

VIEWPOINT ■ Philip K. Howard

Yes, It's a Mess—But Here's How to Fix It

HEALTH CARE IN AMERICA IS SUFFERING A TOTAL NERVOUS breakdown, but it isn't just because doctors are striking and maternity wards are closing. Health-care premiums are rising at unsustainable rates. Some economists estimate that unnecessary tests and procedures, ordered by doctors to build a record just in case there is a lawsuit, cost more than \$100 billion a year—enough to provide health insurance for the 40 million Americans who have no coverage. Modern medical technology is bringing us miracle cures, yet the absence of backup systems to catch human errors is causing thousands of deaths each year. In our culture of legal fear, the candor vital to improving care is also a casualty. Because doctors don't feel safe talking about mistakes, they are unable to learn from them—or even offer an honest apology.

With all the talent and resources devoted to health care—almost 15% of the U.S. economy—why can't somebody just use common sense and fix things? The villain, I believe, is our legal system, which has become a free-for-all, lacking the reliability and consistency that are essential to everyone, especially doctors and patients. Most victims of error get nothing, while others win lottery-like jury awards even when the doctor did nothing wrong. Because of the resulting fear and distrust, doctors and other health-care providers no longer feel comfortable making sensible judgments.

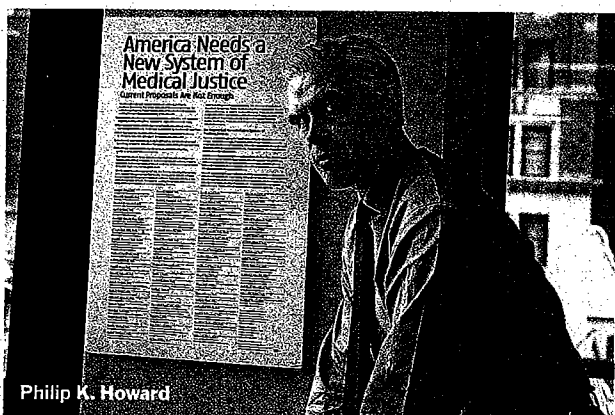
Yet reform is going nowhere. Both sides in the debate, horns locked, have succeeded mainly in confusing the issues. Trial lawyers talk a lot about the “right to sue” when something goes wrong. But what about the right of doctors to a system of justice that reliably distinguishes between right and wrong? Meanwhile, the tort re-

form pushed by doctors is like a bandage on a mortal wound. Placing limits on discretionary “noneconomic” damages may stem today's bleeding and is certainly one element of controlling costs—\$1 million to a plaintiff is \$1 million less to take care of the rest of us. But merely putting caps on pain-and-suffering damages will not restore reliability or trust.

Recently 70 prominent figures in the field of health care came together to call on Congress to create an entirely new system of medical justice. Because neither lay juries nor most judges have the technical knowledge to weigh complex medical evidence, some of these experts believe the most effective solution is to create special medical courts—just as we have separate courts for taxes, patents, workers' compensation and vaccine injuries. Staffed with expert judges—and probably without juries—these tribunals could effectively screen claims, make rulings and award reasonable compensation for actual economic losses, plus pain-and-suffering damages based on a standard schedule: a certain amount for paralysis, for losing a limb and so on. That way we can decide how much money we want to go to victims and how much is available for future health care.

Creating a special medical court is an ambitious undertaking that will be opposed by trial lawyers at every step. But proposals to launch pilot projects at the state level are being drafted in the Senate. We don't really have a choice. American health care is out of control. ■

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Other Remedies

Caps on Damages

WHAT IT WOULD DO Limit noneconomic jury awards for such injuries as pain and suffering.

DIAGNOSIS California and 18 other states have such caps. President Bush and most Republicans, with support from doctors and insurers, support a \$250,000 federal cap, and the House passed a bill to impose one. But Democrats, backed by trial lawyers, are blocking passage in the Senate, claiming it would adversely affect victims who don't work

Limit Lawyer Fees

WHAT IT WOULD DO Cap how much of a settlement or jury verdict attorneys can collect.

DIAGNOSIS Doctors and insurers say that such a restriction, as well as a provision for losers to pay both sides legal fees, would deter frivolous suits. The House bill would cap lawyers' fees on a sliding scale, as states like New York and California do. Critics say both measures would make it hard for some malpractice victims to hire a lawyer.

More Screening

WHAT IT WOULD DO Raise the bar for gaining approval to go forward with a suit.

DIAGNOSIS Just a few states, like Indiana, require a review panel to certify a malpractice case, while more, like Illinois, call for the signature of just one doctor. Physicians say better screening would help weed out bogus claims. States are also mulling tougher requirements for “expert” witnesses. Ohio and Virginia require them to be actively practicing

Whistle Blowing

WHAT IT WOULD DO Make it easier for a doctor to report a colleague's malpractice.

DIAGNOSIS Because they fear being sued or scrutinized themselves, too many doctors are unwilling to speak up about an incompetent physician. A bill in the Senate tries to fix that by establishing a national confidential reporting system. Still, to work effectively, the system needs to give outspoken M.D.s some sort of immunity from countersuits.

Medical Standards

WHAT IT WOULD DO Measure doctor performance against a statistical norm.

DIAGNOSIS This could rationalize malpractice premiums—which are based on a doctor's specialty and location rather than objectively on performance. Some doctors and insurers oppose such an untested move. Standards would clarify the definition of malpractice in any case and would work best if applied by special medical courts, with expert judges—and no juries.