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COMING DOWN TO EARTH: WHY RIGHTS-BASED THEORIES OF TORT CAN AND MUST ADDRESS COST-BASED PROPOSALS FOR DAMAGES REFORM

Benjamin C. Zipursky*

INTRODUCTION

Proposals for caps or limitations on damages in tort cases have been increasingly popular since the 1980s.¹ They come in many flavors: flat or proportional, compensatory or punitive, economic or noneconomic, general or tort-specific, state or federal.² A current focus of attention—and the example I will sometimes refer to in this essay—is President Bush’s proposal for a federal law capping noneconomic damages at $250,000 in all medical malpractice cases, whether in state or in federal court.³ The principal rationales for this proposal, as for most proposals for damages reform, are to reduce the cost of products or services (in this case, medical services) supposedly saddled with excessive liability and liability insurance costs and to diminish the amount of frivolous litigation.⁴

Are caps a good idea? How high (or low) should caps be, and should they only be for noneconomic damages? If there are not caps, should something else be done to stem the putative problems of excessive liability? What do philosophical approaches to tort law—either corrective justice theories⁵ or other rights-based accounts of tort law—have to say about them?
law—tell us about the answers to these questions and to the question of whether there is too much liability in the first place?

Actually, a preliminary problem is how a philosophical theorist of tort can address these questions. This problem is surprisingly vexing because the most cogent philosophical theories of tort law have been offered as internal accounts of the practice. And most of them, my own included, have been particularly tied to the nature of the common law. Indeed I, like many, have disclaimed first-order normative pretensions; I have not said that this system on its substantive merits is the best justified system. I have said that it hangs together normatively in a principled way, and that there are prima facie reasons for those working within it to hew to the structure of these principles. But this sort of internalism leaves open evaluative questions about whether certain revisions ought to take place.

The main goal of this essay is to address this meta-problem: how can a philosophical theorist of tort law add anything to policy debates about reforms in damages law? I begin by considering the most obvious sorts of responses that a corrective justice theorist might offer. Of these, I shall argue that the most promising response is that the corrective justice theorist has nothing whatsoever to offer. A torts professor today who has nothing to say about how to think about damages reform, however, holds a very incomplete set of views, and this lack of opinion deserves to be criticized. Next, I enumerate sev-
eral of the obstacles that face tort theorists today. Finally, I argue
that, notwithstanding our initial concerns, it is possible to be a philo-
sophically oriented, rights-based theorist and still be helpful to de-
bates about tort reform.

II. PHILOSOPHICAL THEORIES OF TORT, AND PROPOSALS FOR
DAMAGES REFORM: INITIAL RESPONSES

The most obvious and commonly heard response to suggestions of
damages reform comes from corrective justice theorists who I will call
“purists.” The purist typically takes the position that the common law
of torts has a coherent and justifiable design as it stands, and that
damages reform would disturb that structure and should therefore be
rejected. According to the purist, tort law is about restoration of an
equilibrium so that both pecuniary and nonpecuniary damages are
necessary to make a victim whole. The victim of a wrongful injury
who is entitled to be made whole has a right to be made whole. Because tort law is not simply a collection of knickknack policy de-
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vices for providing some compensation, but is actually a system of law
that recognizes the right to rectification, social cost arguments about
trimming off tort damages should not be accepted.

The purist position has at least two variations: one I will call “the
deontologist purist” and the other “the coherence purist.” The deon-
tologist purist recognizes in the rights of tort law a kind of untoucha-
ble boundary. As Ronald Dworkin has famously maintained, rights
trump general concerns of utility. Consequently, the deontologist
purist would maintain that because tort law realizes and enforces
rights, and such rights cannot be traded off for simple utility or finan-
cial advantage of society as a whole, tort reform is fundamentally
illegitimate.

