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## The FTCA, Veterans, and Future Medical Expenses

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# The FTCA, Veterans, and Future Medical Expenses

R.J. PINTO\*

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## I. INTRODUCTION

John Doe, a veteran of the U.S. military, receives medical benefits through the Department of Veterans Affairs (VA). As a recipient of those benefits, Doe is eligible to obtain free medical care at any VA facility until his death. One day, Doe undergoes surgery at a VA hospital. As he recovers from the operation, Doe suffers brain damage and eventually falls into a coma. As guardian *ad litem*, his wife, Jane, sues the United States under the Federal Tort Claims Act (FTCA), alleging medical negligence. Jane seeks to recover, among other things, future medical expenses on her husband's behalf. The United States concedes liability, but the parties dispute damages. At trial, Jane testifies that she intends to keep her husband at VA facilities while he is comatose. What result?<sup>1</sup>

Under the prevailing view, Jane is entitled to recover a cash award for the present value of her husband's future medical expenses.<sup>2</sup> In the same vein, the United States, as defendant, is not able to reduce Jane's damage award by the value of the VA medical care that her husband will receive in the future. The validity of this result depends on probing two legal rules: the provisions of the FTCA and the collateral source rule.

As a limited waiver of the United States' sovereign immunity, the FTCA provides an avenue through which an injured person can reach into Congress's pockets and recover for the government's tortious conduct.<sup>3</sup> Though somewhat paradoxically, the FTCA holds the United

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1. I owe this hypothetical's factual pattern to *Rufino v. United States*, 642 F. Supp. 84 (S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 829 F.2d 354 (2d Cir. 1987). In *Rufino*, the court declined to allow the plaintiff to recover damages for future medical expenses. *Id.* at 86. The court found it significant that the veteran's family had decided to keep the veteran at VA facilities ever since the injury. *Id.* at 85–86. The court also noted that any damage award for future medical expenses would benefit only the veteran's family, not the veteran, who was comatose. *See id.* The plaintiff in *Rufino* did not appeal the lower court's decision to deny her claim for future medical expenses. *See* 829 F.2d at 356. After extensive research, *Rufino* appears to be the only published decision *not* to award future medical expenses under the FTCA to a veteran who was entitled to free VA medical care.

2. *See infra* Part II.E.

3. *See* 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2006). Under the FTCA, the fora in which litigants must pursue their claims are the U.S. district courts. Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV.

States liable to the “same extent as a private individual under like circumstances.”<sup>4</sup> In determining the extent to which the United States should be held liable under the FTCA, courts must apply the substantive law of the state where the tort occurred.<sup>5</sup>

On the issue of damages, the FTCA expressly limits a claimant’s reach to money judgments that compensate the claimant for his or her loss, including those awards that serve to compensate for future medical expenses.<sup>6</sup> As the introductory fact pattern indicates, calculating future medical expenses for FTCA plaintiffs who are veterans of the U.S. military is complex, primarily because veterans—who likely will receive VA medical care in the future—seek to recover expenses they will never incur—expenses the tortfeasor, the U.S. government, will eventually foot the bill for.<sup>7</sup> As a societal segment who likely will receive VA medical care in the future, veteran-plaintiffs, simply by virtue of their status as veterans, pose a unique problem to courts and test just how effectively the tort system computes damages.<sup>8</sup> The undeniable reality in these cases is that veterans ask the United States to “pay . . . twice for the same injuries”:

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259, 271 (2009). But before litigants may file their FTCA claims in the district courts, they must first present them to the “appropriate Federal agency,” which has six months to deny or otherwise dispose of the claims. Chelsea Sage Durkin, Comment, *How Strong Stands the Federal Tort Claims Act Wall? The Effect of the Good Samaritan and Negligence Per Se Doctrines on Governmental Tort Liability*, 39 ARIZ. ST. L.J. 269, 270 (2007) (quoting 28 U.S.C. § 2675(a)) (internal quotation marks omitted).

Further, the FTCA does not completely abrogate the United States’ sovereign immunity. Instead, the statute contains thirteen exceptions that operate to bar litigants’ claims against the United States, including claims arising in a foreign country and claims arising out of government activity based on: the performance of a discretionary function, mishandled letters by postal service employees, the United States’ monetary activities, armed forces’ combat activities, the Panama Canal Company’s activities, the Tennessee Valley Authority’s activities, tax collection, several intentional torts, admiralty, wars, quarantines, and banks. Nelson, *supra*, at 271 & n.55.

4. 28 U.S.C. § 2674.

5. Richards v. United States, 369 U.S. 1, 9–12 (1962).

6. 28 U.S.C. § 2674 (exempting the United States from liability for prejudgment interest or for punitive damages).

