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THE TEXAS TWO-STEP: EVIDENCE ON THE LINK BETWEEN DAMAGE CAPS AND ACCESS TO THE CIVIL JUSTICE SYSTEM

Stephen Daniels* and Joanne Martin**

INTRODUCTION

“What’s the real cause of the state’s growing liability crisis, and resulting restrictions on patient access to care? Simply put, it’s an out-of-control legal system.”¹ This quotation is taken from a “Dear Colleague” letter written by the chairman of ISMIE Mutual Insurance Company, a physician-owned, medical malpractice insurer in Illinois. It is a strongly worded, almost angry letter meant to refute the claims of plaintiffs’ lawyers and consumer groups who are “blaming insurance company practices and bad medicine for Illinois’ deteriorating medical liability climate.”²

The letter argues that plaintiffs’ lawyers and consumer groups are distorting the issues, “thus diverting attention from the explosive growth of lawsuits and awards—trends from which they reap huge profits.”³ More specifically, the letter writer concludes that the key problem is noneconomic damages. Such damages are characterized as “[t]he primary cost driver in medical liability”⁴ because they are the source of those “huge profits” for plaintiffs’ lawyers, who work on a contingency fee basis.⁵ The letter concludes, “The legal system should fairly compensate patients injured by medical negligence, but exorbitant, non-economic damage awards—the pot from which lawyers’ fees are taken—must be controlled before more doctors flee Illinois.”⁶

The message of the Dear Colleague letter is clear—a central purpose of the effort to cap damages is to make medical malpractice

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2. Id.
3. Id. We presume the huge profits are being reaped just by the plaintiffs’ lawyers and are not being shared with consumer groups.
4. Id.
5. Id.
6. Id.
claims less profitable and hence less attractive to plaintiffs' lawyers working on a contingency fee basis. Limited damages mean limited contingency fees. If medical malpractice cases become less profitable, then plaintiffs' lawyers (presumed to be rational, self-interested actors) will be less interested in handling such cases and move on to other, more profitable markets. The important question is what happens when the logic of this initial consequence unfolds. If the logic works, there should be fewer medical malpractice claims—not because there will be fewer injury-causing medical errors and hence fewer potential cases of medical negligence, but because there will be fewer lawyers interested in handling such cases. Should this logic manifest itself fully, meaningful access to the civil justice system for some injured people may be diminished since meaningful access requires competent legal representation.

Our interest is in exploring the possible link between damage caps and access to the civil justice system, and in doing so we will draw from our empirical research in Texas. Our research focuses on the effects of tort reform on plaintiffs' lawyers and their practices. In


8. On the amount of death and injury resulting from medical error in hospitals and the costs, see Institute of Medicine, To Err is Human: Building a Safer Health System 26-48 (Linda Kohn et al. eds., 2000). According to the Institute of Medicine, Preventable adverse events are a leading cause of death in the United States. When extrapolated to the over 33.6 million admissions to U.S. hospitals in 1997, the results of these two studies [one in New York, the other in Colorado and Utah] imply that at least 44,000 and perhaps as many as 98,000 Americans die in hospitals each year as a result of medical errors. Even when using the lower estimate . . . [d]eaths due to preventable adverse events exceed the deaths attributable to motor vehicle accidents (43,458), breast cancer (42,297) or AIDS (16,516). Id. at 26 (internal citations omitted).

9. We have reported on this research in Stephen Daniels & Joanne Martin, The Strange Success of Tort Reform, 53 Emory L.J. 1225 (2004) [hereinafter Daniels & Martin, Strange Success]; Stephen Daniels & Joanne Martin, It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas, 80 Tex. L. Rev. 1781 (2002) [hereinafter Daniels & Martin, It Was the Best of Times]; 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); Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest:" How Markets and Reputations Shape the Ways in Which Plaintiffs' Lawyers Obtain Clients, 21 Law & Pol'y 377 (1999) [hereinafter Daniels & Martin, Darwinism]. Our initial research involved ninety-six, in-depth interviews with Texas plaintiffs' lawyers and a major mail survey of Texas plaintiffs' lawyers with 554 useable responses [hereinafter Plaintiffs' Lawyer Survey]. A detailed description of our methodology and the data we collected can be found in It Was the Best of Times, supra, at 1826–28. We are currently in the process of again interviewing
2003, Texas passed major tort reform legislation with the primary, although not exclusive, focus on capping noneconomic damage awards in healthcare cases and putting tighter controls on what is needed to demonstrate economic damages. Specifically, House Bill 4, An Act Relating to Reform of Certain Procedures and Remedies in Civil Actions (HB4), capped noneconomic damages at $250,000 for a single healthcare claim and $750,000 for such claims involving multiple defendants.\textsuperscript{10} In the words of one recent law review commentary, "The centerpiece of HB4 was article 10, which proposed hard caps on all noneconomic damages awarded to patients in medical-malpractice suits."\textsuperscript{11} The legislation also included new jury instructions on economic damages, requiring that such damages be awarded only upon the demonstration of actual losses incurred and evidence of the net loss after reduction for income tax payments. The idea here is to prevent the inflation of economic damages to make up for any diminution in noneconomic damages due to the cap.\textsuperscript{12}

Once passed, HB4's supporters immediately moved to amend the Texas Constitution in order to block a constitutional challenge to the new limitations on noneconomic damage awards.\textsuperscript{13} Proposition 12, its name on the state ballot, stated:

Notwithstanding any other provision of this constitution, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, of a provider of medical or health care with respect to treatment, lack of treatment, or other claimed departure from an accepted standard of medical or health care or safety, however characterized, that is or is claimed to be a cause of, or that contributes or is claimed to contribute to, disease, injury, or death of a person.\textsuperscript{14}

plaintiffs' lawyers in Texas, and we have conducted ten of twenty planned interviews. In addition, as of this writing, another mail survey of plaintiffs' lawyers in Texas is in process.

\textsuperscript{10} TEX. CIV. PRAC. & REM. CODE ANN. § 74.301(a)–(c) (Vernon 1986 & Supp. 2003).

\textsuperscript{11} James L. "Larry" Wright & M. Matthew Williams, Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards, 45 S. TEX. L. REV. 449, 455 (2004).

\textsuperscript{12} See Catherine M. Sharkey, Unintended Consequences of Medical Malpractice Caps, 80 N.Y.U. L. REV. 391 (2005), for the proposition that caps on noneconomic damages may lead to an increase in economic damages.

\textsuperscript{13} See Wright & Williams, supra note 11, at 455–58. This strategy was needed because of the 1988 Texas Supreme Court decision in Lucas v. United States, 757 S.W.2d 687 (Tex. 1988), which struck down similar caps as violating Article 1, section 13 of the Texas State Constitution: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." Id. at 696. A possible response to this constitutional strategy in Texas would be a federal constitutional challenge using the Seventh Amendment's right to a trial by jury in civil cases, a right that has yet to be applied to the states. See Wright & Williams, supra note 11, at 464–517.

\textsuperscript{14} TEX. CONST. art. III, § 66(b).
The proposal passed and is particularly important because it goes beyond protecting the cap in healthcare cases and allows the legislature to enact caps in other cases as well: "Notwithstanding any other provision of this constitution, after January 1, 2005, the legislature by statute may determine the limit of liability for all damages and losses, however characterized, other than economic damages, in a claim or cause of action not covered by Subsection (b) of this section." Enacting any such limitation would require a three-fifths majority in both houses of the state legislature.

Set against this new legal environment in Texas, we will explore how caps can affect access to the civil justice system by examining how caps affect the business of plaintiffs’ law. We do so because plaintiffs’ lawyers function as the civil justice system’s gatekeepers, and the gates will widen or narrow depending on the profitability of the lawyers’ practices. We will pay special attention to the processes surrounding how plaintiffs’ lawyers obtain and screen cases. Acquiring and screening cases is crucial for plaintiffs’ lawyers since their profitability requires an ongoing flow of clients with injuries that the civil justice system will compensate adequately. Here, “compensate adequately” means compensation that will allow lawyers to collect their fees and recoup their investment in a matter without shortchanging the client. Anything that may affect the value of a case, such as a damage cap, is likely to alter the decision as to what the lawyer believes will constitute adequate compensation and ultimately whether to take a case. If the cap’s effect is substantial, it could even influence the lawyer’s decision to continue handling such matters altogether. Working with our Texas data, we will examine the potential impact of caps for plaintiffs’ lawyers generally, and then for medical malpractice specialists—the lawyers most directly affected by the Texas cap.

15. Id. § 66(c).
16. Id. § 66(e).
19. We think it is important to look at that general picture first. While the discussion and debate over caps has focused on medical malpractice and other health-related cases, we should not lose sight of the fact that caps could be placed on any kind of money damage case. The potential for this broader application is illustrated by Proposition 12 in Texas, which specifically authorizes caps on noneconomic damage in health-related cases and also authorizes caps in any other type of case.
These two issues will be dealt with in sections A and B, respectively, of Part III of this article.

