insurance (e.g., Netherlands).[178] But, for our purposes, it is sufficient to posit the existence of some system by which everyone enjoys coverage of their healthcare needs. Medicare is probably the most salient model for how this could (or would) be accomplished in the United States Indeed, several of the specific bills introduced in Congress, and/or otherwise touted by political candidates have been characterized as "Medicare-for-All" bills,[179] to capitalize on the general popularity of Medicare.[180] The U.S. experience with Medicare makes it an attractive model, as Medicare provides excellent precedent for the host of administrative issues that would arise in the course of implementing Universal Care in the United States.

B. How Universal Care Addresses Issues in the U.S. Healthcare System

Universal Care offers a number of advantages for healthcare delivery in the United States, but most of these are beyond the scope of this article. The key element is that it would be universal, so every tort victim in the United States would be able to tap Universal Care to cover their medical services, having no need to sue for those expenses. There are a few other advantages in particular that are worth noting, as they reflect on the operation of the tort system. These are summarized in the bullet points below.

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178 The Dutch system is far more effective than the ACA ever was at ensuring that everyone is insured. Those who fail to acquire the insurance are penalized for their failure to do so (much as the ACA in its original form did). However, if an individual does not purchase insurance within six months, the government buys the insurance for that individual and charges that person the full cost of the insurance plus twenty percent. Under this system, more than ninety-nine percent of the population has coverage; therefore, the Dutch system is one that resembles Universal Care—unlike the ACA. Scott, *supra* note 171; *see also* Davies, *supra* note 7, at 125–30.

179 *Compare Medicare-for-All and Public Plan Proposals*, KFF (May 15, 2019), https://www.kff.org/interactive/compare-medicare-for-all-public-plan-proposals/ [https://perma.cc/9WLP-VS92].

180 It is also easier to defend an idea against the label of "socialism" or "socialized medicine"—and the scare campaign such labels serve—if it is characterized as a mere expansion of a longstanding, and generally popular, government program such as Medicare. *See generally Public Opinion on Single-Payer, National Health Plans, and Expanding Access to Medicare Coverage*, KFF (Oct. 16, 2020), https://www.kff.org/slideshow/public-opinion-on-single-payer-national-health-plans-and-expanding-access-to-medicare-coverage/ [https://perma.cc/8PVU-V3MC].

- The potential to be less expensive overall—increased taxes should be offset by corresponding relief from healthcare/ insurance costs, which taxpayers currently bear.[181]
- Lower transaction costs with streamlined administration.[182]
- Potential for more efficient allocation of healthcare resources.[183]
- A shift in bargaining power would allow the healthcare system to obtain better rates on pharmaceuticals, equipment, etc.[184]

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[181] There is no doubt that the new system would be expensive, and that taxes would need to be raised to pay for it. But people would be relieved of the burden of buying health insurance and paying for health care up to their deductible limit. These out-of-pocket expenditures for health insurance and health care have risen dramatically for American families over the past fifty years. In aggregate terms, Americans pay around $1.6 trillion in federal income tax each year and pay $3.5 trillion for health care and health insurance. Erica York, *Summary of the Latest Federal Income Tax Data, 2022 Update*, TAX FOUND. (Jan. 20, 2022), https://taxfoundation.org/publications/latest-federal-income-tax-data/ [https://perma.cc/6SQW-LKL4]; Berkeley Lovelace Jr., *Americans Shelled Out $10,739 Per Person on Health Care Last Year, but Growth in Spending Slows*, CNBC (Dec. 6, 2018), https://www.cnbc.com/2018/12/06/americans-shelled-out-10739-per-person-on-healthcare-last-year.html [https://perma.cc/ZB96-DMPG]. So, on average, Americans' tax bill could *triple* to cover Universal Care. We'd still be ahead if Americans didn't have to pay for their health care anymore. In other words, if tax payments went up from $1.5 trillion to $4.5 trillion (a tripling of federal income tax liability), $3 trillion would be generated to cover healthcare, and Americans would be spending less on healthcare than the $3.5 trillion they currently spend on it.

[182] There are compelling reasons to believe that transaction costs and administrative costs would be better contained by a system of Universal Care, resulting in lower overall costs for the system. First, taking the private insurance companies (and their profits) out of the mix could end up lowering overall costs for the system. Second, because medical providers would get paid for every patient they treat, there would no longer be a need to overcharge paying patients to compensate for those patients whose bills would be uncollectible absent Universal Care. Obviating the expense of "writing off" uncollectible debts, or resorting to debt collection practices, would bring down the cost of care as well.

[183] It has long been believed, for example, that a reduction in the number of uninsured will reduce reliance on emergency rooms, one of the most expensive places to get care. President Barack Obama explained the concept in a 2016 speech:

> [A] lot of people just didn't bother getting health insurance at all. And when they got sick, they'd have to go to the emergency room. . . . [B]ut the emergency room is the most expensive place to get care. And because you weren't insured, the hospital would have to give you the care for free, and they would have to then make up for those costs by charging everybody else more money.

Remarks by the President on the Affordable Care Act, OBAMA WHITE HOUSE (Oct. 20, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/20/remarks-president-affordable-care-act [https://perma.cc/DXL9-2ZSV]. *But see* Carolyn Y. Johnson, *The Uninsured Are Overusing Emergency Rooms—and Other Health-Care Myths*, WASH. POST (Dec. 27, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/12/27/the-uninsured-are-overusing-emergency-rooms-and-other-health-care-myths/ [https://perma.cc/75Q6-KGPV] (discussing more recent research that disputes this conventional wisdom).

