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THE MEDICAL MALPRACTICE DEBATE: THE JURY AS SCAPEGOAT

*Nancy S. Marder**

I. INTRODUCTION

The civil jury is under attack, particularly as politicians, doctors, and representatives of the insurance industry urge the need for tort reform. They focus on high medical malpractice premiums and doctors who threaten to abandon their practices because they can no longer afford their premiums.[1] They wonder how and where women will find medical care as obstetricians in particular seem to be fleeing the field, or at least searching for states that have lower medical malpractice premiums.[2]

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* Professor of Law, Chicago-Kent College of Law. I want to thank John Nockleby and the Civil Justice Program at Loyola Law School (L.A.) for organizing such a wonderful conference and my fellow participants in the Roundtable discussion "Damage Awards in Personal Injury Litigation," for helping me to clarify my thoughts on this topic. I also want to thank Michael Clancy, Bruce Pfaff, and Curt Rodin for sharing with me their litigation perspectives, experiences, and research and Lucy Moss for providing me with excellent library assistance.

1. *See, e.g.*, Richard A. Oppel, *With a New Push, Bush Enters Fray Over Malpractice*, N.Y. TIMES, Jan. 17, 2003, at A1 ("With doctors across the country protesting the cost of malpractice insurance, President Bush is making a renewed push for strict limits on the jury awards he blames for skyrocketing premiums.").

2. *See, e.g.*, Christi Parsons, *State Supreme Court; Malpractice Debate Pours Cash on Race for Justice*, CHI. TRIB., Oct. 23, 2004, at 1, 25 ("Two southern Illinois hospitals have closed their obstetrical units this year because of the high cost of insuring staff obstetricians."); Richard W. Stevenson, *President Asks Congress for Measures Against Frivolous Suits*, N.Y. TIMES, Jan. 17, 2003, at A24 (describing President Bush's speech at the University of Scranton in Scranton, Pennsylvania, in which he said that "the price of litigiousness was borne by average people like pregnant women who could not

Amidst these accounts of crisis and calls for immediate change, the civil jury is often identified as the culprit. The charge against civil juries is that they award excessive damages, particularly in frivolous lawsuits, and that this, in turn, drives up the cost of medical malpractice premiums. As a result, doctors and insurers are lobbying legislators to take quick action and to restrict juries' authority. The restrictions have often taken the form of imposing caps on non-economic damages or removing certain types of cases from jury consideration.[3]

Although this account, which I will call the "popular account," has spurred many state legislatures to take action,[4] and has even led Congress to consider the imposition of caps,[5] the popular account falls woefully short of explaining the nature of the crisis, why the jury is to blame, and why the quick-fix solutions that wrest power from the jury are appropriate ones to adopt.

This essay will challenge the popular account beginning with its assumption that there is a "crisis" for which the jury is responsible. Much of the press coverage has focused on unusual cases in which juries have awarded large damages. However, these cases are not representative of most cases brought in courts every day. As empirical studies have documented, in many cases plaintiffs who bring medical malpractice claims do not succeed, and if they do

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find obstetricians and poor people whose doctors closed shop."); Sheryl Gay Stolberg, *Short of Votes, Senate G.O.P. Still Pushes Malpractice Issue*, N.Y. TIMES, July 6, 2003, at 1 ("'Women are having trouble finding obstetricians to be able to deliver their babies,' said Senator John Ensign, Republican of Nevada . . . .").

3. *See, e.g.*, Mark Curriden, *Tipping the Scales: Right to Trial by Jury Fades Under Court Rulings, New Laws*, DALLAS MORNING NEWS, May 7, 2000, at 1A ("Thirty-four states, including Texas, limit the amount of money that civil juries can award. Forty-two states have restricted the types of cases that juries can hear.").

4. *Id.*

5. *See, e.g.*, Sheryl Gay Stolberg & Carl Hulse, *Resigned to Failure, G.O.P. Still Pushes Forward on Malpractice Cap Bill*, N.Y. TIMES, July 8, 2003, at A18 ("The House has already passed legislation similar to the bill the Senate is considering."); Sheryl Gay Stolberg, *Senate Refuses to Consider Cap On Medical Malpractice Awards*, N.Y. TIMES, July 10, 2003, at A20 ("Voting mostly along party lines, the Senate refused today to take up a bill that would cap jury awards in medical malpractice cases . . . .").

succeed, the damage awards they receive are quite small.[6] The million-dollar awards might make good reading, but they do not describe the typical award in a medical malpractice case.

It is not surprising that the press chooses to focus its headlines on the million-dollar award, but in doing so it fosters the image of the runaway jury, even when there is no support that juries have gone awry in their damage awards. Again, several empirical studies show that jury damage awards are consistent, that judges and juries usually agree on the damage awards, and that when there are outlying jury awards, the judge, as part of the process, can reduce the award.[7] There are further constraints on the jury that limit any tendencies toward excess; these include the role of the judge in reviewing the damage award, the judge's instructions to the jury, and the juror's oath.

This essay also will challenge the quick-fix solutions that have been proposed, and in some states adopted, in response to the call for tort reform. The typical legislative reforms are ones that limit jury power.[8] These include capping damage awards and taking cases away from the jury.[9] Capping damage awards, for example, while popular among politicians, is likely to hurt those patients who have been most severely harmed by medical providers. In addition, such caps are likely to harm those, such as women, who have non-paying or low-paying work, and therefore are unable to claim much economic harm. Under a system of capped damages, they would be

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6. *See infra* notes 40–43 and accompanying text.

7. *See infra* notes 10, 72.

8. Businesses and service providers, including doctors, also have taken self-help measures, such as insisting that consumers or patients sign jury waivers, in which they are asked to give up their right to a jury trial and agree to binding arbitration. *See, e.g.*, Jane Spencer, *Waiving Your Right To a Jury Trial*, WALL ST. J., Aug. 17, 2004, at D1 (describing jury waivers, "which require people to give up the right to have cases heard by their peers," and which appear in an increasing number of contracts that consumers sign from buying a car to renting an apartment).

9. *See, e.g.*, Mark Curriden, *The Shrinking Role of Juries*, DALLAS MORNING NEWS, May 7, 2000, at 23A (describing types of cases, such as consumer fraud in Illinois and infant injuries at birth in Virginia, that are now decided by judges rather than juries); Curriden, *supra* note 3, at 1A ("Forty-two states have restricted the types of cases that juries can hear.").

limited in the amount of damages they could receive for non-economic injury.

Moreover, none of the reforms are designed to give jurors tools that they need to perform their role more effectively. Proponents of tort reform seem intent on limiting the jury's role rather than aiding it to perform its role more effectively. The tools can be simple—such as giving juries "guideposts"[10] for damages that have been awarded in comparable cases—and yet such approaches are absent from the debate.

Finally, this essay will explore why the jury is the scapegoat in the popular account, allowing legislators, doctors, and other professionals to lose sight of the values that the civil jury offers, values that Alexis de Tocqueville recognized almost 170 years ago.[11] One reason that the jury is being blamed for spiraling medical malpractice premiums is that it is an easy target. It consists of ordinary citizens, who are called to serve in only one case. There are no professional jurors and there are no repeat players. This is also one of the values of the jury that Tocqueville and others have identified. It allows ordinary citizens to bring their commonsense judgment to bear in hard cases. Just as the Supreme Court justices recognized that the criminal jury protects defendants against government overreaching,[12] the civil jury protects plaintiffs from individual and corporate wrongdoing. This is an important role, and one that the popular account would rather overlook, but it is a role that is vital to our democracy.

