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Those who are reforming medical malpractice law, or studying its reform, ought to attend to tort theory. This is not because theory will settle difficult policy debates. But it does enable reformers and scholars to be more aware of how under-appreciated and possibly dubious assumptions or inferences might be skewing their analyses. In this Essay, I aim to make this point with two examples.

I

My first example concerns under-litigation–the apparent fact that a substantial percentage of persons with injuries plausibly traceable to malpractice never sue their doctors.[1] Assume this is a real phenomenon. What are we to make of it? In the eyes of some, it provides proof that the tort system is dysfunctional. After all, if only a small percentage of malpractice victims sue, then there is likely to be significant under-deterrence of bad medical practices and significant under-compensation of injured patients. And, if the point of tort law is—as courts and commentators commonly say—to deter and compensate, it follows inexorably that we have a problem.[2]

Enter theory. The preceding syllogism, of course, starts from an initial condition: *if* the point of tort is to deter and compensate, then . . . . Now some would say that this particular condition is definitional or axiomatic: What else can tort law promise to deliver? But this is a mistake. The claim that the purpose of tort law is to deter and compensate is not an analytic truth. Rather it is shorthand

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1. *See* TOM BAKER, THE MEDICAL MALPRACTICE MYTH 37 (2005) (citing studies).

2. Michelle M. Mello & Troyen A. Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform, 80 Tex. L. Rev. 1595, 1608, 1624-25 (1995).

for a set of descriptive and normative claims that hang together and carry certain entailments. In other words, deterrence and compensation are watchwords for a particular theory of tort law. And, as it turns out, the theory is not a particularly compelling one.[3]

To posit that tort law is a system for deterring undesirable conduct and compensating injury victims is, essentially, to think of tort law as a branch of the administrative state. If you imagine a legislature delegating its powers to regulate unsafe conduct and to provide relief to victims of small-scale disasters to a newly created agency called the Department of Safety and Relief, you will have a general sense of the theory. It posits that, by doling out damage awards predicated on misconduct and injury, judges and jurors in tort cases perform the socially useful function of discouraging such conduct in the future and providing relief to at least some injured persons.

So far so good, at least in terms of the internal coherence of the theory. But problems quickly emerge. Interpretively, compensation-and-deterrence theorists have trouble explaining basic features of tort law, such as the requirement of proof of causation that applies to most torts. If the point really is to deter undesirable conduct and compensate the injured, why should the law care if *this defendant's* misconduct caused *this plaintiff's* injury? If there has been misconduct and injury, then, regardless of any causal relation between them, a payment by defendant to plaintiff will deter and compensate.[4] Prescriptively, are we keen to have non-expert judges and juries decide on a one-off basis what sort of conduct ought to be deterred and which sorts of adverse consequences compensated? Wouldn't it be better to develop safety rules through notice-and-comment rulemaking and to design broad-based, low-transaction-cost compensation systems that promise to achieve greater equity across cases?[5]

Of course there is a lot more to be said in defense and criticism of compensation-deterrence theory. Suppose I'm right, though, that it faces a set of serious deficiencies. What would a more descriptively complete and prescriptively plausible theory of tort look like? I've elsewhere argued, along with Professor Zipursky, that tort is best understood as a law for the redress of private wrongs.[6] Taking

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3. For a survey of various criticisms of compensation-deterrence theory, see John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521–37 (2003).

4. *Id.* at 530–32.

5. *Id.* at 536–37. Compensation-deterrence theorists might respond: "Sure, but until we have those, tort is better than nothing." Resort to second-best arguments of this sort is a sign of a theory running into problems. This is particularly so when alternative theories are available that do not have to rely on second-best notions to make sense of the subject being theorized.