[184] One of the reasons the market for healthcare fails to produce efficient free-market outcomes is that consumer demand for healthcare is so inelastic. *See* RINGEL ET AL., *supra*

The pros and cons of Universal Care have been, and undoubtedly will be, debated in far greater detail and with far greater nuance elsewhere. The topic is demanding considerable attention in the policymaking sphere, and there is plenty of room for good faith disagreements about whether the anticipated benefits listed above are realistic. Universal Care's merits will certainly be disputed, especially as there are so many well-funded stakeholders invested in the status quo. But the problems with our current healthcare and health insurance systems are so severe that the status quo is simply unacceptable. The issue will have to be confronted.

V
HOW UNIVERSAL CARE MAY ADDRESS ISSUES IN THE U.S. TORT SYSTEM

What has been largely overlooked in this debate, however, is how Universal Care would affect the tort system—more specifically how it is likely to help address some of the more serious and intractable problems that the tort system faces. One major theme that emerges from the survey of problems in the tort system discussed above is that the tort system has become too obsessed with the goal of compensating victims—something it is poorly designed to do. And that, in turn, is creating problems and anomalies in both tort doctrine and tort practice.

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note 126. In other words, consumer demand for healthcare, and more particularly for critical or life-saving treatment, does not respond strongly to price changes; this enables the seller of such services to hike up the price without driving their customers away. At the same time, competition, which should be a restraining force on prices, fails because the full costs of medical services are rarely known to consumers until after the services have been rendered. *See supra* notes 117–23 and accompanying text. Under Universal Care, however, the one paying and bargaining for medical services would be the provider of Universal Care (the U.S. government in a "Medicare-for-All" regime), which would not be subject to the information deficits that presently handicap healthcare consumers in bargaining. As the sole purchaser of healthcare services, the government would enjoy monopsony power, allowing it to capture the lion's share of bargaining surpluses for the benefit of healthcare consumers. *See* Robert D. Blair & Wenche Wang, *Bilateral Monopoly, Two-Sided Markets, and the E-Books Conspiracy*, 69 U. MIA. L. REV. CAVEAT 7, 7 (2015) ("Monopsony power refers to the single buyer's ability to depress the purchase price below the competitive level by restricting the quantity purchased."). The government would, of course, be able to bargain for better rates (much as happens with Medicare now), removing the ability for medical providers to engage in price gouging of vulnerable and desperate consumers of their services. Of course, health insurance companies have effectively utilized their bargaining power to control costs, entitling their customers to get better rates for healthcare than the uninsured can. But Universal Care would give everyone, not just the insured, the benefit of such bargained-for rates.

Universal Care would provide compensation for what is perhaps the most urgent and immediate need of accident victims—their medical expenses—and correspondingly ease the degree to which individuals must depend on the tort system for relief. By providing compensation through Universal Care, we can at least partially unburden the tort system of this mismatched policy objective and allow the tort system to focus on its more compelling purposes: corrective justice and deterrence.

A. Universal Care Would Reduce Tort Claims

As a starting point, we should recognize the role of exorbitant medical expenses in the typical tort claim. For the average American, even one with health insurance, the costs of medical care incurred in the event of an accident can be devastating. Hospitalization alone is expensive, but a wide range of medical expenses get tacked on: doctor examination, specialist examination, surgery, emergency room charges, ambulance services, life-flight helicopter services,[185] x-rays, radiologist services, anesthetic, anesthesiologists, medications, physical therapy, etc. As suggested above, one of the best ways to get through the financial crisis that accompanies an injury is to find someone else to pay those costs, and after the victim exhausts their own financial and insurance resources, the next resort is to look for a deep pocket that can be made to pay these charges. Hence, victims feel compelled to file a tort claim.

We see many cases where the medical expenses are the primary motivator. Consider one lawsuit—labeled "ridiculous" by the popular press and social media—where an aunt sued her eight-year-old nephew for injuries she sustained when he gave her an overenthusiastic hug and knocked her down.[186] There are a number of things wrong with this picture, of course.[187] It is easy to blame the #Auntfromfell or plaintiffs' personal injury lawyers for lawsuits like this. But the lawsuit only looks ridiculous until one realizes that suits like this are motivated by the

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185 The author lives in a rural location where helicopter life-flights are routine. Some people in this community buy special life-flight insurance. But without that insurance (or if the company that conducts the life-flight is one not covered by the insurance), the bill for the helicopter trip can be in the tens of thousands of dollars.

186 Abby Phillip, *Aunt Loses Lawsuit Against 12-Year-Old Nephew Who Broke Her Wrist with a 'Careless' Hug*, WASH. POST (Oct. 13, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/10/13/aunt-sues-12-year-old-nephew-who-broke-her-wrist-with-a-careless-hug/ [https://perma.cc/F3Y5-6KQH].

187 The story depicts our worst nightmares of an overly litigious society where even loving family relationships are tainted, or destroyed, by lawsuits between family members.

need to pay medical bills.[188] The nephew's family had liability insurance, and the aunt had unpaid medical bills; she sued in an effort to get those bills covered.[189] Some might blame our tort system for tolerating suits of this nature.[190] But consider Professor Tom Baker's comment on the above case:

> One of the main things that predicts whether someone brings a lawsuit is whether they have medical needs that are not met by their health insurance. When I hear about it, I don't think 'That terrible greedy aunt'. I think, 'She probably didn't get all her health expenses paid'. You might say that's the real problem.[191]

Despite Professor Baker's observations, it is rare that anyone blames the healthcare system for "ridiculous" lawsuits like this. But there is no doubt that many of these lawsuits are driven by the fact that the medical bills are too high or that there was no other way for the accident victim (e.g., the aunt) to pay them. As noted above, medical care is dramatically more expensive in the United States than elsewhere.[192] At the same time, much of America is underinsured (or uninsured)—as many as 43.4% of U.S. adults ages nineteen to sixty-four are "inadequately insured"—against these kinds of injuries.[193] The tort system, therefore, becomes the vehicle for addressing the problem of high medical costs that an injured person cannot even begin to pay[194]—despite the fact that the tort system is a spectacularly inefficient vehicle for compensating accident victims.

