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Heal the Law, Then Health Care

Across the country—and this past week in Maryland—doctors have been marching on state capitols to protest soaring medical malpractice premiums. The problem is real. Some doctors have been driven out of practice. Last year, for the first time, no graduates of the University of Maryland School of Medicine chose residencies in obstetrics, an area hard-hit by lawsuits. But what's the solution? Doctors, focusing on the symptom, want "caps" on non-economic damages (the portion of damages, beyond lost income and medical costs, for pain and suffering).

Be careful what you ask for: Capping damages might slow the rise of insurance rates, but it would not cure the underlying disease: an ad hoc legal system that has infected health care with a debilitating distrust. This distrust has spawned a culture of secrecy and waste in "defensive medicine," undermining the quality of care and contributing to skyrocketing costs and reduced patient access.

Still, some might argue, caps would be a first step. But devoting all the reform energy to one admittedly painful symptom—the steep rise in insurance premiums—diverts us from the real problem: a legal system that is corroding the foundations of health care and is destructive of the interests of both providers and patients.

What's missing from the current debate is any discussion of how the legal system should work in health care. Law is not some sort of sacred mandate but a tool to serve the common good. Asking how law can best serve health care leads to an unavoidable conclusion: A system of justice must be created that makes deliberate judgments—reliable for patients and providers alike—with improved patient care as the primary goal.

Medical personnel who distrust the system of justice are reluctant to be open about their mistakes and uncertainties. Tragically, human errors occur for example, in prescription dosage, because people fearful of legal consequences are reluctant to speak up. What does it take to revive a culture of open professional interaction? There must be a legal framework that doctors and nurses trust will absolutely defend them when they do the right thing.

Improving patient care also requires affirmative incentives to, for example, adopt new systems and protocols. The legal system today is a string of ad hoc decisions, jury by jury, with no rulings of right and wrong and no guidance on where to improve.

The current legal system also promotes the waste of resources. Doctors are encouraged to order tests of marginal or no utility to safeguard

themselves from possible lawsuits. Some consumer advocates suggest that patients should get every possible test or treatment. But funds spent on unnecessary or marginal tests are funds not available to care for other people. For three million Americans lack health insurance. How will we pay for that? Wise allocation of resources requires a legal system that affirmatively defends the doctor or hospital that reasonably chooses not to order a test.

Accountability is also a critical goal. Patients injured by medical mistakes should be compensated reliably. Incompetent doctors should lose their licenses. Doctors who are unfairly charged should be affirmatively protected.

Justice today, studies show, is basically random. Patients have to devote years to litigation and pay lawyers upward of 40 percent of any recovery. Meritorious cases often lose or are settled on the cheap.

But especially in tragic circumstances, doctors who did nothing wrong are often hit with huge verdicts. Meanwhile, inept doctors keep their licenses by threatening to sue their hospitals or licensing boards.

Fixing American health care requires a basic shift in approach in the system of justice. What's needed is fundamental: deliberate standards that everyone can rely upon—standards govern-

ing not just the amount of damages but what is good care and what is not. A growing consensus among patient safety advocates and other credible health care experts holds that a new system of medical justice is needed, including a special health court or administrative compensation scheme that could deliver deliberate, binding rulings on standards of care.

Defenders of the current system argue for injuries because they are "democracy in action." But that is exactly what's wrong. Justice is supposed to be rendered by the rule of law, not a kind of running plebiscite.

William Sage, a health care expert at Columbia Law School, recently observed that it would be a shame to waste the current crisis. American health care finds itself in a "perfect storm" of needless errors, unaffordable cost increases, declining access, inadequate accountability and fearful and frustrated professionals. Millions of people are being hurt. Instead of frittering away the moment in an effort to solve one part of the problem, we should seize the crisis to do what's needed.

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