11. Id. at 695 & n.1.
12. Cf. WEINRIB, supra note 5, at 125. According to Weinrib, corrective justice is concerned
with normative, rather than material, gains and losses:
The correlative gains and losses of corrective justice compare what the parties have
with what they ought to have under a Kantian regime of rights and corresponding du-
ties. The defendant realizes a normative gain through action that violates a duty correla-
tive to the plaintiff's right; liability causes the disgorgement of this gain.
Id. at 125. See also Lionel Smith, Restitution: The Heart of Corrective Justice, 79 TEX. L. REV.
2115, 2120 (2001).
13. See WEINRIB, supra note 5, at 12.
15. See WEINRIB, supra note 5, at 212; Jules L. Coleman, Tort Law and the Demands of Cor-
rective Justice, 67 IND. L.J. 349, 358 (1992) (stating that “corrective justice prohibits creating a
wrongful loss, even if doing so would have the effect of rectifying substantial injustice”).
I believe the deontologist position in tort, at least as so stated, is indefensible. The most prominent corrective justice theorists—Weinrib and Coleman—have not offered a first-order normative defense of tort law, but rather an interpretive theory of the concepts in it. This does not yield a per se normative argument against legislative change. Moreover, some theorists, including Coleman, have forthrightly stated the possibility that quite different systems are justifiable from a normative point of view. And, indeed, no one to my knowledge has offered a sustained, first-order normative argument against a system like New Zealand’s. It is also relevant that corrective justice theorists have rightly recognized the sensitivity of questions regarding the relation between corrective and distributive justice; to the extent that proposed reforms invoke concerns of distributive justice, they cannot be categorically dismissed. Finally, and most importantly, even assuming the Dworkinian way of looking at rights is justifiable within certain political domains such as voting rights, freedom of speech rights, or rights to equality under law, tort law has a different constitutional status from these above-mentioned rights. The concepts of rights and duties in philosophical theories of tort law do not automatically yield a trumping argument with regard to tort reform measures. This is not to say that there are no categorical or constitutional restraints—indeed, that is one of the topics to which I will return in constructing a positive framework.

Weinrib stated, “Corrective justice is . . . immune to the external purposes that characterize distributions.” While “corrective justice holds the parties to the equality inherent in their immediate interaction,” extrinsic purposes “must favor one of the interacting parties and thereby contradict the transactional equality of corrective justice.”

16. See, e.g., Weinrib, supra note 5, at 114–120.

17. See id. at 14–15. According to Weinrib, “private law develops over time and in the context of . . . subsequent occurrences or the thinking of subsequent jurists may lead to fresh nuances in doctrine or to a reevaluation of the coherence or plausibility of previously settled law.” Id. at 15.

18. See Jules L. Coleman, The Practice of Corrective Justice, 37 Ariz. L. Rev. 15, 30 (1995); Coleman, supra note 15, at 360; see also Weinrib, supra note 5, at 148 (arguing that the English approach to determining reasonable care makes more sense than the American approach, at least from a corrective justice standpoint). In deciding whether a defendant has met the standard of care, English courts do not account for the cost of eliminating the risk; American courts follow the BPL formula derived from United States v. Carroll Towing 159 F.2d 169 (2d Cir. 1947). Weinrib, supra note 5, at 148. As noted by Weinrib, “[D]isregard of B makes sense, because it is the risk, not the cost of eliminating it, that connects the parties to an accident as doer and sufferer.” Id.


20. See, e.g., id. at 61–63, 70, 75, 210–14.
Let us look in particular at proposed caps for medical malpractice.\textsuperscript{21} One of the arguments in favor of such caps is that they would lower the high cost of medical care and would make medical insurance more available for many of those in low income brackets.\textsuperscript{22} I am well aware that the question of whether jury behavior warrants caps in medical malpractice is itself controversial.\textsuperscript{23} The point now is simply a moral and a logical one, not an empirical one. If there were empirical support for the proposition that it would be feasible to render healthcare more widely available by reducing pain and suffering awards, then the fact that there are rights involved in tort litigation and that this in some sense might diminish the force of the rights would not be a sufficient reason to rule out considerations of broader availability of healthcare. Indeed, to the extent that this sort of policy concern is realistic, it seems to me incumbent on liberal tort theorists (as much as conservative ones) to consider damages caps seriously, perhaps even \textit{in order to enforce and protect rights} (to medical care) notwithstanding the possible negative impact upon rights to redress in tort.

A more interesting argument than that of the deontologist purist is that of the coherence purist. Philosophical theorists of tort law, including Ernest Weinrib, Stephen Perry, and to some extent John Goldberg and I, have sometimes expressed coherentist views.\textsuperscript{24} The coherence purist takes the position that if the structure of tort law works a certain way, various amendments to tort law are unacceptable because they are inconsistent with that structure.\textsuperscript{25} Weinrib made such an argument with respect to judicial innovations that involve relaxation of causation requirements,\textsuperscript{26} as did Ripstein and I in one article,\textsuperscript{27} Goldberg and I in another,\textsuperscript{28} and Perry in various places.\textsuperscript{29} Wright, Weinrib, and I all express concerns about overdevelopment of

\textsuperscript{22} The White House, \textit{supra} note 3.
\textsuperscript{23} See Sharkey, \textit{supra} note 1.
\textsuperscript{24} See \textit{Weinrib, supra} note 5, at 45; Perry, \textit{supra} note 5, at 297. The fullest expression of my own views on the topic of coherence in torts is in Benjamin C. Zipursky, \textit{Pragmatic Conceptualism}, 6 \textit{LEGAL THEORY} 457, 457-85 (2000).
\textsuperscript{25} See \textit{Weinrib, supra} note 5, at 45-46.
\textsuperscript{26} See \textit{id. at} 153-55.
\textsuperscript{29} See, \textit{e.g.}, Stephen R. Perry, \textit{Risk, Harm and Responsibility}, \textit{in Philosophical Foundations of Tort Law} (David G. Owen ed., 1995).
punitive damages that run along these lines. I think that these arguments tend to cut against the idea of limiting nonpecuniary damages. To the extent that tort law is by its structure committed to the idea of making whole, capping damages because of a concern that the cumulative effects of high damage awards will be sub-optimal would appear illegitimate.