This essay is organized in six brief Parts. Part II examines whether there is a crisis for which the jury is responsible. Part III highlights some of the quick-fix solutions adopted by legislatures and the new problems they create. Part IV looks at some of the institutional safeguards that constrain the jury so that it does not go

10. Shari Seidman Diamond et al., *Juror Judgments about Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 318–22 (1998).

11. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270–76 (J.P. Mayer ed. & George Lawrence trans., Doubleday & Co. 1969) (13th ed. 1850).

12. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (describing the criminal jury as a buffer between the defendant and a "corrupt or overzealous prosecutor and . . . the compliant, biased, or eccentric judge").

awry very often in its award of damages. Part V suggests additional tools that courts could give jurors to improve the jury's performance. Finally, Part VI considers why the jury has become a convenient scapegoat and the dangers the popular account and its quick-fix solutions pose to the jury.

II. IS THERE A CRISIS FOR WHICH THE JURY IS RESPONSIBLE?

A. Is There a Crisis?

Throughout the country, doctors have pointed out that their medical malpractice premiums are increasing to the point where some have decided to leave the profession.[13] In some states, such as New Jersey, they have even staged protests or work stoppages to draw attention to their plight.[14] Some doctors explain that it no longer makes economic sense for them to remain in practice when more and more of their income is going toward payment of their premiums.[15] Other doctors have decided to relocate to states where

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13. *See, e.g.*, Julie Hirschfeld Davis, *Senate Bill To Cap Jury Awards Stalls; Medical Malpractice a Partisan Fight*, CHI. TRIB., July 10, 2003, at 12 ("Physicians are moving to states with favorable laws and insurance premiums, or leaving medicine altogether.").

14. *See* Andrew Jacobs, *Anatomy of a Strike: Doctors' E-Mail Shows Depth of Anger*, N.Y. TIMES, Mar. 10, 2003, at B1; Richard Lezin Jones, *Job Action by Doctors Winds Down*, N.Y. TIMES, Feb. 6, 2003, at B1 ("Leaders [of the New Jersey doctors' work slowdown] said they had no plans to call for an official end to the protest, the largest of a series of recent strikes and slowdowns around the country by doctors angry over soaring malpractice insurance rates."); Richard Lezin Jones & Robert Hanley, *Trenton Seeks a Compromise for Doctors*, N.Y. TIMES, Feb. 5, 2003, at B5 ("The [New Jersey] job action, which organizers estimate involves 70 percent of the state's 22,000 doctors, is by far the largest of several that have occurred across the country in the last year."); *see also* Jane Gordon, *Doctors Plan Rally Over Malpractice Bills*, N.Y. TIMES (Conn.), Feb. 16, 2003, § 14, at 5 (describing a doctors' rally at the State Capitol in Hartford, Connecticut); Joseph B. Treaster, *Surgeons Explain Reasons for Their Walkout*, N.Y. TIMES, Jan. 4, 2003, at A7 (describing surgeons' work stoppage in West Virginia).

15. *See, e.g.*, Gordon, *supra* note 14, at 5 ("'I simply cannot afford to stay in practice and not make a living . . . .'") (quoting Dr. Jacobs, a solo practitioner in Hartford, Connecticut); Robert Hanley, *Lawyers Respond to Threat of Doctors' Job Action*, N.Y. TIMES, Jan. 29, 2003, at B5 ("'I have a friend retiring at age 57 because his insurance rate has quadrupled and he can't afford to run his office and stay in practice . . . .'") (quoting Dr. Robert S.

their premiums are less than what they currently pay.[16] When doctors leave states in search of lower premiums, they may leave locales, particularly in rural areas, without doctors in that specialty.[17] The American Medical Association has described the situation of doctors in nineteen states as having reached "a crisis."[18]

The doctors' economic difficulties—of having to contend with ever-increasing medical malpractice premiums—have been described not only by doctors, but also by those in the press and the legislature, as a "medical malpractice crisis." Although some doctors' economic difficulties are real, it is unclear that they have reached the level of a "crisis." According to one report, while premiums have been going up, so have doctors' salaries.[19] Yet, Democrats and Republicans alike in Congress have resorted to the language of fear and crisis.[20] Newspaper headlines reinforce the view that the doctors' situation has indeed reached "crisis"

Rigolosi, a kidney specialist).

16. *See, e.g.*, Treaster, *supra* note 14, at A7 ("In the last year, more than 100 West Virginia doctors have moved to other states where insurance rates are considered more tolerable."). *But see* Christi Parsons & Bruce Japsen, *Physician Count Clouds Malpractice Argument; State Data Show Increase in Doctors*, CHI. TRIB., July 16, 2004, § 3, at 1 ("[Illinois] figures indicate that there has been a steady increase in the number of doctors licensed by the state in recent years—even in high-risk specialty fields in which doctors reportedly were leaving Illinois in search of lower insurance premiums.").

17. *See, e.g.*, Brad Cole, Commentary, *When Doctors Start Leaving Town*, CHI. TRIB., July 13, 2004, at 19 ("[I]n southern Illinois . . . the area's only two neurosurgeons (based in the region's medical hub, Carbondale) decided to close their practices and relocate out of state to find more favorable malpractice insurance rates. This left the citizens of the lower third of Illinois without a neurosurgeon.").

18. Hirschfeld Davis, *supra* note 13, at 12.

19. *See, e.g.*, Sandra G. Boodman, *Doctors Turn to Patients for Insurance Help; Malpractice Surcharges on the Rise*, CHI. TRIB., Oct. 10, 2004, at 10 ("[F]rom 1999 through 2003, the average reportable compensation of primary care physicians rose nearly 9 percent, to $156,902. Specialists fared better; their incomes rose more than 20 percent in the last four years to $296,000 from an average of nearly $246,000.").

20. Republican Senator Bill Frist has described the medical malpractice issue as "'a national emergency that is hurting people. . . . It's a crisis that is increasing." Stolberg, *supra* note 5, at A20 (quoting Senator Frist). According to another article, even "Democrats concede that there is a medical liability crisis." Stolberg & Hulse, *supra* note 5, at A18.

proportions.[21]

It is not surprising that journalists, in their coverage of the escalating costs of medical malpractice premiums, have embraced the language of "crisis." By describing the doctors' premiums as a crisis, journalists help to create a dramatic story, and in doing so, they attract readers to their articles. If the story were simply that doctors' premiums are going up, just like everyone else's premiums, whether for auto insurance or homeowner's insurance, there would not be much of a story there. But if the premiums can be described as creating a crisis, then it is worthy of front-page coverage. Not surprisingly, then, "[c]overage in the news media has highlighted incidents like a walkout by surgeons in West Virginia, who stopped seeing patients in January [2003] to protest the cost of medical malpractice insurance in their state."[22]

Legislators' use of the term "crisis" to describe the increase in doctors' medical malpractice premiums allows them to resort to quick-fix solutions without taking much time for careful study or well thought out proposals. If there is a "crisis," then the legislators must act quickly. In the face of such urgency, they propose measures that are easy to implement even though it is unclear that these measures will alleviate the so-called crisis.[23] If the increase in premiums had been described as "cyclical" rather than as a "crisis," then legislators might have looked for long-term solutions, rather than stop-gap measures.

