for a Storm: A Proposal for Managing the Litigation Stemming from September 11th, 2001*, 4 PEPP. DISP. RESOL. L.F. 61, 66–67 (2003).

190. See Ackerman, *supra* note 181, at 138–39.

191. See *id.* at 137.

192. See KENNETH R. FEINBERG, WHAT IS LIFE WORTH? 178 (2005) (“[I]t would be a mistake for Congress or the public to take the 9/11 fund as a precedent for similar programs.”).

193. See, e.g., Linda S. Mullenix, *The Future of Tort Reform: Possible Lessons from the World Trade Center Victim Compensation Fund*, 53 EMORY L.J.

tances.¹⁹⁴ Unlike the relatively rare instances of terrorism on American soil, natural disasters are increasing in intensity and frequency,¹⁹⁵ and Congress may be unwilling to operate a fund on a large scale. This view is strengthened by the fact that Congress has not even compensated other victims of terrorism, such as those who were injured or killed in the Oklahoma City bombing, the attacks against the USS *Cole*, or the African Embassy bombings.¹⁹⁶ Furthermore, unlike the September 11 attacks, Hurricane Katrina and other natural disasters are, to some extent, acts of nature that may not be attributable to foreign attackers or actions taken by the United States government.¹⁹⁷ Therefore, states cannot rely on Congress to establish a fund that would compensate victims of public health disasters. Additionally, because the UEVHPA is model legislation that can only be adopted by individual states and not Congress, state legislatures will need to consider how to create and administer funds at the state level.

A victim compensation fund created at the state level may be difficult to administer to compensate solely those individuals who are negligently injured by VHPs and not all victims of public health disasters or emergencies. Victim compensation funds are well suited to dispensing compensation to large groups of people and awarding funds based solely on the presence of any injury.¹⁹⁸ Conversely, the administration of hypothetical state compensation funds will be hampered if the fund administrator has to make distinctions between injuries incurred as a result of a disaster and injuries incurred as a result of negligence by VHPs.¹⁹⁹

1315, 1317–18 (2004).

194. Robert S. Peck, *The Victim Compensation Fund: Born from a Unique Confluence of Events Not Likely to Be Duplicated*, 53 DEPAUL L. REV. 209, 210 (2003).

195. FARBER & CHEN, *supra* note 4, at 113.

196. See Dick Meyer, *Fairness Where There Is None*, CBS NEWS, Jan. 10, 2002, <http://www.cbsnews.com/stories/2002/01/10/politics/main323956.shtml>.

197. See Faith J. Jackson, *A Streetcar Named Negligence in a City Called New Orleans—A Duty Owed, a Duty Breached, a Sovereign Shield*, 31 T. MARSHALL L. REV. 557, 558 (2006). *But see* TED STEINBERG, *ACTS OF GOD: THE UNNATURAL HISTORY OF NATURAL DISASTER IN AMERICA* 97–115 (2000) (arguing that the federal government plays a role in natural disasters by encouraging people to build homes in disaster-prone areas like floodplains).

198. See Farber, *supra* note 187, at 1618 (suggesting that the Fund worked well because “screening claimants was not a major problem”).

199. *Cf.* Ackerman, *supra* note 181, at 161 (noting the difficulty of distinguishing between victims suffering from exposure to toxic dust and those who suffered “more immediate non-fatal injuries” after September 11th).

Therefore, a state that chooses to create a victim compensation fund would likely be forced to compensate *all* victims of disasters and public health emergencies. State legislatures would have to consider who would contribute to the fund, whether it would be funded by taxpayer dollars or funds from insurance companies, and how it would be administered. This is no small task. Accordingly, while a victim compensation fund is one option available to state legislatures seeking to limit the civil liability of VHPs in order to encourage volunteerism and still provide negligently injured victims a means of recovery, it may not be the most viable option.