Note, in contrast, that if medical expenses were more reasonable and compensated for everyone across the board, there would be no reason for this lawsuit or, in all probability, tens (perhaps hundreds) of

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188 Olivia Goldhill, *If You Sensed Something Off About the Story of the Woman Who Sued Her Nephew, You Were Right*, QUARTZ (Oct. 22, 2015), https://qz.com/526941/if-you-sensed-something-off-about-the-story-of-the-woman-who-sued-her-nephew-you-were-right/ [https://perma.cc/7H6C-9WJJ].

189 Eric Levitz, *'Aunt From Hell' Says She Sued Young Relative to Access Homeowner's Insurance*, N.Y. MAG.: INTELLIGENCER (Oct. 14, 2015), https://nymag.com/intelligencer/2015/10/aunt-from-hell-had-her-reasons.html [https://perma.cc/TR7T-XD67].

190 The jury ultimately denied the aunt's claim. Phillip, *supra* note 186.

191 Goldhill, *supra* note 188.

192 *See* Wager, *supra* note 135.

193 Sara R. Collins et al., *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*, THE COMMONWEALTH FUND (Aug. 19, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/looming-crisis-health-coverage-2020-biennial [https://perma.cc/97P6-BSQ9].

194 Indeed, the absence of compensation vehicles may render the tort claim as the first-resort vehicle for addressing the problem of high medical costs that an injured person can't afford to pay.

thousands of others each year—many of which may strain at theories of liability in a desperate attempt to provide compensation to a hapless victim of injury.[195] In other words, Universal Care would remove the primary motivation for lawsuits of this nature, and the injured aunts of the world would get the care they need and never think of suing their nephews. Again, *The Economist* may have had it right when it said that "the best way to slash the number of lawsuits would be to fix . . . [the] health-care system."[196]

B. Universal Care Would Reduce Personal Injury Damages Other than Medical Expenses

1. Inefficiencies in Tort-Based Compensation Drive Claims in Excess of Medical Expenses

Lawsuits do not limit themselves to claims for medical expenses. Plaintiffs inevitably seek additional damages, including lost wages and sizeable claims for pain and suffering. These additional claims make it look a little more like plaintiffs—such as the aunt discussed above—are profiteering from the system, attempting to cash in on outsized tort awards. But note that if the aunt claimed only the medical expenses in the lawsuit, and was awarded all of them, she would still be severely undercompensated due to the high transaction costs—the attorneys' fees would take a sizeable chunk of her recovery. In order to obtain her full medical expenses *and* pay her lawyer, she needs to claim much more than the medical expenses. It is reasonable and rational, therefore, to look for additional claims like pain and suffering that can generate a recovery large enough to pay the medical expenses *and* the lawyers. The seeking of excess claims might be characterized as a means of covering the high transaction costs in a system where the compensation is not guaranteed but fought for in an expensive adversarial system. As Justice Roger Traynor of the California Supreme Court observed, "[A]wards for pain and suffering serve to ease plaintiffs' discomfort

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195 *See* STEVEN K. SMITH ET AL., U.S. DEPT. JUST., NCJ-153177, BUREAU OF JUSTICE STATISTICS BULLETIN SPECIAL REPORT: TORT CASES IN LARGE COUNTIES 1 (1995) ("During a 1-year period ending in 1992, State courts of general jurisdiction in the Nation's 75 largest counties disposed of an estimated 378,000 tort cases involving 1.4 million plaintiffs and defendants.").

196 O'Connell, *supra* note 77, at 1304 (quoting THE ECONOMIST); *see also* Sugarman, *supra* note 20, at 2434–35 ("The simple point here is that if tort were only to compensate for losses not otherwise covered, and if those collateral sources grow, then tort would recede. . . . [T]he adoption of comprehensive health insurance could play a role here.").

and to pay for attorney fees for which plaintiffs are not otherwise compensated."[197]

Moreover, if the plaintiff is suing for medical expenses anyway, "[t]he availability of damages for pain and suffering, in turn, often induces plaintiffs (assisted, indeed prodded, by their lawyers) to inflate their damage assessments and exaggerate their actual injuries."[198] If the need to pay medical expenses is prompting the lawsuit in the first place, and all the costs of suit will be borne in any case, there is little reason to hold back from aggressive pursuit of pain and suffering damages as well.

Under Universal Care, that plaintiff is far less likely to sue at all.[199] Universal Care would cover the medical expenses incurred, perhaps in full, so there would be no need to file a claim for those expenses. The injured person could decide whether to sue for pain and suffering, economic losses (such as lost wages), or for punitive damages, but would do so knowing that the medical expenses are already paid in full. There would be no need to "tack on" these additional damages claims in order to get full and adequate compensation for the medical care, and if no suit is brought, there is no occasion to pile on, inflate, or exaggerate pain and suffering claims.

2. Pain and Suffering Awards Are Inflated by Rising Medical Expenses

As medical expenses have skyrocketed, tort awards have skyrocketed right along with them, at least until tort reform initiatives started capping medical expenses.[200] One reason for this is the fact that medical expenses leverage all other components of a personal injury

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197 Seffert v. L.A. Transit Lines, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) (emphasis added).

198 Jeffrey O'Connell & Ralph M. Muoio, *The Beam in Thine Eye: Judicial Attitudes Toward "Early Offer" Tort Reform*, 1997 U. ILL. L. REV. 491, 495 (1997).

