

ESSAY

LAW IN THE SHADOW OF VIOLENCE: CAN LAW HELP TO IMPROVE DOCTOR-PATIENT TRUST IN CHINA?*

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Can law help to address the lack of trust in doctor-patient relationships in China? This essay examines the role that law, on the books and in practice, has played in the rise and resolution of patient¹-doctor disputes and conflict in China. Law has generally played a secondary role in medical disputes: most patient claims never make it to court, and there is little evidence that negotiated outcomes are influenced by legal standards. Yet a legal framework weighted in favor of hospitals and doctors almost certainly exacerbated doctor-patient conflict in the 2000s. Patients facing legal procedures and rules that appeared to offer little hope of redress took their complaints to the streets. The threat of protest and violence also influenced how courts handled the cases that ended up in court, with courts creating new legal standards or ignoring formal law in order to appease plaintiffs. The result was lack of trust in formal law and the legal process from both plaintiffs and defendants.

Changes to written law and in court practice since 2010 have lessened some of the perceived unfairness of the legal framework for patients. Nevertheless, lawyers both for plaintiffs and for hospitals continue to argue that the system is unfair. Limited evidence suggests that the legal system does a poor job of separating valid from invalid claims and of incentivizing hospitals to reduce malpractice. The few steps taken to date by local and national authorities to use law to address rising doctor-patient conflict have largely focused on addressing the problem of protest, not the lack of trust between patients and doctors or the extent of malpractice.

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¹ I use "patient" to refer to patients and to their families. Many lawsuits and protests are brought by family members of patients, in particular in cases in which the patient is deceased.

Part I of this essay provides a brief overview of the problem of conflict arising from patient-doctor disputes. Part II examines the formal legal framework governing medical disputes in China, i.e. the law on the books. Part III describes the effect (or lack thereof) of formal law on actual practice, on the streets, and in courtrooms, with a particular focus on developments since China's Tort Liability Law came into effect in 2010. Part IV concludes by arguing that law has played and will likely continue to play a minor role in reducing patient-hospital conflict. In the short term, the best hope may be that the legal framework governing patient-hospital disputes does not exacerbate the existing dynamics of distrust.

This essay updates my prior work on medical dispute resolution in China, examining developments since 2010 and focusing in greater detail on the question of how China's legal framework might address the dynamics of distrust that characterize doctor-patient relationships in China.² This essay argues that despite steps taken in formal law to ameliorate some of the perceived unfairness of the legal framework governing medical disputes, little has changed on the ground. Those looking to law to play a role in diffusing doctor-patient conflict in China are likely to be disappointed. The legal system continues primarily to reflect, rather than to address, the lack of trust in Party-state institutions that has been a major contributor to rising unrest in China. Targeted legal reforms could help modestly, and this essay suggests a need to shift the focus of legal debate in China from dispute resolution and protest to steps that might improve the quality of and patients' confidence in the medical system.

I. THE PROBLEM

The extent and intensity of protest, often violent, by patients and their families against doctors and hospitals have been extensively discussed in both the media and in academic accounts.³ Major incidents of violence against doctors attract extensive media attention, leading one official report to describe medical disputes as "bloody conflicts concerning the accumulation of power in society."⁴ Less extreme forms of protest attract less coverage but are even more common and may be extremely disruptive to hospitals. Protest has become a routine tool for patients seeking compensation from hospitals, both in instances of clear

² See Benjamin L. Liebman, *Malpractice Mobs: Medical Dispute Resolution in China*, 113 COLUM. L. REV. 181 (2013). This essay draws on *Malpractice Mobs* for background information, at times without direct citation. This essay also draws on informal background conversations with a range of legal and medical professionals in China.

³ *Id.* at 228-229.

⁴ Li Qiumeng (李秋萌), *Zhengxie Weiyuan: Ying Jiada Daji Yinao Weihu Shehui Wending* (政协委员: 应加大打击医闹维护社会稳定) [CPPCC Member: Hospital Protests Ought to Be Cracked Down On with Greater Force to Maintain Social Stability] (Mar. 12, 2011), <http://news.163.com/11/0312/02/6UTN67RC00014AED.html>.

negligence and in cases of adverse outcomes.⁵ As one hospital official commented, "if a living person goes in and a dead person comes out, then the family will protest."⁶

Frequent media accounts of negligence by and the indifference of doctors and hospital staff have led to the popular perception that malpractice, often egregious, is common. Lack of empirical work makes assessing the frequency of protest, violence, and negligence by doctors difficult;⁷ some recent media accounts suggest that the frequency of serious cases of *yinao* (literally "medical chaos," the term most commonly used to describe patient protest) may be declining.⁸ In my interactions with doctors, hospital officials, lawyers, and academics there has been near consensus that violence against medical staff and egregious forms of malpractice are common. The causes of the volume of protest and the incidence of error are complex. But it is clear that the rise in disputes and the frequency of violence in such disputes are products of a number of factors, including the marketization and cost of health care, the compensation structure for doctors, reliance on the sale of drugs by hospitals and doctors to generate income, the difficulty of obtaining appointments at hospitals, the short time doctors spend with patients, delays in treatment, quality of care, corruption, lack of insurance for catastrophic illness, absence of a robust social safety network, and a general lack of trust in state institutions.

