

Article

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A Cure for What Ails You: How Universal Healthcare Can Help Fix Our Tort System

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INTRODUCTION

The U.S. tort system has, since the mid-twentieth century, evolved to bring particular policy emphasis to the problem of compensating victims of accidental injury.¹ Much of the focus has shifted from the wrongfulness of the conduct of the tortfeasors—and the corresponding need for both accountability and deterrence—toward the needs of the injured, particularly as the cost of medical treatment has skyrocketed.² The tort system's efforts to remedy the problem—accident victims' inability to pay for the medical care they require—has, this article argues, distorted the policy objectives and priorities of the tort system

¹ J. Clark Kelso, *Sixty Years of Torts: Lessons for the Future*, 29 TORT & INS. L.J. 1, 7–10 (1993).

² See *infra* Part I.

and has contributed to the widely perceived “tort crisis.”³ Accordingly, a national health insurance program that provides health care to everyone (“Universal Care”), such as the Medicare-for-All bills now being suggested in Congress, would go far toward curing the ills of our tort system.

Because our current system of medical care cannot begin to meet the needs of the injured—often because those injured individuals were uninsured or underinsured, and because the medical expenses are prohibitively high—injured individuals have increasingly resorted to the tort system in an effort to find a way to pay for necessary medical care.⁴ Judges have responded by adapting tort doctrines to do a better job of compensating victims of injury, invoking policy principles like loss spreading, and replacing tort concepts such as contributory negligence and assumption of risk (the application of which blocked tort recovery) with far more flexible and generous doctrines, such as comparative negligence, strict products liability, joint and several liability, and vicarious liability.⁵ In so doing, the tort system has attempted to play a role more akin to that of an insurer, effectively compensating for the healthcare system’s failure to address issues of access to medical care, or, perhaps more pointedly, the health *insurance* system’s failure to accomplish the attendant goals of loss-spreading and risk-spreading.

At the same time—and probably not coincidentally—the tort system has fallen into disrepute in the United States, with critics decrying the excesses of the system: awarding damages when the defendants’ malfeasance or misfeasance was arguable and, in some highly publicized and highly criticized cases, awarding multimillion-dollar judgments to plaintiffs who, at first blush, appear to be unworthy of such a windfall.⁶ A few injured people appear, to a lay observer, to be getting rich off the system, while many others get clearly inadequate compensation or none at all. Even those who recover their full losses by verdict or settlement may end up short-changed by thirty to forty percent after their attorneys are compensated from the judgment proceeds.

³ See Wallace M. Rudolph, *The Tort Crisis: Causes, Solutions, and the Constitution*, 11 SEATTLE U. L. REV. 659, 659–60 (1988).

⁴ See *infra* Section II.B.1.

⁵ See *infra* notes 29–30 and accompanying text.

⁶ See *infra* note 53 and accompanying text.

The condemnation of the tort system, however, is misplaced. The problem is not that the tort system has failed to do its job, but that the tort system has failed to do the healthcare system's job. Indeed, it is the healthcare market that should be entrusted with the efficient delivery of effective care to those who need it at fair and competitive prices. But the healthcare system has utterly failed in this regard: market failures have resulted in a system that is inefficient and overpriced when compared with virtually every other healthcare system in the world—and therefore one that is inaccessible to many who need the care. The tort system, therefore, has become a go-to resource for covering otherwise prohibitive medical expenses for those injured in accidents,⁷ and courts and legislatures have responded, as noted above, by broadening liability rules in an effort to help these accident victims get access to some compensation via an available deep pocket. If the healthcare system, or market, cannot ensure access to health care, sometimes the tort system can compensate for that. But in and amidst its attempts to do so, the tort system has been compromised.⁸

Thrust into a role it was never designed for, the tort system has unsurprisingly done a poor job of ensuring access to health care across the board. Liability must be established before the payment can be made, and that requires enormously expensive and inefficient ad hoc legal determinations. Indeed, critics of the tort system are justified in their complaints that tort relief is not necessarily going to the most deserving victims, and that such relief is made in inconsistent and indefensible amounts.⁹ But the tort reform policy debate has focused too much on the failures of the tort system, overlooking the degree to which the problems have been generated by failures of the healthcare system. It is hardly reasonable, much less fair, to blame the tort system for its inability to compensate for, or fix, the problem of a failed system for the delivery of medical care to those who need it.

Universal Care initiatives, including Medicare-for-All, are now being proposed, debated, and discussed, and appear to be gaining unprecedented

⁷ Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL'Y 119, 124 (2007) (acknowledging "the fact that that uninsured Americans are forced by need to seek de facto health coverage through the tort system when they are injured.").

⁸ It is obviously reductionist to suggest that the desire to better compensate plaintiffs is the impetus for disrupting traditional tort doctrines, or that it is the sole cause of the problems the tort system presently faces. As this article attempts to demonstrate, there are compelling reasons to attribute at least some blame for the public's loss of confidence in the tort system to compensation-focused shifts in tort doctrine.

⁹ See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

momentum as it becomes clear that the Affordable Care Act cannot resolve the core problems in our health care system. In this discussion and debate, we should note how far a functional healthcare delivery system—one that ensured that every injured person would have their basic medical needs met—would go to relieve this tremendous burden on the tort system, a burden that has distorted the tort system’s priorities, and forced it into a role it was never equipped to perform. Many injured individuals would have little cause to sue, as their most pressing need—appropriate medical care—would already be met. Accordingly, Universal Care may be just what the tort system needs to get itself back on track and focus, not on finding a deep pocket and crafting legal doctrines that would force that defendant to fund the treatment, but on allocating liability to—and demanding accountability from, those whose conduct falls short of societal standards.

The potential impact of Universal Care on the tort system was explored by Professor Gary Schwartz in 1994, based on his initial perception that adoption of Universal Care was imminent in the United States:

[A] national health care program would affect the claiming patterns of tort victims, the attitudes of tort juries in deciding cases, and the development by judges of tort doctrine. Given the[se] foreseeable effects, such a program, in achieving health care reform, could also bring about tort reform, restraining the scope and cost of the overall tort system.¹⁰

In 2007, over a dozen years later, Professor Julie Davies argued that the tort reform agenda might be well served by initiatives to broaden health care accessibility, and that these two initiatives—tort reform and healthcare reform—should be merged.¹¹

Of course, the Universal Care envisioned by the Clinton Administration in the early 1990s never materialized, so Professor Schwartz’s predictions went untested. And the Affordable Care Act (“ACA”) was adopted in 2009 without an expectation that it would serve tort reform purposes, so Professor Davies’ proposed merger of the initiatives—(1) addressing the problem of the uninsured in health care, and (2) addressing the problems of the tort system—never occurred. Indeed, because the ACA fell far short of the goal of ensuring

¹⁰ Gary T. Schwartz, *A National Health Care Program: What Its Effect Would Be on American Tort Law and Malpractice Law*, 79 CORNELL L. REV. 1339, 1340 (1994).

¹¹ Davies, *supra* note 7.

full and universal healthcare coverage,¹² its potential impact to effect change or reform in the tort system went unrealized.¹³ But now, almost thirty years after Professor Schwartz first took up the issue, as both political parties appear to be interested in replacing the ACA with something different,¹⁴ the potential for healthcare reform to address issues in our tort system deserves renewed attention.

Part I of this article begins by discussing the purposes and theories behind the tort system Part II summarizes the problems of the U.S. tort system, including the incentives it creates and the inefficiencies it generates. Part III provides a brief overview of the problems of the U.S. healthcare system, highlighting its extraordinarily high cost. The article then spells out the promise of Universal Care in Part IV—not just how it may address the inefficiencies and spiraling costs in healthcare delivery, but how fixing our healthcare system will relieve an impossible and unfair burden on the tort system. Part V of the article concludes by arguing that Universal Care should address some of the perceived excesses and dysfunction of our present tort system, answering many of its critics' complaints. The tort system may then be able to regain its footing, and its own appropriate sense of purpose: holding tortfeasors accountable for the harm they cause and deterring tortious conduct, undistracted by a competing imperative to facilitate plaintiffs' access to deep pockets.

¹² Implementation of the ACA coincided with a roughly seven-point reduction in the percentage of non-elderly Americans without health insurance, from rates of seventeen to eighteen percent uninsured in the first part of the 2010s, to rates of ten to eleven percent in the latter part of that decade. Jennifer Tolbert, Kendal Orgera, & Anthony Damico, *Key Facts About the Uninsured Population*, KFF (Nov. 6, 2020), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/> [https://perma.cc/9V2X-WMR7].

¹³ See generally Andrew F. Popper, *The Affordable Care Act Is Not Tort Reform*, 65 CATH. U. L. REV. 1 (2016) (noting that there was very little in the ACA that spoke to issues of tort reform).

¹⁴ By the latter 2010s, many Democrats were advocating to replace the ACA with something far more comprehensive. Bradley Jones, *Increasing Share of Americans Favor a single Government Program to Provide Health Care Coverage*, PEW RSCH. CTR. (Sept. 29, 2020), <https://www.pewresearch.org/fact-tank/2020/09/29/increasing-share-of-americans-favor-a-single-government-program-to-provide-health-care-coverage/> [https://perma.cc/E8SB-XW28]. Republicans, campaigning against the ACA, promised to “repeal and replace” the ACA with something better, but even from 2017 to 2019, when they held both houses of Congress as well as the White House, they were unable to forge any consensus on what to replace the ACA with. *Timeline of ACA Repeal and Replace Efforts*, BALLOTPEDIA, https://ballotpedia.org/Timeline_of_ACA_repeal_and_replace_efforts [https://perma.cc/2TY4-5W9X]; Jonathan Cohn, *The ACA, Repeal, and the Politics of Backlash*, HEALTH AFFS. (March 6, 2020), <https://www.healthaffairs.org/doi/10.1377/forefront.20200305.771008/full/> [https://perma.cc/4CJ3-DLQJ].

I

PURPOSES OF THE TORT SYSTEM

The historical policy underlying the tort system is that the person who unreasonably causes harm should be held accountable and made to compensate those harmed by her unreasonable behavior.¹⁵ Indeed, before the twentieth century, it was treated very much as a private law matter and generally involved wrongs that society deemed immoral (e.g., stealing, physical harm, etc.).¹⁶ It typically involved isolated instances of wrongdoing and operated as an expression of corrective justice.¹⁷ Absent the wrongful conduct (i.e., tortious behavior), the victim would have remained unharmed; the tortfeasor therefore owes it to her victim to make it right.¹⁸ Of course, in the case of personal injury, the harm is not always reparable (e.g., a disabling injury or loss of life),¹⁹ and the courts have necessarily resorted to money damages for the plaintiff's compensable losses, most conspicuously, perhaps, the plaintiff's medical expenses—which can be prohibitive, especially in the United States right now—incurred as a result of the defendant's tortious behavior.²⁰

A competing view of tort law, particularly prevalent in the law and economics literature, focuses on incentives and deterrence.²¹ The idea

¹⁵ RESTATEMENT (SECOND) OF TORTS § 283 (AM. L. INST. 1965).

¹⁶ John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 522–25 (2003); see also Mark A. Geistfeld, *The Coherence of Compensation-Deterrence Theory in Tort Law*, 61 DEPAUL L. REV. 383, 388–89 (2012).

¹⁷ *Id.*

¹⁸ See generally Erik Encarnacion, *Corrective Justice as Making Amends*, 62 BUFF. L. REV. 451 (2014).

¹⁹ See *id.* at 484–85 (explaining that “it is never possible, strictly speaking, to fully undo the losses attributable to wrongdoings. There will always be lost time, for instance, that cannot be given back to the victim.”) (emphasis omitted).

²⁰ Indeed, medical expenses and lost wages remain, even today, the most easily documented and most easily justified damages in a plaintiff's claim, and ultimately of the settlement or judgment she obtains. Pain and suffering awards are a mostly a twentieth century phenomenon, and courts have struggled to find functional methods for valuing them. Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CALIF. L. REV. 2403, 2413 (2000) (“Although tort law has formally awarded general damages for the pain and suffering that accompanies personal injuries throughout the twentieth century, the sums juries award today (and in turn the sums lawyers can win for their clients in settlement of claims) dwarf those of 100 years ago, even accounting for inflation.” (citation omitted)); *Seffert v. L.A. Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting) (“[T]here is no way of translating pain and suffering into monetary terms.”).