I do not mean to suggest that some doctors' economic plight is not serious. I simply want to call attention to the way in which it has been described. By labeling it a crisis, which requires immediate attention, further study is foreclosed, and this is to the detriment of the jury.

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21. *See, e.g.*, Editorial, *A Southern Illinois Revolt*, CHI. TRIB., July 13, 2004, at 18; Susan Kuczka, *Doctors Highlight Illinois Exodus: Wristbands Send Message on Costs*, CHI. TRIB., Jan. 25, 2005, §2, at 1; *see also* Stephen Labaton, *Added Rush On Revising Tort System*, N.Y. TIMES, Dec. 13, 2001, at C1 (describing the added urgency of tort reform after September 11, 2001).

22. Sheryl Gay Stolberg, *Transplant Mix-Up Enters Debate on Malpractice Bills*, N.Y. TIMES, Feb. 26, 2003, at A18.

23. *See infra* Part III (describing the quick-fix solutions that state legislatures have adopted).

B. Is the Jury Responsible for the "Crisis"?

In press reports and political debates on the "medical malpractice crisis," the civil jury has been singled out as the leading culprit.[24] The jury has been held responsible for the current crisis in at least two ways. First, there is the view that plaintiffs file "frivolous" lawsuits for which the jury finds the defendant liable and awards damages.[25] President Bush has described the problem as "'junk lawsuits' . . . driving 'good docs' from practice."[26] Second, there is the belief that when the jury awards damages, it awards excessive damages. The Bush Administration, the American Medical Association, and other medical groups "advocate capping the amount of money patients harmed by medical negligence could collect from doctors and hospitals."[27]

The press, in its reporting of jury verdicts, focuses on those cases in which the awards were in the millions of dollars.[28] Thus, according to this account, which I have labeled the "popular account," the civil jury is responsible for the escalating medical malpractice premiums because it fails to discern between frivolous suits and meritorious ones and because it awards excessive damages. According to insurers, these irresponsible acts by juries are unpredictable and have left them with no choice but to increase medical malpractice premiums.[29]

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24. *See, e.g.*, Philip K. Howard, *The Best Course of Treatment*, N.Y. TIMES, July 21, 2003, at A19 (singling out the jury for blame in the medical malpractice crisis and urging that "[e]xpert judges, not juries, must decide what is a valid claim").

25. *See* Stolberg, *supra* note 5, at A20 ("Republicans, and the doctors, insurers and corporate interests who tend to support them, say the caps are necessary to stem a rising tide of frivolous lawsuits that are driving up malpractice premiums.").

26. Boodman, *supra* note 19, at 10.

27. *Id.*

28. Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 423–26 (1996).

29. Joseph B. Treaster, *Malpractice Insurance: No Clear or Easy Answers*, N.Y. TIMES, Mar. 5, 2003, at C1 ("The insurance companies say the limits on awards for pain and suffering eliminate an emotional wild card in dealing with claims.").

The popular account should not be accepted at face value. There are several ways in which this account lacks explanatory power. To begin with, there are very few civil jury trials each year in the United States. Most lawsuits are resolved by motion, settlement, or alternative dispute resolution. In the year 2000, for example, only 3% of all civil cases in federal courts went to trial, and the number that went to trial before a jury was even smaller.[30] In the year 2001, only about 2% of all civil cases in federal courts went to trial.[31] For the same year, state courts of general jurisdiction in seventy-five of the largest counties held almost 12,000 tort, contract, and real property civil trials, of which three-fourths were decided by juries and one-fourth were decided by judges.[32] The 12,000 civil trials in these state courts represent a 47% decline from the number of civil trials in 1992.[33] For the year 2001, only about 3% of civil cases in state courts were decided by a jury or bench trial.[34] Although I have argued elsewhere that the small number of jury trials does not detract from the important role that juries play in our society,[35] it seems unlikely that the small number of jury trials is enough to explain the increase in medical malpractice premiums. Moreover, as medical malpractice premiums have increased in recent years, the number of jury trials in both state and federal courts has continued to decrease. The dwindling number of trials has not escaped notice; recent articles and conferences have taken up the theme of the "vanishing trial."[36]

The number of jury trials in medical malpractice cases in particular has continued to decline in a number of jurisdictions. For example, from January through August, 2004, the number of medical malpractice cases filed in Cook County, Illinois declined by 24%.[37]

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30. OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 9, 19, 22 (2003).

31. Thomas H. Cohen & Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, BUREAU JUST. STAT. BULL., Apr. 2004, at 7.

32. *Id.* at 1.

33. *Id.*

34. *Id.* at 1–2.

35. *See* Nancy S. Marder, *Introduction to The Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 924 (2003).

36. *See generally* Symposium, *The Vanishing Trial*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004).

37. Sarah A. Klein, *Cook County Malpractice Suits Drop; Theories Vary as*

Illinois is one state that has been in the throes of the medical malpractice debate. In Illinois, doctors' complaints about the high cost of premiums led some cities to take action on their own, such as imposing caps.[38] The medical malpractice debate in Illinois also triggered a fierce campaign for a seat on the Illinois Supreme Court,[39] which has twice held that damage caps are unconstitutional.

According to the popular account, plaintiffs file lawsuits in medical malpractice cases and win big; however, empirical studies show otherwise. According to one study which analyzed data from Franklin County, Ohio, plaintiffs' win rates in medical malpractice and product liability cases tended to be low, and when they did win their damage awards were modest.[40] According to one legal reporter: "In general, medical malpractice verdicts tend to favor the defendants more so than in other types of cases."[41] For example, statistics for medical malpractice cases in Cook County, Illinois during the year ending September 2003, as reported in the *Jury Verdict Reporter*, show that defendants in medical malpractice cases won 58.7% of the time.[42] In an earlier comprehensive study, the National Center for State Courts found that plaintiffs in medical malpractice cases won 30% of the time, whereas plaintiffs in all jury trials won 51% of the time.[43]

Press coverage contributes to the public perception that plaintiffs win big when they file medical malpractice and other torts cases. In one study of newsmagazine coverage of tort litigation, the researchers found that medical malpractice and product liability cases received a disproportionate amount of coverage given the

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'04 Cases Fall, CRAIN'S CHI. BUS., Sept. 20, 2004, at 1.

38. *See* Cole, *supra* note 17, at 19 (explaining why the city of Carbondale enacted caps on non-economic damages).

39. *See infra* note 54.

40. Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315 (1999).

41. Jaime Levy, *Settlement Survey: Birth-Trauma Cases Yield Year's Largest Awards*, CHI. LAW., Oct. 2004, at 8, 10.

42. *Id.*

43. Charley Roberts, *Are Runaway Jury Awards a Real Issue?*, L.A. DAILY J., Nov. 8, 1995, at 1, 9 (citing the National Center for State Courts' study of tort and contract litigation in forty-five of the nation's seventy-five largest urban areas, including nine in California).

number of actual cases and contributed to a skewed perception of the rates at which plaintiffs in tort cases prevailed at trial and the mean and median damages awarded.[44] Another study, which looked at personal injury awards reported in two major New York newspapers between 1988 and 1993, found that the typical reported award was more than $5 million, while the typical award for this period was $213,000 in New York State and $252,000 in the New York metropolitan area.[45] However, one researcher who conducted a national telephone survey to ascertain public perceptions of civil jury awards concluded that while the public had an inflated view of jury damage awards, it was "not as great as one might expect given the newspaper reports."[46]

III. WHY THE POPULAR, "QUICK-FIX" SOLUTIONS SHOULD BE RESISTED

In response to the popular account of the "medical malpractice crisis," state legislatures have typically adopted one or two "quick-fix" solutions. One response has been to cap the damages that juries can award for non-economic damages in medical malpractice cases. A second response has been to take certain types of cases away from the jury altogether. Neither approach is likely to stop the increase in medical malpractice premiums and both are likely to do long-term harm to the jury.