II. LEGAL FRAMEWORK

As medical disputes, protests, and violence surged in China in the 2000s, law often appeared to play a secondary role to action on the streets and in hospital hallways. I am not aware of any studies that have

⁵ Patients are not alone in protesting. Media accounts have also detailed protests by doctors and nurses in response to the violence. Shan Chungang (单纯刚), Henan Luoyang Xiang Ganbu Feifa Jujin 4 Ming Hushi Bei Tingzhi Juliu (河南洛阳乡干部非法拘禁 4 名护士被停职拘留) [Township Cadres in Luoyang, Henan, Were Removed from Office and Detained for Illegally Detaining Four Nurses] XINHUA WANG (新华网) [XINHUA NET], (Nov. 22, 2007), http://news.xinhuanet.com/legal/2007-11/22/content_7123801.htm; Qiu Shuo (秋硕), Nanping Shi Diyi Yiyuan Guanyu '6.21' Yihuan Jiufen Yinfa Bufen Yiwu Renyuan Shangfang Jingguo de Baogao (南平市第一医院关于“6.21”医患纠纷引发部分医务人员上访经过的报告) [Nanping City No. 1 Hospital's Report on the Protest of Medical Workers Following the June 21 Hospital-Patient Dispute], Tianya Shequ (天涯社区) [TIANYA COMMUNITY] (June 23, 2009), <http://www.tianya.cn/publicforum/content/free/1/1603956.shtml>.

⁶ Liebman, *supra* note 2, at 233.

⁷ The frequency of malpractice is of course a highly contested question even in countries such as the United States with extensive empirical scholarship on the topic. See A. Russel Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence-Results of the Harvard Medical Study III*, 324 N. ENG. J. MED. 245, 245 (1991).

⁸ Such reports focus on specific local jurisdictions and appear to be largely official local media praising the efforts of local authorities. Such reports thus should be treated with skepticism. They do, however, reflect the pressure local authorities have come under to reduce (and to reduce reports on) incidents of doctor-patient conflict in recent years.

examined the percentage of cases resolved informally or through the courts. Hospital officials and lawyers estimate that nearly ninety percent of patient-hospital disputes are resolved before they get to the courts.⁹ Nevertheless, judges also reported medical disputes increasing beginning in the early 2000s and taking up a greater amount of judges' time, largely due to the need to manage such cases to prevent escalation and unrest.

Even if most disputes are not resolved through formal law or with reference to legal standards, it is clear that the legal framework governing medical disputes in China contributed to the rise of patient-doctor conflict. Throughout the 2000s, the law governing medical disputes was weighted against patients in ways that undermined trust in the medical and dispute resolution systems. Although the legal framework has shifted since 2010, ambiguities and problems remain, and patients and doctors continue to view the current system as profoundly unfair.

From 2002 to 2010, medical disputes in China were primarily governed by the 2002 Regulations on Handling Medical Accidents, issued by China's State Council (the "Regulations").¹⁰ Under the Regulations, a plaintiff seeking compensation was required to show that the defendant¹¹ was responsible for a "medical accident," defined as an error causing personal injury to a patient that resulted from medical personnel negligently violating relevant laws, administrative regulations, rules, standards governing medical care, or ordinary practice.¹² Cases involving "medical accidents" were covered by the Regulations; those not involving a "medical accident" were not covered by the Regulations.

Two aspects of the Regulations attracted the most controversy. First, under the Regulations, damages awarded to plaintiffs in medical accident cases were low – significantly lower than in other tort cases. This was because the Regulations did not permit recovery of compensation for death in cases in which medical accidents led to a patient's death. In contrast, other tort claims were governed by the Supreme People's Court's (SPC's) 2003 interpretation on damages in personal injury cases,¹³ which

⁹ This figure is broadly in line with settlement rates elsewhere. As discussed below, what appears to be unusual in China is the legal framework's lack of impact on settlement negotiations and decisions.

¹⁰ Yiliao Shigu Chuli Tiaoli (医疗事故处理条例) [Regulations on the Disposition of Medical Accidents] (promulgated by the St. Council., Feb. 20, 2002, effective Sept. 1, 2002), ST. COUNCIL GAZ., May 10, 2002, at 6, available at http://www.gov.cn/english/official/2005-08/01/content_18999.htm.

¹¹ The overwhelming majority of defendants are hospitals. Chinese law does not provide for individual tort liability against doctors. Individuals are generally named as defendants only in cases in which individuals operate medical clinics outside of hospitals (often village clinics) or in cases alleging the illegal practice of medicine. Hospitals often require that staff pay a portion of any settlement or court award resulting from their negligence.

¹² Regulations on the Disposition of Medical Accidents, *supra* note 10, art. 2.

¹³ Guanyu Shenli Renshen Sunhai Peichang Anjian Shiyong Falü Ruogan Wenti de Jieshi (关于审理人身损害赔偿案件适用法律若干问题解释) [Interpretation of Some Issues Concerning the Application of Law in the Trial of Cases on Compensation for Personal

provided for a death compensation award of twenty times the average local income for deaths resulting from tortious actions. In practice, this meant that plaintiffs in medical cases who prevailed in court often received hundreds of thousands of yuan less than plaintiffs in other tort cases.

Second, under the Regulations, all determinations regarding whether or not a "medical error" had occurred were required to be made by medical review boards established by local medical associations. Courts were required to defer to these determinations.¹⁴ The use of medical review boards was designed to ensure that medical professionals resolved questions relating to the standard of care or causation. In practice, however, the medical review boards were widely viewed as protecting doctors and hospitals by finding no error or by finding any error to be minor. Local doctors judged their peers, hearings were brief, decisions were generally short and lacked reasoning, and review board members did not appear in court. There has been extensive debate (and little empirical evidence) on the fairness of medical review boards. Hospitals and doctors argue that the boards are essential to ensuring fairness to hospitals and doctors and that only medical professionals are capable of making determinations based on the standard of care.

Actual outcomes were likely less important than appearances. The use of local doctors to determine the fault of other local doctors in a process that lacked transparency virtually guaranteed that patients would view outcomes as biased and unfair. Patients reacted by seeking other mechanisms to protect their interests. Perceiving little chance of prevailing before medical review boards and a legal system that paid far less for deaths due to medical negligence than for other tort claims, many plaintiffs took their claims to the streets.