²¹ This school of thought achieved prominence in the latter half of the twentieth century, led by the writings of Richard Posner and Guido Calabresi, core principles were at play before that in, for example, Judge Learned Hand's decision in *United States v. Carroll*

is not a new one; tort liability was always carried out in a way that would achieve some level of deterrence of tortious behavior. To an economist, torts may be viewed as externalities, where one's behavior imposes costs on other people. In order to provide proper incentives to potential tortfeasors, we must force them to internalize those costs. If all costs are fully internalized, we can expect potential tortfeasors to take efficient levels of precaution, *i.e.*, precautions that are warranted in terms of the expected cost of the behavior (likelihood of harm x extent of harm).²² This approach suggests that the tort system should be wielded to promote efficient exercises of precaution and correspondingly efficient outcomes in society.

But quite independently of deterrence theory, the latter half of the twentieth century brought a shift in the focus of tort doctrine away from corrective justice applied to private wrongs, in favor of principles of collective justice. Based on the idea that society was increasingly socially interdependent and that the costs of injuries were everyone's responsibility,²³ tort law began to play more of a social engineering function. Tort was no longer rooted in concepts of moral wrong, but in terms of public-policy-driven balancing of interests,²⁴ often the business interest verses the interest of individuals harmed by the business activity, in which the economic value of the business activity weighed heavily.²⁵ The shift focused on optimal societal ordering, rather than corrective justice in the individual case.

Given these competing policy objectives, it is not surprising that a sharp debate persists among tort scholars about the primary purposes of the tort system. On the one hand, the "corrective justice" school of thought—as well as the "civil recourse" school of thought—continue to adhere to the historical view that tort law is inherently "private law,"

Towing Co., 159 F.2d 169 (2d Cir. 1947). See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²² See *Carroll Towing*, 159 F.2d 169. Where cost internalization imposes insufficient incentive to abstain from tortious behavior, the law permits the imposition of punitive damages to deter particularly egregious conduct, particularly where the costs of compensating victims are too low to effectively deter such conduct. Robert J. Rhee, *Financial Economic Theory of Punitive Damages*, 111 MICH. L. REV. 33, 52 (2012).

²³ G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 146–47, 219 (1980).

²⁴ WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 15 (1941).

²⁵ See, e.g., *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (arguably licensing a nuisance on the ground that the business's interests—which served the community as a whole—outweighed the plaintiffs' right to quiet enjoyment of their property).

and should resolve disputes in a way that does justice between the affected individuals: the tortfeasor and her victim.²⁶ On the other hand are scholars who think of tort law more as “public law”—including law and economics scholars—focus on deterrence, including the overall minimization of accidents and the efficient investment of resources in care and precaution.²⁷ Their primary interest is not in achieving a just result in the instant case, or in making a wrongdoer pay for the harms she or he may have caused, but in creating efficient incentives for future conduct.²⁸

More troublesome is an outgrowth of deterrence theory that treats tort law as a vehicle for compensation and justifies imposition of liability—including joint and several liability, strict products liability, and vicarious liability—on the ground that defendants have deeper pockets and are in a better position to effectively spread these costs.²⁹ Here we see a departure from the basic concept of tort: that a wrongdoer should be footing the bill for the harm he or she wrongfully causes. The focus shifts away from the historical concept of wrongdoing and toward the concept of facilitating compensation from someone capable of funding it.³⁰ Under these conceptions of tort law, judges and courts assumed a policy-making role, balancing economic and societal interests as they see fit, in what might be characterized as an inherently legislative act—and what some have accordingly condemned as an “unprincipled exercise of political power.”³¹

²⁶ Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802–03 (1997); Michael Wells, *Civil Recourse, Damages-As-Redress, and Constitutional Torts*, 46 GA. L. REV. 1003, 1009–10 (2012).

²⁷ Schwartz, *supra* note 26, at 1819. Schwartz argues that these two purposes can be reconciled in a tort system that effectively serves both purposes, much as criminal law serves purposes of both retribution and deterrence. *Id.* at 1834.

²⁸ *Id.* at 1818.

²⁹ Jeffrey O’Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 146, 153 (1999); see also, e.g., *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436, 440–45 (Cal. 1944) (Traynor, J., concurring). None of these authors use the term “deep pockets” and would probably chafe at such a characterization of their position. Nonetheless, there is little question that juries can be influenced by a defendant’s deep pockets to find liability and award damages, and tort law’s formal recognition of “compensation” as a policy objective has only facilitated and encouraged their ability to do so.

³⁰ At the same time, various types of insurance have emerged and have been utilized to serve the larger purposes of providing compensation, through cost spreading, quite regardless of concepts of fault or moral wrong. O’Connell & Robinette, *supra* note 29, at 137–38.

³¹ Geistfeld, *supra* note 16, at 384 (citing Goldberg, *supra* note 16).

Nonetheless, the compensation priority has taken hold in modern tort law. As articulated by the Hawai'i Supreme Court: "[T]ort law is primarily designed to vindicate social policy."³² And the first social policy to be vindicated is "compensating injured plaintiffs."³³ By the late 1980s many courts had weighed in to agree that the "compensation of victims is the main function of tort law."³⁴ Accordingly, we have adopted tort doctrines that focus less on accountability, or even deterrence, and more on finding a way to access a deep pocket so victims of accidents can get the compensation they need, compensation that is particularly important in an era of costly medical care.³⁵ This approach conceives of the tort system as a type of insurance scheme: losses are spread industry-wide, with consumers sharing some of that burden, and in return the public can expect compensation from the industry for the injuries it inflicts. Uninsured victims thereby get access to compensation for their injuries. Mark Geistfeld characterized it in precisely these terms, based in large part on the fact that so few people have adequate health insurance coverage:

[H]ealth insurance was not widely available in the United States until the 1950s. Not surprisingly, accidental injuries were often financially ruinous for individuals in this era. For these reasons, many tort scholars in the first half of the twentieth century maintained that tort compensation supplies a justifiable form of insurance for accident victims.³⁶

Despite the historical notion that tort liability should be tied to the wrongfulness of the defendant's conduct and the need to "make it right," or even to ensure optimal levels of deterrence, twentieth century trends in tort liability appear, in practice, to have strayed significantly and unapologetically from those principles.³⁷ While some torts scholars may have embraced the shift,³⁸ public confidence in the system

³² Francis v. Lee Enters., Inc., 971 P.2d 707, 712 (Haw. 1999) (emphasis in original).

³³ Steigman v. Outrigger Enters., Inc., 267 P.3d 1238, 1246–47 (Haw. 2011). Notably, the "second" policy is to "prevent injury . . . by providing incentive to deter negligent acts." *Id.* at 1247.

³⁴ Stephen Sugarman, *Serious Tort Law Reform*, 24 SAN DIEGO L. REV. 795, 797–98, 798 n.5 (1987) ("The California Supreme Court has been especially candid about viewing tort law fundamentally as a vehicle for compensating injured victims." (citations omitted)).

³⁵ See John Hasnas, *What's Wrong with a Little Tort Reform?*, 32 IDAHO L. REV. 557, 570 (1996) ("The thinking seems to have been that compensating injured parties at the expense of deep pockets who could afford it was not only fair, but would provide an incentive to avoid the dangerous practices likely to cause injury.").

³⁶ Geistfeld, *supra* note 16, at 413 (citations omitted).

³⁷ See generally *id.*

³⁸ *Id.*; O'Connell & Robinette, *supra* note 29.

is low, with the majority of the public believing that the “[l]aws . . . make it too easy to sue.”³⁹ Nonetheless, as long as health insurance in the United States is unaffordable, much less universal, there will be tremendous pressure on the tort system to play this compensation role.

Various torts scholars have expressed concern about—or even contempt for—tort law’s increased emphasis on facilitating compensation for injuries. When Gary Schwartz attempted to reconcile the roles of corrective justice and deterrence for tort law, he dismissed the competing compensation—or loss-spreading—purposes in a footnote, suggesting that tort law cannot be justified on such terms:

[The] negligence standard makes no sense if loss-spreading is assumed to be a primary goal of the law: only a small fraction of all injuries whose losses might be advantageously spread are caused by the negligence of any third party (or any product defect). Furthermore, the tort system’s insistence on proof of elements such as negligence and defect assures that the tort system will deliver compensation only after substantial delays and considerable contention. These features seem inconsistent with any loss distribution rationale for tort law.⁴⁰

Similarly, Patrick Atiyah—coming from a very different perspective—has condemned the use of tort law to achieve insurance-type compensation goals. In his book, *The Damages Lottery*,⁴¹ he attacked the tort system’s effectiveness in achieving any of these purposes and suggests that the tort system be replaced with comprehensive insurance systems. O’Connell and Robinette summarize his argument as follows:

Why, then, Atiyah asks, resort to the tort system that, with its huge fortuities, delays, and transaction costs, makes a mockery of insurance principles—when insurance is designed, after all, to compensate for unmanageable losses with reasonable promptitude, certainty, and efficiency?

³⁹ Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears:*” *Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*, 50 DEPAUL L. REV. 453, 464 (2000). It is likely, however, that the public’s overwhelmingly low opinion of the tort system has been influenced by a concerted campaign from tort reform advocates. See generally *id.*; Robert A. Kagan, *How Much Do Conservative Tort Tales Matter?*, 31 L. & SOC. INQUIRY 711 (2006); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437 (2006).

⁴⁰ Schwartz, *supra* note 26, at 1818 n.128. Quoted and discussed further in O’Connell & Robinette, *supra* note 29, at 146 n.58 (“We assume Schwartz uses the terms ‘compensation’ and ‘loss distribution’ interchangeably. . . . [Elsewhere], Schwartz discusses tort law and compensation in a more extensive and balanced way, while still rejecting ‘loss spreading as [a justification] . . . for tort law.’” (citations omitted)).

⁴¹ PATRICK S. ATIYAH, *THE DAMAGES LOTTERY* 189 (1997).

Atiyah is so discouraged by the inadequacies of tort law as a compensation device that he would not only abandon compensation as a goal of tort law itself but would largely abandon all personal injury law as well (except for instituting a no-fault scheme for auto accidents).⁴²

These problems with the tort system, highlighted by Professors Schwartz and Atiyah, make it a particularly poor vehicle for carrying out a compensation-focused agenda.

II

INEFFICIENCIES AND INEFFECTIVENESS OF THE TORT SYSTEM

The gap between the theory and the practice looms large in torts and, especially when coupled with complaints about the expense and inefficiency of the tort system, prompts widespread dissatisfaction with the tort system and with personal injury lawsuits in particular. These problems with the system have been thoroughly documented elsewhere, of course—particularly by advocates for the spate of tort reform initiatives proposed and enacted in the various states in recent years.⁴³ For our purposes, however, the legitimate problems with the tort system can be summarized in a few key bullet points:

- The transaction costs of tort litigation are staggeringly high, distorting outcomes.
 - Many victims of accidents get nothing for their injuries because they cannot afford to bring suit against the person or entity they blame for the harm.⁴⁴

⁴² O'Connell & Robinette, *supra* note 29, at 148 (citing ATIYAH, *supra* note 41, at 186–89).

⁴³ To be sure, the tort reform agenda has not focused on the larger purposes of the law—to hold tortfeasors accountable for their harmful conduct or to deter tortious behavior, or even to provide more efficient and meaningful compensation to victims. The focus of most such reforms has been just to limit liability in some form or another. Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 654 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)), *quoted and discussed in* Davies, *supra* note 7, at 129.

⁴⁴ Joe Palazzolo, *We Won't See You in Court: The Era of Tort Lawsuits Is Waning*, WALL ST. J. (July 24, 2017 5:09 pm), <https://www.wsj.com/articles/we-wont-see-you-in-court-the-era-of-tort-lawsuits-is-waning-1500930572> [<https://perma.cc/8C3U-T79P>]; *see also* DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE* (2016) (setting forth a full range of reasons people don't sue, including but not limited to the expense in time, energy, and money of bringing suit).