A. Capping Non-Economic Damage Awards

Many states have responded to the increase in medical malpractice premiums by capping damage awards for non-economic injuries in medical malpractice cases.[47] This has meant that if a jury

44. *See* Bailis & MacCoun, *supra* note 28, at 423–26.

45. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 772–73 (1995).

46. Herbert M. Kritzer, *Public Perceptions of Civil Jury Verdicts*, 85 JUDICATURE 78, 80 (2001).

47. *See, e.g.*, David M. Studdert et al., *Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California*, HEALTH AFFAIRS, July/Aug. 2004, at 54 ("Twenty-one states already cap damages for noneconomic losses in medical malpractice cases, generally with ceilings in the range of $250,000-$750,000.").

awards damages for non-economic injuries that exceed the cap, the judge must reduce the award to the statutory maximum. A typical cap for non-economic injuries ranges from $250,000 to $750,000.[48] California, for example, has a cap of $250,000 for non-economic damages.[49] This amount has remained the same since it was first put into effect in 1975.[50] In 2003, when Congress considered legislation providing for caps for non-economic damages, the dollar figure it used was $250,000.[51] The cap typically applies only to non-economic injury, such as pain and suffering, and not to economic injury, such as loss of one's job and therefore of one's income.[52] Six states, however, cap total damages.[53]

The idea behind the cap is that economic harm can be readily determined, whereas pain and suffering are more subjective and difficult to calculate. The vagueness of "pain and suffering" has meant that juries could use it to award substantial damages, particularly if the person who had been severely harmed did not earn much income and therefore would not have significant economic injury for which to claim economic damages.

One problem with capping non-economic damages is that those who are most severely harmed by medical negligence are those whose financial recovery will now be limited by the cap. Consider, for example, the infant born with cerebral palsy because the attending anesthesiologist was in another room in the hospital with a nurse with whom he was having a relationship, and did not respond to two beeper calls for 40 to 50 minutes.[54] This infant would only be

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48. *Id.*

49. Elizabeth Austin & Jim Day, *Rising Awards Add Fuel to Debate on Tort Reform*, CHI. LAW., Nov. 2003, at 24, 76.

50. *Id.*

51. *See, e.g.*, Stolberg, *supra* note 22, at A18 ("President Bush is seeking to overhaul the nation's medical liability system, including legislation that would impose, among other things, a $250,000 cap on jury awards for noneconomic or 'pain and suffering' damages.").

52. Studdert et al., *supra* note 47, at 54.

53. *Id.*

54. *See* Levy, *supra* note 41, at 9. This case occurred in Illinois, where there are no statutory caps for non-economic damages yet, but where the issue has sparked intense debate and campaigning because the Illinois Supreme Court has, in the past, struck down such a cap as unconstitutional. *See*

able to recover up to $250,000 for pain and suffering in a state with such a statutory cap for non-economic damages. Although one common justification for such a cap is that there are too many frivolous lawsuits, in fact, caps only affect the meritorious lawsuits—the ones in which the defendant has been found to be liable and the plaintiff has been severely injured and awarded substantial damages for non-economic injuries.

Another problem with capping non-economic damages is that it is probably most likely to harm those who earn modest or no incomes, such as women, minorities, children, the elderly, and the disabled. For example, a man who has a high income can show economic harm if, through medical negligence, he suffers brain damage and is no longer able to work. An elderly woman or a stay-at-home mom who receives that same injury through medical negligence, however, cannot show such economic harm if she has no income. Juries can compensate for this disparity by providing for damages based on the victim's pain and suffering. Under a cap regime, however, that amount will be severely curtailed. The man with the high income can still receive damages for his economic loss, but the elderly woman or stay-at-home mom can only receive the statutory cap for pain and suffering.

A statutory cap is a blunt instrument with which to stave off rising medical malpractice premiums. It harms those who have been most severely injured by medical negligence and limits them to a cap that is modest in light of the devastating injuries they have suffered. It may well harm those who are among society's most vulnerable because they have limited economic resources to cope with severe medical injuries caused by medical negligence and will have even

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Parsons, *supra* note 2, at 1 ("Hoping to influence how courts deal with the controversial issue of medical malpractice, heavyweight special interest groups are pouring so much money into the race for the southern Illinois seat on the state Supreme Court that it has become the most expensive in Illinois court history."); Christi Parsons, *Doctor Shortage Cited in GOP Win*, CHI. TRIB., Nov. 4, 2004, at 12 ("In this race [for Illinois Supreme Court justice], insurance companies and other business interests from around the nation helped to funnel more than $8 million into the district, setting a national record for a court race and fueling a firestorm of TV ads.").

fewer resources as a result of capped damage awards for pain and suffering.

A statutory cap also has a harsh effect on the survivors of a person who has died through medical negligence; they are less likely to be able to see that justice is done. A cap of $250,000, such as in California, deters lawyers from taking medical malpractice cases unless they involve future medical costs or economic costs. Cases resulting in death do not involve such costs. In cases where the negligence leads to the death of a non-wage earner, such as an infant, disabled person, or stay-at-home mom, survivors can receive at most $250,000 for pain and suffering. Few lawyers can afford to take these cases, which are typically brought on a contingency fee basis. Because a typical case costs about $100,000 to go to trial and the insurer has little incentive to settle, little recompense remains for the survivors or lawyer.[55] Thus, the statutory cap means that those whose loss is most severe (in that their loved one has died through medical negligence) are the least likely to have access to justice.

Perhaps most significant, even representatives of the insurance industry have acknowledged that caps will not necessarily lead to a decrease in the medical malpractice premiums.[56] This suggests that other factors are at work in the rising cost of premiums, such as the cyclical nature of the insurance industry,[57] underperforming investments that insurers have made,[58] and the inability of the

55. *See, e.g.*, Treaster, *supra* note 29, at C1.

56. *See, e.g.*, Oppel, *supra* note 1, at A1 ("Even representatives of the insurance industry blame factors in addition to jury verdicts.").

57. Bob Herbert, *Cooking Up a Crisis*, N.Y. TIMES, June 25, 2004, at A25 (citing the Congressional Budget Office's explanations for the rising cost of malpractice premiums, including the "cyclical factors in the insurance market"); Oppel, *supra* note 1, at A1 (describing insurance industry practices in which insurers increased premiums in the 1980s to offset future claims, but when these did not occur at the level anticipated, the reserves were treated as profits, encouraging new insurers into the market and leading to a price war).