ii. A No-Fault Compensation Scheme Administered Through a Special Court

No-fault compensation schemes have sparked the interest of those who advocate for alternatives to tort litigation.²⁰⁰ Some states have implemented these schemes in order to partially supplant existing tort law.²⁰¹ By “turning the focus away from causation,” no-fault compensation schemes “make compensation more predictable and limit the effects of arbitrary or subjective decision-making” on the award of funds.²⁰² The most well-known example of a no-fault compensation scheme is the workers’ compensation system.²⁰³ The system compensates employees who are injured in the scope of their employment and protects employers from liability through a no-fault system.²⁰⁴

200. See, e.g., Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 75 n.1 (1993) (citing Jeffrey O’Connell, *Neo-No-Fault: A Fair Exchange Proposal for Tort Reform*, in NEW DIRECTIONS IN LIABILITY LAW 186, 188–89 (Walter Olson ed., 1988)).

201. For example, Florida created the Birth-Related Neurological Injury Compensation Association (NICA) to resolve claims arising out of birth-related neurological injuries. See The Florida Birth-Related Neurological Injury Compensation Association, What is NICA?, <http://www.nica.com/what-is-nica.html> (last visited Apr. 27, 2008).

202. Naomi Seiler et al., *Legal and Ethical Considerations in Government Compensation Plans: A Case Study of Smallpox Immunization*, 1 IND. HEALTH L. REV. 1, 21 (2004).

203. See MARSHALL S. SHAPO, TORT AND INJURY LAW 1199–240 (2d ed. 2000). Other examples include specific types of mass-tort litigation and no-fault automobile insurance plans. See James C. Harris, Comment, *Why the September 11th Victim Compensation Fund Proves the Case for a New Zealand-Style Comprehensive Social Insurance Plan in the United States*, 100 NW. U. L. REV. 1367, 1369 n.9, 1384 (2006).

204. See Amy Widman, *Why Health Courts Are Unconstitutional*, 27 PACE L. REV. 55, 63 (2006).

Although workers' compensation systems eliminate the common law remedy of negligence for workers who are injured in the scope of their employment, they also provide an alternative means of recovery.²⁰⁵ Employers pay premiums to an insurance company or a state fund, and when an employee is injured, the employee receives compensation from the insurance company or the fund.²⁰⁶

The push to create special "health courts" based on the workers' compensation system to handle all medical malpractice disputes is a relatively new tort reform phenomenon.²⁰⁷ Health courts would be staffed by judges who are experts in the health care field and, after hearing expert testimony, those judges would make "binding determinations as to causation, compensation, standards of care, and related issues."²⁰⁸ The patient would be eligible for compensation after the administrative judge rules in his favor.²⁰⁹ Adoption of a health-court system is controversial for a number of reasons, predominantly because it proposes to funnel a large body of litigation into a system that is separate from the conventional judicial process.²¹⁰

Creating a no-fault compensation scheme involving a special court to handle all medical malpractice disputes relating to the use of VHPs is probably less controversial than adopting a health-court system to handle all medical malpractice litigation. First, potential claims against VHPs would likely

205. See, e.g., *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 677 (Utah 1985).

206. See, e.g., Robin Jean Davis & Louis J. Palmer, Jr., *Workers' Compensation Litigation in West Virginia: Assessing the Impact of the Role of Liberality and the Need for Fiscal Reform*, 107 W. VA. L. REV. 43, 52 n.46 (2004) (describing three sources of funding for workers' compensation systems today).

207. Congress, in 2005, introduced the Fair and Reliable Medical Justice Act to fund health court pilot projects. See S. 1337, 109th Cong. §§ 2-3 (2005). Twenty states already have screening panels that assess the validity of malpractice claims. Catherine T. Struve, *Improving the Medical Malpractice Litigation Process*, 23 HEALTH AFF. 33, 35 (2004). These panels, however, provide no liability limitations for health practitioners and have been criticized on several grounds. See Marlynn Wei, Note, *Doctors, Apologies, and the Law: An Analysis and Critique of Apology Laws*, 40 J. HEALTH L. 107, 156 (2007) (noting that screening panels have "added another layer of bureaucracy, exacerbated the cost of litigation, and contributed to more delays").