Plaintiffs and their lawyers also responded to the perceived unfairness of the medical review boards by seeking to avoid the Regulations entirely. A second track of litigation developed. Litigants frequently sued hospitals and doctors for ordinary negligence (not for a "medical accident"), relying on China's General Principles of the Civil Law and the SPC's Interpretation. In such cases, determinations regarding whether defendant conduct was negligent were made by judicial inspection agencies, quasi-private entities¹⁵ retained by parties to the litigation. Damages in such cases were not limited by the restrictions in the Regulations. Hospitals, doctors, and their lawyers condemned this practice as illegal and denounced judicial inspection institutions as lacking expertise (most determinations by judicial inspection agencies

Injury] (promulgated by the Sup. People's Ct., Dec. 26, 2003, effective May 1, 2004), 2004 SUP. PEOPLE'S CT. GAZ. 2, at 3.

¹⁴ Regulations on the Disposition of Medical Accidents, *supra* note 10.

¹⁵ Judicial inspection agencies were originally established under local courts. Judicial inspection organizations were separated from the courts in 2005. Although registered with local justice departments and often affiliated with public institutions such as universities, most judicial inspection agencies operate largely as commercial entities.

are made by individuals trained as medical lawyers or in forensics, not doctors with experience treating patients.) Some courts permitted the practice, in particular for minor claims or claims resulting from allegations of illegal conduct by doctors or hospitals. Other courts, however, adopted more defendant-friendly practices and required all but the most minor claims to be brought to medical review boards. Although the SPC indicated that it authorized this second track of medical dispute resolution, neither the SPC nor China's legislature directly addressed the tension between the litigation under the Regulations and litigation brought pursuant to the General Principles of Civil Law and the SPC's interpretation.

China enacted a comprehensive Tort Liability Law in 2009, which became effective in 2010.¹⁶ The Tort Law changed the law governing medical disputes in three major ways.¹⁷ First, the Tort Law standardized damage awards across tort cases, meaning that plaintiffs in medical disputes may receive damages for wrongful death, as in other tort cases.¹⁸ Second, the Tort Law shifted the burden of proof in most cases from defendants to plaintiffs.¹⁹ Third, the law created an explicit cause of action, with fault assumed and the burden of proof on defendants, for any illegal conduct or violation of treatment standards by hospitals, doctors, or hospital staff or any alteration or concealment of medical records.

The Tort Law eliminated controversy over whether plaintiffs can recover damages for wrongful death. The law also eliminated the distinction between cases alleging a "medical accident" and those alleging

¹⁶ Zhonghua Renmin Gonghe Guo Qinquan Zeren Fa (中华人民共和国侵权责任法) [Tort Liability Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010) 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 4, available at http://www.gov.cn/flfg/2009-12/26/content_1497435.htm.

¹⁷ The Tort Law did not specifically revoke the Regulations, and the Regulations remain in place. Aspects of the Regulations that are in conflict with the Tort Law are understood to be no longer effective. Other portions of the Regulations, in particular those governing administrative sanctions against hospitals and doctors, remain valid. As discussed below, there is debate about whether the provisions of the Regulations governing medical review boards remain effective.

¹⁸ At the time the Tort Law became effective, some speculated as to whether the law meant that the provisions on damages in the Regulations were no longer effective. In practice, however, it appears that courts routinely award death compensation in medical disputes and there is no longer any controversy about the issue. Hospitals and their lawyers are not happy with this outcome, arguing that in many cases it is unfair to require defendants to pay the full death compensation amount. Such criticism appears to be primarily based on a belief that courts are too willing to award full death compensation damages in cases in which causation between medical negligence and the death is either unclear or only partial. The criticism is thus not that defendants should be immune from liability but rather is that the existence of death compensation makes it too easy for courts to hold defendants fully liable.

¹⁹ Prior to the passage of the Tort Law, the SPC had placed the burden of proof on defendants, but the fact that determinations of fault were made by medical review boards served to lessen the effect of the burden of proof. See Zuigao Renmin Fayuan Guanyu Minshi Susong Zhengju de Ruogan Guiding (最高人民法院关于民事诉讼证据的若干规定) [Provisions of the Supreme People's Court on Evidence in Civil Litigation] (promulgated by the Supreme People's Court, Dec. 21, 2001, effective Apr. 1, 2002), art. 4, 2001 FA SHI 33.

medical negligence. In other areas, however, the Tort Law failed to clarify or unify practice. Most notably, the Tort Law did not address whether inspections by medical association medical review boards should continue to be a prerequisite to suits against hospitals or whether plaintiffs in medical cases may rely on inspections carried out by judicial inspection organizations.

At the time the Tort Law was passed, it was widely expected that the Supreme People's Court would resolve many ambiguities in the law through a judicial interpretation. The SPC circulated a draft judicial interpretation on medical cases in 2011 that would have allowed inspections by either judicial inspection organizations or by medical review boards. Six years later, however, the interpretation has not been adopted, most likely because of continuing debate and lobbying, in particular by hospitals against the use of judicial inspections. Lawyers involved in medical disputes also report uncertainty regarding whether inspections should be carried out and overseen by the Ministry of Justice (which oversees judicial inspection organizations) or the Ministry of Health (which oversees medical associations). Debate also exists regarding whether inspections should be issued in the name of individual doctors taking part in the inspection or in the name of the medical association alone and regarding whether inspections should be viewed as a for-fee service or as a professional obligation of doctors.