199 Sugarman, *supra* note 20, at 2434–35.

200 Erik Moller, *Trends in Civil Jury Verdicts: New Data from 15 Jurisdictions*, RAND (1996), https://www.rand.org/pubs/research_briefs/RB9025.html [https://perma.cc/B5JD-UL5U]. *See* Benjamin A. Geslison & Kevin T. Jacobs, *The Collateral Source Rule and Medical Expenses: Anticipated Effects of the Affordable Care Act and Recent State Case Law on Damages in Personal Injury Lawsuits*, 80 DEF. COUNS. J. 239, 244 (2013) ("[I]n the vast majority of personal injury cases, the settlement amount or the damages awarded by the verdict were tied closely to the actual damages—primarily lost wages and medical costs—incurred as a result of the injury.").

claim.[201] Insurance adjustors routinely use the medical expenses as a basis for estimating pain and suffering allowances—usually by applying a simple multiple to the medical expenses.[202] So if the medical expenses double, the expected pain and suffering award doubles right along with them.

Under Universal Care, by contrast, the medical expenses are already covered and not part of the claim for damages. Accordingly, those expenses—already presumably lower, as Universal Care should function to keep medical expenses down—are unlikely to form a baseline from which other damages are extrapolated. It is easy to see how a jury, already awarding hundreds of thousands in medical expenses, might be willing to give pain and suffering awards similarly measured in the hundreds of thousands. But if the special damages are off the table (thanks to Universal Care) or comparatively small—e.g., limited to co-pays or deductibles paid by the plaintiff—it will be a much harder sell for plaintiffs' lawyers to argue for pain and suffering damages that are exponentially higher.

3. Punitive Damage Awards Are Inflated by Rising Medical Expenses

Punitive damages are anchored to compensatory damages in a similar way. The Supreme Court acknowledged as much in *BMW v. Gore*, and again in *State Farm v. Campbell*. In those cases, the Supreme Court articulated that the constitutionality of a punitive damages award should be assessed, in part, by examining the ratio between compensatory damages (including medical expenses) and punitive damages.[203] *State Farm* suggests that punitive damages that are four

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201 *Seffert*, 364 P.2d at 346 (Justice Traynor observed in 1961 that pain and suffering awards at that time rarely exceeded the pecuniary losses: "A review of reported cases involving serious injuries and large pecuniary losses reveals that ordinarily the part of the verdict attributable to pain and suffering does not exceed the part attributable to pecuniary losses.").

202 "[A]n insurance adjuster usually adds up the total medical expenses related to the injury. . . . That's the base figure the adjuster uses to figure out how much to pay the injured person for pain, suffering, and other nonmonetary losses . . . ." David Goguen, *How Do Insurers Value an Injury Claim?*, NOLO, https://www.nolo.com/legal-encyclopedia/how-do-insurers-value-injury-29976.html [https://perma.cc/FM6S-864P]. "When the injuries are relatively minor, the adjuster might multiply the amount of special damages by 1.5 or 2. When the injuries are particularly painful, serious, or long-lasting, the adjuster could multiply the amount of special damages by up to 5." *Id.*; *see also* O'Connell & Muoio, *supra* note 198, at 496 ("It has long been an open secret among adjusters that, where liability is determined to be likely, they will often eventually settle claims for some multiple of a claimant's out-of-pocket damages.").

203 BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

times, or even up to nine times, the amount of compensatory damages are presumptively constitutional as a matter of due process.[204] Accordingly, if medical expenses increase by a certain amount, the constitutionally permissible award of punitive damages in that same case may increase by up to nine times that amount. If medical expenses are not a part of the claim, the permissible punitive damages award may be dramatically reduced, by as much as nine times the amount of medical expenses that would have been claimed absent Universal Care. Thus, the implementation of Universal Care may avoid situations where high medical costs are used to justify high punitive damage awards. If medical costs are not part of the claim, the baseline for punitive damage awards will no longer be indexed to what have been high, and rising, costs of medical care.

C. Juries Will Feel Less Compulsion to Rule in Favor of Sympathetic Plaintiffs if Those Plaintiffs Are Getting Universal Care

Under the current regime, jurors are likely to be moved by the plight of a plaintiff who faces ruinous medical bills, and they may be more likely to rule against an affluent defendant and find liability, if only to afford some relief to a penurious plaintiff.[205] Although juries' tendencies to act this way is disputed, it is a perception widely shared, and dating back at least as far as 1852, when a New York court observed:

> We can not shut our eyes to the fact that in certain controversies between the weak and the strong—between a humble individual and a gigantic corporation, the sympathies of the human mind naturally, honestly and generously, run to the assistance and support of the feeble, and apparently oppressed; and that compassion will sometimes exercise over the deliberations of a jury, an influence which, however honorable to them as philanthropists, is wholly inconsistent with the principles of law and the ends of justice.[206]

In 1989, Peter Huber suggested that by the 1970s and 80s "judges and juries were, for the most part, committed to running a generous sort of charity. If the new tort system cannot find a careless defendant after an accident, it will often settle for a merely wealthy one."[207]

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204 *Campbell*, 538 U.S. at 425.

205 Bornstein, *supra* note 98, at 1495 (noting that jurors are more likely to find liability and to award damages where the plaintiff's injury is more severe).

206 Haring v. N.Y. & Erie R.R., 13 Barb. 9, 15–16 (N.Y. 1852).

207 PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 12 (1989). See also the array of sources quoted and cited in Neil Vidmar, *Empirical Evidence*

The existence of Universal Care is likely to undercut this effect. If juries know that the medical bills are already paid, they may adjudge the defendant's liability more critically and be less generous with the defendant's (or the defendant's insurer's) money. It is a reasonable assumption that a jury may be more willing to be fair to a deep-pocket defendant if the jurors know that the plaintiff is already getting all her basic medical needs met.