208. Widman, *supra* note 204, at 58.

209. See *id.* at 61.

210. Cf. Paul J. Barringer, III, *A New Prescription for America's Medical Liability System*, 9 J. HEALTH CARE L. & POL'Y 235, 250 (2006) (explaining that personal injury lawyers oppose administrative health courts as a "threat to the status quo").

represent a small subset of all medical malpractice litigation.²¹¹ Adoption of a special court to resolve these claims would probably not prompt widespread criticism on the level of that created by a proposed health-court system for all malpractice litigation. Second, plaintiffs would have a reliable means of recovery, yet liability concerns would be minimal because punitive damages are traditionally not available in a no-fault compensation scheme.²¹² Finally, creating a special court to administer a no-fault compensation scheme to resolve malpractice claims arising out of treatment by VHPs would not likely involve significant administrative oversight.²¹³

Although creating a special court to administer a no-fault compensation scheme is an option for states considering adopting the UEVHPA, a number of factors suggest that it may not be the most viable alternative. Many of the issues inherent in the use of a victim compensation fund, such as who should pay into the fund and how large the fund should be, would also arise if states were to create a special court to administer a no-fault compensation scheme. State legislatures may be wary of creating a special court to resolve medical malpractice disputes involving VHPs because there are few working models of medical malpractice courts.²¹⁴ Additionally, although the special court would only need to be utilized rarely, its creation would still involve substantial set-up costs. Administrative costs could rise if the use of VHPs is encouraged and injured parties file more claims as a result of their use.

In sum, creating a victim compensation fund or a special court to administer a no-fault compensation scheme are reasonable alternatives to eliminating a victim's means of recovery under section 11 of the UEVHPA but may not be the most viable alternatives available to state legislatures. In the following Part, this Note argues that states should instead assume liabil-

211. Cf. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT prefatory note 7 (2007) (noting a lack of data on claims against VHPs).

212. See Victor E. Schwartz & Rochelle M. Tedesco, *The Re-Emergence of "Super Strict" Liability: Slaying the Dragon Again*, 71 U. CIN. L. REV. 917, 932 (2003).

213. Cf. Widman, *supra* note 204, at 59 (describing the significant role experts will play under an administrative-health-court model, and suggesting that decisions would be subject to the arbitrary and capricious standard of review).

214. See Common Good, *Frequently Asked Questions About Health Courts*, <http://cgood.org/f-healthcourtsfaq.html> (last visited Apr. 27, 2008) (noting that advocates of health courts are still in the process of developing a conceptual proposal for a health court system).

ity for the negligence of VHPs, which would limit the civil liability of VHPs while still providing victims a means of obtaining redress.

IV. STATE ASSUMPTION OF LIABILITY FOR THE NEGLIGENCE OF VHPS

In the past, governments have “enjoyed near absolute protection—or sovereign immunity—for most types of suits for damages.”²¹⁵ Many governments, however, have waived immunity under tort claims acts and have allowed individuals to sue the government in certain limited situations.²¹⁶ For example, in 1976, the United States launched a campaign to vaccinate the nation against Swine Flu.²¹⁷ When individuals later developed complications from the vaccine, the federal government immunized vaccine manufacturers and assumed liability under the Federal Tort Claims Act for all claims arising out of Swine Flu vaccinations.²¹⁸ Additionally, states have waived sovereign immunity in situations involving the negligence of county officers, agents, and employees.²¹⁹ In general, a state is vicariously liable for the acts of its employees through the doctrine of respondeat superior.²²⁰

Neither Alternative A nor Alternative B in section 11 of the UEVHPA provides that the state is vicariously liable for the negligent acts of VHPs.²²¹ Indeed, Alternative A expressly fore-

215. De Ville, *supra* note 41, at 530.

216. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1044 (5th ed. 1984). The Federal Tort Claims Act permits parties to sue the United States for certain torts committed by persons acting on behalf of the United States. See 28 U.S.C. § 1346(b)(1) (2000). Liability is limited to “circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” *Id.*

217. George W. Conk, *Will the Post 9/11 World Be a Post-Tort World?*, 112 PENN ST. L. REV. 175, 237 (2007).

218. *Id.* at 238.