Courts have not waited for an SPC interpretation to alter their practices. Courts in a number of provinces and provincial-level municipalities, including Beijing and Henan, now allow plaintiffs to choose whether to have inspections carried out by judicial inspection institutions or by medical associations.²⁰ Yet the practice is not uniform, with provinces adopting a wide range of practices.²¹ Shanghai, Zhejiang, and Jiangsu continue to require that medical association review boards conduct inspections in medical cases unless both the plaintiff and the defendant agree to use a judicial inspection.²² Other jurisdictions have adopted measures in between the permissive rules of Beijing and the stricter standards imposed in Shanghai. In Guangdong, plaintiffs are

²⁰ Beijingshi Gaoji Renmin Fayuan Guanyu Yinfa "Beijingshi Gaoji Renmin Fayuan Guanyu Shenli Yiliao Sunhai Peichang Jiufen Anjian Ruogan Wenti de Zhidao Yijian (Shixing)" de Tongzhi (北京市高级人民法院关于印发《北京市高级人民法院关于审理医疗损害赔偿纠纷案件若干问题的指导意见(试行)》的通知) [Notice of the Beijing High People's Court on the Issuance of "Beijing High People's Court Guiding Views (for Trial Implementation) on Some Questions Concerning the Trying of Medical Injury Compensation Cases"] (promulgated by the Beijing High People's Ct., Nov. 18, 2010, effective Nov. 18, 2010), JING GAOFI 2010, No. 400, available at http://www.pkulaw.cn/fulltext_form.aspx?Gid=17241603&Db=lar.

²¹ Yang Fan (杨帆) & Wang Guijun (王贵君), Yiliao Qinquan Anjian Difang Zhidao Wenjian Jianding Guifan Yanjiu (医疗侵权案件地方指导文件鉴定规范研究) [Research on Local Guiding Documents Regulating Inspections in Medical Tort Cases], 23 Zhengju Kexue (证据科学) [EVIDENCE SCIENCE], no. 2, Apr. 2015, at 209.

²² *Id.*

permitted to use medical review boards or judicial inspection organizations. But court rules impose specific requirements on the experience and qualifications of persons taking part in inspections, with stricter standards applying to re-inspections than to initial inspections, apparently to ensure that only a small number of judicial inspection organizations with a relatively high level of expertise are able to conduct inspections in medical disputes.²³ Fujian reportedly has an internal notice that allows the use of judicial inspections but requires that two lawyers with "relevant experience" participate. In Hubei, high court rules require the use of medical association medical review boards, but lawyers say that in practice local courts may allow them to use judicial inspections to support claims alleging negligence by doctors and hospitals.²⁴

Hospital officials and their lawyers have expressed concern about the increased use of judicial inspection organizations. Hospitals view the organizations and the medical lawyers and forensics experts who generally carry out the inspections as lacking the knowledge required to assess causation in specialized areas of practice. As one hospital lawyer argued in conversation, judicial inspection agency staff are trained to make disability determinations and are largely unfamiliar with other areas of medicine. Judicial inspection entities also continue to operate as for-profit entities, making it unlikely that they will rule against the party that retains them. Courts in theory could refuse to accept the decision of a judicial inspection agency (or could order a second inspection). Lawyers say, however, that it is almost unheard of for a court to refuse to accept or to overturn a judicial inspection decision. It is unclear whether replacing a system widely understood as unfair to patients with one widely perceived as biased in favor of patients has helped to alleviate patient distrust in the legal framework governing medical disputes. One plaintiffs' lawyer commented that the legal framework governing medical disputes remains one of "legal chaos."²⁵

²³ Guangdong Sheng Gaoji Renmin Fayuan Guanyu Yinfa "Guangdong Fayuan Sifa Weituo Ruxuan Zhuanye Jigou (2015 Nian Xiuding) de Jiben Tiaojian" de Tongzhi (广东省高级人民法院关于印发《广东法院司法委托入选专业机构(2015年修订)的基本条件》的通知) [Notice of the Guangdong Province High People's Court on the Issuance of the "Basic Requirements for the Judicial Entrustment and Selection of Expert Institutions by Guangdong Courts (2015 Revision)], YUE GAOFA, No. 114, April 15, 2015.

²⁴ Because the Tort Law abolished a distinction between cases alleging medical accidents and those alleging medical negligence, medical review boards in jurisdictions such as Shanghai now make determinations regarding medical negligence, not just medical accidents. Yet it is unclear whether review board staff have focused on whether there is a difference between the standards for finding fault under the Regulations and under the Tort Law.

²⁵ The Tort Law has also resulted in new sources of perceived unfairness and new forms of creative lawyering. The shift of the burden of proof to plaintiffs has been decried by plaintiffs' lawyers, who note the difficulties they face in obtaining evidence given the lack of discovery procedures in China. In response, lawyers have sought to bring an increasing number of suits for illegal hospital actions and alterations to medical records, where the burden of proof is on defendants.

China's Tort Law was not specifically designed to address problems of protest and violence in medical disputes, although some involved in the drafting process did aim to create a system that was fairer to both plaintiffs and hospitals. Other rules and regulations adopted since 2010 have attempted to address the problem of protest and violence directly. Such regulations do so by seeking to restrict the ability of hospitals to engage in settlement talks with aggrieved patients or by treating patient protest as a problem of law and order.

Local authorities in a number of jurisdictions have attempted to reduce the pressure on hospitals to settle medical disputes by enacting rules mandating mediation of patient grievances. Under such rules, all claims exceeding a specified amount, generally either 10,000 or 20,000 yuan, must be referred to a mediation entity established under the local health bureau. Mediators are generally retired health bureau personnel with some medical background. The main goal of such rules appears to be to restrict the ability of hospitals to settle and thus to reduce protest: if hospitals are banned from settling large cases then patients and family members will have less incentive to protest at hospitals. Some lawyers suggest that imposing mandatory mediation may also help to diffuse protest by prolonging the settlement process.

There is little evidence on whether such restrictions are having an effect on hospitals or patients.²⁶ There is no sanction for hospitals that decide to settle disputes above the stipulated amount and no enforcement mechanism to compel patients or their families to go to mediation.²⁷ One Beijing hospital official said that approximately 70 percent of patient grievances are now referred to mediation entities, but added that convincing patients to use mediation still requires extensive effort. Mediation may be effective for low-value disputes but appears largely ineffective for more serious claims. Some lawyers who represent plaintiffs comment that mediation entities are more fair than medical association review boards. Nevertheless, the neutrality of mediation organizations is questionable. Local health authorities (who also oversee hospitals) establish and oversee medical mediation entities, and, in at least some provinces, the mediation committees are funded by hospital insurers.