In addition to working with the data we collected on Texas plaintiffs' lawyers, we will also utilize data from a 2004 survey conducted by the State Bar of Texas. That survey focused on referral practices among lawyers in Texas.20 Few empirical studies of referral practices among lawyers exist, and we know virtually nothing of the possible impact of damage caps (or other tort reform measures) on these practices.21 Yet, referral systems are an important aspect of meaningful access. Referral systems, especially those like the Texas system which permits paid referrals,22 provide economic incentives to move cases among lawyers so that they wind up in the hands of those better able to handle them—the specialists. This is especially important for the movement of complex or high-end tort cases like medical malpractice, because the specialists who handle such matters rely heavily on referrals as a source of their business.23 Changes like damage caps that make certain kinds of cases less economically attractive may alter the incentives for either referring a case to a specialist or for a specialist to accept a case, thereby potentially diminishing access to the most able lawyers.

We will examine the potential impact of the Texas damage cap on the referral system in section C of Part III of this article. But before we begin Part III's exploration of damage caps and the business of plaintiffs' law, it is necessary first to address the more general issue of the link between damage caps and meaningful access to the civil jus-

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20. DEP'T OF RES. & ANALYSIS, STATE BAR OF TEXAS, TEXAS REFERRAL PRACTICES SURVEY REPORT (2004) [hereinafter TEXAS REFERRAL SURVEY]. The survey was done in conjunction with the State Bar of Texas Referral Fee Task Force. It was sent to a random sample of 4,000 active, in-state members of the State Bar of Texas in the spring of 2004. Id. at 3. (Texas is a mandatory bar state, so this sample represents all active lawyers in the state.) Id. at 4. Of the 4,000 surveys sent, 1,215 completed surveys were returned (30.4%). This level of response means a confidence interval of plus or minus three percentage points at the 95% significance level. For a description of the survey's methodology, see id. at 3-7. The specific data used in this article are on file with the authors, and the analyses reported in this paper were conducted by the authors and represent only their interpretations and not those of the State Bar of Texas or the Referral Fee Task Force.


22. Data from the Texas Referral Survey show a mean referral fee of 29.9% and a median of 33.0% (percentage of the successful lawyer's fee paid to the referring lawyer). TEXAS REFERRAL SURVEY, supra note 20, at 77.

23. See Daniels & Martin, It Was the Best of Times, supra note 9, at 1788–95.
tice system. Part II addresses this issue and discusses three matters in doing so: the political rhetoric surrounding caps and the reasons typically offered for enacting caps; an alternative purpose for caps, namely diminishing access to the civil justice system by making certain kinds of cases financially unattractive to plaintiffs’ lawyers; and the more general or longer term implications of making certain kinds of cases financially unattractive to plaintiffs’ lawyers.

II. DAMAGE CAPS AND MEANINGFUL ACCESS TO THE CIVIL JUSTICE SYSTEM

A. Caps and Politics

The idea of capping noneconomic damage awards in medical malpractice cases has been at the forefront of the political efforts for malpractice reform. One reason can be seen in a series of polls sponsored by insurance interests and by the American Medical Association since at least the mid-1970s to gauge, among other things, public acceptance of such caps. These polls suggest that reform efforts that focus on noneconomic damage caps will resonate with the public. The most recent polls show that people are willing to support limits on awards, especially for “pain and suffering.” For instance, a late 2004 national poll sponsored by the Kaiser Foundation asked respondents, “Would you favor or oppose a new law that would put a limit on the amount of money that can be awarded to someone suing a doctor for malpractice for damages for pain and suffering?” Sixty-three percent of respondents said that they would favor such a law and only thirty-three percent said they would oppose it.

In five major national polls conducted between 1975 and 1993 that asked whether people generally supported limits on awards in medical malpractice cases, the lowest level of support was fifty-seven percent.


26. Id.

27. Id.

of respondents (1987)\textsuperscript{29} and the highest was seventy-six percent (1993).\textsuperscript{30} Another nine major polls conducted between 1986 and 2004 asked specifically about limits on "pain and suffering" awards in medical malpractice cases.\textsuperscript{31} The lowest level of support for such limitations on awards was fifty-six percent (2003)\textsuperscript{32} and the highest was seventy-eight percent (2002).\textsuperscript{33} Four of these nine polls were sponsored by the American Medical Association.\textsuperscript{34}

In line with these polls, the political rhetoric of medical malpractice reform focuses on capping noneconomic damages. In Texas in 2003, it was the primary issue in the debate over HB4 and then over Proposition 12.\textsuperscript{35} It was also the issue in a similar political effort in Florida in 2003, which led to three special sessions of the state legislature before a compromise was reached on the amount for a cap.\textsuperscript{36} Florida's governor, Jeb Bush, held out for a $250,000 cap, but finally agreed to a $500,000 cap against physicians and a $750,000 cap against hospitals and healthcare facilities.\textsuperscript{37}

A $250,000 cap is also at the heart of the proposal for federal medical malpractice legislation championed by President Bush in his January 2005 visit to Madison County, IL—one of the tort reformers' so-called "Judicial Hellholes."\textsuperscript{38} A Chicago Sun-Times story on January

\textsuperscript{29} See Roper Org., supra note 28.
\textsuperscript{32} See Fabrizio McLaughlin & Assoc., Peter Hart Res. Assoc., supra note 31.
\textsuperscript{33} See McLaughlin & Assoc., supra note 31.
\textsuperscript{34} See supra note 31.
\textsuperscript{35} See Wright & Williams, supra note 11.
6, 2005, reported, "Flanked by about 150 doctors, many in their familiar white office coats, Bush staked out one of the major new policy initiatives of his second term by imploring lawmakers in Washington to impose $250,000 limits on non-economic damages linked to medical mistakes." The same day, Northern Illinois University released a press statement that began:

President George W. Bush knew in advance his campaign for medical malpractice tort reform would play well in Madison County, Ill., where he unveiled his plan Wednesday.

So did researchers at Northern Illinois University's Center for Governmental Studies, whose recently completed Illinois Policy Survey, found that residents of southern Illinois were ... the group most strongly favoring the capping of awards in such cases.

The political rhetoric surrounding civil justice reform does not advocate caps on noneconomic damages for reasons of principle. Rather, caps are sold to the public for very practical reasons. The rhetorical logic says that caps will lead to significantly lower malpractice insurance for physicians. This, presumably, will in turn prevent physicians from abandoning the practice of medicine, relocating to another state, changing medical specialties, or leaving already underserved places like rural areas. These may all be legitimate policy problems, but the connection between damage caps and insurance rates and between damage caps and these problems remains empirically murky. An influential 2003 GAO report took note of the murky situation, saying:

40. Press Release, Northern Illinois University, NIU Survey Finds Illinois Residents Support Medical Malpractice Reform (Jan. 6, 2005), available at http://www.niu.edu/pubaffairs/presskits/ips2005/malpractice.html. According to the press release, "Statewide, 67 percent of respondents favored a cap, while in southern Illinois that percentage soared to 81 percent. In no region was support below 60 percent." Id.
41. There is, for instance, substantial empirical literature dealing with medical malpractice that would suggest that medical malpractice reform is unlikely to remedy many of the problems used to justify reform. See U.S. General Accounting Office, Medical Malpractice: Implications of Rising Premiums on Access to Health Care (2003) [hereinafter Medical Malpractice]; U.S. Gen. Accounting Office, Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates (2003) [hereinafter Medical Malpractice Insurance]. See also Vasanthakumar N. Bhat, Medical Malpractice: A Comprehensive Analysis (2001); Stephen Daniels & Joanne Martin, Civil Juries and the Politics of Reform (1995); Institute of Medicine, supra note 8; Frank A. Sloan et al., Suing for Medical Malpractice (1993); Neil Vidmar, Medical Malpractice and the American Jury (1995); Paul C. Weiler et al., A Measure of Malpractice (1993); Paul C. Weiler, Medical Malpractice on Trial (1991); 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 (1997); Michelle M. Mello & Troyen A. Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice
Interested parties debate the impact these various measures may have had on premium rates. However, a lack of comprehensive data on losses at the insurance company level makes measuring the precise impact of the measures impossible. As noted earlier, in the vast majority of cases, existing data do not categorize losses on claims as economic or noneconomic, so it is not possible to quantify the impact of a cap on noneconomic damages on insurers' losses. Similarly, it is not possible to show exactly how much a cap would affect claim frequency or claims-handling costs. In addition, while most claims are settled and caps apply only to trial verdicts, some insurers and actuaries told us that limits on damages would still have an indirect impact on settlements by limiting potential damages should the claims go to trial. But given the limitations on measuring the impact of caps on trial verdicts, an indirect impact would be even more difficult to measure.\textsuperscript{42}