These sorts of arguments merit careful attention in the context of tort reform, and the view that I end up adopting bears some relation to this form of purism. But it is necessary to point out a few serious shortcomings of this approach. First and foremost, the most powerful coherence arguments are fundamentally addressed to the judicial role. If one accepts Weinrib's formalism, Coleman's mid-level theory, Perry's Dworkinized view, or my own conceptualism, one is essentially arguing that the degree of coherence is closely related to the plausibility of the claim that something is part of the common law of torts. As Coleman and I have argued at length, this leaves open the question of whether a legislator, or even a judge who has a justifiable claim to occupy a position of revision, should deviate from what would optimize coherence. One could agree with a Dworkinian view that coherence is important, without treating it as paramount, at least in the legislative arena.

Relatedly, it is simply not very convincing that norms of coherence must be dispositive in tort legislation for two reasons. First, norms of coherence are not paramount and are virtually never argued to be paramount in legislation more generally. And it is hard to see as a moral or political matter why they should be—this seems to be a sort of fetishism. While the forces of politics, particularly in a democracy, involve constant compromise and piecemeal legislation, resulting noncoherence or lack of evenhandedness is not necessarily morally problematic or prohibitively unfair, unequal, or anomalous. This is quite different from elevating the view of the coherence purist, rightly valued in the common law from a legal-epistemological point of view, to a necessary condition for political morality in legislation.

30. See WEINRIB, supra note 5, at 135 n.25; Zipursky, supra note 9, at 751–52; see also Richard Wright, The Grounds and Extent of Legal Responsibility, 40 San Diego L. Rev. 1425 (2003).

31. As Weinrib has pointed out to me in personal communications, it is quite different to support restrictions on damages in the interest of safeguarding the system against various kinds of abuses or pathologies that might otherwise arise.

32. See WEINRIB, supra note 5, at 10; see also Zipursky, supra note 24. Interestingly, some damages caps, including the noneconomic damages caps in place in Canada, are judicially imposed.

33. See Zipursky, supra note 24.
Another perspective comes from the "quietist." According to the quietist, tort theory is not about what should be but about what is. It is fundamentally an interpretation of a practice embedded in the courts. We can say how the courts should rule in order to be staying within their practice. And there are some jurisprudential theories, like Dworkin's in one way and Weinrib's in another, that seem to provide some reasons for courts to stay within the practice. But when we are talking about legislation, the philosopher of tort law as a philosopher of tort law has nothing to add.

While the quietist takes the most modest position it is also the most disturbing. If the quietist eagerly admits that he or she has nothing to offer to policy debates, then what is he or she doing in the legal academy? The point is that there is something wrong with a legal theory that, simply as a matter of principle, declares that it is utterly unresponsive to the entire domain of normative questions about how to move forward with the law. Damages reform and tort reform are what lawyers and citizens agonize over and want to make good decisions about. If torts professors have, in principle, nothing at all to add, then they are conceiving of their subject in an unacceptably narrow and peculiar way. This is concededly the unimaginative practical and moral argument that philosophical theorists of tort law ought to have something to say about practical issues, including tort reform.

I have already commented on why I think deontology and coherence are also unacceptable orientations. So where does that leave me? I think that this is why many extremely intelligent and responsible people end up being fairly reductive when it comes to subjects like torts. It is hard to imagine that practical issues, compensation, money, and safety do not matter a lot in torts. Studying torts in a way that is utterly unresponsive to questions about revision does not do the subject justice. If one is reductive about values in tort law, reducing them exclusively either to money or to human welfare considerations, then the task of constructing a comprehensive evaluation of aspects of the system appears to be feasible, at least in principle.

34. See, e.g., Zipursky, supra note 9, at 697.
35. See Robert L. Rabin, Law for Law's Sake, 105 YALE L.J. 2261, 2283 (1996). Furthermore, as Robert Rabin notes, philosophical tort theorists provide no arguments regarding "why present-day concerns about compensation for injury victims, predictability for risk producers, safety enhancement for society-at-large, . . . cost-effectiveness and shared perceptions of fair dealings . . . are less critical matters of concern for a system of private law than protecting individual autonomy." Id. at 2279 (emphasis omitted).
III. COMPETENCY AND POLITICS

The primary reason why one does not see much philosophical work on tort reform is because tort theorists rightly believe that many of the most important questions require work to be done through other methodological approaches. To illustrate, consider again the question of whether to cap noneconomic loss awards at $250,000. Let us suppose that significant reasons behind the proposal are that the following consequences will occur: average verdicts and settlements will either diminish or not increase; average insurance premiums will either diminish or not increase; average medical costs of providers will either diminish or not increase; medical providers will less frequently abandon their practices; and medical costs borne by patients, insurers, and employers will either diminish or not increase.