6. *See generally* John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005) (articulating redress

seriously tort's structure, vocabulary and 'grammar',[7] leads one to grasp that the point of this body of law is to articulate duties of conduct that individuals and entities owe to one another, and to empower those injured by breaches of these duties (i.e., by wrongs) to invoke the law to go after their wrongdoers. Tort law, in other words, is best theorized as a special kind of victims' rights law. As such, it promises to deliver various goods within our liberal-constitutional system of government apart from deterrence and compensation, even though it will sometimes deliver those as well. In particular, it reinforces and refines norms of responsible conduct, helps sustain a distinctively liberal notion of civil society, assures citizens that government is committed to attend to their complaints on a more or less individualized basis, and avoids excessive reliance on top-down regulation.[8]

Now let's consider what under-litigation looks like when viewed through the lens of what I am claiming is better tort theory. On a wrongs-and-redress view, tort law confers on victims of wrongs a legal power to respond to those wrongs by suing, usually for damages. Critically, that option belongs to the victim (or to a legal representative of the victim)—it is hers alone to exercise. It follows that one can infer nothing about the condition of the tort system from the brute fact that a significant percentage of potential claimants are declining to pursue claims. For if we were to learn that the persons with colorable medical malpractice claims choose not to sue based on an appropriately informed and voluntary decision, then there is nothing wrong with how the tort system is operating in this area—it is doing exactly what it is supposed to do. This is because, contrary to compensation-and-deterrence theory, the tort system is *not* best understood as arming victims with the power to sue *in order to serve*

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theory and explaining its implication for constitutional challenges to tort reform legislation); John C. P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364 (2005) (criticizing Judge Calabresi's equation of tort law with accident law for failing to take seriously the idea of tort as a law of wrongs); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003) (explaining the differences between redress or recourse theory and corrective justice theory); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998) (articulating the basic framework of wrongs and recourse).

7. Here I have in mind such features as: the system of plaintiff-initiated suits; the fact that suits are predicated on allegations of injury and wrongdoing; a focus on wrong and injury both in substantive governing law and the fact-finding process; doctrinal requirements demanding that the plaintiff establish not merely that the defendant has committed a "wrong in the air" but a wrong *as to her*; redress that is provided at the demand of the claimant to the claimant, and so forth.

8. Goldberg, *supra* note 6, at 606–11; *see also* BAKER, *supra* note 1, at 111–14 (arguing that medical malpractice lawsuits promote traditional American values).

public goals such as deterrence and compensation. Instead, it arms victims because they are entitled to be so armed. They have a *right* to pursue claims of redress, regardless (at least in the first instance) of whether their doing so enhances deterrence, generates a reliable system of compensation, offsets the political clout of the rich and powerful, justly redistributes wealth, or otherwise redounds to the public good.[9]

Needless to say, everything hinges on the reasons people are refraining from suing, and here it will become important to sift through considerations such as those identified in the excellent paper by Professors Hyman and Silver.[10] To the extent data on under-litigation reflect "information asymmetries," then there really is a problem.[11] A scheme designed to empower victims to pursue claims is failing if the reason those claims are not being brought is that wrongdoers are able to hide their wrongs, or that victims are ill-informed about their rights or unable to locate a lawyer to represent them. At the other end of the spectrum, if victims are not suing because their injuries are relatively minor or transitory (e.g., a post-operative infection that heals), or because they have adequate financial security and do not see much point in seeking additional dollars from their physician, or because they sincerely take the view that mistakes happen, and thus are not inclined to hold even legally at-fault persons accountable, then there is no cause for concern.

An intermediate case concerns the role that the burdens of litigation may play in the decision to sue. Suppose some potential claimants with valid claims do not sue because they are unprepared to take on the burdens of hiring a lawyer and slogging through potentially stressful or embarrassing discovery. Do these features of the system suggest a problem? It depends. Tort law is not disaster relief. It is a process for obtaining vindication. Given that this is what it is about, lawmakers might reasonably (and usually do) place on complainants the burden of proving that they have been wrongfully injured and reasonably (and usually do) give the defendant a fair opportunity to defend herself.[12] Insofar as the transaction costs of

9. Goldberg, *supra* note 6, at 559–83 (discussing the recognition in American law of the idea of a right to a law for the redress of wrongs).

10. *See generally* David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085 (2006).

11. *See id.* at 22, 36 ("Under-claiming is difficult to fix because most of us cannot easily tell whether we received proper care.").

12. Apparently this system works pretty well at deterring and filtering frivolous claims. *See* BAKER, *supra* note 1, at 77–87 (discussing studies indicating that liability insurers do not tend to pay substantial compensation to plaintiffs with weak claims, and that the vast majority of filed

litigation are part and parcel of a system for fairly adjudicating claims of wrong and injury, the fact that they deter certain victims from pressing meritorious claims is not a ground for declaring the system broken. By contrast, if the system grants defendants unjustified opportunities to stonewall or to take advantage of their greater wealth or repeat-player expertise, and that is contributing to under-claiming, then the law may well be in need of reform.