A companion GAO study on the connection between malpractice insurance problems and access to healthcare also found a mixed picture.\textsuperscript{43} Lucinda Finley's recent review of the efficacy of caps on noneconomic damages comes to essentially the same conclusions as the GAO analyses.\textsuperscript{44} A short review we wrote ten years ago of earlier empirical studies assessing the impact of medical malpractice reforms passed in the 1970s, including caps, also noted the mixed picture.\textsuperscript{45}

\textbf{B. Caps and Diminishing Access to the Justice System}

Regardless of whether caps actually serve the purposes laid out in the political rhetoric, they may still diminish access to the civil justice system for potential medical malpractice plaintiffs. While this is something that has not yet attracted much systematic, empirical examination, the possibility that caps diminish meaningful access has been raised. For instance, the 2003 GAO report on medical malpractice insurance premiums noted, "[A]ccording to some trial attorneys we spoke with, attorneys may be less likely to represent injured parties with minor economic damages if noneconomic damages are limited."\textsuperscript{46} The GAO's argument is that caps on damages are, in part, aimed at reducing the number of malpractice cases by making them

\textsuperscript{42} Medical Malpractice Insurance, supra note 41, at 42-43.
\textsuperscript{43} Medical Malpractice, supra note 41.
\textsuperscript{46} Medical Malpractice Insurance, supra note 41, at 42.
less economically attractive. Jerry Van Hoy has documented how caps on awards instituted by Indiana in the 1970s drove most plaintiffs' lawyers out of the Indiana malpractice market altogether by making it impossible for them to handle these cases profitably.47

In her investigation of what she calls the “hidden victims of tort reform,” Professor Finley argues that as a result of caps, lawyers will be less willing to take certain kinds of cases. After an empirical analysis of jury verdicts in California, Florida, and Maryland (with most attention to California), Finley found that the primary impact of damage caps can be seen in those cases involving women, children, and the elderly, especially in death cases involving these groups.48 Because of caps, these groups of people are likely to lose a larger percentage of their compensatory damage awards compared to men of working age. She says:

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.49

For Finley, the most profound consequence of caps will be on “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.”50 The idea is that the rights

48. Finley, supra note 44, at 1313. A recent analysis of the California cap on noneconomic damages in medical malpractice cases came to similar conclusions with regard to which groups of people would feel the brunt of the caps. See Nicholas M. Pace et al., Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA 30–33 (2004) (describing the effects of caps by age and gender of plaintiff). Another study examining California jury verdicts, however, did not find the same effects with regard to age and gender. This study, nonetheless, did find a disparate impact with regard to the most severely injured people. See David Studdert et al., Are Damage Caps Regressive? A Study of Malpractice Jury Verdicts in California, 23 HEALTH AFF. 54, 54 (2004).
49. Finley, supra note 44, at 1313 (emphasis added).
50. Id.
one has in practice will be dependent on lawyers willing to take cases involving those rights.\textsuperscript{51}

As if to echo Finley's concerns, a March 20, 2004 article in the \textit{Houston Chronicle} noted that "[t]he number of medical malpractice lawsuits filed in Harris County has fallen dramatically since Texas lawmakers imposed a cap six months ago on the amount of money juries can award."\textsuperscript{52} Similarly, a recent article in \textit{Texas Lawyer} on the connection between access and capping of noneconomic damages in medical malpractice cases summarizes one plaintiffs' lawyer's view by saying, "HB 4 has slammed the courthouse doors shut on those who can least afford it—children, stay-at-home moms and the elderly."\textsuperscript{53} The article goes on to quote another plaintiffs' lawyer who said, "Only those people who have an impressive earnings history and a significant earnings future have a case that is viable under H.B. 4."\textsuperscript{54} Other lawyers are quoted as saying that they are taking fewer medical malpractice cases as a result of HB4.\textsuperscript{55}

In short, limits on noneconomic damage awards may affect access to the civil justice system by making cases financially unattractive to plaintiffs' lawyers working on a contingency fee basis. Access may be

\textsuperscript{51} The TIPS Task Force said "that materially limiting contingent fees . . . could have a tempering effect on [malpractice insurance] premiums. The reason is simple, medical malpractice victims will not find lawyers to assist them in their claims." CARROLL ET AL., supra note 7, at 28.

\textsuperscript{52} Andrew Tilghman, \textit{Malpractice Filings Fall After Cap}, HOUS. CHRON., Mar. 20, 2004, at A33.

\textsuperscript{53} Mark Donald, \textit{Access Denied: Does Tort Reform Close Courthouse Doors to Those Who Can Least Afford It?}, TEX. LAW., Jan. 10, 2005, at 1.

\textsuperscript{54} Id.

\textsuperscript{55} Id. Although not involving medical malpractice cases, some of our earlier work in Texas found similar dynamics surrounding changes in noneconomic damages. We found that plaintiffs' lawyers were handling fewer auto cases and were becoming much stricter in screening those cases they did handle, potentially leaving some victims without meaningful access. See Daniels & Martin, \textit{Strange Success}, supra note 9. Plaintiffs' lawyers did this because of their belief that juries were awarding less noneconomic damages in auto cases, a belief for which we found empirical support. Id. at 1245-47. The change in noneconomic damage awards was not, however, a result of a legislatively imposed cap. Rather, in the lawyers' view, this was a result of many years of proto-tort reform, public relations campaigns affecting—or "poisoning"—the jury pool. According to a Lubbock, Texas, judge and mediator interviewed as a part of the Texas Department of Insurance 1998 rate reduction process, "I don't think that you can say tort reform gets direct credit. I think the propaganda associated with the tort reform and the poisoning of the jury panels had effect on bringing things [jury verdicts] down." Texas Department of Insurance, Selected Quotations from Focus Group Sessions (1998), http://www.tdi.state.tx.us/commish/legal/lcortqru.html. The idea of "poisoned" jury pools has been seen as a national problem. For instance, a 1997 article in \textit{Trial} complained of "an environment charged with 'tort reform' rhetoric, where potential jurors come to court already influenced by deliberate propaganda aimed at discrediting plaintiffs and their lawyers . . . ." James L. Gilbert et al., \textit{Overcoming Juror Bias in Voir Dire}, TRIAL, July 1997, at 42. If this informal change involving noneconomic damage awards can diminish access, we would certainly expect formal caps to produce the same result.
diminished because the only way for most people to afford representation, especially in a substantial matter like medical malpractice, is to hire a lawyer who will handle it on a contingency fee basis. As Herbert Kritzer reminds us, the contingency fee is about access to the system for those without the means to pay a lawyer to represent them. Plaintiffs' lawyers are the gatekeepers to the civil justice system. As Kritzer says, "from the perspective of the average citizen, contingency fees are about 'access to justice' through the mechanism of civil litigation, or the threat of civil litigation." A Texas lawyer we recently interviewed said the same thing, noting:

ninety percent of the people out there make their living, they pay for their kids to go to school, they pay to take care of their kids, they pay for their mortgage, they pay for their one or two cars, and at the end of the month, they may have $100 left over if they're the lucky ones. . . . And so, for someone to have the ability to go hire a lawyer on anything other than a contingency, you know, I think it's a fiction.

A 1993 analysis of the use of lawyers in closed medical malpractice claims in Wisconsin starkly shows the importance of legal representation. Of the 2,896 closed claims in the study, fifty-nine involved pro se plaintiffs, and another 102 involved unrepresented plaintiffs. Claimants were able to secure a monetary settlement in only one of the fifty-nine pro se claims (a success rate of 1.7%), and in eight of the other 102 claims (a success rate of 7.8%). In contrast, the success rate for claimants represented by counsel was thirty-four percent. Interestingly, the success rate for claimants represented by the two most experienced plaintiffs' firms in the study—the specialists handling 100 or more claims among the 2,896—was 50.2% (56.1% and 46.4%, respectively). In other words, representation makes a difference and the best representation can make a substantial difference.

Imposing caps that make cases financially unattractive can also affect access to the justice system in another way. The referral system may be affected, especially with regard to moving more complex and higher value cases to the specialists. Indeed, many high-end plaintiffs'
lawyers rely heavily on lawyer referrals as a source of business, so much so that some have developed a network of lawyers from whom they regularly receive referrals and to whom a fee is typically paid. Legal changes that affect profitability may discourage lawyers from making or accepting referrals. Changes that make cases the specialists handle less profitable can disrupt the referral system because there will be less money from which the specialist can recover his or her time and expenses, and less to pay the referring lawyer the usual fee (typically about one-third of the specialist's fee). Changes that make cases the referring lawyers handle less profitable can disrupt the system by making it harder for these lawyers to stay in business. If they cannot stay in business, there will be no one to refer cases to the specialists. As one lawyer we interviewed, who relied almost exclusively on lawyer referrals, bluntly stated, "If my referring lawyers go away, I'm in trouble." Consequently, access to the most able and appropriate lawyers may be diminished.