Admittedly, it is somewhat speculative to assume that a jury will be less generous to a plaintiff if they are aware that the plaintiff is insured and already being compensated for her medical care. But this assumption is the reason behind rules of evidence,[208] such as Evidence Rule 411 and the collateral source rule, both of which prevent the jury from knowing whether there is insurance available to pay the claim.[209] The assumption behind these rules is that knowledge of insurance will influence the jury because (1) knowledge that the plaintiff is already insured against this loss is likely to result in a diminished jury award; and (2) knowledge that the defendant is insured is likely to result in a judgment for the plaintiff, even if the defendant's fault is arguable (because the jury knows that a nonnegligent defendant won't be paying the judgment anyway).

If *everyone* is covered by Universal Care, the jury will undoubtedly know that—no rule of evidence will shield them from that knowledge. And, depending on how subrogation is treated in the ultimate legislation,[210] the medical expenses are unlikely to be part of the claim at all. The otherwise resourceless plaintiff no longer looks so vulnerable, because her health care is provided for. As a result, the jury may feel less pressure to find for the plaintiff, and the nonnegligent defendant is far less likely to be stuck with the bill for injuries that are really not that defendant's fault.

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on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases, 43 Duke L.J. 217, 218–21 (1993).

208 J. E. Lyerly, *Evidence: Revealing the Existence of Defendant's Liability Insurance to the Jury*, 6 CUMB. L. REV. 123, 123 (1975).

209 John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1478 (1966).

210 *See* discussion of subrogation, *infra* Section V.D.1.

D. Additional Issues Related to Tort Claims Under Universal Care

1. The Collateral Source Rule and Subrogation

There are a few issues of tort law that would need to be resolved as part of the Universal Care implementation. These include the applicability of the collateral source rule and the availability of subrogation.

We have assumed, throughout this article, that the plaintiff would be barred from claiming damages for medical expenses incurred if those expenses are being covered by Universal Care.[211] Unless the plaintiff is actually pursuing those expenses, there is little reason to concern ourselves with the collateral source rule. The rule operates to prohibit the parties from alerting the jury that compensation has already been received from the Universal Care system, and it is operative only if the plaintiff is seeking damages for expenses for which they have already been reimbursed. Moreover, as noted above, it would be impossible to keep the jury ignorant of the plaintiff's entitlement to Universal Care in any case.

A related but distinct issue is the question of subrogation: whether the Universal Care system should have the right to pursue a subrogated claim for medical costs that the Universal Care system has borne, but which were occasioned by the defendants' tortious behavior. Compelling arguments can be made either way, and Professor Schwartz explores and analyzes these arguments in some detail.[212] Some would argue that relieving defendants of the burden of paying for the medical services occasioned by their tortious behavior prevents them from internalizing the costs of their behavior.[213] As a matter of strict economics, this is true: absent liability for the plaintiff's medical care, the defendant lacks sufficient incentive to take appropriate precautions and exercise an efficient degree of care.[214]

On the other hand, if the public fisc—funded by taxpayers—is already compensating the plaintiff for medical expenses, there may be enormous efficiencies that come from forgoing the battles over liability. This was much of the impetus behind No-Fault Auto;

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211 Indeed, many of the efficiencies the tort system would recognize from the implementation of Universal Care, discussed in Section V.B., would evaporate if plaintiffs were able to pursue these expenses a second time in a suit against the alleged tortfeasor(s).

212 Schwartz, *supra* note 10, at 1341–48.

213 *Id.* at 1347.

214 *Id.*

decreasing transaction costs was one of the primary goals and benefits of that system.[215] What was lost in terms of incentives to potential tortfeasors was arguably more than made up for in terms of savings to the system, as compensation could be done without resorting to costly legal battles over which party was at fault.[216]

As Professor Schwartz concludes, there are no clear answers as to whether allowing the Universal Care administrator to pursue subrogated claims would be beneficial:

> In evaluating the subrogation option, one needs an estimate of how much deterrence in fact would be lost if the liability of tortfeasors were reduced. . . . At this point, the economists' models should be supplemented by a realistic and perhaps skeptical appraisal as to how much deterrence the current tort system actually provides. Moreover, evaluation of the option should also acknowledge that subrogation carries with it a considerable overhead, the cost of which must be debited against whatever the deterrence advantages of subrogation might be. Indeed, these overhead costs are sometimes prohibitive, persuading insurers to make no effort to enforce their subrogation rights.[217]

He follows this with an example from the auto insurance environment in which subrogation has become routine and functions smoothly.[218] But the case for subrogation is dubious, and the potential benefits for

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215 *See* Trevor M. Gordon, *To Reform or Repudiate? An Argument on the Future of No-Fault Auto Insurance*, 17 QUINNIPIAC HEALTH L.J. 63, 63–66 (2014). The creation and rise of the automobile introduced Americans to a previously unrealized freedom of inexpensive convenient travel. *Id.* at 63. But as the number of drivers on the road skyrocketed in the twentieth century, so did collisions and, ultimately, litigation. *Id.* at 64. The courts were flooded with lawsuits by individuals seeking justice for their injuries, but the process proved time consuming, expensive, and incapable of properly compensating many victims (notably those who were victimized by uninsured drivers). *Id.* In response, the idea of No-Fault auto insurance was conceived in the 1970s and was modeled after workers compensation schemes that were already in place. *Id.* The basic idea was that an injured driver could have their medical expenses covered by their No-Fault insurance regardless of who was at fault for the accident. *Id.* The idea was to eliminate the need for litigation over minor injuries. *Id.* Usually, the drivers were insured up to a capped amount and may be permitted to sue if the expenses exceed that amount or if the injury was particularly severe. *Id.* at 64–65. The concept was adopted and implemented differently among the states. *Id.*

216 Of course, automobile accidents are less of a concern in terms of incentives. Because accidents also put the tortfeasor herself at risk, she already has a strong incentive to avoid accidents: her own neck is on the line. Types of torts that do not place the tortfeasor in similar jeopardy may be less suited to a no-fault system; the lack of liability may prompt tortfeasors to take unwarranted risks with other people's lives if they know they won't be held liable for the medical expenses occasioned by their tortious behavior.