A critic of these arguments might assert that: (a) there is a flaw in one or more of alleged causal links between imposing caps and the reduction of medical costs, (b) the general assumption that reducing the costs of patients and third-party payers is an essential goal that is unfounded, or (c) the negative consequences of instituting caps under the Bush proposal are prohibitive. To evaluate these objections requires detailed empirical inquires that are beyond the field of expertise of philosophical theorists. First, we need social scientists and data gatherers to find evidence to support the first response. These are complex issues on which a great deal has been written. There are some data suggesting that California's caps did have a beneficial effect on the size of damages awards, and perhaps also on insurance premiums. Other data and information point in the opposite direction. And even assuming that damage caps have significant beneficial effects, it is entirely possible that these effects do not ultimately benefit the consumer.

38. See, e.g., Larry I. Palmer, Patient Safety, Risk Reduction, and the Law, 36 Hous. L. Rev. 1609 (1999); see generally Sharkey, supra note 1.
39. See, e.g., Richard E. Anderson, Effective Legal Reform and the Malpractice Insurance Crisis, 5 Yale J. Health Pol'y L. & Ethics 341, 349–50 (2005); Richard A. Epstein, Contractual Principle Versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice, 54 DePaul L. Rev. 503, 504 & n.9 (2005); Sharkey, supra note 1, at 404–05 & n.45.
Second, damage caps are also usually put forward on the basis of a view that there is a problem that needs to be fixed.\textsuperscript{41} Tort reformers suggest that our system is at a dangerous juncture—that we must be more wary. The idea that damages are out of control or have "run wild" has not been adequately substantiated.\textsuperscript{42} In fact, the Congressional Budget Office's report suggests the opposite.\textsuperscript{43} Whether damages are out of control is partially an empirical question: What is the state of affairs in medical malpractice liability? And it is also partially a question of values: Is the state of affairs one that needs to be fixed? To a substantial extent, the first question needs to be addressed by empirical work of social scientists and by lawyers. The latter question can be addressed by many parties: patients, consumers, doctors, insurance companies, patients' advocates, lawyers, and judges.

Third, even if one were to assume that there is a serious problem, and that caps would fix that problem, that would of course not end the analysis. We still would need to ask what the collateral consequences of the change would be, and whether those would undercut the value of the change. Again, there are empirical and predictive components as well as an evaluative component. As an illustration, damage caps might reduce the capacity of patients injured by medical malpractice to find an attorney who would bring their case. The inquiry must also determine whether this is true, and if it is true, how desirable or undesirable this is (and under what circumstances). Similarly, there are predictive and evaluative questions about degrees of deterrence, degrees of medical malpractice, and degrees of uncompensated harm.

Even if policy debates about damages reform engage many important questions that tort theorists are not particularly competent to answer, either empirically or as a matter of political value, it does not follow that tort theorists have nothing important to contribute to the debates. On the contrary, the debate is and ought to be broader and more robust than suggested above. For one thing, even the factors I have listed above will inevitably involve matters of degree. That means that judgment about the value of our institutions and our forms of law will be critical. Secondly, it is easy to overestimate the number of evaluative questions that are solely "political." For example, whether the current level of medical malpractice litigation in our soci-


\textsuperscript{42} See id. at 19–23; Zipursky, Civil Recourse, supra note 6, at 751–52.

\textsuperscript{43} Beider & Elliott, supra note 41, at 3–9. As some authors have stated, "Both anecdotal and statistical evidence about damage awards can be misleading because the amount of damages actually paid can be reduced after a trial." Id. at 5.
ety is "too much" is not simply a political question or a question involving empirical inquiry into what the level is; it is also a question whose answer varies with how we think about litigation theoretically. If, as scholars like David Hyman and Charles Silver believe, litigation is a means of medical regulation, then it begs the question to say that we have too much regulation without a baseline analysis of the need for regulation. If, as Weinrib argued, litigation is instead a question of making things right when one party has understandably perceived a serious wrong, or if, as some influential twentieth century theorists believed, tort law is an effort to shift costs to a deep pocket where a tragedy has occurred, then our perception of whether there is too much litigation will change.