C. Caps as an Instrument for Change in the Law's Development

Diminishing access is a direct or immediate consequence of imposing caps that make certain cases financially unattractive. But the indirect consequences may be equally important, especially with regard to high-end or elite plaintiffs' lawyers—the specialists. Marc Galanter and David Luban, in a 1993 article dealing with punitive damages, outlined a rough theoretical argument about the substantial impact of formal tort reform on the plaintiffs' bar and eventually on the civil justice system. As we read their argument, it is based on the presumption that tort reform is aimed at making a contingency-fee-based practice less profitable. The direct and most obvious consequences of tort reform, Galanter and Luban said, involve plaintiffs' lawyers handling fewer tort cases or leaving the market altogether—or the jurisdiction—especially the high-end or elite plaintiffs' lawyers. This would mean less opportunity for people to enforce the protections of tort law because there would be fewer lawyers working in this field. Consequently, the law's purposes may not be served.

63. This discussion draws from Daniels & Martin, Darwinism, supra note 9, at 394–96.
64. This in fact happened in Texas in the wake of the 1991 changes in the handling of workers' compensation cases which drove most lawyers out of this practice area. Id. These lawyers were a regular source of referrals for a number of high-end plaintiffs' lawyers. Id. High-end lawyers, in turn, saw their practices suffer because they relied so heavily on referrals from the workers' compensation lawyers. Id.
Galanter and Luban believe that the high-end or elite lawyers are most likely to leave the market because they have the resources and skills to seek other lucrative opportunities. Less proficient lawyers will be the ones left working in the field. This could mean, Galanter and Luban say, fewer top-notch lawyers devising novel legal strategies that extend the law. It would also diminish the networks among plaintiffs' lawyers through which new ideas and innovations circulate. To the extent such lawyers act as mentors for new lawyers entering the field, the opportunities for apprenticeship training would be fewer, diminishing the overall quality of the plaintiffs' bar. The quality of the plaintiffs' bar would be further diminished, they say, by the less proficient lawyers who will move into the market as the better ones leave.

In addition, Galanter and Luban argued that the most skilled plaintiffs' lawyers typically obtain the best settlements, not only because they are better-than-average negotiators, but also because defendants do not want to confront them in jury trials. Most cases settle out of court, and information about the size of settlements is often disseminated among both the plaintiffs' and defense bars. This information sends signals that govern negotiations in future cases because settlement negotiations occur "in the shadow" of past settlements. If too many good lawyers exit the plaintiffs' bar, the shadow shortens, and defendants will be able to bargain harder for lower settlements.

In other words, it may be possible to affect change in the law itself—in practice—by altering the market for certain services. Caps are a powerful instrument for altering the market.

III. DAMAGE CAPS AND THE BUSINESS OF PLAINTIFFS' LAW

Plaintiffs' lawyers are specialists. They devote most, if not all, of their practices to representing individuals suffering some kind of injury and do so on a contingency fee basis. Theirs is a precarious business, and damage caps make that business even more so. Plaintiffs' lawyers typically deal with "one shot" clients for whose injuries the law potentially provides compensation. They must generate an ongoing stream of such clients in order to survive financially. Identifying those matters that are likely to lead to an adequate level of compensa-

66. Id. at 1452–53.
67. Id.
68. Id.
69. Id.
70. Id.
tion and handling them with some degree of cost effectiveness is crucial.\textsuperscript{72} If a case is not successful (meaning there is no compensation), the lawyer will receive no fee and will not be reimbursed for the expenses incurred in preparing the case.

Merely being successful, however, may not be enough. The lawyer may still face financial problems if the compensation awarded is not sufficient to cover both the client's needs and the lawyer's investment of time and money. In other words, a lawyer can "win" a case but still lose financially. In addition, lawyers must weigh opportunity costs—weighing risks and costs against likely return in choosing among contingency fee cases and weighing contingency fee cases against less risky hourly or flat fee cases.\textsuperscript{73}

Drawing from our empirical research in Texas, the first section of Part III provides a general outline of the precarious business of practicing plaintiffs' law. It forms the context for the second section of Part III, which examines plaintiffs' lawyers who specialize even further into healthcare-related areas directly targeted by Texas's recent capping of noneconomic damages. Finally, the last section of Part III draws from the Texas Referral Survey and looks at the referral system.

\textbf{A. The Business of Plaintiffs' Law: A General Picture}

Maintaining a steady stream of clients with injuries that the civil justice system will adequately compensate is everything for plaintiffs' lawyers. Without such a stream of clients, they will quickly be out of business. How do they maintain that steady stream of clients with compensable injuries? How do they screen cases? These are crucial issues since "adequate compensation" means compensation that will allow the lawyer to collect his or her fee and recoup his or her investment in the matter \textit{without} shortchanging the client. This definition is essential in understanding the potential impact of caps on noneconomic damages.

In light of the frequently aired television commercials offering legal services in Texas and elsewhere, the assumption might be that most plaintiffs' lawyers get their clients through advertising and take almost everything that comes in the door. In reality, this is far from true. Of the 549 plaintiffs' lawyers in our Plaintiffs' Lawyer Survey who responded to a question on advertising, 70.1\% said they advertise.\textsuperscript{74} As

\textsuperscript{72} See KRITZER, \textit{supra} note 18, at 67–88, on screening by lawyers in Wisconsin.

\textsuperscript{73} See \textit{id.} at 180–218, for a discussion of Wisconsin lawyers' return on investment in cases.

\textsuperscript{74} Of those who did advertise (n=385), the most frequently used vehicle was the \textit{Yellow Pages} (77.7\%). Plaintiffs' Lawyers Survey, \textit{supra} note 9. For 37.1\% of the advertisers, this was the
Table 1 shows, however, advertising is not the key source of clients for the lawyers in the survey, even for those who do advertise. It shows that referrals of one kind or another are the key source of business, with lawyer referrals being the most important source of clients, followed by client referrals, other referrals, and advertising (all forms combined). The relative unimportance of advertising as a source of clients for most respondents is reflected in the fact that only 9.6% of respondents received at least fifty percent of their clients from advertising.

<table>
<thead>
<tr>
<th>Source</th>
<th>Mean Percent of Clients</th>
<th>Median Percent of Clients</th>
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</thead>
<tbody>
<tr>
<td>Lawyer Referrals (n=540)</td>
<td>37.2%</td>
<td>30.0%</td>
</tr>
<tr>
<td>Client Referrals (n=539)</td>
<td>28.9%</td>
<td>25.0%</td>
</tr>
<tr>
<td>Other Referrals (n=539)</td>
<td>12.8%</td>
<td>5.0%</td>
</tr>
<tr>
<td>Advertising (n=539)</td>
<td>12.3%</td>
<td>0</td>
</tr>
<tr>
<td>All Other (n=540)</td>
<td>6.3%</td>
<td>0</td>
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</tbody>
</table>

The importance of referrals as a source of business is a key to understanding the impact of caps on plaintiffs’ lawyers’ practices. This is so, regardless of the referral source, because referral business is based on a lawyer’s reputation for getting good results and treating clients fairly. A key part of this includes not shortchanging the award the client receives in order for the lawyer to get all of his or her fee. Plaintiffs’ lawyers loathe reducing the return to the client so that the lawyer comes out ahead financially. This is a sure way to lose business in what is a competitive marketplace. A number of lawyers we interviewed said that, if need be, they would reduce their fees in this situation. One lawyer said, “service to your client is real important... we will reduce our attorneys fees to help a client.” The same logic applies to cases that also involve a fee to a referring lawyer. If a lawyer short-

only advertising they did. Id. The second most frequently used vehicle was the Internet, used by 31.4% of those who advertise. Id. Television was used much less frequently. Id. Only 14.5% of those who advertise used television, essentially the same percentage that used mailings to other lawyers—14.8%. Mail to other lawyers is a way to generate the referral of cases. Id.

75. See Daniels & Martin, Darwinism, supra note 9, on the importance of reputation. See also Kritzer, supra note 18, at 66–67. Kritzer stated:

Contingency fee lawyers want their clients to leave satisfied with the result the lawyer obtained on their behalf; more important, the lawyers want the clients to stay satisfied.

A lawyer who settles cases too cheaply will have trouble maintaining the reputation necessary to create the flow of potential clients that is in the lawyer’s long-term interest.

Id. at 67.
changes his or her referring lawyers, the referring lawyer will take his or her business elsewhere and suggest that other referring lawyers do the same. Limiting damages makes it harder for the lawyer to make a profit unless the lawyer is willing to risk his or her reputation by short-changing the client or the referring lawyer.

Regardless of how clients are obtained, plaintiffs' lawyers must choose cases with some care. A practice that uncritically takes all comers—a practice made up of a large proportion of problematic or frivolous cases—is one that will certainly be short-lived. The lawyer must be able to identify those cases with adequate liability and a reasonable chance of obtaining a level of compensation sufficient for the client while still covering the lawyer's fee and expenses. Plaintiffs' lawyers, perhaps contrary to the assumptions of some, are generally rather choosy. The Plaintiffs' Lawyer Survey revealed that respondents' firms signed only 25.4% of the calls received by the entire firm in the typical month to a contingency fee contract. When the survey asked about just the individual respondent (rather than the respondent's entire firm) with regard to calls signed to a contract, the percentage signed to a contract was 26.7%.

