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

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INTRODUCTION

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

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

[2] H.R. 4280, 108th Cong. (2004); 150 Cong. Rec. H2873-74 (daily ed. May 12, 2004). The vote tally is available at http://clerk.house.gov/evs/2004/roll166.xml (last visited Aug. 12, 2004). This vote was the second

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

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

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

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

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

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

[4] S. 607 § 5(b).

[5] *Id.* § 3(15); H.R. 4280 § 9(15).

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

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

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

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

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

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

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

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

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

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[8] *See* GAO REPORT, *supra* note 1.

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

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

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

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

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

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

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

[12] *Id.*

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

[14] NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 24.

[15] NATIONAL CENTER FOR STATE COURTS, *supra* note 13, at 27.

[16] *Id.* at 28.

[17] NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 28.

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

[19] NATIONAL CENTER FOR STATE COURTS, *supra* note 13, at 27.

[20] NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 28.

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

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

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

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

[24] NATIONAL CENTER FOR STATE COURTS, *supra* note 11, at 29.

[25] U.S. DEPARTMENT OF JUSTICE, *supra* note 23.

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

[27] U.S. DEPARTMENT OF JUSTICE, *supra* note 23.

[28] *Id.*

corporate misconduct and cover-up, such as asbestos and the Dalkon Shield contraceptive device.[29]

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

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

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

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

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

[32] *Id.* at 2.

[33] *See supra* note 26 and accompanying text.

[34] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 31, at 2.

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

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

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

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

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[36] WEILER ET AL., *supra* note 35, at 62.

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

[38] HEALTH GRADES QUALITY STUDY, PATIENT SAFETY IN AMERICAN HOSPITALS (2004), *available at* http://www.healthgrades.com/media/english/pdf/HG_Patient_Safety_Study_Final.pdf.

[39] PUBLIC CITIZEN CONGRESS WATCH, *supra* note 31, at 1; INSTITUTE OF MEDICINE, *supra* note 37.

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

[41] *Id.*

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

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

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

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

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[42] GAO REPORT, *supra* note 1.

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

[44] *Id.* at 8 (emphasis in original).

[45] *Id.* at 13 (emphasis in original).

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

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

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

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

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

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[46] *Id.* at 8.

[47] *Id.* at 9.

[48] *Id.* at 10 (emphasis in original).

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

[50] *Id.* at 679.

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

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

This is because:

> [i]nsurers make most of their profits from investment income. During years of high interest rates and/or excellent insurer profits, insurance companies engage in fierce competition for premium dollars to invest for maximum return. Insurers severely underprice their policies and insure very poor risks just to get premium dollars to invest. This is known as the "soft" insurance market.
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> But when investment income decreases—because interest rates drop or the stock market plummets or the cumulative price cuts make profits become unbearably low—the industry responds by sharply increasing premiums and reducing coverage, creating a "hard" insurance market usually degenerating into a "liability insurance crisis."

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

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

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

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

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

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[52] *Id.*

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

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

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

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

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

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

[57] *Health-Care Reform—Bush's Insurance-Cap Plan a Proven Failure*, SEATTLE TIMES, May 16, 1991, at A12.

[58] *Tort Reforms Don't Cut Insurance Rates, Study Finds*, 14 LIABILITY WEEK No. 29, at 1, 8 (July 19, 1999).

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

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

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

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

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

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

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

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

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

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

[63] *See* Finley, *supra* note 7, at 851.

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

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

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[64] For a full elaboration of these responses to criticisms of the role of noneconomic loss damages, see Finley, *supra* note 7.

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

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

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

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

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

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[66] Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, at C1.

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

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

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

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

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[68] Chamallas, *supra* note 67, at 84.

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

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

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

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

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

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

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

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

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

[73] I am also in the process of gathering data from additional states, but the analysis is preliminary.

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

A. California

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

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

Table 1: Female Plaintiffs in California (67 cases)

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

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

The data for men breaks down as follows:

Table 2: Male Plaintiffs in California (64 cases)

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

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

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

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

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[74] 31 Trials Digest 3d 146, 2000 WL 1084674 (Sup. Ct. Riverside County Cal. June 21, 2000).

[75] 19 Trials Digest 3d 15, 1999 WL 504604 (Sup. Ct. Los Angeles County Cal. Apr. 22, 1999).

[76] 6 Trials Digest 2d 40, 1995 WL 547375 (Sup. Ct. Costa County Cal. Mar. 29, 1995).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[78] Treaster, *supra* note 66, at C1.

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

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

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

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

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

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

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

Category	*Amount*	*Percent of Total Damages*
Average Total Compensatory Award	$896,750	100%
Average Economic Damages	$60,500	6.8%
Average Noneconomic Damages	$836,250	93.3%

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

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

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

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

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

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

[79] *See* S. 2061, 108th Cong. (2004); S. 2207, 108th Cong. (2004).

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

Table 13: Gynecological Malpractice in California (28 cases)

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

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

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

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

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

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

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

B. Florida

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

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[80] *See* S. 2061.

[81] 1999 Fla. Laws ch. 99–225, § 27 (amending FLA. STAT. ANN. § 768.81 (West 1997)).

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

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

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

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[82] Smith v. Dep't of Ins., 507 So. 2d 1080 (Fla. 1987).

[83] 2003 Fla. Laws ch. 416 (amending FLA. STAT. ANN. § 766.118 (West 1997)).

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

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

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

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

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

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

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

Category	*Amount*	*Percent of Total Damages*
Average Total Compensatory Award	$864,777	100%
Average Economic Damages	$71,922	8.3%
Average Noneconomic Damages	$792,855	91.7%

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

Category	*Amount*	*Percent of Total Damages*
Average Total Compensatory Award	$1,157,975	100%
Average Economic Damages	$392,975	34%
Average Noneconomic Damages	$765,000	66%

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

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

Table 18: Gynecological Malpractice in Florida (15 cases)

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

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

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

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

Table 19: Female Deaths in Florida (32 cases)

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

Table 20: Male Deaths in Florida (64 cases)

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

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

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

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

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

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

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

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

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

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

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

C. Maryland

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

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

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[84] Koenig & Rustad, *supra* note 29.

[85] *Id.*

[86] MD. CODE ANN. CTS. & JUD. PROC. § 11-108 (2003).

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

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

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

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

Table 23: Gynecological Malpractice in Maryland (9 cases)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

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