219. See, e.g., S.C. CODE ANN. § 15-78-40 (2007).

220. See Abigail Hing Wen, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1566 (2003).

221. See UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11, Alternative A, subsec. (b), at 39 (2007) (“No person is vicariously liable for damages for an act or omission of a volunteer health practitioner if the practitioner is not liable for the damages under subsection (a).”); *cf. id.* § 11, Alternative B, at 40–41 (failing to include any provision holding states vicariously liable for the acts of VHPs).

closes that possibility.²²² The April 2007 Draft of the UEVHPA, however, contained a third alternative that stated VHPs were deemed to be agents or employees of the state while providing services pursuant to the UEVHPA.²²³ Although VHPs were still protected from negligence liability, the alternative stated that “the state may be named as defendant and is liable for the payment of any judgment” based upon the negligence of the VHP.²²⁴ It also provided that no person or entity other than the state was vicariously liable for damages arising out of a VHP’s negligence.²²⁵ Essentially, the state would be vicariously liable for a VHP’s negligence through the doctrine of respondeat superior.²²⁶ The final version of the UEVHPA, however, does not contain state assumption of liability as an alternative.²²⁷ It is unclear why the drafters omitted an assumption-of-liability provision from the final version of the UEVHPA.

A. ENACTING THE ASSUMPTION-OF-LIABILITY ALTERNATIVE

Unlike establishing a fund or creating a special court, adopting this alternative only requires the drafter substitute language providing that the state may be named as a defendant under section 11, in lieu of adopting Alternative A or Alternative B. This solution is simple to enact because the drafter of a bill to adopt the UEVHPA need only substitute the state assumption of liability solution for Alternative A or Alternative B in the bill introduced in the state legislature. Such language might appear in the following model provisions:

- (a) Subject to subsection (c), a volunteer health practitioner who provides health or veterinary services pursuant to this [act] is not liable for the payment of a judgment based on an act or omission of the practitioner in providing those services and may not be named as a

222. *Id.* § 11, Alternative A, subsec. (b), at 39.

223. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11, Alternative A, subsec. (a) (Proposed Draft Apr. 2007), <http://www.law.upenn.edu/bll/archives/ulc/uiehsa/2007apr6draft.htm>. This language was also included in the comments of the final version of the Act. *See* UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11 cmt. 4 at 46.

224. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11, Alternative B, subsec. (a) (Proposed Draft Apr. 2007).

225. *Id.* § 11, Alternative B, subsec. (b).

226. *Cf.* Hodge, *Risk Management*, *supra* note 33, at 74 (discussing VHPs and hospital liability under the doctrine of respondeat superior).

227. *See* UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11, at 39–41. Instead, the comments to the UEVHPA indicate that some states may choose to provide victims a means of recovery through the assumption of liability. *Id.* § 11 cmt. 4 at 46. The comments, however, do not indicate how a state should determine whether to assume liability. *See id.*

defendant in an action based on such an act or omission. However, a volunteer health practitioner is deemed to be an agent or employee of this state under [cite the state tort claims act] while providing health or veterinary services pursuant to this [act], and the state may be named as defendant and is liable for the payment of any judgment based upon an act or omission of the practitioner as provided in [the tort claims act].

(b) No person other than this state is vicariously liable for damages for an act or omission of a volunteer health practitioner if the practitioner is not liable for the payment of a judgment based on the act or omission under subsection (a).