These figures tell us how important screening is for plaintiffs' lawyers. A hypothetical posed in the Plaintiffs' Lawyer Survey along with what we learned in our interviews provide important insight into the screening process. The Plaintiffs' Lawyer Survey asked lawyers whether they would take a straightforward, low-value auto accident case involving only soft tissue injuries worth $3,000, minimal property damage, and liability that appeared to run to another party who was adequately insured. It is the kind of case one might expect any lawyer to take, but only 42.7% of respondents said they would take the case at the time of the survey. When asked if they would have taken the same case five years earlier, of the 455 lawyers who were in practice five years prior and who answered the question, 75.2% said they would have taken the case. The difference was a perceived change in the market for these cases caused by the tort reform public relations campaigns that made these cases worth much less—particularly with regard to noneconomic damages. 76

A number of the lawyers we interviewed offered some sense of why lawyers might hesitate to take such a case. In their view, juries have become more "antiplaintiff" as a result of tort reform public relations campaigns. In turn, insurance companies were getting tougher with respect to settlement in the latter 1990s. As a result, the lawyers said

76. See Daniels & Martin, Strange Success, supra note 9, at 1245-47.
they needed to be more careful in deciding which cases they chose to handle. Cost effectiveness was extremely important. As one lawyer simply stated: “we’re getting increasingly selective because the process of taking a case to court is getting enormously expensive, ... I front all the costs and if we lose, I eat the costs.”

A San Antonio lawyer explained why he was “very selective” with these cases:

Low impact, soft tissue cases, we’re very selective with because the insurance companies are not paying for those cases [and] juries are not giving monies for those cases. ... In today’s climate, if someone goes in with that type of case, they’re automatically cast out as a person that’s only there for the money, regardless of the injury ... there’s a very good chance that you’re just not going to be able to achieve your full fee as per the contract.77

Even one of Texas’s high-volume practices was tightening its screening:

There are some [requirements] that we have modified in the last couple of years. The physical amount of damage that the person has on their vehicle, as well as the quickness with which they have sought medical treatment. So we do have parameters in place. We’ve probably gotten stricter over the last two years just because of the changes in tort reform.

A third lawyer made the direct connection to noneconomic damages:

I mean, when I look at these [jury] verdict reports, and I see that a jury found the defendant was in a car wreck—100% negligent—the defendant ran a stop sign and hurt somebody, and they award $6,742 in property damages to the plaintiff and they award $1,192.50 in medical bills, zero pain and suffering, zero mental anguish, zero disability, zero physical impairment, you know, whatever. I look at that like, good God, what have we come to? ... They didn’t give a shit, you know. ... There are people on juries now [who say], “I couldn’t award anything for pain and mental anguish.” ... So, that’s the biggest problem I see, it’s just in attitudes.

These comments demonstrate why lawyers would be hesitant to take the case in our hypothetical. Soft tissue injury auto accident cases are not very cost effective because the cost of handling them is increasing, awards are decreasing in general, and noneconomic damage awards are decreasing in particular. As a result, lawyers are handling fewer of these cases. In short, the comments on auto cases suggest that anything that effectively limits damages—and thereby

77. Another lawyer we interviewed noted: “there was a time in my practice where my policy was that if it was clear liability and if there was an insurance that I would take any car wreck case ... I don’t take any of those low-impact car wreck cases with soft tissue injuries [anymore].”
limits contingency fees—may have consequences for access to the civil justice system.

As one might expect, the screening gets more intense as the costs involved in a case increase. In our interviews, we found that plaintiffs' lawyers who have modest practices invested more in screening the few larger cases that came into their offices—the cases that could make the difference between a break-even year and a profitable one. A lawyer who occasionally handled both medical malpractice and products liability cases that were not too large or complex described his approach to screening:

[For medical malpractice] we have a nurse and several doctors that we have available to us on a contract basis. . . . They screen every case that comes into the office. Especially in the medical negligence cases, we go through two or three different screenings to make sure that they are the type of case that will be cost effective and in the end will yield a positive result. On the products cases, we have a better feel but even there we've got to be very careful. We have to have a very serious injury for both cases, but for products cases that's one of the very first requirements. For example, I don't take . . . let's say an aerosol can that is defective and explodes and blows away somebody's finger. That's not worth taking unless it's a little girl or small child. But if it's an adult, it's just not cost effective. . . . You have to realize that in today's climate every case that you take, there's a ninety-five percent chance it will have to be tried to a jury. Our philosophy is we never take a case for settlement purposes because that's a good way to lose a lot of money, lose your time and to have a very unhappy client at the end.

The process for screening lower-value cases is different, but the key issue is still the level of damages.

No prospective client even comes into this lawyer's office unless the initial telephone screening shows some potential for damages. That initial screening focuses on the level of injury and on the person involved. Because of the overhead this lawyer carries—four lawyers (himself included) and ten staff members—there must be some kind of substantial injury to justify accepting the case. By this he means no soft tissue injuries (like the injuries in the hypothetical). He tends to refer those cases to younger lawyers he knows who are just beginning to practice, and his reason for doing so illustrates the balancing of the cost involved and the potential award. He said, "They [younger lawyers] are willing to take those cases. Their overhead is not as high as mine, so they can cost effectively handle those cases knowing the outcome will be lower because it cost less for them to put the cases together."
Equally important for this lawyer’s screening process is the potential client. He said,

[Just across the board the credibility of your client is ever, ever more important in these times. You have to have a client that has a good work history, a client that has never been in trouble with the law. Those things make for a cost effective case. That’s not to say that someone that’s been in jail or has been convicted of a felony doesn’t deserve to be handled by my office, but going in we know—and those are very standard questions for us—going in we know that that person is going to have to give some ground or that case will never be resolved. Or if it is tried it’s going to be lost or severely, severely compromised. . . . So those are the cost effective things that we look at.

Even where a potential client lives becomes a part of the calculation:

I try to shy away from clients that are out of state or that have lived in two or three cities while they’re treating. Because that means a lot of travel for us, and we’ve got to bill for the travel: overnight stays, doctors in different cities, court reporters in different cities to gather the evidence that we’ll need for trial.

Such charges would have to be deducted from the award the client receives. If there is no award, these additional costs will be losses absorbed by the lawyer.

The potential impact of limited noneconomic damage awards can also be seen in a lawyer’s sensitivity regarding how to handle a case once he or she decides to take it. Costs are again an important factor for the lawyer. For instance, even what seems to be a relatively strong, straightforward case may not be one worth taking to trial. In our interviews, many lawyers talked of what were once considered “slam dunk” cases in which noneconomic damages would almost always be awarded, like rear-end collisions. These were cases they would have readily taken to trial in the past. Not so today because juries now award minimal damages or find in favor of the defendant in such cases.

The following quote from a San Antonio lawyer illustrates how a successful case that goes to trial may not be adequate:

[Y]ou can heat up a case where . . . let’s put it hypothetically, let’s say you’ve got a $1,000 worth of damage to your car. . . . Say you’ve got $3,000 worth of medical and all of a sudden the insurance company says we’ll give $4,500. Well, you figure that out, nobody’s going to come out alright [it will not cover all the “costs” plus the usual contingency fee]. So you end up filing a lawsuit and if you figure you have to try that case, you’re going to spend another $2,000 or $3,000 just proving your case. You know by the time you pay your court reporters, you know $400 or $500, you pay your doctor a thousand or $1,500 . . . well then the next thing you know
You've got $3,000 worth of medical and $3,000 worth of expenses actually on the case. And if the jury comes back and says, okay, I'll just give you your medical, you're screwed, you know. And so those are the problems that you run into when you file a lawsuit.

The lawyer is "screwed" because there will not be enough money for the client and for the lawyers. Again, because of the importance of referrals as a source of business, plaintiffs' lawyers avoid reducing the return to the client so that the lawyer comes out ahead financially.

The impact of diminished awards is aggravated by the increasing amount of time it takes to resolve claims. A reasonable, but not high, verdict may still mean financial problems for the plaintiffs' lawyer because he or she is spending more time on each case to get the same fee. As one Fort Worth lawyer stated: "I spend more time on discovery. [These cases are] more time-intensive for the same case you had five years ago." This time factor means that there will be a longer period before any money is coming back into the firm. The lawyer continued, "I mean, it's your money that's sitting out there. . . . It's kind of static." He sees this as a deliberate strategy on the part of the insurance companies who "want to put as much financial pressure on the plaintiffs' bar as possible. . . . If you can't settle cases during the year to keep your cash flow in the black, it makes it very difficult."