National authorities have also sought to increase sanctions against protestors. In April 2014, five central government departments issued a notice on medical disputes.²⁸ As with similar local regulations that

²⁶ Some observers have praised the mediation entities for resolving a large number of disputes, but do so based primarily on the total number of cases undergoing mediation. Existing academic studies examine the types of claims leading to grievances, not patient confidence in the outcomes or the amounts paid through mediation compared to those paid through litigation or private settlement.

²⁷ This is likely because there is no legal basis to mandate mediation of medical disputes. Health bureaus may be able to bar hospitals from settling disputes, but they cannot mandate that patients engage in mediation prior to going to court.

²⁸ Wu Bumen Guanyu Yifa Chengchu Sheyi Weifa Fanzui Weihu Zhengchang Yiliao Shi Zhixu de Yijian (五部门关于依法惩处涉医违法犯罪维护正常医疗时秩序的意见) [Opinion of

preceded the national notice, the rules can be read primarily as describing the forms of protest and violence that hospitals have faced in recent years. The rules bar destroying hospital property; beating or threatening doctors; insulting or threatening medical staff; setting up funeral shrines at hospitals; blocking hospital entrances; bringing explosives, hazardous materials, or weapons to hospitals; and leaving the bodies of deceased patients at hospitals.²⁹

Revisions to China's Criminal Law in August 2015 criminalized protest against hospitals.³⁰ Article 290 of the Criminal Law provides for a criminal sentence of three to seven years for anyone leading a mob to cause serious disruption of social order.³¹ The revision added obstructing a hospital's operation to the list of examples of conduct giving rise to criminal sanctions under the provision. Commentators have noted that the revision is intended to criminalize serious cases of medical protest.³²

The legal response to protest has been largely reactive, seeking to constrain violence and protest. Such steps do appear to be having some effect. Doctors and hospitals report modest improvement in the handling of patient protests. Hospital officials say that the situation is improving, because of better coordination with the police and the permanent stationing of police at many hospitals and because of improved internal

Five Departments on Sanctioning According to Law Illegal Criminal Conduct Relating to Medical Care in Order to Protect Regular and Timely Medical Procedures] (promulgated by the Sup. Peoples' Court, Sup. People's Procuratorate, Pub. Sec. Bureau, Ministry of Justice, and the Nat'l Health and Family Planning Comm., Apr. 22, 2014), available at http://www.spp.gov.cn/flfg/201404/t20140428_71374.shtml.

²⁹ The notice appears to be an attempt to signal to the police that they should take medical protests seriously and that hospitals and police should improve coordination to prevent major incidents. The notice also calls for better service by hospitals, improved reporting of disputes, and increased legal services for patients. *Id.*

³⁰ Zhonghua Renmin Gongheguo Xingfa Xiuzheng'an (Jiu) (中华人民共和国刑法修正案(九)) [Criminal Law Amendment IX of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 29, 2015, effective Nov. 1, 2015), amend. 31, 2005 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 5; Xingfa XiuZheng'an Tongguo "Yiniao" Zhong Ru Xing (刑法修正案通过“医闹”终入刑) [Criminal Law Amendments Finally Criminalize "Medical Chaos"], Beijing Xiehe Yiyuan (北京协和医院) [PEKING UNION MEDICAL CENTER HOSPITAL] (May 5, 2016), <http://www.pumch.cn/Item/14605.aspx>.

³¹ Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 14, 1997, rev'd Aug. 29, 2015, effective Nov. 1, 2015), art. 290.

³² Bai Jianfeng (白剑峰), Renmin Ribao Bu Tu Bu Kuai: Shangyi Ruyi Shi Shehui Zhichi (人民日报不吐不快: 伤医辱医是社会之耻) [*People's Daily Getting it off One's Chest: Harming Doctors and Insulting Doctors are the Shame of Society*], Renmin Ribao (人民日报) [PEOPLE'S DAILY] (July 10, 2015), <http://opinion.people.com.cn/n/2015/0710/c1003-27282054.html>. It appears that even before the revision of the Criminal Law the Supreme People's Procuratorate (SPP) had begun to emphasize serious attacks on medical staff. The SPP reported 347 prosecutions nationwide for attacks on medical staff in 2014. Zui Gao Jian: Quanguo Yinian Banli Wenling Shayi Deng Yanzhong Sheyi Fanzui 347 Ren (最高检: 全国一年办理温岭杀医等严重涉医犯罪 347 人) [SPP: 347 Cases Brought in One Year for Serious Criminal Actions Relating to Medical Care Such as the Wenling Doctor Murder] Zhongguo Xinwen Wang (中国新闻网) [CHINA NEWS] (June, 24, 2015), <http://www.chinanews.com/gn/2015/06-24/7362441.shtml>.

hospital procedures for managing patient grievances. The role of professional protestors in medical disputes appears to be decreasing, at least in major cities. But little attention has been paid to steps that might help to prevent disputes or the escalation of disputes in the first place. Continuing media coverage of assaults on doctors suggests that the problem remains extensive and deep-rooted.³³

III. ON THE STREETS AND IN THE COURTROOM

The discussion above suggests that the formal legal framework has contributed to mistrust between doctors and patients. Yet focusing on written law misses much of the complexity of how medical disputes are actually resolved. This section highlights four characteristics of medical disputes in China that are not captured by examining formal legal provisions. Evidence suggests that while the "shadow of the law" has limited effect on hospital-patient disputes, the shadow of violence has a significant effect on hospitals and on courts.³⁴ The threat of protest keeps many cases out of court and casts a shadow over how courts handle cases that do wind up in the formal legal system.