- Contingency fees, designed to improve access to justice, help only those victims whose claims involve high dollar amounts.⁴⁵
- The cost and time it takes to go through a trial is so great that the parties have powerful incentives to settle before trial, and the compromise settlement is likely to give the victim less than her full losses.⁴⁶
- Even nonnegligent defendants, who are ultimately exonerated of any tortious behavior, may be subjected to crushing expenses in defending a suit.⁴⁷
- Nonnegligent defendants may end up paying “nuisance” settlements to avoid the cost of litigating, punishing the innocent.⁴⁸
- Such nuisance settlements may encourage even more meritless claims as the system has the potential to enable this type of extortion.⁴⁹
- Compensation is incomplete.
 - Access to justice is difficult and expensive; accordingly, many victims never file claims for their losses (or their full losses) and go entirely uncompensated.⁵⁰

⁴⁵ Plaintiffs’ lawyers are insufficiently compensated unless the claim generates a substantial economic recovery from which they can claim a percentage as their attorneys’ fees. Wronged and injured individuals whose losses are either too low, or not monetizable (e.g., losses that are sentimental in nature—such as the companionship of a cherished pet—are typically uncompensated in our system, even though the damage done and the losses felt by the victim may be very acute). See Palazzolo, *supra* note 44.

⁴⁶ The time between filing a lawsuit and going through a trial can take months or even years. Additionally, many states have capped noneconomic damages and medical-malpractice recovery which in combination with increasing legal fees further incentivizes parties to settle for a smaller amount or lawyers to turn away potential plaintiffs with small claims. *Id.*

⁴⁷ Total litigation costs, including attorney’s fees for a defendant, can be as high as thirty percent of the total compensation being demanded by the plaintiff. Joni Hersch & Kip Viscusi, *Tort Liability Litigation Costs for Commercial Claims*, 9 AM. L. & ECON. REV. 330, 331 (2007).

⁴⁸ See Steven B. Hantler et al., *Is the “Crisis” in the Civil Justice System Real or Imagined?*, 38 LOY. L.A. L. REV. 1121, 1141 (2005).

⁴⁹ It is hard to know, however, just how much “frivolous” litigation actually occurs. See generally Lance P. McMillian, *The Nuisance Settlement “Problem”: The Elusive Truth and a Clarifying Proposal*, 31 AM. J. TRIAL ADVOC. 221 (2007).

⁵⁰ Saks, *supra* note 9, at 1185, 1189. While the consumer litigation funding industry was developed to alleviate some of the expenses associated with litigation and increase access to the civil justice system, it comes with host of its own problems such as astronomically high fees and interest rates that can often leave the vulnerable personal injury plaintiff owing double or triple the advanced amount, ultimately eating away at any additional compensation

- Even in the rare case when the judgment gives the victim full compensation for all her losses, her attorney keeps a substantial share of it.⁵¹
- This is a particular problem when the plaintiff is claiming medical expenses she has already been billed; if one-third of the medical expenses award goes to her attorney, she still can't pay her medical bills.
- As a practical matter, plaintiffs may need to seek extra compensatory damages, for pain and suffering, emotional distress, and loss of enjoyment of life, as well as punitive damages in order to generate a large enough award to cover the medical expenses after paying the contingent fee.⁵²
- Court opinions sometimes consciously err on the side of overcompensating the plaintiff, recognizing that a substantial portion of the recovery will go to the lawyers.⁵³
- Plaintiffs' pushing for these extra damages occasionally produce an extraordinarily high recovery.
 - The odd high-recovery case can undermine public confidence that the system is fair and reasonable.⁵⁴

the plaintiff was able to get with the help of the funder in the first place. See Nicholas Beydler, *Risky Business: Examining Approaches to Regulating Consumer Litigation Funding*, 80 UMKC L. REV. 1159, 1159–60 (2012); see also Palazzolo, *supra* note 44 and accompanying text.

⁵¹ Contingency fees are usually in the range of thirty to forty percent of whatever compensation the plaintiff is awarded. See F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 453 (2006).

⁵² See *Seffert*, 364 P.2d at 345 (Traynor, J., dissenting) (“[A]wards for pain and suffering serve to ease plaintiffs’ discomfort and to pay for attorney fees for which plaintiffs are not otherwise compensated.”); see also Philip L. Merkel, *Pain and Suffering Damages at Mid-Twentieth Century: A Retrospective View of the Problem and the Legal Academy’s First Responses*, 34 CAP. U. L. REV. 545, 577 (2006) (citing Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 477 (1959) (“Morris acknowledged an argument of personal injury lawyers that pain and suffering damages were used to pay the contingent fee of the plaintiff’s attorney, but he called the damages ‘a clumsy substitute.’”)).

⁵³ See, e.g., *Helfend v. S. Cal. Rapid Transit Dist.*, 465 P.2d 61, 68 (Cal. 1970) (justifying the excess recovery that the collateral source rule generates on the ground that it “partially serves to compensate for the attorney’s share”); Patricia C. Bradford, *Measuring Tort Damages for Loss of Earnings Without Deducting Income Taxes: A Wisconsin Rule Which Lost Its Rationale*, 70 MARQ. L. REV. 210, 230 (1987) (“With respect to attorney’s fees, courts have reasoned that any overcompensation the plaintiff receives because the award for lost earnings is not reduced by taxes is offset by the fact that the plaintiff does not receive the entire award because he must pay his attorney.”).

⁵⁴ See, e.g., McMillian, *supra* note 49, at 228 (explaining that the accumulation of anecdotes, such as the McDonald’s hot coffee case, that on the surface appear to be injustices develop a societal consciousness that America is a lawsuit-happy culture when in reality the cases are usually much more nuanced).

- The occasional high-recovery case may cripple or bankrupt a defendant, and even an entire industry.⁵⁵
- The occasional high-recovery case may shock the insurance industry and prompt premium increases that must be borne by a wide cross-section of society who have never engaged in tortious activity.⁵⁶
- Deterrence purposes are poorly served by the tort system as well.
 - The costs of judgments are typically born by the defendants' insurers, not by the defendants themselves.⁵⁷
 - Products liability (and other forms of strict liability) burden defendants who are not, in fact, negligent—e.g., innocent sellers of products later shown to be defective are liable under these laws in most states and will be left to carry the full freight of liability, particularly if the manufacturer of the defective product is insolvent or beyond the court's jurisdiction.⁵⁸
 - Negligence or strict liability is so easily found, in many cases, that no one can assume that they can avoid liability simply by exercising reasonable care; everyone must anticipate, and insure against, legal liability.⁵⁹

⁵⁵ See, e.g., Ben Berkowitz, *Special Report: The Long, Lethal Shadow of Asbestos*, REUTERS (May 11, 2012 4:03 AM), <https://www.reuters.com/article/us-usa-asbestos-lawsuits/special-report-the-long-lethal-shadow-of-asbestos-idUSBRE84A0J920120511> [<https://perma.cc/W3D7-KQ7N>] (“By government estimates, about 100 companies have been forced into bankruptcy proceedings because of asbestos liabilities—including construction-materials and industrial heavyweights such as Johns Manville (now a part of Berkshire Hathaway Inc), USG Corp and Owens Corning.”).

⁵⁶ Andrea Dickinson & Meg Sutton, *The Ripple Effect of Social Inflation and Nuclear Verdicts on the Insurance Industry*, AMWINS (Dec. 8, 2020), <https://www.amwins.com/resources-insights/article/the-ripple-effect-of-social-inflation-and-nuclear-verdicts-on-the-insurance-industry> [<https://perma.cc/X754-LMUF>] (describing how “nuclear verdicts” have shaken the insurance industry); see, e.g., Dan Murray et al., *Understanding the Impact of Nuclear Verdicts on the Trucking Industry*, AM. TRANSP. RSCH. INST. 50 (June 2020), <https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf> [<https://perma.cc/MKP6-3BSA>].

⁵⁷ See Kenneth S. Abraham, *Tort Luck and Liability Insurance*, 70 RUTGERS UNIV. L. REV. 1, 7–8 (2017) (“Even by my conservative calculation, liability insurance pays roughly \$165 billion, or 71%, of the \$230 billion in annual tort liability costs. . . . The true figure is probably closer to 80% or more.”).

⁵⁸ CONG. RSCH. SERV., SELECTED PRODUCTS LIABILITY ISSUES: A 50-STATE SURVEY (2005), https://www.everycrsreport.com/files/20051013_RL32560_8c8ec5ee5b46f07a994e3dcd6a979488a55b3dd5.pdf [<https://perma.cc/N8S6-SJ5A>].

⁵⁹ This is especially true under vicarious liability doctrines such as respondeat superior which makes employers legally responsible for wrongful acts of an employee or agent while working within the scope of their employment or agency. As our modern society has made

- Learned Hand reasonableness isn't applied in medical malpractice cases—doctors may be held liable for medical decisions that are perfectly reasonable under *Carroll Towing*;⁶⁰ indeed, defensive medicine continually pushes the medical-malpractice liability standard higher.⁶¹

Of course, there has been a plethora of so-called “tort reform” initiatives designed to remedy these failures of the tort system, or at least to temper their impact.⁶² But such initiatives—caps on pain and suffering awards, caps on punitive damages, etc.—pushed by the insurance industry and the business community respond to the problems of the odd high-recovery case and have focused on limiting recovery by the few tort victims who are actually getting significant compensation for their injuries.⁶³ Needless to say, this type of reform is not making the system more effective in any of its arguable purposes: corrective justice, deterrence, or even victim compensation. Indeed, most of the tort reform agenda acts not to “fix” the system or make it more effective, but only to limit liability in some form or another; it is both narrowly focused and transparently “fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system.”⁶⁴

huge advances in information technology, the ability of one party to “police” the acts of another makes it easier for plaintiffs to establish that an employer-employee or agency relationship existed between the party and the actual tortfeasor they could have reasonably policed. Rory Van Loo, *The Revival of Respondeat Superior and Evolution of Gatekeeper Liability*, 109 GEO. L.J. 141, 156–59 (2020).

⁶⁰ Schwartz, *supra* note 10, at 1361.

⁶¹ Kenneth De Ville, *Act First and Look Up the Law Afterward?: Medical Malpractice and the Ethics of Defensive Medicine*, 19 THEORETICAL MED. & BIOETHICS 569, 578 (1998). Because the duty of care in medical malpractice cases is the type of care that a reasonably competent and skilled health care professional, with a similar background and in the same medical community, would have provided under the circumstances, medical defendants can be expected to avoid liability (playing it safe) by giving a level of care that meets or exceeds that standard. David Goguen, *What Is the “Medical Standard of Care” in a Medical Malpractice Case?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-the-medical-standard-care-malpractice-case.html> [<https://perma.cc/E9FP-H6G2>]. Given the uncertainty of the ultimate determination, a rational actor (and even more so, a risk-averse actor) would err on the side of giving a slightly higher standard of care than what they perceive to be the applicable standard. But if most competent medical professionals are exceeding that standard, it will only set a new standard at that higher level of care. And that dynamic should be expected to exert continual upward pressure on the standard of care.

⁶² See CONG. BUDGET OFF., THE EFFECTS OF TORT REFORM: EVIDENCE FROM THE STATES (2004), https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/report_2.pdf [<https://perma.cc/P7QY-RMB7>].

⁶³ See, e.g., Hubbard, *supra* note 51, at 493.

⁶⁴ Page, *supra* note 43, at 654.