I should be clear about what I am *not* saying here. Even if it turns out that a significant percentage of the plaintiffs who do not sue are refraining for the right reasons, it does not follow that government needs to be content with the status quo. Instead, it might want to encourage individuals to be more assertive about their rights. And one valid reason for doing so might be a concern that so few people are asserting their rights that doctors are not being deterred from committing malpractice and victims are not being adequately compensated. (To say the government might be justifiably concerned about the systemic implications of whether individuals are or are not availing themselves of their rights is not to say that those implications capture the content of those rights or the purposes of recognizing them.) Also, nothing in the foregoing suggests that, even apart from the issue of under-litigation, government has no business designing and implementing schemes for deterrence and compensation. That governments have long provided a law for the redress of wrongs does not mean that they cannot and should not provide other forms of law. Perhaps state governments or the federal government ought to put in place systems of regulation and compensation that operate apart from the tort system, or schemes that foster conditions that will permit market forces to generate incentives toward safety. These same concerns might even justify a governmental decision to supplant the operation of the tort system in a particular area in order to better achieve one or both of these goals. But to allow for these possibilities is, again, not to say that the tort system aims to deter and compensate, nor that the phenomenon of under-litigation itself establishes that the system is broken.

II

Here is a second way in which tort theory affects our analysis of medical malpractice law. Suppose that, like compensation-

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claims have some basis). Whether that filtering comes at too high a price is the issue under consideration.

deterrence theorists, one conceives of tort law as "public law"—regulatory law, social welfare law, or consumer protection law. It would seem to follow that tort is the sort of law that merely adjusts the "burdens and benefits of economic life."[13] And, at least since 1937, the Supreme Court has been sending a relatively clear message to judges about what they are to do with suits challenging such laws for violating constitutional rights, such as the federal rights to due process of law and equal protection. They are supposed to toss them out under the rational basis test. If a legislature wants to set up malpractice review panels, or establish very short statutes of limitations, or statutes of repose, or impose caps on damages for such claims, they can do so as long as a court is later able to reverse-engineer a legislative policy rationale for the measures in question. And the latter is hardly a difficult task, at least as applied to defendant-friendly tort reform measures. For any such measure, a court can readily construct a salutary goal that legislators might have had in mind. (In the area of malpractice, for example, legislators can surely be supposed to have sought to make medical services more affordable or available.) Thus, in this view of tort, a court should uphold as rational even the most regressive and thoughtless pieces of medical malpractice reform, such as Virginia's flat caps on compensatory damages.[14]

This entire mode of analysis is, as I just said, premised on the idea that tort law *is merely* regulation adjusting the burdens and benefits of economic life, no different in kind from, say, a regulation issued by the FDA mandating that drug manufacturers place warning labels for certain kinds of health risks on their products. To my mind, however, there is a difference between the constitutional issues raised by these two classes of law. And again, it is because I think the conventional theoretical wisdom is wrong to treat tort law as public law in this sense. Malpractice plaintiffs, like other tort plaintiffs, do not wear tin badges—they have not been deputized to rein in the medical profession on behalf of a grateful public. Nor are they filing claims with FEMA for disaster relief, or under Medicare for medical benefits. They are suing to redress wrongs done to them. And when tort is understood as victims' rights law, the tenor of the court's constitutional analysis should change. Thus, as I have argued at (excessive) length elsewhere, courts reviewing due process challenges to defendant-friendly tort reforms ought not to rely on the rational basis test, but instead should consider: (1) the nature of the interest

13. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

14. Goldberg, *supra* note 6, at 528–29.

being protected by the tort cause of action (bodily injury, economic expectancy, etc.); (2) the nature of the wrongful conduct interfering with that interest (intentional/callously indifferent, careless) and the degree of interference with the tort posed by the reform legislation; and (3) the justification(s) for the reforms.[15]