Whether there is too much litigation necessarily involves a theoretical understanding of what the law is doing. Many theorists are pluralists, and believe that litigation involves all of the descriptions above, which also involves theoretical understanding. In other words, the plausibility and wisdom of our policy choices sometimes depend on the depth and the accuracy of understanding our political system. For instance, our perception of noneconomic loss varies depending on whether we view an award as a handout for the unlucky funded by a heavy tax on the average medical services provided to the consumer, or as a noncentralized and nongovernment funded means of regulation. If, as most philosophical theorists of tort believe, noneconomic loss is neither of the above, then we are likely to arrive at a different answer still. The debate about how we ought to understand noneconomic loss is a tort theory debate to which rights-based tort theorists can contribute and in which they should participate.

IV. ON THE PUTATIVE PROBLEMS OF INCOMMENSURABILITY

Once one recognizes that policy debate requires both empirical information and normative premises, it is plausible to infer that normative theorists of the subject might have something to say. Another concern, which I will refer to broadly as "incommensurability," is that if tort law involves basic rights to be made whole and damages reform involves the costliness of the system, how can they ever be rationally combined?


Incommensurability is discussed a great deal in legal scholarship.\textsuperscript{46} There is a wave of tort scholarship that focuses on the question of whether, for example, pain and suffering can be commensurable with monetary damages.\textsuperscript{47} I do not mean to undermine the significance of these questions when I say that this is not the sort of incommensurability problem I have in mind. That problem is easier than what concerns me, for at least in that case we are talking about two things that are both valued, and we are agonizing over the lack of a common metric in which to value them.

A less philosophically pristine and a more urgent type of incommensurability problem is whether a domain of secondary rights should be diminished in strength and magnitude in order to reduce both the costs of those who engage in the activities themselves or make use of the services or products in question, and the amount of litigation. This incommensurability problem is less philosophically pristine for a number of reasons. First, the trade-off is not about sacrificing one type of good for another type of good for the same person. The trade-off is also not about compensating tort plaintiffs for their injuries or about the level of their compensation. Rather, the trade-off is about a range of plaintiffs in a system receiving less so that society as a whole incurs fewer costs. The problem is at least in part interpersonal and society-based, not wholly intrapersonal.

Second, the problem is not about a trade-off in quite the same way. It is about whether we ought to move to a somewhat revised system. In the individual case, one wonders how to trade apples against oranges, pain and suffering against money. But, because tort law involves more than an individual case concerning an individual transaction or exchange, we cannot view this problem as one good in exchange for another. Instead, this problem requires a practical decision about whether to alter the system so that it is less costly in certain respects, even though that may involve sacrificing compensation for some and a de facto diminished plaintiffs’ power in certain cases. Because the evaluation of tort reform proposals fall within the many social and political decisions in our system that do not even purport to be about trade-offs for individual persons, the paradigm of incommensurability does not describe the nature of the value problem well.

\textsuperscript{46} See, e.g., \textit{id.} (describing twentieth century “loss-spreading” theorists, such as Fleming James); Joseph H. King, Jr., \textit{Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law}, 57 SMU L. Rev. 163 (2004); Margaret J. Radin, \textit{Compensation and Commensurability}, 43 Duke L.J. 56 (1994).

Moreover, the trade-off does not necessarily involve sacrificing only a good. If remedies are reduced, a right-holder's domain of rights is weakened. Therefore, the ultimate question is whether the diminution in power and rights is something that ought to be traded-off for lower costs in the system.

At first blush, these observations make the question easier because there is not even an implication of a metric of good as such; it is more a point about choosing a social welfare function across individuals in a society. So the metric problem is arguably more a matter of cutting across persons than a matter of understanding different kinds of value for one person. I will turn to that in a moment. Note that several important scholars have not turned to the social welfare function or have done so only quite indirectly. From Priest through Croley and Hanson, there is an insurance-driven model of the problem that purports to consider valuation at the individual level, and to make an argument (either for or against broad pain and suffering awards) on that basis. What troubles me about this argument is that it depends upon the premise that tort law is a form of insurance. The statement that tort law is an insurance system is about as accurate as the statement that religion is the opiate of the masses: brilliant, startling, and illuminating as a metaphor; animating and controversial as a cry to institutional reform; but wildly ideological and inaccurate as a statement of fact. There is much more to being a citizen in a legal system that has tort law than paying a premium on your products and services and getting money when you suffer a certain kind of loss, just as there is much more to religion than its rendering more tolerable the suffering of daily life.