In light of the way in which plaintiffs' lawyers obtain, screen, and handle cases, we can see something of the general impact that caps on noneconomic damages can have. Awards would be diminished with a cap, as would the lawyer's ability to collect the entire fee and recoup the expenses put into the case. This, in turn, may lead lawyers to take fewer cases, to be even more careful in screening cases they do take, and to alter the way they handle the cases they do take. The result may be that lawyers will not take meritorious but less potentially profitable cases.78

The next section examines those plaintiffs' lawyers who might be directly affected by the recent Texas cap on noneconomic damages in healthcare cases. Specifically, we will focus on those lawyers who are medical malpractice specialists.

B. Medical Malpractice Specialists

Of the 541 lawyers in the Plaintiffs' Lawyer Survey who responded to a question on the kinds of cases they handled, forty-six lawyers (8.5%) reported that fifty percent or more of their business involved

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78. This has already happened in Texas with regard to auto accident cases in the absence of a cap. See Daniels & Martin, Strange Success, supra note 9, at 1245-47.
medical malpractice claims. Because this number is low, our discussion in this section will be somewhat speculative, but there is still much to be learned about the potential impact of noneconomic damages caps on access by examining these lawyers' views. To add depth to the survey results, we will also draw from the interviews of plaintiffs' lawyers we conducted in Texas.

We will discuss two matters in this section of Part III. First, we will discuss the importance of the screening process for medical malpractice specialists. This process shows us the balancing these lawyers must do between the substantial costs of handling medical malpractice cases on the one hand and the potential level of damages on the other. Given the costs involved, a lawyer who does not adequately strike that balance will soon be out of business. Building on the discussion of screening, we will next explore the possible effects of the Texas damage cap on these specialists.

1. Screening Cases

In section C, we will discuss in detail the importance of referrals as a source of business for medical malpractice specialists. Before doing so, we will begin the discussion of screening by first looking at Table 2 and what it tells us about referrals. We do so here because it shows that on average over half of malpractice lawyers' clients come from lawyer referrals. This makes referral fees a crucial cost factor for medical malpractice specialists in an already costly line of work. In many situations, these fees may be among the highest costs, if not the highest, and they are always in the background of the screening process. In deciding whether to take a case referred by another attorney, the specialist must take this substantial cost into consideration, and it means that the specialist must be very careful in screening cases.

79. The Texas cap also applies to nursing home cases, but there were only three respondents in our survey who reported that fifty percent or more of their business was in nursing home cases. None of the three was among the forty-six medical malpractice specialists. Of the forty-six medical malpractice specialists, the mean percentage of medical malpractice cases was 77.3%, with a median of 80.0%. Twenty-eight of the forty-six had seventy-five percent or more of their business in medical malpractice, fifteen had ninety percent or more, and eight had one hundred percent.

80. In contrast, Table 1 showed that for all respondents in the Plaintiffs' Lawyer Survey, 37.2% of clients came from lawyer referrals.
In the Plaintiffs' Lawyers Survey, the percentage of calls signed to a contract by medical malpractice specialists is very low (11.1% for firms and 13.0% for individuals), lower than the percentage for all plaintiffs' lawyers (25.4% for firms and 26.7% for individuals). The survey did not specifically ask medical malpractice specialists what percentage of medical malpractice matters they actually accepted. Our interviews, however, do give us a sense that these specialists take a very small percentage of the malpractice matters that come to them—usually less than ten percent, and even lower for some.

The reasons for taking so few cases are easy to understand—medical malpractice cases are very hard to prove and expensive to properly prepare. These cases are also expensive to screen. The lawyers we interviewed routinely indicated that an initial outlay of at least $10,000 was needed for experts to determine whether to take a case or not, and this figure did not include anyone's time in the lawyer's firm. This means that medical malpractice specialists may spend thousands of dollars in deciding not to take a case—money they will not get back. It is a part of the overhead for this kind of practice that must be covered by the successful cases.

The importance of costs is highlighted by the fact that many plaintiffs' attorneys will not take a medical malpractice case, especially a complex one. Of the 541 lawyers in the Plaintiffs' Lawyer Survey who responded to a question on the cases they handled, over half (54.5%) said they handled no medical malpractice cases and for another one-third (32.9%) medical malpractice made up less than twenty-five percent of their practice. For instance, one Houston lawyer with a substantial litigation practice said,

We don't take any medical malpractice cases, [we refer them]. Number one, they are way too technical for our expertise. . . . They are also very, very expensive to handle. Easily you can spend $100,000 without blinking on those kinds of cases and typically we don't have that kind of cash lying around. We don't have the contacts with the experts in those kinds of fields. So it's just not something that we do and probably won't ever.
We recently interviewed this lawyer again, and he has not changed his mind about medical malpractice cases.

Some medical malpractice specialists internalize a part of the cost of screening by having one or more nurses or nurse-lawyers on staff or even by having a physician-lawyer on staff. For instance, one specialist said,

I have two nurses that work here full-time and every case that comes in the office, every call that comes in, is run by one of the nurses to see if it is a case that would even get someone's attention and that we would spend our time to investigate it. And then if it does that, we will get some medical records.

Another lawyer's screening system is extensive:

We have nine lawyers now that do almost nothing but medical malpractice. Two of our lawyers are doctor-lawyers; one is a nurse-lawyer; we have three nurse-paralegals. Any time anybody makes a call . . . they’re going to talk to a nurse-paralegal, they’re not going to talk to a lawyer. The nurse-paralegal gets that call and screens that call. A large number of those calls, the nurse-paralegal tells them over the phone that what they’re describing is not medical malpractice. They may be mad at their doctor, you know, because they looked at them the wrong way or pinched them the wrong way. Or a frequent thing is that somebody went in for back surgery and they are not any better after the back surgery. Those things are not medical malpractice. So those are screened out over the phone. If the nurse-paralegal thinks that the case sounds like it may potentially have merit, then she will either on her own or after consulting with one of the doctor-lawyers get a medical authorization from the potential client and get the medical records to review.

We don’t take a contract first and then obtain the records and review them. We don’t want to take a contract and give a client the sense of hope unless we know what the case is about, we’ve analyzed it, believe it will be a successful case. So the medical records are obtained and then the normal process is that those records are going to be reviewed by one of the nurse-paralegals and by one of the MD-JDs, and then either the records themselves or those initial reviews are going to be reviewed by the senior MD-JD and it’s going to be reviewed by me. And then we meet once a month, what we call our nonlitigation meeting; in any given month we’re going to have seventy or eighty cases under consideration for the ones we’re going to take. We talk about all of them. There has to be an agreement from the medical side and from my side, the legal side of it, that we’re going to pursue that case—that not only is the medicine favorable in terms of we believe that there has been a medical screw up but that we can find an expert that will say that, or we’ve already found an expert that will say that. At that point, we will have done research through Medline and the medical journals and the medical texts, and we will have medical literature that says what was wrong.
And then I look at it from a damages standpoint, a venue standpoint, an economic standpoint. Only if we agree on all of that and basically... everybody in the room reaches agreement, do we then decide we're going to then get the client in and sign the client up.

With such an investment in firm infrastructure, it is easy to see why this lawyer has a minimum of one million dollars in potential damages as a threshold for cases he will take. The successful cases have to help pay for this overhead.

As this example shows, the screening process focuses on both damages and liability, but damages are ultimately the most important factor for most lawyers. This is not to say that liability is ignored; but in balancing damages against liability, low damages will weigh more heavily than good liability. As one malpractice specialist stated,

[O]f course in the med-mal area you’re obviously interested in damages because these cases are so expensive that you can’t afford, I mean you have to have some kind of a damages screening criteria. Although I don’t have any hard and fast rule like some law firms, it’s got to have a settlement value of $500,000 or a million or more, or whatever. I look at things like severity and permanency of the injury. I look at, if it’s a death case, the age of the individual, whether they were employed and whether they were working or able to work.

Another lawyer’s remarks are fairly representative of what we were told. He said, “I don’t take a med-mal case, and I think that most people don’t take a med-mal case, unless there is a pretty serious injury involved.” There must be enough recovery potential to pay for the costs of screening the case, the costs of preparing the case, the costs of actually litigating the case, the cost of the lawyer’s time, and possibly the cost of the referral fee. On top of this, there must be enough recovery to help pay for the costs of screening all of the cases ultimately rejected by the lawyer, as well as other parts of the lawyer’s overhead.

The importance of damages is illustrated by the consensus of a number of lawyers who explained that they would not take a low value medical malpractice case even if there was obvious malpractice. One specialist provided the following example to make the point:

For example, I had a case today, that called in and a doctor left a tube in their stomach [after surgery]. . . . The guy was fine, the guy was doing well—he just felt like it was malpractice. . . . I explained to him that it probably was malpractice, but if he is fine and dandy, then there is no problem. They opened him up and took the tube out and he’s fine. There is hardly any way economically to pursue a medical malpractice case such that in the end I will have a happy client. We will pursue the claim and then all the money will have
gone for court reporters and doctors' expenses and testifying and things of that nature.