First, although the Regulations in theory provided hospitals with a legal framework in which payouts for malpractice claims were low, in practice the legal standards provided little or minimal protection to hospitals. Hospitals reported routinely settling cases for more than they would be required to pay if they lost the same case in court. Whether hospitals faced a protest or threat of protest was generally the most important factor influencing the resolution of medical disputes. Settlements were and are often made with little regard to legal provisions and often exceeded the amounts that would be payable in court. Faced with protestors, most hospitals paid, regardless of whether they thought the claim had merits. This was true in particular before China's Tort Liability Law came into force in 2010. As damage awards in court have risen since 2010, the dynamic may be less pronounced.³⁵

The willingness of hospitals to pay in excess of legally stipulated amounts reflects the fact that the financial impact of settlements and court judgments on major hospitals remains relatively minor. Hospitals are reluctant to reveal information regarding settlements and judgments against them. Informal conversations make clear that the financial impact of disputes is often a secondary concern for hospitals. Hospitals

³³ See, e.g., Chris Buckley, *A Danger for Doctors in China: Patients' Angry Relatives*, N.Y. TIMES (May 18, 2016), http://www.nytimes.com/2016/05/19/world/asia/china-attacks-doctors-hospitals.html?_r=0.

³⁴ 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 140 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1946) (1835).

³⁵ Some hospitals report that the amount they are willing to offer in settlement depends on the court in which patients are likely to file a claim. One Beijing hospital official noted that some district courts in Beijing are understood to be more patient-friendly than others.

remain more concerned about the reputational impact of disputes. Such concerns include both the immediate impact of protestors interfering with day-to-day hospital operations and also the potential influence on hospitals' relationships with their administrative supervisors.³⁶

Second, although most cases are resolved outside the courts, the number of medical disputes in the courts has also surged since the early 2000s.³⁷ The threat of protest and violence leads courts to provide compensation to most plaintiffs, even those with weak legal claims. The legal system may have been weighted in favor of hospitals, but court practice reacted to the threat of instability by seeking to ensure plaintiffs recovered some damages. My prior study of medical disputes in one municipality in central China found that plaintiffs recovered some damages in 77 percent of cases.³⁸ Courts were particularly likely to award damages in cases of clear violations of medical practice or standards, such as prescribing overdoses of medication, cases of clear misdiagnosis, and cases of extreme outcomes from common procedures. But court-awarded compensation often appeared tied as much to the severity of the plaintiff's injury as to the degree of the defendant's wrongdoing. Compromise verdicts are frequent, with courts appearing to require each party to undertake half of the damages suffered.

That plaintiffs receive some damages does not mean they have won their case. Plaintiffs often recover only a portion of the amount sought in court. Plaintiff appeals of cases in which they received compensation are common, reflecting plaintiff dissatisfaction with the amounts awarded. Nevertheless, the fact that plaintiffs generally do receive some compensation from courts demonstrates that claims that plaintiffs have no chance in court are overstated.

Court decisions do not provide a framework that influences negotiations outside of court. Instead, stability concerns shape outcomes in court. Judges confirm that they sometimes order hospitals to pay damages in cases in which there is no evidence of error in order to appease plaintiffs and prevent protest. Courts seek ways to expand liability against hospitals, including awarding damages even when there is no or little evidence of causation between the alleged negligence and the injury. Thus, courts in my study awarded damages for wrongdoing such as

³⁶ The fact that hospitals are generally less concerned with the financial impact of disputes than with the effect on their reputation does not mean that the amounts in controversy are insignificant. The growth in disputes and the financial opportunities such disputes present resulted in the development of a specialized bar within the legal profession. Many lawyers who handle such cases are former doctors. Although most represent hospitals, there are a small number of lawyers in most major cities who specialize in representing plaintiffs, often in part on a contingent-fee basis.

³⁷ The Supreme People's Court reported that courts nationwide heard 17,000 medical malpractice claims in 2010, a 7.6 percent increase from 2009. Supreme People's Court Statistics (on file with the author). Data on later years appears to be unavailable.

³⁸ As far as I am aware, no empirical study of medical malpractice litigation has been carried out since my study in 2013.

failure to maintain records, failure to produce evidence, illegal practice of medicine or use of doctors with insufficient qualifications, denial of treatment, or incomplete diagnosis and treatment. In three cases courts awarded damages for patient suicides or attempted suicides.³⁹ In other cases courts awarded damages against large hospitals even though the primary harm had resulted from patients seeking care from unlicensed doctors at local clinics.⁴⁰

Judges believe that appeals and protest are minimized by ensuring that plaintiffs receive some compensation, even if courts need to push the limits of (or ignore) existing law in order to reach such outcomes.⁴¹ This was particularly true prior to 2010, when judges sought to ameliorate the low damage awards available under the Regulations by expanding other forms of liability against hospitals, including by permitting claims for ordinary negligence.⁴² Judges also argue that they must take account of plaintiffs' situations, and this means granting compensation to plaintiffs facing difficult circumstances. Judges view themselves as being caught between patients' demands, pressure from superiors to avoid escalation and protest, and legal requirements.

The willingness of courts to award damages to most plaintiffs reflects the institutional framework in which courts operate. As protest and unrest surged in China in the early 2000s, courts became concerned with preventing instability across a range of substantive areas.⁴³ Courts at times appeared to serve as compensation agencies for the state, not arbiters of fact or law. As one judge commented, "Courts are not law; courts are a mechanism for solving government problems." Courts' primary goal in many cases was to ensure that the case was resolved and did not result in protest or escalation. Courts innovated in order to protect themselves from protest and criticism, not to expand their authority.

The Decision of the Communist Party's Fourth Plenum in 2014 set forth a roadmap for extensive reform to China's courts.⁴⁴ Reforms are designed to make the courts more professional and more accessible and to reduce external pressure on the courts. It remains too early to assess the effect of these reforms on how courts adjudicate medical disputes.

³⁹ Liebman, *supra* note 2, at 216-217, 236-37.

