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FOREWORD

This symposium extends a scholarly effort launched at The Urban Institute's highly successful National Medical Malpractice Conference held in Washington in February 1985. At that time, medical malpractice issues were making headlines again—nearly a decade after an earlier apparent medical malpractice "crisis" had subsided. Since the conference there has been a further intensification of interest in the malpractice problem as well as a widening of concern to embrace other areas of tort law and liability insurance and the possibility of general tort reform.

Although the medical malpractice situation has helped to catalyze a larger tort reform movement, it remains a discrete problem area, rewarding separate study (as in this symposium) and inviting separate legislative attention. The special problems encountered by the law of medical malpractice include the difficulty and high cost of establishing causation and defining the appropriate standard of care in each case. More fundamentally, this body of law differs from other tort doctrine in seeking to govern relationships that are formed under a wide variety of circumstances, that are frequently close and ongoing, and that may not be beyond efficient ordering by private contract. Many medical injuries that are candidates for redress under the tort system are not unanticipated hazards or products of intentional misconduct but are instead low-probability events the risk of which the parties may have recognized and allocated to their own satisfaction. Indeed, the management and spreading of health risks are central objects in each medical care transaction. Whether tort law, by prescribing important terms of these transactions, contributes to the optimal prevention of injuries and the optimal allocation of risks is a question that needs to be carefully considered. The means chosen by society to allocate resources to health care uses is not only a tort-law issue but a major concern of the nation's overall health policy.

Most of the articles in this symposium grew out of presentations made at the Urban Institute conference. They provide new information, insightful perspectives, and thoughtful reform proposals that should contribute to the

ongoing policy debate. They underscore the importance of thinking about the law of medical malpractice in the context of the health care industry's overall development and of the need to analyze malpractice law's effects on the cost and quality of care.

The Table of Contents shows the symposium's five parts. Part I is largely descriptive. Its articles delineate the emergence and nature of the malpractice problem and recount the changes that past difficulties have prompted in both the insurance system and the legal environment. New empirical evidence on the effects of past legislative reforms is presented by Patricia Danzon. Other empirical work on the nature and extent of the malpractice problem is also reviewed, giving an up-to-date picture of the state of knowledge.

Unfortunately, it has proved impossible to present in Part II of the symposium, as intended, an accurate snapshot of the current legislative scene in the states.* Not only are the legislatures moving too quickly and in too many different directions, but the merger of malpractice reform with general tort reform has also blurred the subject further. Part II is thus limited to a presentation of the pathbreaking ideas of Jeffery O'Connell. Following a description of the Moore-Gephardt bill, the main federal proposal, O'Connell himself offers an enlightening synthesis of that proposal with another that he has made.

Parts III and IV open an entirely different reform frontier by suggesting that private contracts between providers and patients might alter conventional tort rights, remedies, or procedures. Two premises underlie this extended discussion. First, bargaining over tort rights is not a zero-sum game, meaning that both providers and consumers could benefit from particular changes. Second, different solutions might be appropriate in different circumstances. Thus, providers and consumers might both prefer to have iatrogenic injuries handled under an indemnification regime of their own choosing rather than under the system that the legal system has developed for them—a regime that costs a great deal to operate and is widely criticized for serving well only the interests of trial lawyers. The various discussions of the possibilities for private reform reveal a great deal about alternative approaches to the compensation of medical injuries, about the changing character of the health care industry (especially its expanding opportunities for consumer choice), and about the legal system itself. Enthusiasm for private reform is not universal, as shown by some of the perspectives offered, particularly in Part V. Nevertheless, focusing on the possibilities of private contract presents some interesting challenges to conventional wisdom concerning both the health care industry and the tort system.

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* State-by-state "score cards" are available elsewhere, though without much accompanying detail. *See, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATURES, WHAT LEGISLATORS NEED TO KNOW ABOUT MEDICAL MALPRACTICE 18-19 (July 1985) (coverage through 1983); the AMA Division of Legislative Activities maintains a continuously updated chart, *cf. Tort Reform Legislation Gains Momentum*, AM. MED. NEWS, Apr. 25, 1986, at A1, col. 1 (coverage as of early 1986). But the Division's own quarterly, STATE HEALTH LEGISLATION REPORT, provides more detailed discussion of recent state health legislation, tort reform, and related cases.

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