(c) This section does not limit the liability of a volunteer health practitioner for:

- (1) willful, wanton, grossly negligent, reckless, or criminal conduct;
- (2) an intentional tort;
- (3) a claim for breach of contract;
- (4) a claim asserted by a host entity or by an entity located in this or another state which employs or uses the services of the practitioner;
- (5) an act or omission relating to the operation of a motor vehicle, vessel, aircraft, or other vehicle for which this state requires the operator to have a valid operator's license or to maintain liability insurance, other than an ambulance or other emergency response vehicle, vessel, or aircraft operated by the practitioner while providing health or veterinary services or transportation pursuant to this [act].²²⁸

Essentially, this language states that VHPs function as state employees during a public health emergency, and that the state agrees to assume liability for their negligence. Victims may still sue VHPs for intentional torts, and the state does not agree to assume liability for those claims. Because the state agrees to be named as a defendant, this language provides a clear, alternative remedy for states whose courts have construed open courts provisions as providing substantive checks against legislative tort reform efforts. Further, from a public policy perspective, state assumption of liability is preferable because it avoids burdening vulnerable populations. Therefore, this alternative is also a viable option for states whose courts have construed open courts provisions as not providing substantive checks against tort reform.

Expanding on the language of the April 2007 draft, states contemplating adopting the assumption-of-liability alternative may also consider modifying this solution slightly to streamline the litigation process, reduce the discovery burden on plaintiffs, facilitate settlement, or conserve judicial resources. The deci-

228. UNIF. EMERGENCY VOLUNTEER HEALTH PRACTITIONERS ACT § 11, Alternative B, subsecs. (a)–(c) (Proposed Draft Apr. 2007) (alteration in original).

sion to modify the alternative solution should be governed by knowledge of the state's judicial system, docket length, and other judicial management systems already in place.

For example, states could include language in the bill adopting the UEVHPA that helps judges manage pretrial discovery, settlement talks, and summary judgment motions.²²⁹ Instead of creating a special health court to hear medical malpractice cases or cases involving the UEVHPA, states could implement "continuing judicial education" programs that train[] judges in case management skills and equip[] judges to assess the qualifications of medical, statistical, and economic experts."²³⁰ Additionally, states could create a division of their trial court system to hear cases involving the UEVHPA. Regular trial court judges could serve a rotation in the specialized division.²³¹ While serving, "judges could receive special training and would gain concentrated exposure to medical liability cases. Because the judges would be elected within the general pool of trial judges, political pressures would be reduced."²³² This system would likely be more workable in urban areas with a plentiful pool of judges than in rural areas.²³³ For states that already mandate continuing judicial education or trial court rotations, these requirements could be adopted easily.²³⁴

States that do not already have continuing judicial education programs or trial court divisions in place may be wary of imposing new requirements on the judiciary until they determine how often cases involving the UEVHPA will proceed to trial. Litigation resulting from public health emergencies or disasters, however, will involve "a finite number of courts, staffed by a handful of judges, with resources that are already spread extraordinarily thin."²³⁵ Case management procedures, including creating a trial court division to hear cases involving

229. Cf. Catherine T. Struve, *Expertise and the Legal Process*, in *MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM* 173, 175 (William M. Sage & Rogan Kersh eds., 2006) (discussing the importance of the pretrial process, which helps the judge "manage pretrial discovery and settlement talks and to address motions for summary judgment").

230. *Id.* at 177.

231. *Id.*

232. *Id.*

233. *Id.*

234. *See id.*

235. Robert M. Pestronk et al., *Public Health in Court: Who's to Judge?*, 32 *J.L. MED. & ETHICS* 47, 49 (Special Supp. 2004) (comments of J. Shields).

the UEVHPA, “will allow the courts and judges . . . to respond responsibly, appropriately, and efficiently.”²³⁶

States should embrace the maxim that “an ounce of prevention is worth a pound of cure,”²³⁷ particularly when the benefits of doing so extend beyond the realm of the UEVHPA. Public health emergencies, terrorist attacks, and other situations implicate similar “legal and operational” issues.²³⁸ Accordingly, states that prepare their judicial system for handling cases involving the UEVHPA are more likely to be prepared for the onslaught of cases following natural disasters, an influenza pandemic, or acts of biological terrorism.