A. Costs of the U.S. Tort System vs. Costs in Other Countries

Economists have attempted to tally the cost of our tort system, both to the individuals implicated in it, and to the economy and society as a whole. Contrasting those figures with the cost of tort systems in other countries makes a strong case that the U.S. system is far from ideal.⁶⁵ When compared with an array of European countries, for example,

[t]he U.S. has the highest liability costs as a percentage of GDP of the countries surveyed, with liability costs at 2.6 times the average level of the Eurozone economies . . . [and] four times higher than those of the least costly European countries in our study – Belgium, the Netherlands and Portugal.⁶⁶

There are many reasons tort liability may be lower in these countries, including the fact that many of them rely far more heavily on government regulation of industry to ensure safety.⁶⁷ In the American politics, on the other hand, deregulation has long been a popular concept heralded by President Ronald Reagan—and many in the Republican leadership—since as a necessary condition for economic growth.⁶⁸ And if the government does not regulate industry to ensure safety, the tort system has a far more compelling role to play in placing

⁶⁵ CONG. BUDGET OFF., THE ECONOMICS OF U.S. TORT LIABILITY: A PRIMER 20 n.5 (2003) (“[I]n 2000, tort costs equaled 1.9% of gross domestic product in the United States, compared with 1.7% in Italy and 1.3% in Germany—the next two closest countries.”), <https://www.cbo.gov/sites/default/files/108th-congress-2003-2004/reports/10-22-tortreform-study.pdf> [<https://perma.cc/M3KD-3A7Z>]; cf. Richard Posner, *Is the Tort System Costing the United States \$865 Billion a Year?*, THE BECKER-POSNER BLOG (Apr. 1, 2007), <https://www.becker-posner-blog.com/2007/04/is-the-tort-system-costing-the-united-states-865-billion-a-year-posner.html> [<https://perma.cc/P8EJ-Z88D>] (disputing the conclusions of Tillinghast-Towers Perrin, and suggesting that the tort system may not be as costly as claimed therein).

⁶⁶ U.S. CHAMBER INST. FOR LEGAL REFORM, INTERNATIONAL COMPARISONS OF LITIGATION COSTS: CANADA, EUROPE, JAPAN, AND THE UNITED STATES 2 (2013), https://institutelegalreform.com/wp-content/uploads/media/ILR_NERA_Study_International_Liability_Costs-update.pdf [<https://perma.cc/2RGK-PD77>] (“Features of the legal environment in each country are highly correlated with litigation costs, implying that changes to the liability system may have a substantial effect on costs. A common law (rather than civil law) tradition and a high number of lawyers per capita are strong indicators of higher litigation costs.”).

⁶⁷ See Elbert R. De Jong et al., *Judge-Made Risk Regulation and Tort Law: An Introduction*, 9 EUR. J. RISK REG. 6, 6 (2018) for a discussion by European scholars of the novelty of judge-made law, which ultimately regulates the conduct of people outside the litigation. The suggestion is that there is a role for tort liability here *because* the government has failed in its role as risk regulator. *Id.* at 7.

⁶⁸ Will Kenton, *Reaganomics*, INVESTOPEDIA (May 25, 2021), <https://www.investopedia.com/terms/r/reaganomics.asp> [<https://perma.cc/GAD7-45NV>].

a check on industry practices that endanger the people and their property.⁶⁹

It is worth noting as well, however, that each of the three nations with the lowest tort costs—Belgium, Netherlands, and Portugal—has an effective system of Universal Care,⁷⁰ which, as is argued below, dramatically decreases the need to rely on the tort claims for healthcare compensation, and therefore reduces demand for tort claims in the first place.

B. Problems with Incentives in the Tort System

The data on costs are certainly disputable, as it is very difficult to measure the full cost of a tort system.⁷¹ We have no way of measuring, for example, the cost to society of leaving tort victims uncompensated.⁷² And even if we could measure costs as to individual victims, it is exceedingly difficult to figure out how many of victims there may be or how much compensation they should be entitled to.⁷³ At the same time, even those who do bring suit typically settle their cases confidentially as an explicit term in the settlement agreement, so it is difficult to determine whether reasonable compensation was ever provided in those cases.⁷⁴ So what motivates tort victims to bring suit

⁶⁹ Susan Rose-Ackerman, *Tort Law as a Regulatory System*, 81 AM. ECON. REV. 54, 55 (1991).

⁷⁰ The Portuguese and Belgian systems are publicly funded and available to everyone. See *Healthcare in Portugal*, ALLIANZ CARE, <https://www.allianzcare.com/en/support/health-and-wellness/national-healthcare-systems/healthcare-in-portugal.html> [https://perma.cc/Y5U4-CYJ7] Dominique Vandijck & Lieven Annemans, *Belgian Healthcare: Overview of the Health System and Financing*, ICU MGMT., Winter 2009/10, at 37, <https://healthmanagement.org/c/it/issuearticle/belgian-healthcare-overview-of-the-health-system-and-financing> [https://perma.cc/4GJN-RQMT] (“The Belgian health system is based on the principles of equal access and freedom of choice, with a Bismarckian-type of compulsory national health insurance, which covers the whole population and has a very broad benefits package.”). The Dutch system still includes a role for private insurance and, like the Affordable Care Act, mandates that everyone buy it through a heavily regulated health insurance market. Dylan Scott, *The Netherlands Has Universal Health Insurance — and It’s All Private*, VOX (Jan. 17, 2020), <https://www.vox.com/policy-and-politics/2020/1/17/21046874/netherlands-universal-health-insurance-private> [https://perma.cc/47LR-W2YQ].

⁷¹ See, e.g., Press Release, Americans for Insurance Reform, Tillinghast’s “Tort Cost” Figures Vastly Overstate the Cost of the American Legal System (Jan. 6, 2004), http://www.centerjd.org/air/pr/Tillinghast_Overstates.pdf [https://perma.cc/YA46-6C47].

⁷² For a compelling discussion of the cost of leaving tort victims un- or under-compensated, see Rick Swedloff, *Uncompensated Torts*, 28 GA. STATE U. L. REV. 721, 727–34 (2012) (addressing the issue in the particular context of intentional torts).

⁷³ In 2015, a study estimated that fewer than two in 1,000 alleged tort victims filed a lawsuit. Palazzolo, *supra* note 44.

⁷⁴ See McMillian, *supra* note 49, at 234–35.

in the first place? The next few sections address this question and how the often-conflicting incentives of other key players—defendants, plaintiffs’ bar, and insurance companies—may be problematic to a plaintiff’s recovery and the tort system as a whole.

1. Incentives for Victims

It stands to reason that victims of injuries, in a system where health care is expensive and many people are either uninsured or underinsured, will be highly motivated to sue in an effort to find some way to pay their medical bills.⁷⁵ Professor Davies acknowledged “the fact that uninsured Americans are forced by need to seek de facto health coverage through the tort system when they are injured.”⁷⁶ As *The Economist* put it, “for millions of Americans, the legal system is also their primary health insurer.”⁷⁷ Therefore, even if the liability claim is weak, and the defendants’ negligence being doubtful or arguable, the victim may feel compelled to give the tort system a try.⁷⁸ Faced with staggering medical debt, victims may see a lawsuit as the best, or only, hope of avoiding bankruptcy.⁷⁹

Some have suggested that the tort system fosters a “sweepstakes” mentality, that plaintiffs are motivated by the potential to strike it rich

⁷⁵ See Christopher J. Robinette, *Harmonizing Wrongs and Compensation*, 80 MD. L. REV. 343, 345 (2021).

⁷⁶ Davies, *supra* note 7, at 124.

⁷⁷ Jeffrey O’Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303, 1304 (1994) (quoting *Sue the Rascals*, THE ECONOMIST (Feb. 13, 1993)).

⁷⁸ Of course, attorneys working on a contingent fee basis are more reluctant to take a weak case since they only get compensation contingent on winning. But as the amount in controversy rises the litigation costs tend to rise at a slower rate so weaker cases with a potential for a large recovery may sway reluctant attorneys to take the case. William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 711–12 (2016).

⁷⁹ Lorie Konish, *This is the Real Reason Most Americans File for Bankruptcy*, CNBC (Feb. 11, 2019), <https://www.cnbc.com/2019/02/11/this-is-the-real-reason-most-americans-file-for-bankruptcy.html> [<https://perma.cc/6KNV-6V76>]; Kimberley Amadeo, *Medical Bankruptcy and the Economy*, THE BALANCE (Apr. 30, 2021), <https://www.thebalance.com/medical-bankruptcy-statistics-4154729> [<https://perma.cc/B3EK-KLF9>]; *but see* Salvador Rizzo, *Sanders’s Flawed Statistic: 500,000 Medical Bankruptcies a Year*, WASH. POST (Aug. 28, 2019), <https://www.washingtonpost.com/politics/2019/08/28/sanderss-flawed-statistic-medical-bankruptcies-year/> [<https://perma.cc/DS4L-PK2J>] (suggesting that, while medical expenses may have contributed to hundreds of thousands of the bankruptcies in America, there is evidence to suggest that they have caused only tens of the thousands bankruptcies).

with a tort claim.⁸⁰ The evidence suggests, however, that comparatively few plaintiffs bring suit motivated by the desire to get rich.⁸¹ However, their lawsuit may still be about money, motivated by a desire to recover the expenses the accident has imposed on them and their need to cover those expenses. In a Rand study, fifty-two percent of plaintiffs surveyed about their reasons for suing said that rationale “I needed someone else to pay me compensation because I had no other way to cover all my expenses” was “very important.”⁸² As Mark Rothstein observed, “Even though financial compensation is not the only reason why injured patients sue, it is an important reason, and the need to pay for future medical bills is a key element of the financial motivation.”⁸³

The well-documented “endowment effect” in economics suggests that people will place a much higher value on keeping what they have than they will on acquiring something they have never had.⁸⁴ This economic principle predicts the behavior of tort litigants: willing to sue to avoid being stripped of their assets and standard of living by a tort injury, but far less willing to resort to litigation to claim money they have never owned, had claim to, or even dreamed of possessing. The endowment effect suggests that disproportionately, tort plaintiffs will sue to recover their losses far more often than they will sue for a chance at any kind of windfall.⁸⁵

2. *Incentives for Defendants*

The fear of liability creates incentives for defendants to take precautions, including issuing warnings with posted signs and product labeling. Strict adherence to a Learned Hand analysis would, theoretically at least, lead to an optimal level of precaution—where the expenditures on precaution are legally required only where the

⁸⁰ See TAMARA RELIS, PERCEPTIONS IN LITIGATION AND MEDIATION: LAWYERS, DEFENDANTS, PLAINTIFFS, AND GENDERED PARTIES 33–41 (2009).

⁸¹ *Id.* at 42–46.

⁸² DEBORAH R. HENSLER, ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 171 (1991), cited in Schwartz, *supra* note 10, at 1350.

⁸³ Mark A. Rothstein, *Health Care Reform and Medical Malpractice Claims*, 38 J. LEGAL MED. ETHICS 871 (2010).

⁸⁴ Herbert Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J.L. STUDIES 225 (1991).

⁸⁵ There is considerable evidence as well that plaintiffs’ primary motivations are not financial at all. While both plaintiffs’ and defendants’ attorneys believe that plaintiffs’ primary incentive is financial, plaintiffs themselves speak of other motivations. RELIS, *supra* note 80, at 44–46. They want a chance to be heard, moral vindication, acknowledgement that they have been treated unjustly. *Id.* They want the defendant to admit responsibility and apologize, and to deter similar events. *Id.*

precautions would yield benefits that outweigh their costs.⁸⁶ The trends in tort law, however, have not been so limiting; liability is found, and deep pockets are tapped, without strict adherence to Hand-type balancing.⁸⁷ The inherent uncertainty that accompanies shifting standards may lead to over-precaution—including the ceasing of certain activities altogether—which is not only wasteful but highly disruptive of economic activity.⁸⁸ The costs of over-deterrence is not easy to measure, but it may be considerable, as explained by Walter Olson:

[S]ome of the costs of overdeterrence can be measured fairly directly, if partially, and given monetary price tags of a sort. . . . Diverse sources agree that hundreds of millions of dollars, if not more, are spent on medical tests that have been ordered less to prevent misdiagnosis than to stave off liability. . . . Many of the economic values society sacrifices in pursuit of fuller liability are less easily translated into cash terms: the enjoyment of rock faces and hiking paths now put off limits to outdoor enthusiasts, the full usefulness in expert hands of a machine hobbled by “idiot-proofing,” the advice value of a retired business leader who quits a hospital board for lack of insurance. These costs do not show up as direct expenditures on anyone’s books but are just as real and in principle might be assigned a price tag.⁸⁹

At times, the warnings and labels reach absurd proportions, which only brings the tort system into further disrepute.⁹⁰ The fear of liability may result in over-deterrence: the removal of playground equipment (presumably the “fun” structures), the forbidding of children to run, and even the closure of parks and swimming pools altogether—depriving

⁸⁶ See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (1947).