⁴⁰ Court cases also provide a window into problems in China's healthcare system. Many claims resulted from patients who delayed treatment until very late in an illness, likely due to the high costs of treatment. Claims arising from the use of unlicensed doctors were common. Likewise, many claims resulted from patients who sought drugs from third parties, not hospitals, or who obtained care from doctors who were moonlighting away from their regular place of employment.

⁴¹ There is almost certainly significant variation among courts. My study examined one largely rural municipality in central China. Liebman, *supra* note 2, at 184.

⁴² My 2013 study found a modest increase in damage awards from 2001 to 2010, but very few awards that could be classified as large – in the hundreds of thousands of yuan. *Id.*

⁴³ Benjamin L. Liebman, *Legal Reform: China's Law-Stability Paradox*, 143 DAEDALUS, no. 2, Spring 2014, at 96.

⁴⁴ Benjamin L. Liebman, *Authoritarian Justice in China: Is There a 'Chinese Model'? in THE BEIJING CONSENSUS? HOW CHINA HAS CHANGED THE WESTERN IDEAS OF LAW AND ECONOMIC DEVELOPMENT AND GLOBAL LEGAL PRACTICES* 225 (Chen Weitseng ed., 2016).

The threat of protest and violence from medical disputes remains and appears likely to continue to influence how courts handle such cases. Whether courts are permitted and encouraged to follow the law even when state interests in social stability might suggest a different outcome will be a key test of just how far the Fourth Plenum's reforms are designed to go towards shifting the role of China's courts.

Third, government intervention in medical disputes is common. Many disputes become disputes between protestors and government officials. Hospitals at times welcome such intervention, as the involvement of Party-state officials helps to shift responsibility for disputes onto the shoulders of local officials. But intervention also results in pressure on hospitals to settle. Intervention by government officials into disputes between patients and hospitals confirms the view of patients that hospitals are state actors and that such disputes are fundamentally disputes with the state. State intervention appears to do little to further patient trust in hospitals.

The willingness of officials to intervene in what in other countries would be civil disputes between private parties reflects the reality that the overwhelming majority of healthcare providers in China are state actors. Yet it also reflects a dynamic that I have described elsewhere as the "over-responsive state."⁴⁵ Faced with unrest, officials are unwilling to allow the legal system to resolve disputes. This responsiveness, even if a rational response of state actors,⁴⁶ also furthers the belief that the state will ultimately intervene to provide assistance to those in need. Intervention incentivizes further unrest.

Fourth, the resolution of medical disputes on the streets and in courtrooms suggests that many of the problems are systemic, reflecting not just the healthcare system or the courts but also the functioning of the Chinese political system as a whole. Trust in institutions and individual state actors (including courts and hospitals) is weak in China,⁴⁷ even though trust in the central Party-state remains robust.⁴⁸ Problems in the healthcare system and the fact that medical care often involves questions of life and death exacerbate this distrust. Breaking the cycle of distrust in hospitals and in the courts is not simply a question of improving the quality of courts or of medical care.

The rise in patient-hospital conflict demonstrates how trust can spiral downward even as institutions improve and highlights the fact that trust depends both on the quality of institutions and on popular expectations. China's healthcare system and courts improved significantly between the start of the reform era in 1978 and the early

⁴⁵ Liebman, *supra* note 2, at 242–51.

⁴⁶ Reliance on protest may make sense as a screen for those with legitimate grievances. Liebman, *supra* note 2; Peter L. Lorentzen, *Regularizing Rioting: Permitting Protest in an Authoritarian Regime*, 8 Q.J. POL. SCI. 127.

⁴⁷ Li Lianjiang, *Political Trust in Rural China*, 30 MOD. CHINA 228, 232 (2004).

⁴⁸ Elizabeth J. Perry, *Chinese Conceptions of "Rights": From Mencius to Mao—and Now*, 6 PERSP. ON POL. 37 (2008).

2000s. Yet reforms to institutions failed to keep up with popular expectations regarding how these institutions should function.

IV. LEGALIZING TRUST?

Neither China's formal law nor court practice created the cycles of distrust that characterize patient-doctor interactions and that result in protest and violence. But the legal framework almost certainly made such problems worse. Can the legal system play a more constructive role in reducing patient-doctor conflict? This essay concludes with four observations regarding the potential role of law in addressing the problems that result in distrust between doctors and patients.

First, one lesson learned from examining the role of law in the rise of patient-hospital conflict in the 2000s is that over-reliance by hospitals on a legal framework heavily tilted in their favor likely exacerbated conflict by incentivizing patients to use protest and by producing a backlash in the courts. The interaction of formal legal rules that were clearly one-sided with weak trust in official institutions and a strong tradition of protest produced a cocktail of unrest. It is in the interests of patients and doctors alike to have legal rules that attempt to achieve a balance between patients and healthcare providers. The current chaotic web of different practices, with some courts permitting patients to rely on for-hire judicial inspection organizations and others insisting on the continued use of medical review boards, has done little to improve confidence in the system, from patients or doctors. Likewise, building effective mediation institutions requires ensuring that such institutions are neutral arbiters of disputes, not just health bureau (or insurance company) efforts to shift the locus of dispute away from hospitals and to reduce compensation payments.

Most of the legal reaction to the rise of medical protest and violence has been punitive, focusing on stopping protest, rather than addressing the problems that give rise to protest. Recent efforts to criminalize protest against hospitals and to outlaw specific patient conduct linked to protest may reduce the frequency of extreme actions by patients and their families. Such provisions will not result in greater trust in medical care.