Nevertheless, many important tort scholars—including, for example, Professors Louis Kaplow and Steven Shavell—have chosen to assess proposals for tort policy from the point of view of asking what sorts of tort law would be most conducive to the maximization of social welfare, which in turn requires a selection of preferred social welfare function. To view the issue as one requiring a choice of social welfare function is to distort the question in a number of ways. First, the question the legislator is faced with is not most realistically understood as a question about what system should exist; it is a question

48. E.g., George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1535 (1987) ("Expanded tort liability improves social welfare ... because it provides a form of compensation insurance to consumers.").
49. See Croley & Hanson, supra note 47 passim; Priest, supra note 48, at 1547.
50. See Croley & Hanson, supra note 47, at 1791 & n.24 (stating that the two main economic goals in an efficient torts system are insurance and deterrence); Priest, supra note 48, at 1534–35.
about what changes should occur. We will start with our current sys-
tem and then have various sorts of amendments. In none of the re-
form proposals I have seen are we looking at a proposal of starting
something from the beginning. So the question is really about giving
up certain possibilities allegedly for a set of good reasons. And there-
fore the scholar helping to analyze the question should not realisti-
cally be asking whether the postrevision system will optimize welfare
on some function. He or she should be asking whether the changes
will be for the best. More specifically, the question is not so much
whether the new system approximates more closely what would be
rational. It is whether it would be a good change. And this involves
having a view about what is good in the current system, and what is
bad in it, and what effects the alteration would have on the good and
the bad.

The question can be re-analyzed as follows: given the point on a
social welfare function that our current system roughly instantiates,
and the changes that would arguably occur if reformed in certain
ways, and given how that might alter where our society is on the social
welfare function, should those reforms be undertaken? Thus, for ex-
ample, assume simply for the purposes of argument that the costs of
medical care nationwide in 2008 and thereafter would diminish by one
percent if there were a nationwide pain and suffering damages cap of
$250,000 instituted in 2006, and that there would be smaller verdicts in
a small fraction of cases (three percent), smaller settlements in a
somewhat larger group of cases, a bit less malpractice litigation overall
(two percent), only a 0.1% rise in the incidence of actual medical mal-
practice, and virtually no change in the percentage of meritorious
cases unlitigated and nonmeritorious cases litigated. In this scenario,
some people would gain and some would lose. But let us assume that
there is a shape to these changes and that, overall, there would be a
slightly different point on a social welfare function than where our
society is currently. It is tempting to argue that the decision about
whether the "right social welfare function" to select as a theoretical or
political matter (which, in turn, will determine whether the policy re-
forms are reasonably believed to lead to overall improvements, de-
clines, or neither on the curve), is outside the realm of the
philosophical tort theorist. And it might then seem to follow that the
tort theorist has nothing to add to the question of the normative advis-
ability of damages reform.

There are several problems with this argument. First, the assump-
tion that there is a social welfare function, and that this is a way to
think about tort reform, is of course philosophical. Second, the pre-
mise that the choice of social welfare function is not something to which the philosophical theorist of tort will or may contribute is wholly undefended and indefensible. The very choice of (a) whether the social welfare function selected is based on aggregation of welfare; (b) whether the social welfare function is egalitarian and, if so, in what way, and to what degree; or (c) how accidents and compensation will figure into the form of welfare-aggregation or comparison, and into the ascertainment of equality—are decisions that in one sense are political but are certainly not beyond or independent of reflective theory.

Third, the question of whether improvement over years along a social welfare function is a good reason to change the law now is a claim of political and moral value. For one thing, there are costs of all sorts (including economic and political); for a second, there is a precedential significance in passing significant federal tort reform; for a third, there are constitutional considerations in doing so.

Fourth, even the selection of salient changes that will or will not occur under the plan is a choice that imports a theoretical and conceptual apparatus. Fifth, the substance of estimates, the procedures used to decide on such estimates, and the decisional norms used to decide when estimates are realistic and worth depending upon are quite controversial and will typically display choices at a deeper normative level. In other words, the shaping of the problem along the lines described above does not happen in a theoretical vacuum, it happens in a theoretical paradigm, and one that may be quite open to challenge.

Finally, it is highly misleading to suppose that the move to a social welfare function is a way that the "welfarist" can fare better than can the rights-theorist in the realm of tort reform debates, in light of the problems of incommensurability. The welfarist has not solved any problem of incommensurability. He or she has merely devised a framework of talking about decisional tradeoffs that enables us to be comfortable. To be sure, there was once a kind of welfarist—an aggregative utilitarian with a robust hedonic theory—that believed he had actually cogently dealt with problems of incommensurability. But that theoretical figure was never able to address interpersonal utilities. In any case, no welfarist takes that position. And as the Pareto theorist can do very little, we are left with a welfarist who does not address any incommensurability problems either at the interpersonal or the intrapersonal level, but rather with one who (wisely, in my view) lives with incommensurability as a fact of moral and political life.

The upshot is not that I have solved any incommensurability problems, but rather that no one has. We have to make political,
moral, and practical decisions as well as we can, and there is no reason we should shun some of our most illuminating frameworks for understanding and describing our law.