⁸⁷ Schwartz, for example, explains how medical malpractice standards now in place impose liability far more readily than Learned Hand’s *Carroll Towing* opinion would justify. Schwartz, *supra* note 10, at 1361.

⁸⁸ See generally Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON & ORG. 279 (1986) (discussing how uncertainties surrounding legal liability may result in wasteful overcompliance while noting how uncertainty may also result in wasteful undercompliance; either way, uncertainty undermines efforts at creating efficient incentives).

⁸⁹ Walter Olson, *Overdeterrence and the Problem of Comparative Risk*, 37 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 42, 43 (1988).

⁹⁰ See, e.g., George Will, Opinion, *Litigation Nation*, WASH. POST (Jan. 11, 2009), <https://www.washingtonpost.com/wp-dyn/content/article/2009/01/09/AR2009010902353.html> [<https://perma.cc/MJ9P-8V9J>] (reviewing PHILIP HOWARD, *LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW* (2009)) (“The warning label on a five-inch fishing lure with a three-pronged hook ‘Harmful if swallowed’; the label on a letter opener says ‘Safety goggle recommended.’”).

the public of *any* recreational use of such spaces and facilities.⁹¹ Products liability exposure may deter companies from introducing innovative products or prompt them to pull from the market existing products that pose minimal risks of harm—the potential liability being too great.⁹² There may even be incentives to avoid testing products for their safety; as such testing is expensive, and if it shows *any* risk to anyone, it may create liability even where lack of testing would not.⁹³ In many of these cases, society may suffer serious losses from the over-deterrence, including “defensive medicine,” which has been estimated to cost between \$45 billion and \$300 billion each year.⁹⁴ One lawsuit has the potential to “spoil it for everyone,” intimidating potential defendants into withholding beneficial products and services from the market (and from the public) altogether, lest they expose themselves to potentially ruinous litigation. Senator Joe Lieberman explained this in a Senate hearing on legislation related to products liability:

I have been approached again and again by businessmen and women, particularly those from small businesses, who have told me that their fear of product liability is affecting their willingness to put new products on the market and, therefore diminishing their need to either retain or hire new workers. . . . They tell me they fear not only the cost of awards, but the cost of litigation, and the cost of insurance.⁹⁵

⁹¹ See, e.g., Dan Uhlinger, *Towns' Worst Fears Realized: Suits Follow Playground Mishaps*, HARTFORD COURANT (Sept. 24, 1999), <https://www.courant.com/news/connecticut/hc-xpm-1999-09-24-9909240112-story.html> [<https://perma.cc/JV79-39D9>]; David Mattau, *NJ Homeowner Associations Not Opening Pools for Fear of COVID Lawsuits*, N.J. 101.5 (May 6, 2021), <https://nj1015.com/nj-homeowner-associations-not-opening-pools-for-fear-of-covid-lawsuits/> [<https://perma.cc/S7A5-34SA>] (fear of legal liability forces swimming pool closure during COVID-19 pandemic); *Monmouth Beach Condo Must Keep its Pool Closed Because of COVID-19 Liabilities*, NEWS 12 N.J. (May 7, 2021), <https://newjersey.news12.com/monmouth-beach-condo-must-keep-its-pool-closed-because-of-covid-19-liabilities> [<https://perma.cc/FYF3-3UEM>] (stating same).

⁹² Jürgen O. Skoppek, *The Market Consequences of Product Liability Litigation*, MACKINAC CTR. FOR PUB. POL'Y (July 1, 1989), <https://www.mackinac.org/6266> [<https://perma.cc/EY86-6BJ3>].

⁹³ *Id.*

⁹⁴ Eric D. Katz, *Defensive Medicine: A Case and Review of its Status and Possible Solutions*, W.J. EMERGENCY MED. (Sept. 9, 2019), <https://westjem.com/cpc-em/defensive-medicine-a-case-and-review-of-its-status-and-possible-solutions.html> [<https://perma.cc/256W-X8P3>]; Thomas Sullivan, *Defensive Medicine Adds \$45 Billion to the Cost of Healthcare*, POL'Y AND MED. (May 5, 2018), <https://www.policymed.com/2010/09/defensive-medicine-adds-45-billion-to-the-cost-of-healthcare.html> [<https://perma.cc/83A5-CGTC>].

⁹⁵ *Hearing on Product Liability Laws and Their Impact on Small Business Innovation and Competitiveness Before the S. Comm. on Small Bus.*, 102nd Cong. 1–2 (1991) (remarks of Sen. Lieberman).

He went on to note that the

perception . . . that product liability laws now act not as a rational system to punish those who act irresponsibly, but as a kind of random lottery of risk, regardless of fault. So those business people are overreacting by withholding new and useful products from the market and . . . abstaining from competing with foreign firms [not subject to a comparable risk of liability].⁹⁶

3. Incentives for the Plaintiffs' Bar

Contingency fees are generated as a function of the total recovery, so there are great incentives to take high-dollar cases. As a matter of simple math and self-interest, it is the amount and probability of the potential recovery, rather than the egregiousness of the defendant's conduct, that motivates a plaintiff's lawyer to take a personal injury case.⁹⁷

Cases with high medical bills are especially attractive because it is hard to dispute such bills; it is easy to tell the defendant that you can't settle for anything less than the medical expenses, and the defendant is hard pressed to characterize such claims as "exaggerated" in any way. Pain and suffering awards, and especially punitive damages awards, are much harder to get: the jury must be persuaded, and it must feel either great sympathy for the plaintiff or great indignation for the defendant.⁹⁸ Defendants are slow to offer much in settlement of such indeterminate claims, *especially* if the medical expenses are low.⁹⁹ Not only is the plaintiff far more likely to sue if she has substantial medical expenses to pay, but she is far more likely to find an attorney willing to bring the suit on her behalf. Lower medical expenses mean a lower recovery

⁹⁶ *Id.* at 2.

⁹⁷ Of course, highly egregious conduct has the potential to generate a high-dollar recovery for a variety of reasons: (1) a defendant may be willing to settle quickly and quietly—and generously—rather than suffer the reputational costs of having their egregious conduct played out before a jury, and before the public at large; (2) a jury is far more likely to return a verdict for the plaintiff and to err on the side of overcompensating (rather than risk undercompensating) a plaintiff who has been victimized by a defendant's egregious conduct; and (3) especially egregious conduct may give rise to punitive damages claims, over and above any compensatory damages paid.

⁹⁸ Brian H. Bornstein, *From Compassion to Compensation: The Effect of Injury Severity on Mock Jurors' Liability Judgments*, 28 J. APPLIED SOC. PSYCH. 1477, 1477 (1998) ("[M]ore severely hurt plaintiffs were more likely to obtain a favorable verdict, even though evidence of liability was held constant. Greater severity [of injuries] influenced liability judgments only insofar as it elicited positive feelings toward the plaintiff or negative feelings toward the defendant.").

⁹⁹ See *infra* note 202 and accompanying text.

overall, and because that should reduce the lawyer's fee, lawyers are more likely to decline such cases, and there will be less litigation overall.

4. Incentives for Insurance Companies

Even if the insurance company knows it will have to pay eventually, there may be compelling reasons for insurance companies to fight tort settlements.¹⁰⁰ They may benefit from the delay.¹⁰¹ They may benefit from earning a reputation for hard bargaining: putting word out on the street that plaintiffs' lawyers shouldn't expect a quick or a generous settlement.¹⁰² These incentives make it difficult for plaintiffs to obtain quick or reasonable settlements and necessarily drive up the attendant transaction costs.

C. Systemic Failure of the Tort System

The upshot is that the U.S. tort system appears to do an underwhelming job of serving its three putative purposes: (1) holding wrongdoers accountable for the harm they cause, (2) deterring tortious conduct, and (3) compensating victims of accidents.¹⁰³ But the third failure may be the most conspicuous—as pursuit of that third purpose may be disruptive of the other two.

Anecdotal information suggests that some tort victims are compensated quite handsomely—enough to alarm those who must pay tort judgments and the public at large¹⁰⁴—the tort system fails to

¹⁰⁰ In *Campbell v. State Farm*, for example, the court heard evidence that State Farm had adopted a performance, planning, and review (PP & R) policy designed to “meet corporate fiscal goals by capping payouts on claims.” *Campbell v. State Farm Mut. Auto Ins. Co.*, 65 P.3d 1134, 1143 (Utah 2001), *rev'd sub nom.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). “[T]he evidence of its PP & R scheme demonstrates that State Farm specifically calculated and planned to avoid full payment of claims, regardless of their validity.” *Id.* at 1149.

¹⁰¹ Jay M. Feinman, *Incentives for Litigation or Settlement in Large Tort Cases: Responding to Insurance Company Intransigence*, 13 ROGER WILLIAMS U. L. REV. 189, 199 (2008) (“Even if an insurance company ultimately has to pay a judgment, there is a financial advantage to delaying the payment and capturing the time value of the money. In recent years companies have paid greater attention to the value of float and therefore have greater incentive to delay or deny payment of large claims.”).

¹⁰² *Id.* at 191–92 (“The [insurance] companies are likely to be hard bargainers, in order to establish their reputation and to discourage easy claims.”).

¹⁰³ See generally ATIYAH, *supra* note 41.

¹⁰⁴ A prime example is the infamous McDonald's hot coffee case. See William J. Chriss, *The External Aspect of Legal Ethics, Hot Coffee, and the Noble Lawyer: Attacks on the Profession and Their Massive Ethical and Social Damage*, 19 TRINITY L. REV. 13, 38–42

generate full recoveries for the overwhelming majority of wrongfully injured persons.¹⁰⁵ Michael Saks gives an example from the area of medical malpractice:

[T]he study of California medical malpractice found that at most only 10% of negligently injured patients sought compensation for their injuries. Even for those who suffered major, permanent injuries (the group with the highest probability of seeking compensation) only one in six filed. The earlier Health, Education, and Welfare study found that only 6% of those negligently injured filed claims. The Harvard Medical Practice Study found that in New York State “eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system.”¹⁰⁶

Professor Paul Weiler makes similar observations in the context of medical malpractice claims, which are equally applicable to all personal injury claims:

Viewed as a form of insurance, the . . . regime has major flaws. . . . [T]ort benefits are doled out in a rather arbitrary manner to some—but not most—deserving victims, and also to those . . . who are not even “deserving” under tort law’s fault-base frame of reference. Even worse, to make payment to the relative handful . . . who do surmount the natural and legal barriers to demonstrating legal entitlement to damages, the . . . system must spend an inordinate amount of both time . . . and money . . . litigating.¹⁰⁷

Even the few who do bring suit, it appears, are unlikely to get sufficient compensation to cover the medical expenses incurred as a result of their injury. Saks concludes, “On average, awards undercompensate losses. A recent study of medical malpractice awards found that each one percent increase in loss resulted in an additional one-tenth to one-twentieth of a percent increase in award.”¹⁰⁸

(2013) (discussing the discrepancy between the media coverage of the McDonald’s hot coffee case and the reality).

¹⁰⁵ See generally Saks, *supra* note 9.

¹⁰⁶ Saks, *supra* note 9, at 1183–84 (citing HARVARD MED. PRAC. STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK, 7–1 (1990); LEON S. POCINCKI ET AL., THE INCIDENCE OF IATROGENIC INJURIES 50, 55 (1973); CAL. MED. ASS’N & CAL. HOSP. ASS’N, REPORT ON THE MEDICAL INSURANCE FEASIBILITY STUDY 101 (Don H. Mills ed., 1977)).

¹⁰⁷ Paul Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908, 915 (1993), quoted in O’Connell, *supra* note 77, at 1303.