Many recently proposed or initiated reforms focus on dispute avoidance, not improving the quality of care. Some commentators in China have argued for the creation of government-backed compensation funds to provide assistance to patients who suffer adverse outcomes from medical care not linked to negligent care. Such proposals appear primarily designed to shift the burden of disputes away from hospitals. Likewise, some hospitals in China have begun experiments designed to reduce the likelihood of disputes. One Beijing hospital now requires that lawyers be present when doctors inform patients of the risks of surgery. The goal appears to be both to dissuade patients from suing and to ensure that doctors provide adequate information to patients. Some hospitals likewise have expanded the use of lawyers in training doctors about

needed disclosures; one hospital now video records doctors informing patients of possible adverse outcomes in high-risk cases. At least one hospital in Beijing has experimented with mandating that patients undergoing high-risk surgery purchase insurance (sold by the same company that insures the hospital) against adverse outcomes not due to negligence. The goal appears to be both to raise awareness of adverse outcomes and to shift the burden of paying for such outcomes to patients.

Second, the discussion of the legal framework governing doctor-patient interactions in China must shift from a focus on dispute resolution to a focus on other measures that might help to strengthen doctor-patient relationships. Disputes reflect a breakdown or lack of trust; disputes are rarely the cause of mistrust. The lack of patient trust in the medical system is the result of a range of problems in the healthcare system. Most such problems are unlikely to be addressed by new legal provisions. There is also a need to shift the legal and policy conversation in China from a focus on dispute resolution to thinking about whether law can play a role in improving patient confidence in the system through measures other than dispute resolution.

There are no easy solutions, but experience in other jurisdictions suggests a range of legal and policy steps that should receive increased attention. These include provisions mandating greater disclosure of risks, increased transparency regarding errors and standards, stronger limits on conflicts of interests, clearer practice standards for doctors, greater emphasis on patient health literacy, mandatory reporting of adverse outcomes, and stronger confidentiality provisions for professional investigations of misconduct. None of these offers a perfect solution: scholarship in the U.S. has argued that law plays only a limited role in increasing trust.⁴⁹ But greater focus on such measures would begin to shift the focus away from disputes and toward measures that might prevent error, improve patient confidence, and reduce the likelihood of patient protest.⁵⁰

Increased transparency measures are particularly worthy of further attention as a mechanism for improving trust in the healthcare system. Other state institutions, including the courts, securities regulators, and China's environmental ministry, have sought to use transparency both to reduce wrongdoing and to increase popular trust. Imposing greater obligations on hospitals to report adverse outcomes and incidents of error

⁴⁹ Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 463, 520 (2002).

⁵⁰ Some involved in legal debates in China have expressed interest in apology laws that would insulate doctor apologies from liability. Weak rules of evidence and procedure in Chinese courts might make it difficult to ensure that apologies are not taken as admissions of fault. Nevertheless, apology laws might provide some modest improvement to the dynamics of distrust that give rise to so much conflict. Plaintiffs' lawyers have also argued for increased use of criminal sanctions against doctors, a proposal not surprisingly viewed skeptically by hospitals and doctors. Likewise, proposals to impose personal liability on doctors have gained little traction. Imposing liability on doctors might well incentivize a higher standard of care, but would do little to increase trust.

might likewise offer modest improvements by reducing negligence and by increasing patient trust.⁵¹ But transparency is needed not only regarding errors, but also on appropriate practice standards and as part of a broader effort to improve healthcare literacy.

Third, there is a need for a role for independent and autonomous organizations that advocate on behalf of patient interests in both individual cases and at the national level. Patient safety organizations have played important roles in legal and policy debates in many other countries. One lesson learned from the rise of medical conflict in China is that failure to permit the evolution of autonomous and transparent institutions may breed even more instability.

At the individual dispute level, much debate in China continues to focus on whether courts should permit the use of judicial inspections or should require inspections by medical review boards. Little of this debate, however, has focused on whether steps could be taken to improve trust in either set of institutions, for example by including patient advocates on the review boards. Lawmakers, courts, and academics have failed to create or even to propose institutions for evaluating medical error that balance patient rights with the need for experts to assist in evaluating whether or not medical error has occurred. Yet finding such potential advocates is difficult given the lack of patient advocacy organizations.

At the national level, one reason that hospitals have proven to have so much influence over policies and law is that there are no organizations effectively advocating on behalf of patient interests. This is not surprising: restrictions on the development of NGOs and other autonomous organizations make it difficult for effective patient advocates to emerge and to play such roles. This situation has been made worse by the recent tightening of oversight over civil society.

Fourth, increasing patient trust in medical care will require greater separation of hospitals from the state. Many of the problems discussed above stem from low-quality care and over-burdened medical providers. But the lack of separation between the state and hospitals contributes to lack of trust and to violence by transforming many disputes into conflicts with the state. State oversight also exacerbates pressure on hospitals to settle, even in cases where there is little or no evidence of error, thus incentivizing further protest.

Hospitals face many challenges, and some of these challenges stem from the fact hospitals are expected to do too much. Yet some result from the fact that hospitals remain very much state actors. Ties to the state provide a measure of protection for hospitals, but also mean that popular distrust in healthcare providers is not readily disentangled from popular

⁵¹ Developed legal systems of course also struggle to balance patients' interests in compensation with the goal of improving medical care. The widespread practice in the U.S. of sealed settlements in malpractice cases does little to improve transparency or to reduce the frequency of error. See, e.g., Ross E. Cheit, *Tort Litigation, Transparency, and the Public Interest*, 13 ROGER WILLIAMS U.L. REV. 232, 246 (2008).

distrust in a wider range of state institutions. Greater separation of hospitals from the state would allow more neutral oversight of healthcare providers and, in the long run, might also further patient trust.

Reforms to Chinese law may result in modest improvements to the cycle of distrust that has resulted in so much violence – and which also undermines patient care. Law can and should play a supporting role to needed healthcare reforms. Yet the key observation of this essay is about the limits of law in addressing patient-doctor distrust. The limited role of law reflects both the weakness of law and also state ambiguity about the role law should play in ordering Chinese society and governance. The primary question in China remains not whether law can play a positive role in reducing tensions, but whether law and the legal system can avoid making these problems worse.