Additionally, the bill could specifically provide that judges may use mediators during the pretrial process. “Mediation is a confidential, voluntary process in which an impartial third party—the mediator or, at times, comediators—works with parties in a dispute to help them negotiate a resolution to their conflict.”²³⁹ Unlike binding arbitration, mediation allows participants—in this case, the state and injured plaintiffs—to discuss all issues relevant to settlement and compensation without triggering “the due process concerns raised by agreements for binding arbitration.”²⁴⁰ One benefit to using mediation to settle after both sides “have had time to evaluate the merits of a claim” is that it allows parties to avoid the emotional and economic costs of discovery.²⁴¹ Mediation to facilitate settlement is not appropriate, however, if either or both parties to a claim lack information necessary to assess its merit and value.²⁴²

One concern pertaining to the use of mediation is that it may “convey[] the message that litigants should settle their cases because juries are so unpredictable and trial is a bad and expensive process.”²⁴³ This concern most commonly arises in

236. *Id.*

237. *See, e.g.*, Christopher M. Grengs & Edward S. Adams, *Contracting Around Finality: Transforming Price v. Neal from Dictate to Default*, 89 MINN. L. REV. 163, 201 n.229 (2004).

238. Elisabeth Belmont et al., *Emergency Preparedness, Response & Recovery Checklist: Beyond the Emergency Management Plan*, 37 J. HEALTH L. 503, 503 (2004).

239. Carol B. Liebman & Chris Stern Hyman, *Disclosure and Fair Resolution of Adverse Events, in MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM*, *supra* note 229, at 191, 205.

240. *Id.* at 206.

241. *Id.* at 209.

242. *See id.*

243. John Lande, *How Much Justice Can We Afford?: Defining the Courts' Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and*

connection with mandatory mediation because of the accompanying “philosophical objections to creating barriers to trial.”²⁴⁴ Therefore, courts could avoid sending mixed messages about settlement by ensuring that participation in mediation is voluntary.

Another option available to states looking to streamline the litigation process is the use of a medical malpractice panel to assess the merits of claims involving the UEVHPA. Many states use a similar process to assess the merits of all malpractice cases.²⁴⁵ Typically, a complaint is filed with a panel, the respondent answers, and discovery is permitted.²⁴⁶ In some states, findings by the panel are admissible in court.²⁴⁷ If a litigant is unhappy with the panel’s decision, the claimant has the right to proceed to trial.²⁴⁸ One advantage to this system is that litigation is streamlined because the discovery process does not crowd dockets or consume scarce judicial resources.

Similarly, states could also consider requiring potential plaintiffs to consult a medical expert before filing suit.²⁴⁹ This requirement, also called a certificate-of-merit requirement, is intended to weed out relatively weak malpractice claims.²⁵⁰ Seventeen states currently have this requirement.²⁵¹ A lawyer for the potential plaintiff must “certify, at or near the outset of the suit, that a qualified expert has reviewed the claim and has found some basis for it. The provision should be carefully designed to deter flimsy claims without imposing undue burdens on valid” claims.²⁵² Medical malpractice panels and certificate-of-merit requirements are attractive to states because they “appeal to the self-regulatory preferences of the medical profession” and are relatively simple to institute.²⁵³

Other Elements Needed to Administer Justice, 2006 J. DISP. RESOL. 213, 230.

244. *Id.* at 248.

245. Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 FORDHAM L. REV. 943, 990 (2004).

246. *See id.* at 991 (describing state variations in medical malpractice screening panels).

247. *Id.*

248. *E.g.*, Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 193 (1990).

249. *See Struve, supra* note 229, at 174.

250. *See id.*

251. *Id.*

252. *Id.*

253. William M. Sage, *Why Are Demonstrations of Comprehensive Malpractice Reform So (at All) Controversial?*, 37 U. MEM. L. REV. 513, 524 (2007).

It is possible, however, that the inclusion of such provisions in the alternative solution may violate open courts provisions or conflict with due process guarantees. The constitutionality of these provisions has not yet been tested in many states that have open courts provisions.²⁵⁴ States that are considering imposing a certificate-of-merit requirement or instituting the use of medical malpractice panels should gauge the constitutionality of doing so by engaging in the analysis set forth above in Part III.