¹⁰⁸ Saks, *supra* note 9, at 1272 (citing Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 L. & SOC’Y REV. 997,

But there can be no doubt that the prioritization of compensation in the tort system has undermined the system's ability to pursue its other legitimate objectives. The goals of corrective justice and deterrence are inevitably sacrificed in a system that is trying to compensate injured persons regardless of the wrongfulness of the defendant's conduct or the need to deter the same. The result is to force comparatively innocent (but deep-pocketed) persons to pay—despite their lack of wrongdoing—and to deter a lot of non-tortious behavior, including productive economic activity. We get less justice and less efficiency, all in pursuit of compensation goals that the tort system is poorly equipped to serve.

Of course, if we found more effective, efficient, and comprehensive methods of compensating victims, the tort system might be liberated to focus on corrective justice and deterrence. And, as noted by Professor Stephen Sugarman, we might experience less litigation if the United States similarly provided compensation outside the tort system: “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.”¹⁰⁹ *The Economist* enthusiastically endorsed that outcome, noting that “the best way to slash the number of lawsuits would be to fix America's dreadful health-care system.”¹¹⁰ Thus, there are compelling reasons to believe that Universal Care would, in terms of both quality and quantity of claims, move the tort system's needle in a positive direction.

III INEFFICIENCIES AND INEFFECTIVENESS OF THE HEALTH CARE SYSTEM

Health care and health insurance have become increasingly hot topics in politics in the recent decades and even more so since the Obama administration made it a priority in 2009. At the root of the problem is the fact that health care has become so expensive in the United States that few, if any, Americans can afford to meet their healthcare needs without some type of health insurance, and the market

1019 (1990)). As discussed *infra*, at Section V.B.1, even if the plaintiff is awarded his full losses, the attorneys' fees will cut into a large chunk of that.

¹⁰⁹ Sugarman, *supra* note 20, at 2434–35.

¹¹⁰ O'Connell, *supra* note 77 (quoting THE ECONOMIST commenting that healthcare reform, like tort reform, is “another example where more reason and less passion is sorely needed”). *But see id.* at 1304–06 (disputing that expanding health insurance would decrease tort filings).

for health insurance has been no less dysfunctional than the market for health care.¹¹¹ As a result, a rising number of Americans are becoming saddled with crippling medical debt.¹¹² Those who can find a way to blame others for their medical problems will find powerful incentives to resort to the tort system as a way out of this dilemma,¹¹³ even for long-shot, high-dollar cases that strain and stretch the principles of liability.¹¹⁴ Accordingly, these problems with healthcare costs indicate that the primary source of this crisis is not the failure of the tort system itself, but rather the failure of the healthcare system (or the health insurance system)—more specifically, its failure to make health care affordable and accessible to those who need it.

A. Market Failure in the Healthcare Market

The market for health care is curiously unaffected by many of the free-market forces (e.g., price competition) that might otherwise provide a check on rising costs. Consumers of health care are rarely given the opportunity to make meaningful choices about what care they are willing to pay for or even what it will ultimately cost: the medical services are ordered by the doctor, and the patient typically submits to those services with no idea of what the costs will be.¹¹⁵ The plaintiff then is surprised by the bill later on.¹¹⁶

¹¹¹ See, e.g., Elisabeth Rosenthal, *Those Indecipherable Medical Bills? They're One Reason Health Care Costs So Much*, N.Y. TIMES: MAGAZINE (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/magazine/those-indecipherable-medical-bills-theyre-one-reason-health-care-costs-so-much.html> [<https://perma.cc/DJ72-ZGBE>] (noting that factors contributing to high healthcare costs include runaway drug prices, excessive testing, and sky-high charges for the most basic medical interventions); CHRIS POPE, MANHATTAN INST., CONTINUOUS RENEWABLE COVERAGE: RX FOR AMERICA'S DYSFUNCTIONAL HEALTH-INSURANCE SYSTEM 5–6 (2020), <https://media4.manhattan-institute.org/sites/default/files/rx-americas-dysfunctional-health-insurance-system-CP.pdf> [<https://perma.cc/8YQJ-R34E>] (detailing the dysfunction of the health insurance market).

¹¹² Krysten Crawford, *America's Medical Debt Is Much Worse than We Think*, STAN. INST. FOR ECON. POL'Y RSCH. (July 20, 2021), <https://siepr.stanford.edu/news/americas-medical-debt-much-worse-we-think> [<https://perma.cc/JU4Q-M2VK>].

¹¹³ Davies, *supra* note 7 and accompanying text.

¹¹⁴ Hubbard, *supra* note 78, at 712 (explaining why it may make rational economic sense to file long shot—or “implausible”—cases, if the stakes are high enough).

¹¹⁵ See, e.g., Rosenthal, *supra* note 111 (discussing how the complex system of billing and coding medical providers use to charge for services enables “sky-high” charges for basic medical care while also keeping patients in the dark on the itemized costs of those services); *but see infra* notes 121–123 and accompanying text.

¹¹⁶ Rosenthal, *supra* note 111.

A related issue is the patient's inability to engage in comparison shopping and gravitate to lower-cost providers. A true free market would involve price competition between healthcare providers which, in turn, would put downward pressure on healthcare pricing as providers competed for patients.¹¹⁷ In actuality, patients have little choice or information on which they might base such a choice.¹¹⁸ Most individuals have a take-it-or-leave-it option to obtain the health insurance provided by their employer.¹¹⁹ Once they "take it," they are stuck with whatever doctors and other healthcare providers are in the insurance company's network.¹²⁰ This puts patients in a position where they are utterly without bargaining power. Unless their insurance company flexes its muscles to bring down costs, patients are almost entirely vulnerable to the exploitative pricing of a monopolist.

In order to help address this problem, the Trump administration launched a 2019 initiative aimed at "improving price and quality transparency in American healthcare."¹²¹ This long-overdue effort acknowledged the severity of the problem and, as it is phased in over the next several years, may help restore some elements of a functional marketplace to the healthcare system.¹²² The industry has resisted those reforms, however, and it remains to be seen how effective the price transparency initiative will be in correcting the market failure.¹²³

¹¹⁷ Chris Seabury, *The Cost of Free Markets*, INVESTOPEDIA (June 24, 2021), <https://www.investopedia.com/articles/economics/08/free-market-regulation.asp> [<https://perma.cc/C22N-95W3>] ("Supply and demand create competition, which helps ensure that the best goods or services are provided to consumers at a lower price.").

¹¹⁸ See, e.g., Helaine Olen, Opinion, *Choosing a Health Insurance Plan Is Not 'Shopping,'* N.Y. TIMES (Nov. 2, 2017), <https://www.nytimes.com/2017/11/02/opinion/health-insurance-shopping-obamacare.html?searchResultPosition=2> [<https://perma.cc/9LCP-FCFV>] ("Only 9 percent of Americans can properly define all four of these vital phrases: health care premium, health plan deductible, out-of-pocket maximum and coinsurance . . .").

¹¹⁹ See KAISER FAM. FOUND., EMPLOYER HEALTH BENEFITS ANNUAL SURVEY 75 (2019).

¹²⁰ See *id.* at 217.

¹²¹ Under Executive Order 13877 (2019), which called for improving price and quality transparency in American healthcare to put patients first, the Department of Health & Human Services, Department of Labor, and Department of the Treasury collectively issued and proposed rules on "transparency in coverage" which in part require hospitals to provide patients with information about the hospital's "standard charges" for over 500 shoppable services. It will be implemented over a four-year period. See 85 Fed. Reg. 72,158 (Nov. 12, 2020).

¹²² *Hospitals Have Started Posting Their Prices Online. Here's How Consumers Will Benefit*, NPR (July 16, 2021, 5:02 AM), <https://www.npr.org/2021/07/16/1016747500/hospitals-have-started-posting-their-prices-online-heres-how-consumers-will-bene> [<https://perma.cc/WFV7-5BP7>].

¹²³ *Id.*

But it should be clear that markets (competitive or otherwise) did not correct this problem; this was a market failure that required a regulatory response.

At the same time, hospitals are not permitted to reject patients from their emergency rooms on the basis of ability to pay.¹²⁴ Those who are impoverished and uninsured are treated, and the bills are written off as uncollectible, leaving the hospital to either take the hit or recoup the losses from other sources.¹²⁵ This rule obviously distorts the market so that prices do not actually reflect the marginal cost of the service, frustrating the efficiency that might otherwise have been achieved by a market equilibrium.

Finally, even if patients did have sufficient information to comparison shop and make meaningful price-based choices about their health care, the market is disrupted by the extreme inelasticity of demand for critical medical services.¹²⁶ Anytime the healthcare decision is a matter of life or death, of course, the decision is likely to be a foregone conclusion—regardless of the price of the service. Desperate buyers

¹²⁴ Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd (1988); *Uninsured and Facing an Emergency? Know Your Rights!*, PATIENT ADVOC. FOUND., <https://www.patientadvocate.org/explore-our-resources/preventing-medical-debt/uninsured-and-facing-an-emergency-know-your-rights/> [<https://perma.cc/2E2E-M2RT>]. This rule is driven by ethical and humanitarian concerns rather than economic efficiency concerns, and it is highly disruptive of the market forces that might otherwise promote efficient market-based solutions. U.S. GEN. ACCOUNTING OFFICE, GAO-01-747, EMERGENCY CARE: EMTALA IMPLEMENTATION AND ENFORCEMENT ISSUES 1 & 11 (2001).

¹²⁵ See Craig Garthwaite et al., *Hospitals as Insurers of Last Resort*, 10 AM. ECON. J. 1 (2018) (concluding that increases in the uninsured population correlates with lower hospital profit margins). See also William C. Hsiao, *How to Fix American Health Care: What Other Countries Can—And Can't—Teach the United States*, FOREIGN AFFS., Jan.–Feb. 2020, at 96, 99 (explaining when one insurance plan negotiates lower prices for services, the provider can charge another insurance plan higher prices to make up the difference resulting in varying prices of the same service by more than 300 percent). Ironically, the uninsured pay much higher rates than the insured because insurance companies can negotiate special rates for those on their plans. Even for those medical services not covered by insurance (e.g., deductibles), the insured pay less than the uninsured. See Kevin Lucia et al., *Balance Billing by Health Care Providers: Assessing Consumer Protections Across States*, THE COMMONWEALTH FUND (June 13, 2017), <https://www.commonwealthfund.org/publications/issue-briefs/2017/jun/balance-billing-health-care-providers-assessing-consumer> [<https://perma.cc/D4XX-8UZV>].

¹²⁶ JEANNE S. RINGEL ET AL., RAND, THE ELASTICITY OF DEMAND FOR HEALTH CARE xi (2002), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1355.pdf [<https://perma.cc/C252-8ZKJ>]; see generally Randall P. Ellis et al., *Health Care Demand Elasticities by Type of Service*, 55 J. HEALTH ECON. 232 (2017).

who have no opportunity to comparison shop are vulnerable to exploitative pricing by the healthcare industry.¹²⁷

For all of these reasons, private, market-based solutions in the health care market are unlikely to produce effective or efficient outcomes. Even the fiercest defenders of private competitive markets recognize that, in cases of market failure, government intervention is warranted.¹²⁸ We see it in the case of natural monopolies, such as utilities, which prompt every state in the union to have a system of regulating utility rates.¹²⁹ We also see it in the case of public goods, such as national defense, where the free-rider problem would otherwise frustrate any market-based equilibrium.¹³⁰ Therefore, the government typically provides the service in these industries and compels everyone to pay for it through taxes.¹³¹

It is not surprising that the failure of the healthcare market is prompting similar calls for government intervention. Many believe the time has come for the government to provide (or to ensure the provision of) medical care and require everyone to pay for it, just as they do for national defense, local fire prevention, policing, libraries, public schools, etc.¹³² If the market fails to provide something so critical to human life in a way that makes it accessible to everyone, alternatives need to be considered.

As discussed below, government intervention in the market for health care may serve not only to keep prices low but to keep costs low as well. This is a lesson we have learned from other countries that have ventured into truly Universal Care, as well as from our own experience with Medicare.¹³³

¹²⁷ See Glenn Melnick, Opinion, *Blame Emergency Rooms for the Out-of-Control Cost of Health Care*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/emergency-rooms-cost-insurance.html> [<https://perma.cc/356T-D8R4>].