V. WHAT CAN RIGHTS-BASED TORT THEORY OFFER?

Let me summarize where we are. There are four bad reasons for rights-oriented tort theorists to avoid the topic of cost-based damages reform. One of them is a sort of purism—deontic or coherentist—that is out of place because we are not in the court-based realm. A second is a sort of quietism that wrongly isolates the significance of understanding legal structures to the enterprise of interpreting the common law. A third is the view that decisions about tort reform are either based purely on empirical beliefs or on raw political choice, neither to which the rights-based tort theorist can contribute. And the fourth is that the rights-based torts theorist is peculiarly vulnerable to problems of incommensurability. All are ill-founded.

I want to turn now to a more positive set of considerations: what do philosophical tort theorists have to offer to the tort reform debate? It will be useful to organize my answers around the three kinds of philosophical responses that we began the paper with: deontologist purist, coherence purist, or quietist. Each of these naïve figures has a more sophisticated counterpart from whom I think tort policy debates could learn: I shall call them the “rights watcher,” the “integrity watcher,” and the “skeptic,” respectively. Again, as a preliminary, these are not meant to be the substantive contributions of the tort theorist; such contributions would require far greater legal and empirical backing than the following brief suggestive remarks enjoy.

A. The Rights Watcher

The rights watcher rejects the naïve position that just because tort law can be understood as a domain of rights, the claims of plaintiffs are utterly untouchable. But he or she nevertheless takes seriously the idea that there is something special about the domain of rights, and about the power to act upon having been wronged and having been injured by seeking redress in courts. He or she may be open to the idea that the machinery of rights is slow, unsatisfying, disappointing, and freighted with the apparatus of state and bar. But to the rights watcher, there is a core to the idea of a right against the tortfeasor. For the rights watcher, then, a critical question is whether damage caps realistically threaten the idea that those injured by torts have a genuine right of redress against the tortfeasor. As my long-time collaborator (and fellow symposiast) John Goldberg has argued
in a recent article on the constitutional status of tort law,\textsuperscript{52} and as many state courts have held in recent years, this right is not simply an invention of contemporary tort theorists plugged into common law, it is an idea rooted in our constitutional structure.\textsuperscript{53}

At first blush, the limitation of noneconomic damages to $250,000 does not appear to threaten the idea of a medical malpractice plaintiff's right. A few considerations make this a nontrivial question: the rejection of the collateral source rule, the limitations on attorneys' fees, and the stringency of expert witness requirements under both federal and state laws, make it much more difficult and expensive to bring a remunerative case with severe limitations on noneconomic damages. There are many cases (such as those brought by an insured, nonworking person who is the victim of medical malpractice), in which noneconomic damages will be a large portion of the award. If noneconomic damages are capped at $250,000, the upside of an award is quite low, particularly in light of high costs of experts. If we then remember that most cases result in a settlement and that settlement is in the shadow of ultimate expectations, the question of whether it effectively threatens the right becomes significant. Of course, there is an issue of political and legal philosophy concerning which should loom larger in practical legislative decisions: the formal legal right to redress, or the effective usability of this right.

The rights watcher will also want to be attentive to the right of parties who have not committed a tort to be free of liability, and, arguably, to be free of unreasonable claims of liability. Insofar as abusive and frivolous litigation are problems, and unjustifiable liability is a problem when it goes beyond what can be expected in a system with reasonable procedures but some error rate (and I view this as an open question), it is desirable to have well-designed legislation to restore adequate attentiveness to those rights. I have no doubt that a cap will reduce excessive liability in some cases where the basic cause of action is sound. But this is not the core of the defendants' rights problem. The core of the problem is liability where there should be none. I have grave doubts about whether, even assuming there is a significant problem along these lines, the reform proposals in question (particularly damages caps) are plausibly addressed to that problem.


\textsuperscript{53} See, e.g., Moore \textit{v.} Mobile Info. Ass'n, 592 So. 2d 156 (Ala. 1991); Smith \textit{v.} Dep't of Ins., 507 So. 2d 1080 (Fla. 1987); Fedan \textit{ex rel} Pedrocelli \textit{v.} Wisconsin Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005).
Finally, the rights watcher will, in my view, want to keep an eye on all of the goals, not just the right to redress wrongs or the right to be free of undeserved redress by others. He or she will want to keep her eye on the goal of the right to decent medical care and the right of access to medical care at all. These too are important goals for the rights watcher.

B. The Integrity Watcher

Lawyers have a picture of how the law hangs together, and within tort scholarship, some of this legal knowledge about coherence confronts the philosopher of tort law. The integrity watcher will be on the lookout for whether we are trying to use a sort of law in a domain where it does not fit, and for whether we are joining together legal structures in a way that is assured to come with major problems of their own. The integrity watcher will also strive to maintain concepts and principles that keep the law from being too much of a hodgepodge to count as a law, and will try to maintain some sense of evenhandedness and fairness.