58. *See, e.g.*, Amy L. Faust, Letter to the Editor, *Health Care and Job Growth*, N.Y. TIMES, Aug. 21, 2004, at A26 ("Workers and businesses are paying for insurance companies' huge investment losses during the recession, and are still lining their executives' pockets now that the business climate has improved."); Oppel, *supra* note 1, at A1 (describing medical malpractice insurers who are able to invest premiums for much longer than other insurers before their claims come due and who suffered because of steep drops in the

medical profession to weed out bad doctors.[59]

B. Taking Cases Away From Juries

Another legislative response to the medical malpractice crisis has been to take certain cases away from juries even though juries have traditionally decided such cases. According to one report, as of the year 2000, forty-two states had restricted the types of cases that juries could hear.[60]

This response has entailed taking certain types of cases away from juries and giving them to others to decide. For example, cases of consumer fraud in Illinois, infant injuries at birth in Virginia, and negative vaccine reactions in North Carolina are decided now by judges rather than juries.[61] In Texas, a special state commission decides worker's compensation cases, whereas juries had previously heard such cases.[62] A federal law bans lawsuits based on small airplane crashes if the airplanes are eighteen years old or older, regardless of the cause of the crash, including assembly errors or defective parts.[63]

Another method of undercutting the right to jury trial has been for states to expand the list of those actors who are immune from suit. For example, volunteer firefighters in Hawaii, Montana, and West Virginia, prescription drug makers in Utah, and officers of nonprofit organizations in seventeen states can no longer be sued in

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bond yields and the stock market after the 1990s); Stolberg, *supra* note 2, at 1 ("Democrats, and the trial lawyers and consumer groups who support them . . . tend to blame the insurance industry for the malpractice crisis, saying that the industry has increased rates to compensate for investment losses in the stock market.").

59. *See, e.g.*, Edward Lloyd, Letter to the Editor, *Insurance Costs*, CHI. TRIB., July 16, 2004, at 28 ("The medical profession, including state medical boards, continues to ignore the few doctors causing all the problems.").

60. Curriden, *supra* note 3, at 1A.

61. Curriden, *supra* note 9, at 23A.

62. *Id.*

63. Mark Curriden, *Statutes Can Shield Companies; Sometimes Merit Can Be Irrelevant*, DALLAS MORNING NEWS, May 7, 2000, at 25A. One woman, whose husband died when his small, twenty-year old plane crashed, in part due to a defect in the plane, discovered that she could not sue the manufacturer. She was surprised by this discovery: "'I thought I had rights to take this to a jury, and then I found I didn't have those rights.'" *Id.* (quoting Janell Warner).

their states' courts.[64] In Texas in 1995, the legislature shielded accountants, real estate agents, lawyers, doctors, and engineers from allegations of deceptive trade practices,[65] while Louisiana protected doctors and lawyers from malpractice claims after three years.[66] Citizens who have been harmed by these actors' conduct can no longer seek redress through a jury trial in state court.

The reduction in the types of cases that juries can hear lessens the protection that juries afford to all citizens. These types of cases are precisely the ones that call for community values. The jury, which has been valued because it expresses the commonsense judgment of the community, is now being removed from the decision-making process. Moreover, this process is failing to attract much notice. Although capped damage awards captured most of the newspaper headlines, perhaps because even Congress considered imposing such caps,[67] taking cases away from the jury undermines the protection of the ordinary citizen. As one mother whose daughter was killed while crossing the street after leaving the school bus, and who cannot sue the school system because it is immune from suit in Texas, remarked: "'When did juries go away?'"[68]

IV. THE JURY'S INSTITUTIONAL SAFEGUARDS

Although proponents of the popular account assume that excessive jury damage awards are the prime reason for escalating medical malpractice premiums, and urge quick-fix solutions, such as capping non-economic damage awards or taking certain types of cases away from the jury, there are several institutional safeguards that already constrain jury damage awards. If proponents of the popular account paid greater heed to these institutional safeguards, then they would feel less need to impose quick-fix solutions that do more harm than good. These safeguards include the judge's review of the jury's damage award, the judge's instructions to the jury, and the juror's oath.

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64. Curriden, *supra* note 9, at 23A.
65. Curriden, *supra* note 63, at 25A.
66. *Id.*
67. *See supra* note 5 and accompanying text.
68. Curriden, *supra* note 3, at 1A (quoting Maria Gutierrez).

A. Judicial Review of Damage Awards

After the jury determines damages, either party can seek review of the award by the trial judge. Through remittitur[69] or additur,[70] the judge can either decrease or increase the damage award. Review of the damage award by the trial judge is an integral part of the process. If the judge decreases or increases the jury's damage award in the post-verdict period, this does not necessarily mean that the jury was wrong in its determination; it can simply mean that the judge had information that the jury did not have. For example, juries are not typically told if there is a statutory cap that limits the amount of damages that can be awarded for non-economic injury.[71] The judge would have to adjust the jury's award downward if it exceeded the cap.

Thus, the determination of damages in a jury trial needs to be viewed as a two-step process involving two decision-makers. First, the jury determines the damages. Second, the trial judge reviews that determination. The authors of one empirical study have noted that the judge's adjustment of the damage award in the post-verdict phase often goes unrecognized,[72] even though the adjustment can be significant. For example, this empirical study, which analyzed data from several state verdict reporters, including data for medical malpractice cases in New York between 1985-1997, found that New York judges adjusted damage awards, usually downward, in 44% of the cases.[73]

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69. Remittitur, "[t]he power to reduce damages[,] . . . is recognized by virtually all judicial systems." JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 12.4, at 560 (2d ed. 1993).

70. Additur, which is "the power to increase damages[,] . . . has not been accepted in all courts." *Id.* However, some state courts have upheld its constitutionality under state law. *See id.* at 561.

71. One explanation for this practice is that otherwise juries would add extra money for medical costs or lost wages. *See* Edward Felsenthal, *Why a Medical Award Cap Remains Stuck at $250,000*, WALL ST. J., Nov. 14, 1995, at B1.

72. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 298–99 (1998).

73. *Id.* at 298. During the same time period, and using verdict reporters in Florida and California, Vidmar found that the reductions in jury awards in

One question is how to make the public, press, and politicians aware of the interim nature of the jury's damage award and the integral role that the judge plays in the determination of the actual damage award. In an earlier piece, I explored several options, including delaying the announcement of the damage award until after the judge's review, having the judge describe the jury's award as an "interim" award, and having the judge become involved in the award determination at an earlier stage.[74] Another option, though not one that I favor, is having the judge make the damage award on his or her own.[75]

The advantage of any of the first three options is that they preserve the joint role of jury and judge in the award of damages. One reason that judges should not decide damages alone is that these are decisions for which there is no right answer and so we turn to a jury to obtain a community sense of what is appropriate. By having the jury reach a determination first, the damage award will have the input of the community. By having the judge review the determination, the award will be consistent with awards in comparable cases. The challenge is to explain to those outside the courtroom that there is a two-step process and that juries and judges are reaching the determination together. Thus, the jury award has not been reached by a runaway jury, but rather by a jury whose work has been reviewed by a judge.

Unfortunately, press coverage of jury damage awards merely exacerbates the problem. The press focuses on news, not ordinary, everyday events.[76] Thus, if most jury awards are modest,[77] and if

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these two states were less dramatic than in New York, but the awards, especially in Florida, were substantially smaller than those in New York. *Id.* at 292, 295, 298.

74. *See* Nancy S. Marder, *Juries and Damages: A Commentary*, 48 DEPAUL L. REV. 427, 437–42 (1998).