¹²⁸ Sean Ross, *How Is a Market Failure Corrected?*, INVESTOPEDIA (Aug. 18, 2020), <https://www.investopedia.com/ask/answers/042115/how-market-failure-corrected.asp> [<https://perma.cc/K4GW-XZRY>] (“Market failures can be corrected through government intervention, such as new laws or taxes, tariffs, subsidies, and trade restrictions.”).

¹²⁹ See generally Travis Kavulla, *There Is No Free Market for Electricity: Can There Ever Be?*, 1 AM. AFFS. 126 (2017) (explaining the development of utility regulation).

¹³⁰ See Richard M. Ebeling, *National Defense and the Fundamental Problem with “Public Goods,”* FOUND. FOR ECON. EDUC. (Mar. 7, 2018), <https://fee.org/articles/national-defense-and-the-fundamental-problem-with-public-goods/> [<https://perma.cc/Q5WD-HYHN>].

¹³¹ *Id.*

¹³² See, e.g., Amy Alspaugh et al., *Universal Health Care for the United States: A Primer for Health Care Providers*, 66 J. MIDWIFERY & WOMEN’S HEALTH 441 (2021).

¹³³ See discussion *infra* Section III.B.

B. Costs of the U.S. Healthcare System vs. Costs in Other Countries

A multiplicity of factors—including, inter alia, the lack of a functional market to keep prices low and the pressures to engage in defensive medicine (arguably driven by the tort system)—have driven the cost of medical care up at rates far beyond that of general inflation rates,¹³⁴ and far beyond the cost of medical care in other countries.¹³⁵ In December 2019, the Health Care Cost Institute published a comparison of healthcare costs in various highly developed nations that demonstrated, in a compelling series of charts, how the U.S. costs were the highest by far.¹³⁶ There are compelling reasons to believe that this

¹³⁴ Kimberly Amadeo, *The Rising Cost of Health Care by Year and Its Causes*, THE BALANCE (Mar. 27, 2021), <https://www.thebalance.com/causes-of-rising-healthcare-costs-4064878>. See also Diane Archer, *Health Care Costs Continue to Rise Faster than Inflation*, JUST CARE (Dec. 11, 2019), <https://justcareusa.org/health-care-costs-continue-to-rise-faster-than-inflation/#:~:text=Axios%20reports%20that%20in%202018,in%20utilization%2C%20fueled%20the%20increase> [<https://perma.cc/8BT7-T76H>] (“[H]igher prices, not an increase in utilization, fueled the increase [of over 4% per year in healthcare spending in 2017 and 2018].”); Fred Pace, *Health Care Costs Continue to Rise Faster than Wages*, HERALD-DISPATCH (Dec. 29, 2019), https://www.herald-dispatch.com/news/health-care-costs-continue-to-rise-faster-than-wages-inflation/article_b13bb940-5253-5564-9c2b-9c99e256a54b.html [<https://perma.cc/7D3Z-7BXZ>]; *New Analysis of Large Employer Health Coverage: The Cost to Families for Health Coverage and Care Has Risen More than 2X Faster than Wages and 3X Faster than Inflation over the Last Decade*, KFF (Aug. 15, 2019), <https://www.kff.org/health-costs/press-release/new-analysis-of-large-employer-health-coverage-the-cost-to-families-for-health-coverage-and-care-has-risen-more-than-2x-faster-than-wages-and-3x-faster-than-inflation-over-the-last-decade/> [<https://perma.cc/QS9T-4SKV>].

¹³⁵ In 2019, health spending per person in the United States was \$10,966—forty-two percent higher than Switzerland, the country with the next highest per capita health spending. Emma Wager et al., *How Does Health Spending in the U.S. Compare to Other Countries?*, HEALTH SYS. TRACKER (Jan. 21, 2022), <https://www.healthsystemtracker.org/chart-collection/health-spending-u-s-compare-countries/#item-start> [<https://perma.cc/3FXT-PX48>].

¹³⁶ John Hargraves & Aaron Bloschichak, *International Comparisons of Health Care Prices from the 2017 iFHP Survey*, HEALTH CARE COST INSTITUTE (Dec. 17, 2019), <https://healthcostinstitute.org/in-the-news/international-comparisons-of-health-care-prices-2017-ifhp-survey> [<https://perma.cc/J2JQ-U8C5>]. Follow the link for a color version of the chart on the following page. Even in black and white, however, it is clear that the USA dots (all at 100%) are far higher than in other countries (with the exception of angiograms and cataract surgery in New Zealand).

is not a simple case of “you get what you pay for.” First, medical outcomes are at least as good in a variety of countries with significantly lower medical expenditures. Richard Knox, an expert on the German healthcare system, contrasted it with the U.S. system as follows:

Nobody can accuse Germany of stinting on care or technology. As the new analysis found, Germany still has more doctors and nurses per capita than we do, about the same number of MRI and CT machines and considerably more hospital beds. Yet it spends half of what the U.S. does on health care per capita, and bests us on measures of population health such as life expectancy, infant mortality and maternal mortality.

....

Nobody seriously thinks one nation’s system could be imposed on any other’s. Still, these international comparisons make the instructive point that America’s fiercely defended reality is not the only way to provide for citizens’ health-care needs. But it is certainly the most expensive way.¹³⁷

In 2018, the United States spent more on health care as a share of the economy (16.9% of its GDP) than any other OECD country¹³⁸ and



Id.

¹³⁷ Richard Knox, *Why Are U.S. Health Costs the World’s Highest? Study Affirms ‘It’s The Prices, Stupid,’* WBUR (Mar. 13, 2018), <https://www.wbur.org/news/2018/03/13/us-health-costs-high-jha> [<https://perma.cc/NNK3-4B2Q>].

¹³⁸ The Organisation for Economic Co-operation and Development (OECD) is an international organization, with 38 member countries—including the most highly developed countries in the West—who work together to promote effective policies and find “solutions to a range of social, economic and environmental challenges.” *About*, OECD, <https://www.oecd.org/about/> (last visited Feb. 24, 2022) [<https://perma.cc/LL8R-WBZK>].

almost twice as much as the average OECD country.¹³⁹ “Despite the highest spending, Americans experience worse health outcomes than their international peers. For example, life expectancy at birth in the U.S. was 78.6 years in 2017—more than two years lower than the OECD average and five years lower than Switzerland, which has the longest lifespan.”¹⁴⁰ Infant mortality rates in 2019 were higher in the United States than in more than fifty other countries.¹⁴¹ Maternal mortality rates in 2017 were higher in the United States than in more than sixty other countries and, unlike most of the rest of the world, have been rising dramatically since 2000 (from twelve to nineteen maternal deaths per 100,000 live births).¹⁴²

The dramatic growth of the medical tourism industry is a testament to the fact that American patients feel that they can get adequate health care in other countries,¹⁴³ and that the cost of the same procedures in the United States are expensive enough to justify the cost of the international travel in order to get access to more affordable healthcare markets.¹⁴⁴

Second, the high quality of the healthcare services provided in the United States does nothing for the significant subset of Americans who cannot afford it in the first place.¹⁴⁵ If only the insured have access to

¹³⁹ Roosa Tikkanen & Melinda K. Abrams, *U.S. Health Care from a Global Perspective, 2019: Higher Spending, Worse Outcomes?*, THE COMMONWEALTH FUND (Jan. 30, 2020), <https://www.commonwealthfund.org/publications/issue-briefs/2020/jan/us-health-care-global-perspective-2019#4> [<https://perma.cc/BEJ7-HJ8N>].

¹⁴⁰ *Id.*

¹⁴¹ See *Mortality Rate, Infant (per 1000 Live Births)*, THE WORLD BANK, <https://data.worldbank.org/indicator/SP.DYN.IMRT.IN> [<https://perma.cc/X2DP-XMU3>].

¹⁴² *Compare Maternal Mortality Ratio (Modeled Estimate, per 100,000 Live Births)*, THE WORLD BANK, <https://data.worldbank.org/indicator/SH.STA.MMRT>, and *Maternal Mortality Ratio (Modeled Estimate, per 100,000 Live Births)—United States*, THE WORLD HEALTH BANK, <https://data.worldbank.org/indicator/SH.STA.MMRT?locations=US> [<https://perma.cc/B4DN-LVAK>].

¹⁴³ *Medical Tourism Global Market Report 2021: COVID-19 Impacts, Growth and Change to 2030*, BUSINESSWIRE (Jun 8, 2021, 10:57 AM), <https://www.businesswire.com/news/home/20210608005855/en/Medical-Tourism-Global-Market-Report-2021-COVID-19-Impacts-Growth-and-Change-to-2030---ResearchAndMarkets.com> [<https://perma.cc/4KL2-CQF5>].

¹⁴⁴ The same procedures may be forty to ninety percent less expensive in other countries versus the United States. Sandra K. Cesario, *Implications of Medical Tourism*, 22 NURSING FOR WOMEN’S HEALTH 269, 270 (2018).

¹⁴⁵ See generally Aaron E. Carroll & Austin Frakt, *The Best Health Care System in the World: Which One Would You Pick?*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/interactive/2017/09/18/upshot/best-health-care-system-country-bracket.html> [<https://perma.cc/YC95-EESJ>].

it, a healthcare system can hardly be praised as the *best* system of health care, no matter the quality of care provided to the few who can afford it.¹⁴⁶ For those who have no access to it, or whose access subjects them to crushing debt, it may be no better than no system at all. Indeed, a system that provided them with minimally adequate health care would be far superior, at least from the perspective of the “have nots.”¹⁴⁷

In other words, the divide between the “haves” and the “have nots” in the United States is depicted in particularly stark terms by the problem of health care.¹⁴⁸ The “haves” continue to have access to very high-quality care and to benefit from a system that fosters innovation; they are sufficiently empowered to ensure that the system that serves them continues to do so.¹⁴⁹ The same is true of those who profit from the status quo: the pharmaceutical industry, health insurers, doctors, and for-profit hospitals.¹⁵⁰ Members of Congress, and many of their biggest donors, are therefore heavily invested in the status quo and actively resistant to any system that might compromise the present system for the benefit of the disempowered in society.¹⁵¹

C. Problems with Incentives in the Healthcare System

The high cost of medical care, which is rising at a far higher rate than inflation,¹⁵² generates a host of difficulties. Soaring costs of health insurance force rational actors who enjoy comparatively good health to forgo the insurance: they are unlikely to need the insurance, and

¹⁴⁶ *Id.*

¹⁴⁷ And the “have nots” were estimated to be around 30 million in 2019. CONG. BUDGET OFF., WHO WENT WITHOUT HEALTH INSURANCE IN 2019, AND WHY? (2020), <https://www.cbo.gov/system/files/2020-09/56504-Health-Insurance.pdf> [<https://perma.cc/W28Q-JPWU>].

¹⁴⁸ Lenny Bernstein & Laurie McGinley, *An Army of Doctors. Access to an Experimental Drug. A Special Patient Gets Special Care.*, WASH. POST (Oct. 3, 2020), https://www.washingtonpost.com/health/an-army-of-doctors-access-to-an-experimental-drug-a-special-patient-gets-special-care/2020/10/03/ba3e1e32-05b0-11eb-897d-3a6201d6643f_story.html [<https://perma.cc/Q9D7-3NJ3>] (“VIP treatment is a feature of American medicine. Major hospitals throughout the country have private spaces for celebrities, the super-rich and the influential, patients who want to be shielded from the public and just may make a large donation if they are happy with their care.”).

¹⁴⁹ *Id.* The complaint that universal care will result in “lower quality” care is a concern only for those few who are currently enjoying a very high quality of care, and only if the new universal care would be set up in a way that deprived them of the opportunity to pay a premium for better care.

¹⁵⁰ See Davies, *supra* note 7, at 154.

¹⁵¹ *Id.* at 126–27.