In the end, the client will wind up with little or nothing if the case value is too low, and an unhappy client is bad for business. Similarly, another lawyer said, "we don't take [low value medical malpractice cases] because the damages may not be of a size that we can dedicate the office forces to handling that kind of case. You just can't stop the world and handle a $25,000 malpractice case. You just can't do it."81 This lawyer estimated that his firm spends at least $60,000 for out of pocket expenses in a malpractice case (this does not include anyone's time).82

The potential impact of stringent caps on noneconomic damage awards is easy to see in the context of how choosey plaintiffs' lawyers are with regard to medical malpractice cases, assuming that they will even take on such a case. In contrast, a relatively high cap—over one million dollars—may not have a substantial impact since there could still be enough money to ensure that the client's needs are met and the lawyer's contingency fee and out of pocket expenses are covered. If the cap is set low, like the $250,000 cap in Texas, the impact could be significant because it would be much harder for the lawyer to come out ahead (depending on the kind of malpractice case) without short-changing the client or the referring lawyer (if there is one). Given the importance of referrals as a source of business for medical malpractice specialists—both lawyer and client referrals—neither option is tenable.

The main point of the discussion of screening is a simple one—the specialists are interested only in the very best cases. The remarks of a Dallas lawyer offer a very good, succinct summary. He said, "the really successful ones [medical malpractice specialists] now are only interested in the cases that involve catastrophic damages. They won't

81. According to the TIPS Task Force, "Information provided to the Task Force suggests that a medical malpractice claim must amount to $100,[000]–200,000 simply to break even. Anything less means that . . . the case will be refused." CARROLL ET AL., supra note 7, at 32.

82. Still, we found one lawyer among those we interviewed who at one time would take a lower value malpractice case, but only if the malpractice is obvious. A Houston lawyer interviewed before the 2003 tort reforms who handles million-dollar-plus malpractice cases said he had

a couple of malpractice cases that are worth maybe $20,000 or $25,000 [at the time of the interview]. . . . Well, you know, when you leave something in somebody and another procedure is going to remove it and you aren't going to have any permanent problems, it's a $20,000 to $25,000 case, but it takes a few letters to get it done. But, he took these cases only after an initial review by the firm's own physician-lawyer and a review of the records that showed that the malpractice was clearly obvious. When asked after the imposition of the 2003 cap on noneconomic damages if he would take such a case, the answer was a definite no.
talk to anybody else.” He continued, “They will not take a case unless it is a lead pipe cinch and involves catastrophic damages.”

2. The Impact on Medical Malpractice Specialists

All of the lawyers we have recently interviewed agree that medical malpractice cases will be less attractive financially because of the new Texas cap on noneconomic damages, with the greatest impact on cases involving women, the elderly, single people with no dependents, and children. These are Lucinda Finley’s “hidden victims” of tort reform. Most simply, as one lawyer said, “It limits your ability to take cases where you don’t have large economic losses . . . and medical malpractice cases are still expensive to pursue. . . . None of the changes in HB4 did anything to lower the litigation cost to the plaintiff.” He went on to say that regardless of the cap,

 doctors still charge several thousand dollars to review a case, several thousand dollars to write reports and testify in cases . . . and then you have routine litigation expenses: the cost of depositions, the cost of gathering records. If you’re gonna have other experts like vocational experts or economists, then you’re gonna hafta pay them too.

Consequently, it is difficult to take a case and make a profit when damages are severely limited. A major medical malpractice specialist said,

[I]f you have a capped case that is going to take $100,000 to [litigate], you cannot justify the time, effort and expense of litigation for the chance of getting a client a recovery of $40,000–$50,000. It doesn’t make any sense and I don’t recommend it to people . . . . I unfortunately have that conversation almost weekly with somebody, explaining [that] in [a] capped environment they just don’t have a way to make a case given the expense that potentially would be involved for a risky recovery.

In his estimation, echoing Finley’s arguments about the “hidden victims” of tort reform, “they essentially closed the courthouse door to the negligence that would kill a child, a housewife or an elderly person.” The reason is that “there are no medical expenses, no loss of earning capacity, and unless it’s drop-dead negligence that you can prosecute with one or two experts, that’s just not a case that I think in Texas right now is a viable case.”

While the cap may have its greatest impact on malpractice cases involving certain groups of people, it may also have an impact on medical malpractice cases generally. Because the economics of han-
dling malpractice cases has changed with the cap, greater emphasis must be placed on the amount of economic damages recoverable in any kind of malpractice case. This means looking for cases with higher damage potential. Some types of cases will still be economically attractive, like birth trauma cases in which the baby survives. In one specialist’s view,

[T]here’s a lot of medical malpractice that can still be viable. Certainly, birth trauma cases are viable cases. Orthopedic or anesthesia cases that have led to permanent impairment with a wage earner, and it doesn’t even have to be a high wage earner . . . but you’ve got to really be able to create some loss of earning capacity to justify potential recovery outside of simply the intangible damages.

Still, we are beginning to see medical malpractice specialists in Texas looking to reorient their practices in some way. Some are moving out of the market altogether and looking into other areas of contingency fee work, like business litigation. This may be extreme, but it seems that few specialists will be handling as many medical malpractice cases as before. One specialist we interviewed, both before and after Texas’s 2003 changes, said that his practice used to consist of over ninety percent medical malpractice, but that ratio has fallen to sixty percent. He continued, “After this year, as we’ve worked through the cases that were filed before [the cap took effect], I would say we’re closer to 60/40, sixty percent still being med-mal and forty percent more general personal injury.”

Interestingly, this lawyer does not think that the number of calls coming to his office on medical malpractice cases will decrease, but rather that the proportion his firm will accept will decrease. The firm is “absolutely more selective” in the screening process, he said, because of the cap on noneconomic damages. His remarks clearly reflect the key point regarding the connection between the damage cap and access. Medical errors and medical negligence will not go away or lessen in the wake of the cap, but potentially legitimate malpractice claims will not be pursued because of the cap.

Another specialist is also looking at reducing medical malpractice to about sixty percent of his business, with the remaining forty percent being other personal injury, “Well, I’d still like to keep med-mal as my primary area of practice . . . hopefully over sixty percent . . . but sixty percent med-mal and forty percent other personal injury would probably be about right.” He said, “We are now looking at other kinds of personal injury cases. Car wrecks, products [liability] and nonsubscriber cases [non-workers’ compensation work injury], which I wouldn’t have even looked at before HB4.” He too will screen more
strictly, "I think you have to be really, really careful about what cases you take, how much money you spend on those cases . . . there's always been an economic decision in whether you take a case or not. But it's just now become a little bit more critical."

Journalistic accounts also suggest that access for injured people may become more difficult in the malpractice area. Indeed, a Texas Lawyer article from January 2005 carried the title Access Denied: Does Tort Reform Close Courthouse Doors to Those Who Can Least Afford It? The story quoted one well-known malpractice specialist in Dallas as saying, "My office has only taken two new med-mal cases since H.B. 4 became effective [on September 1, 2003]. Before the change in the law, we would have taken in 30 to 40 cases over the same time period." Another lawyer is quoted as saying, "H.B. 4 was a pivotal point for me because of the way I ran my shop . . . . I had a low-volume, high-dollar-investment practice and my client population was the type who were going to bear the brunt of H.B. 4—children, housewives and the elderly." This lawyer has completely changed her practice and is now a mediator.

With specialists leaving this practice area or at least limiting their amount of work in the area, the concerns raised by Galanter and Luban about the indirect effects of tort reform noted earlier come to mind. They were concerned with the consequences for the substance of the law if the specialists left or diminished their activity, because these are the lawyers who devise novel legal strategies that extend the law. This same concern is echoed by a lawyer we recently interviewed, who said that

the civil justice system was set up to give people access to justice, and that meant that you would have an opportunity to try novel theories of law and you would have an opportunity to test theories of factual scenarios and see whether or not juries agreed that certain acts were negligent or not. And so, the system was never set up for just the sure-fire winners. But now, given a cap on the damages, it makes it a much bigger risk to take the marginal cases, because your likelihood of recovery is limited financially, and you hafta decide where you’re going to spend your limited dollars; because we have less income, we have less money to spend.

The potential impact of caps does not end here. Because referral fees are a substantial cost factor, limiting awards may also affect the referral system that moves complex or high-end cases to those lawyers

84. Donald, supra note 53.
85. Id.
86. Id.
87. Id.
best able to handle such cases. This is especially important for medical malpractice cases, since lawyer referrals are the main source of clients for many medical malpractice specialists. The next section explores this potential impact with regard to medical malpractice.