75. *See id.* at 439, 441–42.

76. Floyd Norris, a columnist for *The New York Times* and one of the participants at the conference at Loyola Law School, made this point clear in some of his comments during the question and answer period of the Roundtable. *See* Panel IV—Roundtable: Damage Awards in Personal Injury Litigation, Loyola Law School (Oct. 1, 2004) (tape on file with Professor Nockleby, Loyola Law School).

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

those that are not modest are typically reduced by the judge,[78] then these humdrum events are unlikely to receive attention by the press. Rather, press coverage will necessarily focus on the few large awards, the ones that will make the news because they are extraordinary, if not sensational. Unfortunately, such coverage, though reasonable from the press's perspective, contributes to a common misperception that most jury damage awards are excessive. Occasionally, there are articles reporting on jury trends,[79] but these few articles are unable to counter the image of the runaway jury created by articles focusing on the high, but aberrational, damage awards.

After the trial judge has reviewed the jury's damage award, an appellate panel of judges can review the award as well. For example, if the defendant is found liable and the plaintiff is awarded damages, the defendant can appeal both the liability finding and the damage award. Thus, the jury's damage award is subject to scrutiny by at least two levels of courts, with the possibility of a third should the state's highest court agree to review the case as well. Appellate review, however, is unlikely to change popular perceptions about runaway jury awards because by the time the appellate court decides the case, it has long since disappeared from public attention.

B. Jury Instructions

Another institutional feature that can constrain jury damage awards is the judge's instructions to the jury. The judge has responsibility for informing jurors about their roles in the judicial process, including how they are to determine damages.

In spite of the criticisms of jury instructions, such as that they are lengthy, difficult to follow, and directed to a legal rather than a lay audience,[80] they remain the primary means by which jurors learn

78. *See supra* notes 72–73 and accompanying text.

79. *See, e.g.*, William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, Mar. 2, 2001, at A1; William Glaberson, *A Study's Verdict: Jury Awards Are Not Out of Control*, N.Y. TIMES, Aug. 6, 2001, at A9.

80. *See, e.g.*, Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 IND. L.J. 1101, 1101–02, 1105–12, 1117–18 (1993); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A*

what they are supposed to do as jurors. For example, the judge explains to the jurors that they are the finders of fact and that they are to apply the law as the judge gives it to them to the facts as they find them.[81] The judge also explains to the jurors that in their fact-finding role, they are to decide which witnesses they find credible and which version of the facts they believe.[82]

Jurors typically take their cues from the judge.[83] Even when the judge tries to maintain a neutral demeanor and not reveal his personal predilections, jurors often discern his views based on more subtle means such as his body language and intonation.[84] After all, the judge is an authority figure in the courtroom and the jurors are, for the most part, new to their job. When the judge speaks directly to the jury through jury instructions, typically delivered at the end of the trial before the jury commences its deliberations,[85] the jurors attend carefully to his words. Thus, they try to follow the judge's instructions about how they are to perform their job in general and how they are to determine damages in particular.

Almost 170 years ago, Tocqueville presciently noted the authority that the judge exerts over jurors, particularly in civil cases.[86] He explained that jurors were likely to look to the judge in civil cases, more so than in criminal cases, because civil cases tended

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Psycholinguistic Study of Jury Instructions, 79 COLUM. L. REV. 1306 (1979); Robert F. Forston, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 601–06, 616–23.

81. *See, e.g.*, 4 HON. LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS (CIVIL) (2004) ¶ 71.2 ("My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them . . . .").

82. *See, e.g.*, *id.* ¶ 1.8 (Credibility of Witnesses).

83. *See* Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975).

84. *Id.*

85. There has been a move to introduce preliminary jury instructions early in the trial and then give final instructions at the end of the trial, but this approach has been tried by judges in just a few states, such as Arizona. *See* ARIZ. SUPREME COURT COMM. ON MORE EFFECTIVE USE OF JURIES, JURORS: THE POWER OF 12 (1994) [hereinafter POWER OF 12]; B. Michael Dann & George Logan III, *Jury Reform: The Arizona Experience*, 79 JUDICATURE 280, 280–83 (1996).

86. *See* TOCQUEVILLE, *supra* note 11, at 274.

to be more complicated than criminal cases and because in criminal cases the judge appeared to be another governmental actor from which the jury needed to protect the defendant, whereas in civil cases, the jury had no similar concern.[87] Tocqueville urged judges to see the influence that they could have over jurors in civil cases and to realize that jurors would take what they learned from the judge about judicious thinking in the courtroom and apply it to their own business conduct when they returned to their private lives.[88]

Judges can use the instructions to give guidance to jurors about determining damage awards. In their instructions, judges can highlight the factors that jurors should consider, as well as those they should ignore. For example, in some states jurors are not to consider whether the plaintiff has insurance.[89] Rather, they are to reach a damage award without any consideration of third-party coverage, and the judge so instructs the jury. Thus, when the popular account describes jury damage awards as having gone awry, this ignores the effect that jury instructions have on jurors' efforts to perform their job ably, including their efforts to determine appropriate damage awards. The problem with damage award instructions is that they tend to be vague. If they were used to provide jurors with additional information about determining damages,[90] then jurors would try to follow these instructions, just as they try to follow all of the instructions that the judge gives them.

C. Juror's Oath

Another constraining factor on jurors' performance of their role in determining damage awards is the oath that they take before they serve on the petit jury. After the jurors have been selected, but before the trial has commenced, the jury is impaneled. The jurors, having been seated in the jury box, are asked to rise as a body and to

87. *Id.*

88. *Id.* at 275.

89. *See, e.g.*, CALIFORNIA BOOK OF APPROVED JURY INSTRUCTIONS (BAJI) § 1.04 (8th ed. 1995) ("There is no evidence before you that the defendant has or does not have insurance for the plaintiff's claim. Whether such insurance exists has no bearing upon any issue in this case. You must not discuss or consider it for any purpose.").

90. *See infra* notes 97–102 and accompanying text.

take an oath in which they swear to uphold the law. A typical oath in a civil case is as follows:

> Do you, and each of you, understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court?[91]

The jurors take the oath together and in the presence of the judge, the public, the parties, and God. The oath is designed to impress upon the jurors the seriousness of their task.[92]

The jurors are asked to decide the case in accordance with the evidence presented at trial and the instructions provided by the judge. Thus, the jurors know from the outset that they must follow the law as the judge has explained it to them. The jurors are not free to decide the case any way they think.[93] Rather, there are constraints, such as the evidence and the instructions, which they have agreed to follow before all present in the courtroom. Similarly, in deciding the damage award the jurors are constrained by the evidence that has been presented at trial and the instructions given by the judge. The jurors have agreed to abide by these conditions in the public setting of the courtroom and in the presence of witnesses. Even if they end up sympathizing with the injured plaintiff, they are to be governed by what the evidence shows and the instructions provide.

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91. California Courts: Guide to California Jury Service: The Trial Process, *available at* http://www.courtinfo.ca.gov/jury/step1.htm (last visited Aug. 1, 2005).

92. *See* WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 356 (2d ed. 1875) (observing that jurors must "promise, under the awful sanction of an oath, to lay aside anger, and hate, and fear; nor allow themselves to be swayed by love or friendship while they address themselves to their solemn duties").