¹⁵² See *supra* note 134.

therefore its expected value—for them—is less than the price.¹⁵³ Consumers with serious chronic conditions, on the other hand, will find the insurance to be worthwhile because their anticipated outlay for health services likely exceeds the cost of the insurance. The resulting dynamic has been termed the “death spiral”¹⁵⁴ because, as healthier people drop their coverage, the insurance companies must raise rates even more to compensate for the fact that only those with high health care needs (or who are likely to need expensive care) are buying insurance.¹⁵⁵ The newly raised rates, of course, only prompt even more people—again, the healthiest ones—to drop the coverage.

Before the Affordable Care Act (“ACA”), of course, insurance companies could simply refuse to insure those with chronic or preexisting conditions. Insurance companies could keep rates down by insuring only the healthiest people and those least likely to need care. But that left the people with the greatest need for medical insurance not only uninsured but also uninsurable. The ACA addressed this problem by prohibiting insurance companies from refusing to cover people with preexisting conditions and addressed the “death spiral” problem by requiring *everyone* to buy health insurance—a requirement known as the “individual mandate.”¹⁵⁶ Under the ACA, as originally passed, failure to buy insurance brought a monetary penalty.¹⁵⁷

The individual mandate was politically controversial and became the focus of lawsuits aimed, unsuccessfully, at invalidating the ACA.¹⁵⁸ In 2017, Congress voted to eliminate the penalty for failure to buy health insurance,¹⁵⁹ opening the door to a new “death spiral.” And, indeed,

¹⁵³ “Expected value” is a term of art in economics, derived by multiplying the probability of an outcome by the value of the outcome. Will Kenton, *Expected Value (EV)*, INVESTOPEDIA (June 27, 2020), <https://www.investopedia.com/terms/e/expected-value.asp> [<https://perma.cc/447Q-X6JM>]. A ten percent chance of winning a \$200 lottery has an expected value of \$20. Similarly, a health insurance benefit has a very low expected value to a comparatively healthy person who has a very low probability of needing that health care.

¹⁵⁴ Jon Gabel & Heidi Whitmore, *The Marketplace Premiums Increase: Underwriting Cycle or Death Spiral?*, HEALTH AFFAIRS (Feb. 8, 2017), <https://www.healthaffairs.org/doi/10.1377/hblog20170208.058341/full/> [<https://perma.cc/7TBG-LZGJ>].

¹⁵⁵ See Michael Geruso & Timothy J. Layton, *Selection in Health Insurance Markets and Its Policy Remedies*, 31 J. ECON. PERSP. 23 (Fall 2017).

¹⁵⁶ *Summary of the Affordable Care Act*, KFF (Apr. 25, 2013), <https://www.kff.org/health-reform/fact-sheet/summary-of-the-affordable-care-act/> [<https://perma.cc/J3KW-3GGY>].

¹⁵⁷ *Id.*

¹⁵⁸ *E.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

¹⁵⁹ The Tax Cuts and Jobs Act, passed in December 2017, eliminated the individual mandate penalty effective January 1, 2019. See Christine Eibner & Sarah Nowak, *The Effect*

the number of uninsured Americans has increased since 2017 (after a dramatic drop when the ACA was first implemented),¹⁶⁰ as comparatively healthy individuals can opt out of health insurance without penalty.

IV

THE PROMISE OF UNIVERSAL HEALTH CARE

The ACA compromise has certainly failed to garner widespread support across the United States,¹⁶¹ as it has fallen well short of its goal of ensuring health care for everyone,¹⁶² and as the Republican establishment has worked hard to stoke resentment against it.¹⁶³ Despite the fact that many of the ACA's provisions, including those protecting people with preexisting conditions, are enormously popular among Americans across the political spectrum, the legislation overall is far less popular.¹⁶⁴ And its future is dubious at best; with the individual mandate penalty repealed, and with the protection for people with preexisting conditions in place, it will be hard to avoid a “death spiral.”¹⁶⁵

But good fixes for this problem are hard to come by.¹⁶⁶ Even in the late 2010s, when both houses of Congress, as well as the White House, were in Republican hands, Republicans who had campaigned against the ACA—and had promised to “repeal and replace” it—were

of Eliminating the Individual Mandate Penalty and the Role of Behavioral Factors, THE COMMONWEALTH FUND (July 11, 2018), <https://www.commonwealthfund.org/publications/fund-reports/2018/jul/eliminating-individual-mandate-penalty-behavioral-factors> [<https://perma.cc/5KMV-3LJ2>].

¹⁶⁰ Tolbert et al., *supra* note 12.

¹⁶¹ Liz Hamel, et al., *5 Charts About Public Opinion on the Affordable Care Act and the Supreme Court*, KFF (Dec. 18, 2020), <https://www.kff.org/health-reform/poll-finding/5-charts-about-public-opinion-on-the-affordable-care-act-and-the-supreme-court/> [<https://perma.cc/79GY-DXHL>].

¹⁶² The percentage of uninsured non-elderly Americans never fell below ten percent. Tolbert et al., *supra* note 12.

¹⁶³ Tom Cohen, *GOP Seeks a Groundswell of Opposition to Obamacare*, CNN (Nov. 21, 2013), <https://www.cnn.com/2013/11/21/politics/obamacare-gop-snowball/index.html> [<https://perma.cc/FD5T-G5LJ>].

¹⁶⁴ Hamel et al., *supra* note 161.

¹⁶⁵ See Gabel & Whitmore, *supra* note 154 and accompanying text.

¹⁶⁶ Oren Cass, *Republican Party Battles Over Its Post-Trumpian Soul*, FIN. TIMES (Sept. 3, 2020), <https://www.ft.com/content/824983ed-2a99-4c3a-a6ad-c05f54d48239> [<https://perma.cc/7B6W-BQC7>] (“Republicans brought together libertarians and conservatives who both prized markets but in different ways. Libertarians regard the free market as an end unto itself, or trust that the free market will deliver the best outcome. Conservatives see the free market as a means to an end.”).

hamstrung by the fact that they had no consensus on what they should replace it with.¹⁶⁷ It wasn't just that the White House and the conservative critics of the ACA were unable to implement their healthcare reform proposals; they were unable to come up with any practically (or politically) viable proposals whatsoever.¹⁶⁸ The problems with U.S. health care are exceedingly complex and not amenable to simple or straightforward resolution,¹⁶⁹ especially not by any approach compatible with small government, deregulating the industry, or "keeping the government's hands off your health care."¹⁷⁰ And the ACA, a compromise approach designed to keep health care in private hands, has failed to solve the persistent problems in that system.¹⁷¹

A. What Universal Care Might Look Like

The general discontent with the ACA—fierce opposition from the right (except for the preexisting condition protections) and ambivalence from the left—has fueled calls for further reform. As the right has failed to produce a viable alternative, the left is now touting Universal Care, most often in the form of a government-administered, single-payer plan. This idea is not a new one. Various versions of Universal Care have been proposed over the years, including proposals

¹⁶⁷ Julie Rovner, *5 Reasons Why GOP's 'Repeal and Replace' Didn't Work*, HEALTHCARE FINANCE (Jul. 19, 2017), <https://www.healthcarefinancenews.com/news/5-reasons-why-gops-repeal-and-replace-didnt-work> [<https://perma.cc/88CB-N3YB>].

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* President Trump expressed his own surprise at the complexity of the problem, asserting that "*nobody* knew that health care could be so complicated." (emphasis added) Kevin Liptak, *Trump: 'Nobody Knew Health Care Could Be So Complicated'*, CNN (Feb. 28, 2017), <https://www.cnn.com/2017/02/27/politics/trump-health-care-complicated/index.html> [<https://perma.cc/25SS-ECFJ>].

¹⁷⁰ *Americans' Views of Government: Low Trust, but Some Positive Performance Ratings*, PEW RESEARCH CENTER (Sept. 14, 2020), <https://www.pewresearch.org/politics/2020/09/14/americans-views-of-government-low-trust-but-some-positive-performance-ratings/> [<https://perma.cc/LMK6-NJU2>] (noting the low level of trust in government but acknowledging that healthcare could be an exception); *see also* TPM TV, *Obama Pokes Fun at 'Don't Touch My Medicare' People*, YOUTUBE (Jul. 28, 2009), <https://www.youtube.com/watch?v=pJp-roulVsA> [<https://perma.cc/J58M-TDPX>] (President Obama's reaction to someone who objected to government run healthcare but nonetheless supported Medicare).

¹⁷¹ It is worth noting that the Dutch system of Universal Care *does* include a role for private insurers. Dylan Scott, *The Netherlands Has Universal Health Insurance—And It's All Private*, VOX (Jan. 17, 2020), <https://www.vox.com/policy-and-politics/2020/1/17/21046874/netherlands-universal-health-insurance-private> [<https://perma.cc/PR4S-YQMA>]. *See infra* note 177 for more about the Dutch system.

from Senator Edward Kennedy in the 1970s,¹⁷² and proposals from the Clinton administration in the 1990s.¹⁷³ At the same time, less-universal proposals have been enacted to afford government-funded health care to older Americans (Medicare), low-income Americans (Medicaid), and veterans (Veterans Health Administration, or VHA).¹⁷⁴ Medicare and Medicaid—the former being available to participants over a certain age, and the latter to low-income participants—enjoy high levels of public support on both sides of the political aisle.¹⁷⁵

Looking at other countries, we see a variety of approaches to Universal Care in addition to systems where the health care is provided directly by government employees (e.g., India).¹⁷⁶ Most involve some type of regional control, with centrally collected tax money given in block grants or distributed to regional governments for implementation (e.g., Canada, Denmark),¹⁷⁷ and others that retain a role for private

¹⁷² Barry R. Furrow, *Health Reform and Ted Kennedy: The Art of Politics and Persistence*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 459–64 (2011).

¹⁷³ Davies, *supra* note 7, at 125–30.

¹⁷⁴ Medicare, enacted in 1965, is a national health insurance plan that provides care for people over the age of sixty-five. It has been expanded to include younger people who are disabled as defined by the Social Security Administration, as well as people suffering the end stages of several enumerated diseases (e.g., ALS, or Lou Gehrig's disease). See JAY E. GREINIG & NATHAN A. FISHBACH, *METHODS OF PRACTICE* § 30:30 (5th ed. 2020), Westlaw (database updated Oct. 2021). The VHA is part of the federal government. Its hospitals and clinics are owned and operated by the federal government. Doctors, administrators, medical staff, and nonmedical support staff are all federal employees. Veterans are entitled to receive medical care at these facilities without paying any premiums or facing any deductibles—although they may be required to make modest copayments. *2022 VA Healthcare Copay Rates*, VA, <https://www.va.gov/health-care/copay-rates/> (last updated Dec. 23, 2021) [<https://perma.cc/9B77-RDNE>]. In addition to these federal initiatives, some states have targeted healthcare programs, such as California's "Medi-Cal" program which affords medical benefits to Californians whose income places them up to 138% of the federal poverty level. *Medi-Cal Categories*, DISABILITY BENEFITS 101, https://ca.db101.org/ca/programs/health_coverage/medi_cal/program2a.htm [<https://perma.cc/TM69-RTEB>].

¹⁷⁵ Dan Mangan, *Medicare, Medicaid Popularity High: Kaiser*, CNBC (July 17, 2015), <https://www.cnbc.com/2015/07/16/medicare-medicare-popularity-high-ahead-of-birthday.html> [<https://perma.cc/R6ZL-S64E>].

¹⁷⁶ Roosa Tikkanen et al., *International Health Care System Profiles, India*, THE COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/india> [<https://perma.cc/U7QV-BLEX>].

¹⁷⁷ Roosa Tikkanen et al., *International Health Care System Profiles, Canada*, THE COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/canada> [<https://perma.cc/RGV4-HC68>]; Roosa Tikkanen et al., *International Health Care System Profiles, Denmark*, THE COMMONWEALTH FUND (June 5, 2020), <https://www.commonwealthfund.org/international-health-policy-center/countries/denmark> [<https://perma.cc/K7NX-USAQ>].

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.

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

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.

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 #Auntfromhell 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

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 pay¹⁹⁴—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

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

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

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

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

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.

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;

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

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

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.

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 America²²⁸—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,

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

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* recovery²⁴³—might be

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

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 properly 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.