C. The Referral System

Just over two-thirds (68.2%) of the malpractice specialists in the Plaintiffs' Lawyer Survey obtained fifty percent or more of their cases from lawyer referrals. As Table 3 shows (using data from the Texas Referral Survey), medical malpractice cases represent the largest category of cases in Texas referred for a fee, larger even than auto accident cases—which comprised the largest proportion of all tort cases. In this section, rather than using data from the Plaintiffs' Lawyer Survey, we will use data from the Texas Referral Survey supplemented by our interviews with Texas plaintiffs' lawyers.

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Medical Malpractice</td>
<td>642</td>
</tr>
<tr>
<td>Auto Accident</td>
<td>550</td>
</tr>
<tr>
<td>Products Liability</td>
<td>484</td>
</tr>
<tr>
<td>Criminal</td>
<td>344</td>
</tr>
<tr>
<td>Employment</td>
<td>287</td>
</tr>
</tbody>
</table>

The referral system should provide incentives for moving cases to the most skilled lawyers. Table 4 shows that for respondents to the Texas Referral Survey who had referred at least one medical malpractice case, the most important reason for referring was that the case was outside of the lawyer's practice area. The next most important reason was that the case was in the lawyer's general practice area but was too complex.

88. See supra tbl.2.

89. Respondents were asked to check all reasons that applied from a list of specific reasons. These were the most checked reasons.
When asked how a lawyer chose to whom to refer a case, Table 5 shows that by far the most important reason was a lawyer's reputation followed by compatibility with the client. The size of the referral fee was far less important. These two tables provide evidence for the idea that, at least with regard to paid referrals for complex cases like those involving medical malpractice, the referral system may indeed work to move cases to the most competent lawyers.

Given this evidence, the most important questions in the Texas Referral Survey for our purposes asked lawyers about the impact recent tort reforms like HB4 would have on referral practices. Respondents were asked whether these reforms would affect the referring of cases with the expectation of a fee, and whether such reforms would affect the acceptance of referrals for which a fee would be paid. Although HB4 included other provisions beyond those dealing with damages, the damage provisions were clearly the ones that defined debate over HB4. Still, since there were other provisions in HB4 beyond the damage provisions, the responses to the Texas Referral survey questions dealing with the impact of HB4 on referral practices should be taken as suggestive and not definitive.
When asked if reforms like HB4 would increase or decrease the number of cases the respondent would refer with the expectation of receiving a fee in return, Table 6a provides a clear message. Half of those respondents making paid referrals of any kind said HB4 would decrease the number of paid referrals they would make. Just over forty percent (41.6%) said it would have no impact and 6.6% said it would increase the number. For those who referred at least one personal injury case or one medical malpractice case, the percentages are similar.

The Texas Referral Survey did not go further and ask respondents why they responded as they did to this question. Perhaps the prospect of diminished fees had some influence on those who responded that their number of referrals would decrease after HB4, especially for those with more contingency fee business. A more precise answer will take additional research. But our recent interviews suggest that the prospect of diminished fees is a possibility. Some lawyers accepting referrals are cutting costs by lowering the referral fee they will pay, potentially making it less attractive to refer the case. For instance, one malpractice specialist said,

Before [HB4 and Proposition 12] I would typically send twenty-five percent to thirty percent, sometimes thirty-five percent referral fee back [to the referring lawyer]. . . . Now it's kind of, you know, at the
end of the case let me see how it is and then I'll send you something.
Or, I may not be able to send you anything.
Another said, "I've become more lean on exactly how much I'll pay out in referral fees. . . . I'm trying to stick around the twenty-five percent referral fee range. . . . Sometimes we might do it on a third, but the days of 50/50 (a fifty percent referral fee) are probably history."

Lower referral fees may lead some attorneys to keep a case rather than refer it. In this regard, a lawyer we recently interviewed said, "I've heard lawyers say, 'Well, if he can get $450,000 for the case and I can get $300,000 for it, that means I get $100,000 if I keep it [presuming a contingency fee of one-third]. If I send it to him, it means I get $50,000 [for the referral fee—one-third of the other lawyer's one-third contingency fee on $450,000], so I'll just keep it.'" This lawyer's fear is that lower referral fees will entice more lawyers to keep the case in an effort to maximize their return at the client's expense. If the case is not referred, it is the client who suffers because the less capable lawyer gets an award lower than would have been achieved for the client by referring the case to a specialist.

While Table 6a reflects less willingness to refer cases, Table 6b reflects less willingness to accept referrals. The message of Table 6b is a strong one that gets stronger as it moves from lawyers accepting any kind of paid referral, to those accepting paid personal injury referrals, to the medical malpractice specialists.90 Lawyers still wanting to refer cases may find a smaller market for those referrals. This is especially true for those wanting to refer medical malpractice cases to a specialist. Almost all of the specialists in Table 6b said that they would be accepting fewer cases. This is consistent with the discussion in the previous section—that medical malpractice specialists may be taking fewer medical malpractice cases and that they will be screening more strictly for the cases they do take, especially cases that involve Finley's "hidden victims" of tort reform. In short, access to the best lawyers may be limited, at least for certain kinds of people.

Whatever the faults of a system allowing paid referrals, such a system can move the cases of uninformed consumers to those lawyers better able to handle them. Damage caps may, among other things, substantially affect the incentives that make a referral system work, especially with complex and expensive matters like medical malpractice. Caps on other types of complex cases will further undermine the referral system.

90. Defined as respondents accepting at least one medical malpractice referral and having at least fifty percent of their business comprised of contingency fee cases.
IV. Conclusion

Noneconomic damages have long been a target of tort reformers, especially in healthcare-related cases. Reformers advocate severe, almost draconian caps on these damages because, they claim, these damages are the cause of crisis in the healthcare system. Their arguments are a rhetorical "Texas two-step," a dance that is presented as one thing when it really is another. The political rhetoric says that caps will lead to significantly lower malpractice insurance for physicians and thereby ensure the availability of healthcare services. Instead, our analysis suggests that caps on noneconomic damages serve a different purpose—diminishing access to the civil justice system by making medical malpractice or other healthcare cases financially less attractive to contingency fee lawyers. And, it appears that caps may serve this different purpose quite well. This purpose is the logical consequence of the "Dear Colleague" letter with which we began.

Perhaps the best summary of how well the cap on noneconomic damages in Texas will serve this purpose can be found in the remarks of an East Texas lawyer we recently interviewed. He built much of his once successful practice on medical malpractice and nursing home cases:

I built a medical malpractice and nursing home practice, and you know there was a lot of good work that needed to be done there and there still is. However, we had House Bill 4 and Proposition 12 passed in Texas, which virtually gutted anyone's ability to go in and stand up for the rights of the elderly in the nursing home setting. The biggest problem is the cap on damages; the $250,000 cap does nothing more than hurt the children and the housewives and the elderly the most, because they don't have any economic damages, they don't have any earning capacity and they don't have any lost wages. . . . In doing the nursing home cases the development costs of my cases were between $60,000 and $100,000 out of pocket. . . . I mean, the aides that are involved are usually scattered all over the country—we've flown to Atlanta[, Georgia and] Columbus, Ohio. The expert costs are between $20,000 and $30,000 per expert, so costs add up fairly quickly. When you put a $250,000 cap on it, it is economically unfeasible for someone to devote three years of their life, three years of their time, invest $80,00 or $100,000 in the case, hoping to just get that back. And you get paid roughly $30,000 a year for doing something that is as difficult as any area of law. So, you know, post-Prop 12, my practice was like this—there's a big hole in it.

This lawyer has not filed any medical malpractice or nursing home cases since September 2003 when HB4 went into effect. He is now

91. See Letter from Harold L. Jensen to policyholders, supra note 1.
looking at business litigation, primarily because he believes it will be less costly. He explained,

The upside to it is they generally don't cost as much in dollars to develop, because your expert expenses and the number of depositions involved are usually less. You know, by comparison, in the last nursing home case we tried in . . . January of 2004, there were forty-three depositions taken in that case. And the typical—or at least what I've found so far—the typical business tort case you're looking at ten or less, which at roughly $600 to $1,000 a piece, not including your time, saves on case development.

When asked if he would take any more nursing home cases, this lawyer said no. With regard to medical malpractice, he stated that it is unlikely that he would take any cases; but if so it would only be for a client who is a substantial wage earner. In his estimation, these are the only kinds of cases that are economically feasible.

When lawyers, especially the most skilled, are unable to take certain kinds of cases on a contingency fee basis, meaningful access to the civil justice system for injured people is diminished. For some—Finley's "hidden victims" of tort reform—the situation will be especially acute, as the East Texas lawyer notes. Without meaningful legal representation these plaintiffs may be effectively left with no realistic remedy for their injuries. In Texas, because the state constitution has been amended to specifically authorize caps, they may also be left with no avenue to challenge the propriety of the noneconomic damage cap. The one option left, according to a recent law review article, is to apply to the states the right to a jury trial in civil cases found in the Seventh Amendment to the United States Constitution.\(^2\) While we make no endorsement, the findings presented here give some credence to that claim.

\(^2\) See Wright & Williams, supra note 11, at 464–66.