93. The juror, like the judge, "is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921). Jurors, like judges, fill in the gaps left by the law and instructions by drawing from their own experience; however, they are not free to ignore the law and instructions. This is so particularly in civil cases, where judges have procedural devices, such as special verdicts, *see* FED. R. CIV. P. 49(a), or general verdicts accompanied by interrogatories, *see* FED. R. CIV. P. 49(b), to help the jury structure its deliberations. These devices are available to judges in civil, but not in criminal, cases.

V. GIVING JURORS TOOLS TO IMPROVE THEIR PERFORMANCE

In spite of the institutional safeguards that constrain a jury when it determines damages, the jury, like any institution, has room for improvement. The jury could determine damages more efficaciously if it had certain tools. These tools would aid it in the performance of this role, rather than deprive it of this role altogether, as proponents of the popular account would do. A judge could provide the following tools: guidelines from past comparable cases; a special verdict or interrogatories to guide the jury in its determination; and basic instruments such as a laptop with an Excel spreadsheet or at least a calculator.

A. Guidelines

Two empirical studies that looked at jury damage awards, one in medical malpractice cases[94] and another in product liability cases,[95] found the awards to be fairly consistent,[96] but suggested ways in which they could be made even more consistent. One way was for judges to provide jurors with guidelines, or "guideposts"[97] to use Shari Diamond's term, or "schedules"[98] to use Peter Schuck's term, from past comparable cases.

The guidelines could take several different forms. One possibility is for courts to give juries a distribution of awards in comparable cases. One difficulty, of course, is deciding which cases are comparable. As Shari Diamond has pointed out,[99] however, this

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94. *See* Vidmar et al., *supra* note 72, at 265.

95. *See* Diamond et al., *supra* note 10, at 315–16.

96. *See* Vidmar et al., *supra* note 72, at 267, 281, 295 (finding that juries in their award of damages for pain and suffering in medical malpractice cases in California, New York, and Florida reached consistent awards which were not as high as press accounts suggested because they were often reduced by trial judges in the post-verdict period); Diamond et al., *supra* note 10, at 315–16 (finding greater variability for damage awards than for liability, but finding less variability for juries' damage awards than for individual jurors' damage awards).

97. Diamond et al., *supra* note 10, at 318.

98. Peter H. Schuck, *Mapping the Debate on Jury Reform*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 306, 325–26 (Robert E. Litan ed., 1993).

99. *See* Diamond et al., *supra* note 10, at 320.

is the same problem that the drafters of the *United States Sentencing Guidelines*[100] faced when they tried to determine an appropriate range of sentences for particular crimes and drew on past practices in different jurisdictions. The drafters of a "Guideline for Jury Damage Awards" would have to take care to avoid the pitfall of the *Sentencing Guidelines*, which is that they are not truly "guidelines," but rather, a rigid grid from which departures, either upward or downward, are extremely difficult for judges to make. The *Sentencing Guidelines* managed to shift sentencing discretion from judges to prosecutors.[101] A guideline for damages, unlike the *Sentencing Guidelines* for judges, would have to give juries guidance without depriving them of their discretion. Even with this caveat, however, there still would be some loss of autonomy for the jury and some assertion of authority by whoever drafts the guidelines.[102]

There are several other ways that judges could give guidance to juries without being overly intrusive. One possibility is for the court to provide jurors with a list of factors that they could consider, but would not be bound to follow. Yet another possibility is to have the judge give the jury his or her view of an appropriate award, but still

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100. U.S. SENTENCING GUIDELINES MANUAL (1998) [hereinafter SENTENCING GUIDELINES].

101. *See, e.g.*, Terry J. Hatter, Jr., *Drugs and the Law: "War Games,"* 29 LOY. L.A. L. REV. 89, 90 (1995) ("[H]ow can one justify the so-called sentencing guidelines and mandatory minimums that effectively take the discretion from federal judges—those historically charged with the task of balancing the protection of society with the proper punishment of the convicted criminal?"); Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992) ("Whereas sentencing once called for hours spent reflecting on the offense and the person, we judges are becoming rubber-stamp bureaucrats. When we come to see ourselves as judicial accountants, freed from the awful responsibility of imposing a sentence, we will have abdicated our judicial role entirely."); Sheila Balkan, *Sentencing Matters*, TRIAL, Oct. 1996, at 74 (reviewing MICHAEL TONRY, SENTENCING MATTERS (1996)) ("Certainly one reason for the disparity [still present in sentencing] is the power given to prosecutors to influence the sentences of cooperative defendants so they receive more lenient sentences than those under the guidelines. This is a power not given to judges.").

102. This is one reason why the ABA/Brookings Symposium did not support guidelines for damage awards. *See* ABA/BROOKINGS SYMPOSIUM, CHARTING A FUTURE FOR THE CIVIL JURY SYSTEM 16 (1992).

permit the jury to make its own recommendation. The judge's award could serve as an "anchor" for the jury's award.[103] Or, judges could simply share with juries whatever information they now use to decide whether they should adjust the jury's damage award. In each instance, the goal would be for the court to give the jury some additional information, which could be in the form of a range or a ballpark figure, whereas now such information comes only from the attorneys.

B. Special Verdicts/Interrogatories

Another alternative is for judges to use a special verdict or a general verdict and interrogatories as a means of helping the jury to structure its discussion of damages. These are procedural devices that are already available to judges in civil cases in federal[104] and state courts[105] to assist the jury in structuring its discussion of the case. When they are used, it is typically in the liability phase of a trial; however, there is no reason they could not be used in the damages phase.

Special verdicts and a general verdict and interrogatories are two vehicles by which a judge can pose a series of questions to the jury to help it in its reasoning process. For example, under the *Federal Rules of Civil Procedure*, a federal court can give the jury a series of written questions to which the jury is expected to respond by making written findings of fact.[106] Alternatively, the court can give the jury a set of written questions to which the jury is expected to make written findings of fact as well as to render a general verdict.[107] With

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103. *See* Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385, 386, 393 (1990) (finding that jurors use the plaintiff's *ad damnum* or dollar amount of damages as an "anchor" from which they might go up or down in their damages award depending on expert testimony).

104. *See* FED. R. CIV. P. 49(a) & (b).

105. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-224(a) (West 1991); MD. CODE ANN., CTS. & JUD. PROC. § 2-522(c) (2004); N.Y. C.P.L.R. § 4111(b) & (c) (McKinney 2004).

106. *See* FED. R. CIV. P. 49(a) (Special Verdicts).

107. *See* FED. R. CIV. P. 49(b) (General Verdict Accompanied by Answer to Interrogatories).

either method, the judge helps the jury to structure its consideration of the issues.

The general reluctance on the part of judges to use either of these devices is that the deliberations, and how the jury chooses to structure them, are supposed to be the exclusive province of the jurors. These procedural devices require the judge to play a somewhat more intrusive role in the deliberations than is customary. Judges are likely to feel that they are being intrusive whether the special verdict or general verdict and interrogatories are directed to helping the jury determine liability or damages. From the jury's perspective, this approach, like the guidelines, shifts some power from the jury to the judge.

C. Basic Tools

Perhaps at the most basic level, jurors could determine damages more effectively if they had some basic tools, such as a laptop computer with an Excel spreadsheet, or at the very least, a calculator. Jurors are asked to determine damage awards, which in some cases can be a complicated matter, and yet they are not given any tools, other than perhaps pencil and paper, with which to do this. Giving jurors basic tools, which they would have in any other work setting, seems the least courts could do to enable juries to perform ably.