One can surely mock this alternative test. But, as my economist colleagues like to remind me, the question is: "As compared to what?" Seen in this light, my multi-factored monstrosity looks a bit less hideous. Consider by comparison the Wisconsin Supreme Court's recent decision in the *Ferdon* case, which struck down Wisconsin's cap on non-economic damages in malpractice cases on equal protection grounds.[16]

The plaintiff in that case argued that such caps ought to be subjected to strict scrutiny under the equal protection clauses of the state and federal constitutions.[17] That request was not merely doctrinally unmotivated. It reveals a basic and deep tension in the thinking of many who are today favorably disposed to the tort system.[18] For at least the last fifty years, progressive scholars and trial lawyers have been trying to have it both ways, endorsing tort law as a law of wrongs and redress *and* as a vital piece of regulatory machinery that delivers safety, brings the powerful to heel, and responds to interest-group capture of the regulatory state.[19] Cases like *Ferdon* reveal the basic instability of this position. If one is going to take seriously the idea that tort law is about accountability of wrongdoer to victim, then one has plausible grounds for asking for more robust judicial oversight of defendant-friendly tort reform measures than rational basis review, albeit not strict scrutiny.[20] But then one also has to accept that tort law is not a blank regulatory check that judges and jurors get to fill out based on their conceptions of desirable public policy outcomes, but instead a body of law with a more limited and distinctive enterprise in mind. On the other hand, one can tout the virtues of tort law as a shadow regulatory regime. But then one has to refrain from appealing to the seemingly

15. *Id.* at 613–22.

16. Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 447 (Wis. 2005).

17. *Id.* at 456.

18. It goes nearly without saying that there is plenty of inconsistency on the other side of the 'v.' Consider, for example, conservatives who wield the idea of 'personal responsibility' like a bludgeon, yet miss no opportunity to trash the one body of law that, more than any other, is all about holding persons (natural and artificial) responsible to others.

19. *See, e.g.*, THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1-2 (2001) (arguing that tort law combines the "manifest" function of compensating injury victims with the "latent" function of regulating businesses to promote the public's interest in safety).

20. Goldberg, *supra* note 6, at 611–26.

compelling notion that the law ought to provide victims of wrongs with recourse against their wrongdoers.[21] More importantly for present purposes, one probably has to relinquish any demand for strict scrutiny of tort reform legislation.[22] To do so, on this understanding of tort, would be akin to demanding strict scrutiny for legislation reducing fines for OSHA violations.

In my view, therefore, the *Ferdon* majority wisely declined the plaintiff's invitation to apply strict scrutiny. Following standard modern protocol, it opted instead for rational basis analysis. But not exactly, for its version of rational basis carried sufficient 'bite' that the damage cap provisions were struck down as irrational.[23] This analysis, like the plaintiff's implausible plea for strict scrutiny, reveals the strain inherent in any tort theory that simultaneously supposes that tort law is just a form of regulatory law and that tort law should enjoy greater immunity from legislative revision than ordinary regulatory law. According to the majority, it could not consider the rationality of the cap in isolation, but rather had to gauge it as part of

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21. Several conferees wondered aloud why the public might be as receptive as it seems to be to the modern tort reform movement. The answer may be that it is not, or that it is, but only because of well-financed disinformation campaigns by industries vulnerable to significant tort liability and their political allies. Either explanation ignores the fact that there are some instances in which even fans of tort law should shake their heads in disbelief. For example, how does one justify the recent Texas Vioxx verdict that awarded a widow who lost her 60-year-old husband (of one year) $253,000,000.00 in a wrongful death action against Merck for failing to warn of the risk of heart failure that may accompany the drug? *See* Benjamin C. Zipursky, *Much Pain, Much Gain: Skeptical Ruminations on the Vioxx Litigation*, JURIST, Jan. 23, 2006, http://jurist.law.pitt.edu/forumy/2006/01/much-pain-much-gain-skeptical.php. The plaintiff claimed and received lost income of about $450,000. The jury then awarded her an additional $24 million (!) for her grief and for the loss of companionship that she stands to experience for the remainder of her life. On top of that, it added more than $200 million in punitive damages. Thus, by virtue of the verdict, the victim was rendered one of the very richest people in America. True, the verdict has now been reduced because of Texas's damages caps. And, yes, of course, the case is a statistical outlier. But so what? There is simply no plausible notion of vindication or redress that gets one from even a culpable failure on the part of Merck to inform consumers of the health risks of Vioxx to the idea of this plaintiff being entitled to demand of the company $253 million for contributing to the death of her husband. Perhaps one can justify such an award as some sort of bounty-hunter premium or correction for systemic under-litigation, but that is precisely the sort of public-law justification that members of the American public seem to have a hard time swallowing.