217 Schwartz, *supra* note 10, at 1347 (internal footnote omitted).

218 *Id.* at 1348.

the tort system appear to be most conspicuous in a regime that doesn't allow it.[219]

2. Impact on Medical Malpractice Claims

Finally, no discussion of intersection of the tort system and the healthcare system would be complete without a discussion of medical malpractice litigation. No doubt medical malpractice liability, and the insurance to cover it, have been cited as factors in driving up the cost of medical services.[220] Doctors and hospitals have to pay those judgments and those insurance premiums somehow. And as it is a "cost of doing business," it only makes sense to pass those costs on to their patients.[221]

Passing costs on to a customer, of course, is possible only to the degree that there is some inelasticity of demand, however.[222] In competitive markets, where there are substitute goods or services available to the consumer, the seller may well be forced to swallow increased costs; raising prices would simply chase their customers to competing sellers and products.[223]

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219 Note that the North Carolina Department of Insurance prohibited subrogation clauses in North Carolina insurance policies decades ago, so a world without subrogation is hardly an untested concept. *See, e.g.*, *In Re* A Declaratory Ruling by the N.C. Comm'r of Ins. Regarding 11 N.C.A.C. 12.0319, 517 S.E.2d 134, 135 (N.C. Ct. App. 1999). The North Carolina rule has been consistently upheld by the courts. *E.g.*, *id.*

220 *See* Stephen Zuckerman & John Holahan, *Despite Criticism, The Affordable Care Act Does Much to Contain Health Care Costs*, URBAN INSTITUTE (Oct. 2012), http://webarchive.urban.org/UploadedPDF/412665-Despite-Criticism-The-Affordable-Care-Act-Does-Much-to-Contain-Health-Care-Cost.pdf [https://perma.cc/Q2RY-JV3R]. On the other hand, some argue that the costs related to medical malpractice are not a substantial healthcare-cost driver as most assume. Michael D. Frakes, *The Surprising Relevance of Medical Malpractice Law*, 82 U. CHI. L. REV. 317, 359–60 (2015).

221 *See, e.g.*, Mark Pauly et al., *Who Pays? The Incidence of High Malpractice Premiums*, F. HEALTH ECON. & POL'Y, 2006, at 1, 8. ("by a combination of increasing prices and increasing quantity of (apparently) profitable outputs, the group practice physicians we studied appear able and willing to offset the effect of higher premiums on their incomes."). Even if it is the insurance companies that pay for these cost shifts, it ultimately transfers to the patients in the form of higher medical insurance premiums. *See* Katherine Baicker & Amitabh Chandra, *Defensive Medicine and Disappearing Doctors?*, 28 REGUL. 24, 30–31 (2005).

222 PRINCIPLES OF ECON., *Sec. 5.3 Elasticity and Pricing*, https://opentextbc.ca/principlesofeconomics/chapter/5-3-elasticity-and-pricing/ [https://perma.cc/6YNM-GWQV].

223 Amy Gallo, *A Refresher on Price Elasticity*, HARV. BUS. REV. (Aug. 21, 2015), https://hbr.org/2015/08/a-refresher-on-price-elasticity [https://perma.cc/K2D7-BX8Q].

But as noted above, health care may be one of the services for which demand is particularly inelastic,[224] enabling the health care provider to pass a very large portion of increased costs on to their customers (patients). Due to the market failures discussed above, the patients have few other options in terms of finding alternative providers, and often cannot consider "doing without" the medical care, as fundamental issues such as life, death, pain, and disability are not amenable to a monetized trade-off.[225]

However, medical malpractice claims are, by definition, personal injury claims, and the availability of Universal Care should—for all the reasons argued above—dramatically reduce the number of claims, as well as the amounts size of the claims that *are* filed. Patients would more reliably get the medical expense compensation and wouldn't need to prove the doctor's fault to get it.[226]

Moreover, if Universal Care does reduce medical malpractice claims—the cost of which is typically blamed, in part, for the spike in the costs of health care in the United States—it could end up fostering a "virtuous cycle" of cost reductions: fewer claims, less defensive medicine, lower costs, and a larger percentage of the resources going to actual care. And, perhaps most importantly, this easing of the burden on healthcare providers, unlike most tort reform initiatives designed to address medical malpractice issues, does not come at the expense of victims. Many of those claims are diverted from the tort system not because tort reform has limited their ability to get compensation, but because the needed compensation has already been provided by a functional system of Universal Care.

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224 Mary Hall, *Elasticity vs. Inelasticity of Demand: What's the Difference?*, INVESTOPEDIA (Apr. 26, 2021), https://www.investopedia.com/ask/answers/012915/what-difference-between-inelasticity-and-elasticity-demand.asp [https://perma.cc/KAX4-8VUL] ("The most common goods with inelastic demand are utilities, prescription drugs, and tobacco products. In general, necessities and medical treatments tend to be inelastic . . . .").