Providing jurors with basic tools is consistent with a growing movement by some judges and academics to treat jurors as active decision-makers rather than passive vessels into which information is poured.[108] For example, in courts around the country, judges now

108. *See, e.g.*, ABA/BROOKINGS SYMPOSIUM, *supra* note 102, at 16 ("[W]e generally support measures that would move the jury from being a 'passive' fact-finder to taking a more 'active' part in the trial process . . . ."); B. Michael Dann, *From the Bench: Free the Jury*, LITIG., Fall 1996, at 5 ("[T]he traditional passive jury that absorbs evidence and law should be changed to an active jury that participates as a near equal with judge and counsel."); *Waking Up Jurors, Shaking Up Courts*, TRIAL, July 1997, at 20 ("The 'passive juror' notion is an antiquated legal model that is neither educational nor democratic. It flies in the face of what we know about human nature to assume that jurors remain mentally passive, refrain from using preexisting frames of reference, consider and remember all the evidence, and suspend all judgment until they begin formal deliberations.") (quoting then-Arizona Superior Court Judge B. Michael Dann).

give jurors notepads and pens with which to take notes during the trial. Fifteen years ago this practice was rare.[109] Ten years ago it was widely recommended but still not widely practiced.[110] Only within the past few years has it become fairly widespread.[111] Other practices, such as allowing jurors to submit written questions to the judge during the trial or allowing jurors to engage in pre-verdict deliberations, are still viewed as cutting-edge and have only been put into effect in a few states, such as Arizona.[112] Yet all of these innovations are consistent with a view that jurors should be treated as active decision-makers, akin to judges. .Equipping jurors with such basic tools as laptops and calculators[113] is consistent with this active model of the juror as well as with expectations that jurors have from their experiences in the workplace or classroom.[114]

VI. WHAT IS AT STAKE?

A. The Jury as Scapegoat

The civil jury is an easy target. Jurors are ordinary citizens who are summoned to serve on a jury and who complete their service and return to their private lives. They are not repeat players in the

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109. *See* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 128–29 (1988) (relying on an Administrative Office of the U.S. Courts estimate that "90 percent of the federal judges do *not* permit jurors to take notes" and asking: "So why is there so much resistance?").

110. *See* ABA/BROOKINGS SYMPOSIUM, *supra* note 102, at 18–19 (describing juror note-taking as "the most widely suggested reform for enhancing juror comprehension" and noting that it was "far from universal," but recommending that "it become so").

111. JURY TRIAL INNOVATIONS 141 (G. Thomas Munsterman et al. eds., 1997).

112. *See, e.g.*, William H. Carlile, *Arizona Jury Reforms Buck Legal Traditions*, CHRISTIAN SCI. MONITOR, Feb. 22, 1996, at 1 (reporting that Arizona adopted eighteen of the jury reform panel's fifty-five recommendations, including allowing jurors to submit written questions to the judge and to engage in pre-verdict deliberations in civil trials).

113. For other tools that jurors should be given, see Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257 (2001).

114. *See, e.g.*, Lisa Guernsey, *For the New College B.M.O.C., 'M' Is For 'Machine,'* N.Y. TIMES, Aug. 10, 2000, at G7 ("The computer has . . . become the portal through which students do everything they need to do on campus.").

judicial process. Even more important, they are not professionals and typically have no training in the law.

There is ambivalence toward juries. Perhaps this is attributable to the fact that they are made up of laypersons. Juries are entrusted with enormous responsibilities—deciding liability and damages in civil cases and life or death in some criminal cases—yet jurors are often treated as if they cannot be trusted. Until recently, they were not allowed to take notes during the trial, no matter how lengthy and complex it was, for fear the note-taking would distract them.[115] In most courtrooms, they are not allowed to submit written questions, no matter how reasonable or pertinent they are, for fear that it will lead them to form a view of the case too early in the process.[116] In all courtrooms, they are not instructed on the jury's power to nullify for fear that the jury will engage in nullification too readily and without just cause.[117] At the same time that jurors are asked to decide the hardest cases in our society, the ones for which there are no right answers, they are rarely given all the tools they need to perform that function.

It is not surprising, then, that juries have become the scapegoat in this debate on escalating medical malpractice premiums. Whereas doctors and insurers are professionals who have powerful lobbying arms with ample resources, jurors are laypersons who have nobody to speak on their behalf and who are paid from $5 to $40 per day for their services. It seems much easier to blame juries and to limit their scope than it does to revamp health coverage and the insurance industry's role in it.

B. The Dangers of the Popular Account

Casting the civil jury into the role of scapegoat in this debate is not without costs. The U.S. Supreme Court has described the

115. *See* KASSIN & WRIGHTSMAN, *supra* note 109, at 128.

116. *See* Nicole L. Mott, *The Current Debate on Juror Questions: "To Ask or Not To Ask, That Is the Question,"* 78 CHI.-KENT L. REV. 1099, 1108–09 (2003).

117. *See* United States v. Dougherty, 473 F.2d 1113, 1139–44 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part) (explaining why juries should be educated as to their power to nullify and attributing courts' failure to do so to an underlying distrust of juries).

criminal jury as a buffer between the defendant and an overzealous prosecutor or hardened judge.[118] In medical malpractice cases, the civil jury serves as a buffer between the injured plaintiff and the medical professional charged with having acted negligently. The injured plaintiff has no other body to turn to for redress. State review boards, staffed by fellow doctors unwilling to second-guess a colleague, rarely provide a viable means of redress. Even injured individuals who prefer to avoid the emotional toll of litigation, and who only wish to see that the doctor is stopped from engaging in negligent treatment of other patients in the future, have few routes to achieve that modest goal.

The civil jury serves as a buffer between the injured plaintiff and individuals and corporations who have acted negligently, irresponsibly, or even unscrupulously and caused them serious harm. The civil jury, comprised of ordinary citizens who hear only one case and who have no stake in the outcome of that case, often can take a stand that is more courageous or innovative than a legislature can.

Earlier in our history, when civil juries declined to find contributory negligence, they essentially created a regime of comparative negligence before the legislature and judges had eliminated contributory negligence as a defense.[119] In other areas as well, from the law of wrongful discharge, in which jury verdicts slowly created a form of job security that the common-law doctrine of employment-at-will denied, to the award of punitive damages, juries have helped to shape the law and have sometimes taken the lead until legislatures have been ready to act.[120]

VII. CONCLUSION

The chipping away of the civil jury, as proponents of the popular account advocate, will have ramifications far beyond cases of medical malpractice. The civil jury stands as a bulwark against

118. Duncan v. Louisiana, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

119. *See* Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 113.

120. *See id.*

wrongful behavior that causes injury. The damage award not only tries to make the injured plaintiff whole again, but also encourages the defendant, whether it is a doctor, hospital, or car manufacturer, to take steps to reduce the possibility of harm to others in the future. If the civil jury is pared down so that it becomes a "jury lite" and can no longer hear certain kinds of cases or award certain kinds of damages, then the citizenry will lose the protections that the jury system has traditionally afforded. Far better, at least in my view, is to keep the civil jury strong and to give it the tools it needs to perform its vital roles.