22. Goldberg, *supra* note 6, at 580–83 (noting that public-law conceptions of tort helped pave the way for the application of the rational basis test to due process and equal protection challenges to tort reform legislation). This is not to say that it is impossible to formulate an argument for robust scrutiny of tort reform legislation within a public-law conception of tort, just difficult. Professor Abel, for example, has argued that heightened scrutiny of defendant-friendly tort reform is warranted because the capture of legislatures by defendant-friendly interest groups has rendered them, in this area at least, less democratically accountable than courts. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 535-46 (1999).

23. Ferdon v. Wis. Patients Comp. Fund, 701 N.W.2d 440, 460–61 (Wis. 2005).

the overall edifice of statutory and common law governing malpractice cases.[24] Thus, the court had to assess not just how the cap might serve some goal or goals, but whether it served the overall goals of the entire scheme. One goal of the scheme, the majority supposed, is the delivery of compensation to injury victims on fair terms.[25] Surely, however, it is not fair to deny compensation to the most severely injured medical malpractice victims, which is what tends to happen by virtue of the operation of caps. And so, the opinion concludes, because the cap is not a means of delivering *fair* compensation it must be struck down as irrational.[26]

The key moves in this analysis—looking to the purposes of the scheme, as opposed to those of the provision under review; identifying one purpose that is not served by the caps as opposed to others that are or might be served by it; treating the caps as part of a self-contradictory legislative scheme—are, I think, fairly obvious departures from standard rational basis analysis. At least in this aspect of its analysis, the *Ferdon* majority found itself doing back-flips.[27] That it had to do so attests to the fact that the court, like most modern courts and commentators, is operating with an impoverished tort theory that leaves it unable to capture what is distinctive about this body of law, and therefore unable to ask a useful set of questions about the constitutional limits on its reform.

By criticizing the application of strict scrutiny and rational basis analysis to defendant-friendly tort reforms, I do not mean to imply that judges and commentators can merely crank the handle on some alternative test and spit out answers to the question of the constitutionality of damage caps or tort reforms. In many instances, these will be hard cases, which is partly why they have attracted a good deal of scholarly attention. What a test grounded in better tort theory can offer, however, is a framework that asks questions more immediately relevant to, and more helpful in assessing, the constitutionality of reform measures such as caps. In particular, it does not invite courts that are justifiably worried about the legitimacy

24. *Id.* at 463–65.

25. *Id.* at 464.

26. *Id.* at 466–67.

27. The majority offers a somewhat more promising line of argument when it suggests that caps on non-economic damages, as applied to certain classes of malpractice claimants who tend to have minimal economic damages but significant non-economic damages, violate the guarantee of equal protection of the law. Wisconsin cannot, the majority reasons, hold out tort law as if it is open to everyone, and then create legal rules that *de facto* bar certain persons from meaningful access to that law or meaningful redress. *Id.* My view is that this intuition is still better expressed through the idea of a right to a law of redress, as opposed to a right to equal access to whatever version of tort law courts or legislatures happen to provide.

of certain tort reform measures to play games with rational basis analysis. Instead, it asks them to focus on the matters that are really at hand, including the nature of the tort at issue, the interest(s) the cause of action aims to vindicate, the type of wrongdoing to which victims have been enabled to respond, the degree of interference with the tort cause of action that can be expected to result from the reform, and the apparent justifications for the reform.

CONCLUSION

The claim of this Essay is that lawyers and scholars involved in on-the-ground analyses of medical malpractice reform and other tort reform efforts need to attend to theory along with data. As I have tried to demonstrate using the examples of under-litigation and constitutional challenges to tort reform measures, theory inevitably plays a role in how we construct the data and what sort of inferences and conclusions we draw from it. The business of tort reform is important. It is not one that we should undertake without first having an adequate grasp of what it is that we are reforming.