225 Melnick, *supra* note 127.

226 Similar policy considerations underlie Paul Weiler's provocative but compelling argument in favor of no-fault medical liability. Weiler, *supra* note 107, at 921–22 ("[C]overage for patient losses will not turn on the fortuitous question whether the injury can be proved to be the result of the negligence of a doctor or other provider—proof that requires more monetary expenditures than does payment to the few patients who successfully litigate that issue.").

VI
LETTING THE TORT SYSTEM FOCUS ON ITS HISTORICAL AND TRADITIONAL POLICY OBJECTIVES: CORRECTIVE JUSTICE AND DETERRENCE

The struggle to reconcile tort doctrine with its divergent aims—corrective justice (forcing wrongdoers to pay for the harm they cause), deterrence (providing incentives to take appropriate precautions), and compensation (ensuring that victims of accidents can get compensation for their injuries)—has been frustrating and unsatisfying. Torts scholars are bitterly divided, as these policy objectives often conflict.[227] The compensation priority has been particularly disruptive of the tort system and has engendered considerable backlash, including the tort reform movement in the late twentieth and early twenty-first centuries. Perhaps the greatest benefit Universal Care will bring to the tort system, therefore, is relieving the pressure on that system to function as a compensation scheme for accident victims. The tort system is ill-suited to play this role in any case as it provides meaningful compensation to only a tiny fraction of injured persons in America[228]—and at tremendous cost in both time and money.[229]

The focus on the plight of the victim, and the imperative to find a way to compensate her, has prompted tort rules that force deep pockets to pay regardless of their degree of culpability (e.g., strict products liability, joint and several liability,[230] and vicarious liability), and rules that justify plaintiffs' recovery in terms of cost-spreading.[231] These trends have sparked outrage by observers, who understandably wonder where they can find justice in a system that punishes defendants whose degree of fault is disproportionately small compared to the liability they are forced to bear.[232] And tort doctrines that make large awards, regardless of the defendants' level of culpability, prompt dismay from those concerned about how fear of liability may stifle innovation,

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227 *See* Goldberg, *supra* note 16.

228 *See* Saks, *supra* note 9, at 1184–84 (giving data on medical malpractice claims in particular).

229 *See supra* Part II.

230 Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, 681–82 (2003).

231 *See* Geistfeld, *supra* note 16. *See also*, Hasnas, *supra* note 35, at 574 ("Juries do indeed tend to find in favor of the plaintiff, and issue large awards, when given instructions derived from a theory of tort that regards placing the cost burden of injuries on the parties best able to bear it as a requirement of social justice.").

232 La Fetra, *supra* note 230, at 681–82.

competition, and healthy risk-taking,[233] and about how our culture has evolved to encourage blaming others rather than taking personal responsibility for unfortunate outcomes.[234]

The key losses claimed in most personal injury suits—the objectively measurable pecuniary damages—are medical expenses and lost wages. These, as discussed above,[235] are the most pressing needs of an injured accident victim.[236] Universal Care takes the first one off the table almost completely, although limitations on coverage may still prompt suits for the expenses that Universal Care does not cover, including any deductibles or copayments.[237] The second one remains a part of the mix, so tort claims will still be necessary to obtain compensation for forgone income.[238] But without the medical expenses, the incentive—and in many cases the necessity—to pursue a tort claim against any and all available deep pockets is tempered considerably. We should expect fewer suits, and those filed should be claiming considerably smaller amounts.

So which tort claims would still be pursued under a regime that afforded Universal Care? The answer is likely to be those cases that the tort system has historically treated as worthy of recovery: where the defendant's conduct is genuinely blameworthy, where the defendant disregards the rights and the safety of others, and where the defendant's conduct is egregious enough to demand legal intervention to hold them accountable. Plaintiffs should still be able to get significant recoveries in such cases, as juries will be eager to find liability, and assess substantial damages, against especially callous tortfeasors. In such

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233 *Hearing on Product Liability Laws*, *supra* note 95, at 1–2.

234 *See, e.g.*, La Fetra, *supra* note 230, at 658.

235 *See supra* Section II.B.1.

236 *See* Robinette, *supra* note 75, at 347.

237 There may be other limitations as well. Medicare, for example, depending in part on whether the individual chooses optional supplemental plans, may not cover dental care, custodial care, hearing aids, or prescription lenses. *What's not covered by Part A & Part B?*, MEDICARE.GOV, https://www.medicare.gov/what-medicare-covers/whats-not-covered-by-part-a-part-b [https://perma.cc/A9WP-QHBH].

238 One might envision, however, a system of universal disability insurance or unemployment insurance that would ease pressure on plaintiffs who lost income, eliminating (or diminishing) the need or incentive to sue for such losses. Even a guaranteed income system such as that advocated by presidential candidate Andrew Yang in 2020, could contribute to easing the financial desperation of accident victims, and therefore their incentives to resort to the tort system for relief. Eric Latch, *Andrew Yang's Ideas on Universal Basic Income Earned Him Fans. But Can He Win Votes?*, THE NEW YORKER (Jan. 23, 2021), https://www.newyorker.com/news/our-local-correspondents/andrew-yangs-ideas-on-universal-basic-income-earned-him-fans-but-can-he-win-votes [https://perma.cc/8XJH-8TAK].

cases, therefore, there will still be incentives to sue. The threat of litigation and liability should still be potent enough to deter potential tortfeasors from engaging in seriously negligent or reckless conduct; even if there is no litigation over medical costs, the system should still demand an ample measure of accountability.

But the problem of over-deterrence—e.g., when cities close playgrounds or public swimming pools because they can't risk liability,[239] where doctors engage in "defensive medicine,"[240] or when useful products are kept off the market because they can't be made 100% idiot-proof—may well ease.[241] And with the anticipated drop in the number, and magnitude, of tort claims, it is likely that the putative "tort crisis" will dissipate considerably.