The integrity watcher should not like flat damage caps for nonpecuniary loss. A forty-five-year-old law professor who loses significant motion in his left hand because of negligent spinal surgery will receive the same noneconomic damages award as a seventeen-year-old-woman who loses her reproductive system and her colon because a gynecologic surgeon, working late through the night, leaves a terrible set of incisions and infections. A person who unnecessarily suffers HIV because of a negligent switching of vials of blood will be limited just the same. The loss of hair for life will be equated with the loss of sight for life. These are anomalous. The integrity watcher will bridle at these cases of false evenhandedness—all are limited to $250,000, even though the concept of making whole is not equally captured in these cases.

A rather different sort of concern bedevils President Bush's proposed caps for the integrity watcher: a concern about federalism. Of course, an obvious glitch in consistency is that medical malpractice law is fundamentally the domain of the states. And so it is an obvious and entirely fair criticism that states' rights advocates, such as the current GOP purports to be, ought not to be pushing this agenda. That sort of lack of integrity is not really my concern; it is a bit too easy, and, after all, it may be that the states' rights agenda does not deserve so much attention and is a bit of a façade in any case. What concerns me is the question of whether it makes sense as a matter of constitutional structure to have a federal damages cap. And I think the prima facie an-
swer is that it does not. Here is an area where there are powerful reasons for thinking it should not be a federal issue, as a political or a constitutional matter. We are talking about state courts, and states' domain in insurance law, tort law more broadly, and regulation of the medical profession. There is no evidence that the "laboratory of the states" is not working. There is no plausible functional argument that the federal forum is necessary for such change. There is plenty of argument over whether caps are a good or a bad idea. And there is plenty of jurisdictional variation in conception of both the medical profession and of the role of tort litigation. The idea that tort reform of medical malpractice law (as opposed to, for example, products liability law) should be federalized undermines the fabric of the constitutional system as we understand it. An interesting question is whether, as a matter of constitutional law, tort reform of medical malpractice law is permissible. But the integrity watcher is not limited simply by that question.

Additionally, because the integrity watcher has a keen sense of legal forms, he or she will wonder whether fears of inadequate regulation should be the reasons for declining to cap damages or whether regulatory enhancement would not be a better route in any case. He or she will also wonder whether damage caps are the best solution for uncontrolled fluctuations of medical malpractice liability insurance premiums or whether financial regulation of insurance companies might not be a better suited legal tool for that end.

C. The Skeptic

Finally, we come to the skeptic. Recall that the philosophical quietist questioned whether an understanding of the concepts of rights and duties within the common law of torts will really add anything at all to debates about tort reform. The skeptic wonders the same thing, but also wonders whether the debates about tort reform are really occurring within the domain of reason as opposed to the domain of power. The skeptic has, perhaps, an inflated sense of what would really constitute a plausible argument. But these higher demands can be helpful in seeing more clearly.

And so the skeptic wonders, first, whether the enforcement of rights of tort law is really what we would care most about in the first instance, as opposed to, for example, better and more easily available medical care; he or she will be skeptical about the value for and the need of large damage awards, and skeptical about the elaborateness, the richness, and the zeal of our current personal injury bar and the American Medical Association. But he or she also wonders whether
the problems asserted to exist now really do exist and, if so, whether
cost reduction of medical care is really the anticipated effect of mal-
practice caps. He or she also wonders whether there is really any evi-
dence that this effect—to any significant degree whatsoever—will
follow. The skeptic is, in short, skeptical about whether there is any
evidence that damages reform will do anything like curing the ills of
the current system or whether these supposed ills are really ills. And
if the skeptic also happens to be a cynic, he or she will have no trouble
thinking of explanations for the existence of reform proposals for
which there is little or no evidence of success.

VI. Conclusion

The rights watcher, the integrity watcher, and the skeptic are meant
to highlight approaches to analyzing damages reform that might be
provided by a philosophically oriented rights-theorist in tort law, like
me. But I suspect that, although few in the audience are philosophers,
many find these approaches and arguments quite familiar, and I hope,
appealing. For these approaches are not so much the philosopher’s as
the lawyer’s approaches. Looking for rights, looking for cogent and
evenhanded forms with which to structure institutional arrangements,
and skeptically challenging proposals for change—these are intellec-
tual activities and contributions of the legal mind as much as the theo-
rist’s. For legislation, as much as for adjudication, I am hopeful that
the philosophical rights-theorist can support the thoughtful judgment
of the legal mind in its scrutiny of whatever political proposals come
our way, and whatever reforms we might try to undertake ourselves.