B. ASSUMPTION OF NEGLIGENCE LIABILITY BY THE STATE STRIKES THE OPTIMAL BALANCE

A number of factors suggest that this alternative solution strikes the optimal balance between encouraging volunteerism among VHPs and providing negligently injured victims a means of recovery. First, the government is best suited to internalize the risk of liability in public health emergencies or disasters and spread the cost out over all of the jurisdiction's taxpayers.²⁵⁵ Because many individuals benefit when VHPs respond to a disaster, the costs incurred from a VHP's negligence are appropriately borne by all taxpayers, not just the health care industry and medical malpractice insurance providers.

Some elected officials may be sensitive to enacting legislation that provides that the state may be named as the only defendant in a negligence action.²⁵⁶ It is unlikely, however, that the state would be exposed to a large number of suits through vicarious liability, given the limited pool of potential plaintiffs and relatively rare occurrence of public health disasters.²⁵⁷ Therefore, the state would be exposing itself to liability only on

254. See, e.g., Kelly Kotur, *An Extreme Response or a Necessary Reform? Revealing How Caps on Noneconomic Damages Actually Affect Medical Malpractice Victims and Malpractice Insurance Rates*, 108 W. VA. L. REV. 873, 898 (2006) (explaining how West Virginia's statute capping noneconomic damages for medical malpractice cases has yet to be constitutionally challenged).

255. Cf. Lincoln Mayer, Note, *Immunity for Immunizations: Tort Liability, Biodefense, and Bioshield II*, 59 STAN. L. REV. 1753, 1774 (2007) (stating that the government is "best suited to internalize the risks and benefits" of biodefense products and other situations involving the common good).

256. See Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 832 (2007) (suggesting that elected officials will be highly sensitive to tort liability).

257. Cf. William Lay, Note, *Redefining Actionable "Subsidies" Under U.S. Countervailing Duty Law*, 91 COLUM. L. REV. 1495, 1505 (1991) (indicating that natural disasters are rare events).

limited occasions involving few plaintiffs. Additionally, if necessary, the state could take steps to limit the amount of compensation available to plaintiffs in certain instances. For example, plaintiffs' recovery could be offset by any collateral medical benefits, including health insurance.²⁵⁸ More importantly, plaintiffs may not be able to collect punitive damages in an action against the state.²⁵⁹ The purposes of punitive damages are to deter negligence and to punish tortfeasors, but those purposes would not be served by awarding punitive damages against the state. These decisions about compensation should be governed, in part, by the way that courts have assessed the constitutionality of tort reform efforts dealing with medical malpractice damage caps.²⁶⁰

Second, by providing that victims may sue the government for the negligence of VHPs, state legislatures ensure that judicial review will play a role in the compensation process.²⁶¹ One major criticism of the September 11, 2001 Victim Compensation Fund is that it provided no mechanism for judicial review of the Fund administrator's determinations and awards.²⁶² The Fund administrator did not issue any written opinions that explained the reasoning behind the awards.²⁶³ Claimants objected to the lack of transparency and perceived lack of fairness.²⁶⁴ Therefore, by allowing victims to name the state government as the sole defendant and file suit, victims would be assured some

258. See Ackerman, *supra* note 181, at 144 (explaining that the Fund deducted collateral source compensation from victims' total awards).

259. Notably, punitive damages are rarely awarded in medical malpractice cases. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 136 (2001).

260. See, e.g., Clarke v. Oregon Health Scis. Univ. 175 P.3d 418, 434 (Or. 2007); Mattos v. Thompson, 421 A.2d 190, 196 (Pa. 1980) (striking down a state statute giving health care arbitration panels "original exclusive jurisdiction" over medical malpractice claims).

261. Mayer, *supra* note 255, at 1772 (stating that judicial review is an "important self-correcting mechanism" in a compensation scheme).