At the same time, when medical expenses are covered, other plaintiff-friendly or compensation-oriented tort doctrines may be gently scaled back or even retired, such as (1) strict liability for injuries caused by products, when the defendant's—either the manufacturer's or the retailer's—fault cannot be shown; (2) vicarious liability, when the employer had no reason to know or suspect that its employee may be behaving in a negligent manner; or (3) joint and several liability, which functions to force deep-pocketed defendants to pay far more than their fair share of the plaintiff's damages. Professor Schwartz suggests as much:

> If a national health care program is adopted, judges would be aware that the insurance mandated by federal law now covers accident victims for the medical care they need. Granted, those victims' income losses would remain; still, judges might be less inclined to rely on loss-spreading notions to approve either individual verdicts or new causes of action. . . . In short, the implementation of a national program would tend to constrict both the effective scope and the actual cost of the current regime of tort liability.[242]

Accordingly, tort doctrines that once limited defendant liability—such as assumption of risk or contributory negligence, which have been diluted to permit plaintiffs at least *some* recovery[243]—might be

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239 *E.g.*, Uhlinger, inter alia, *supra* note 91.

240 *See* Katz, *supra* note 94; Sullivan, *supra* note 94.

241 *Hearing on Product Liability Laws*, *supra* note 95, at 1–2.

242 Schwartz, *supra* note 10, at 1354.

243 *E.g.*, Tezak v. Montgomery Ward & Co., 33 F. App'x 172, 175 (6th Cir. 2002) (plaintiff was awarded damages even though the jury found him to be at ninety-eight percent fault for the injuries he received); California adopted pure comparative negligence and

resuscitated if the need to compensate the victim is less acute.[244] There will be less pressure to find defendants liable for what are merely misfortunes. A plaintiff who is the author of his own misfortune would be entitled to medical care under Universal Care and would have less need for a comparative negligence rule (or, at least, a pure comparative negligence rule) that empowers that plaintiff to tap a deep pocket for a contribution. A plaintiff whose injury could be attributed to a number of potential defendants might not need to single out the one with the deep pocket to carry the full freight of liability under a joint and several liability rule if the plaintiff's medical needs are already fully covered. Judges, juries, and legislatures may well think differently about all these legal rules in a regime where the medical costs are covered. And that shift in thinking may be just what the tort system needs.

CONCLUSION

Critics of the tort system have found easy targets in the evolving tort doctrines since the mid-twentieth century, as courts have allowed these doctrines to develop in ways that favor plaintiffs and give them access to deep pocketed defendants, motivated in part by the plight of injured persons facing devastating medical expenses. These doctrines have unduly focused on ensuring that injured persons can get some compensation and have justified imposing liability, not so much in terms of the wrongfulness of defendant's conduct, but in terms of the defendants' superior ability to bear or spread the costs of such injuries. In the process, defendants have been treated increasingly as *de facto* insurers, driven in part by the fact that health care has become prohibitively expensive in the United States and so many people lack adequate health insurance. Injured persons find themselves relying on the tort system to cover their medical costs, and the tort system has struggled under the burden of playing that role.

Universal Care has the potential to be a game changer for the tort system, however. If injured persons have their medical costs already

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determined the defense of assumption of risk was merged into the assessment of liability in proportion to fault. Li v. Yellow Cab Co., 532 P.2d 1226, 1241 (Cal. 1975).

244 While it is unlikely that comparative negligence states would revert to the old contributory negligence regimes they once had, the availability of Universal Care dramatically undercuts the argument in favor of pure comparative negligence. States that use pure comparative negligence may be emboldened to adopt modified comparative negligence, which would deny recovery to plaintiffs who are at least fifty percent responsible for their injury. Such plaintiffs would have their medical expenses covered by Universal Care and have much less need for tort liability rules that afford them some recovery.

covered, they are far less likely to sue, and those who do bring suit will be making more modest claims. Those claims, if they are brought at all, will not include medical expenses and will most often be limited to lost wages and pain and suffering. The anticipated decrease in the number and scope of filings would benefit a seriously overburdened system.

But even more important than unburdening the system of these cases would be the unburdening of the tort system of its perceived role as a mechanism for compensating injured persons. It compensates only a small fraction of injured persons even now—and undercompensates them at that. It also comes at a considerable administrative expense, both in terms of time and money. The tort system's attempts to play a role for which it is so ill-suited has invited well-founded criticism of the system and launched a variety of ill-conceived tort reform initiatives (particularly those designed to cap or reduce payouts in the few cases where the system grants recovery), initiatives that do nothing to further any of the legitimate purposes of the tort system.

But this unfortunate outcome is not a result of the tort system's failure; it is a case of healthcare system's failure. If we can fix health care in the United States and remedy the market failures so people who need health care can get it, the tort system may be liberated from its present role as a compensation scheme. This would allow the tort system refocus attention on its more defensible policy objectives—corrective justice and deterrence—and to right itself.

If, instead of pouring societal resources into tort litigation (and the quest for deep pockets to pay the prohibitive cost of health care), American society invested in Universal Care, the erstwhile "compensation policy objective" of the tort system would be far better served: far more people would get the compensation they really need, and with dramatically reduced transaction costs. Any transaction costs saved, of course, would preserve resources that could be better employed for additional compensation for the accident victims who need it.

The tort system's ills might yet be healed, if the cause of those ills is property diagnosed. If the problems are the result of a failed healthcare system, the best remedy for those problems may lie not in tort reform, but in healthcare reform. Indeed, from the perspective of the tort system, Universal Care could be the cure we've all been waiting for.