262. See Elizabeth Berkowitz, *The Problematic Role of the Special Master: Undermining the Legitimacy of the September 11th Victim Compensation Fund*, 24 YALE L. & POL'Y REV. 1, 15 (2006).

263. Cf. Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 634-35 (2003) (explaining that Congress gave the Special Master "a blank check" to administer the Fund, and that he was "unattached to any court").

264. See *id.* at 635 (noting that concerns about the Fund's procedures were "resolved out of public view" and were not "subjected to the normal legislative hearing process").

procedural protection and transparency in the compensation process.

Third, the government serves as a reliable defendant from which negligently injured victims can recover if their claims have merit. VHPs may not be covered by their standard malpractice insurance policies if they volunteer outside of their normal jurisdiction.²⁶⁵ In contrast, when a state government assumes liability, plaintiffs are guaranteed a more financially secure defendant than a VHP without insurance.

Fourth, allowing victims to recover from the government allows the government to reduce the number of potential plaintiffs in a permissible way. Unlike a victim compensation fund or a no-fault compensation scheme administered through a special court, a lawsuit demands that recovery be predicated on causation because “[n]egligence cases are highly dependent on the particular facts and circumstances, as evaluated by the jury on a case-by-case basis.”²⁶⁶ In order to recover, plaintiffs would have to demonstrate that their injury was caused by a VHP’s negligence. This fault-based determination allows states to avoid the crippling financial task of compensating all victims of natural disasters and public health emergencies.²⁶⁷ This alternative also relieves states from having to determine which disaster victims merit recovery through a fund.

Unless victims have a cause of action to sue they will probably not be compensated for their injuries through any other mechanism. As stated above, those injured individuals are likely to be vulnerable and already forced to bear a disproportionate share of the burden after a disaster.²⁶⁸ Accordingly, without a cause of action to sue for the negligence of VHPs, victims will be unable to make themselves whole.

In sum, the assumption of negligence liability by the state strikes the optimal balance between the needs of victims and the needs of volunteers. It promotes volunteerism among VHPs by limiting their liability for negligence. It provides negligently injured victims with a reliable means of obtaining redress. As-

265. See De Ville, *supra* note 41, at 530 (noting that clinicians worry that their medical malpractice insurance policies do not cover them outside of jurisdictions in which they are licensed).

266. Weeks, *supra* note 25, at 286.

267. Cf. Meyer, *supra* note 196 (discussing the difficulties in compensating victims of natural disasters).

268. See, e.g., BRASCH, *supra* note 174, at 13–14 (explaining how the “impoverished and disadvantaged” endured unsanitary conditions in the immediate aftermath of Hurricane Katrina).

sumption of negligence liability by the state also provides vulnerable individuals who are the most likely to be negligently injured while receiving care from a VHP with an adequate and reasonable remedy.

CONCLUSION

The UEVHPA represents one attempt to authorize and regulate the deployment of VHPs in response to disasters and public health emergencies. By limiting the civil liability of VHPs for negligence, the UEVHPA attempts to balance the need to encourage volunteerism and the need to provide negligently injured victims with a means of obtaining redress. Even though it eliminates a right to recover under the common law cause of action for ordinary negligence, section 11 of the UEVHPA does not provide an alternative remedy. Therefore, as written, section 11 violates the open courts provisions found in many state constitutions.

Over twenty states will consider adopting the UEVHPA in 2008. During this process, state lawmakers must carefully consider the conflict between section 11 and open courts provisions because the solutions offered by the UEVHPA will render it unconstitutional in some states. In order to comply with open courts provisions, when drafting legislation to adopt the UEVHPA, enacting state legislatures should adopt an alternative to section 11 that limits the civil liability of VHPs and yet still provides a remedy for negligently injured victims. Public policy concerns also suggest that state legislatures should adopt the UEVHPA with significant changes to section 11 to protect vulnerable populations. The assumption of liability by the state for the negligence of VHPs strikes a balance that promotes volunteerism and provides an alternative remedy for victims.