7. See, e.g., Amlotte v. United States, 292 F. Supp. 2d 922 (E.D. Mich. 2003).

8. Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 741 n.7 (1964) (providing, incidentally, the basis of the veteran-plaintiffs’ argument that the deterrent rationale underlying the collateral source rule is undermined when one government branch causes the injury and another pays the damage award).

first through federal benefits and then through a damage award for future medical expenses.<sup>9</sup>

The relationship between a veteran's status as a recipient of federal benefits and the veteran's request for future medical expenses in tort implicates the collateral source rule.<sup>10</sup> As a common law doctrine still intact today, the rule prohibits courts from reducing a plaintiff's damage award by "collateral" compensation—or to put it plainly, by compensation received from a source other than the tortfeasor.<sup>11</sup> By even greater force of logic, then, the collateral source rule allows courts to reduce a plaintiff's damage award if the tortfeasor has compensated or promised to compensate the plaintiff for injuries suffered.<sup>12</sup> Along these lines, the United States, in defending against veteran-plaintiffs' FTCA claims, argues the collateral source rule should not apply because the VA medical care to which veterans are entitled is not a collateral benefit.<sup>13</sup> In syllogistic terms, the United States' argument is as follows:

*Major premise:* Under the collateral source rule, a plaintiff cannot recover damages for compensation he or she has received or will receive from the tortfeasor.

*Minor premise:* The United States is obliged to provide eligible veterans with VA medical care for injuries suffered.

*Conclusion:* A veteran-plaintiff eligible for VA medical benefits who sues the United States for personal injuries cannot recover damages for future medical expenses because the veteran will receive compensation—medical care—from the tortfeasor—the United States.

Veteran-plaintiffs, of course, respond in kind, countering with arguments grounded in federal precedent.<sup>14</sup> It is simply unfair, veterans argue with the weight of several federal judges behind them, to substitute future VA medical care they are entitled to receive for a cash award they could use,

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9. Defendant's Post-Trial Memorandum of Points & Authorities Showing that the Court Should Deduct the Value of Past and Future Federal Benefits from Any Potential Award of Damages at 1, Schoenfeld v. Quamme, No. 3:02CV00819 (S.D. Cal. Sept. 14, 2009), 2009 WL 3500909 [hereinafter Defendant's P&A]; see also Brooks v. United States, 337 U.S. 49, 53–54 (1949) (noting the United States is forced to pay twice for the same injuries in this scenario).

10. Note, *supra* note 8, at 741 n.7.

11. Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort's Soul*, 48 U. LOUISVILLE L. REV. 1, 8 (2009) (quoting RESTATEMENT (SECOND) OF TORTS § 920A (1979)).

12. *Accord In re Air Crash Near Cerritos*, 982 F.2d 1271, 1277 (9th Cir. 1992); *Thomas v. Shelton*, 740 F.2d 478, 484–85 (7th Cir. 1984); see also Note, *supra* note 8, at 741 (contending courts can mitigate damages without upsetting the tort system's main objectives if tortfeasors themselves reduce the plaintiff's loss).

13. See, e.g., *Feeley v. United States*, 337 F.2d 924, 934 (3d Cir. 1964) ("The government argues . . . [it] will be forced to pay twice for this future [medical] care, which it is not required to do under [collateral source] principles.").

14. See *infra* Part II.

if they so wished, to pay for medical care at a private hospital.<sup>15</sup> This fairness consideration, along with the bulwark of precedent—the logical underpinning of which is less than pellucid—ultimately is sufficient to carry the day; courts consistently hold in the veteran-plaintiffs’ favor and allow them to recover future medical expenses without requiring an offset.<sup>16</sup>

This Comment probes why courts reach that conclusion, especially in an era of increasing national debt and expanded government liability.<sup>17</sup> The simple answer, as the harrowing metaphors used to describe veteran-plaintiffs’ injuries remind us,<sup>18</sup> may indeed be fairness or justice.<sup>19</sup> But without a defense of conventional wisdom, that answer is only as simple as the chancellor’s foot is lengthy.<sup>20</sup> Maybe the answer has its roots in logic, but forcing a tortfeasor to pay twice plainly spells overcompensation. Perhaps the text of the FTCA provides an answer, but even a cursory glance at the statute reveals that it does not. The upshot is a jurisprudence that is wrong in policy, logic, and law.

15. Or to pay down their mortgage. Or to pay for their ice cream addiction. Or to donate to their favorite charity. The point here is that the alternative—entitlement to VA medical care—necessarily predetermines the use to which they put their damage award, which is inconsistent with the familiar tort principle that plaintiffs need not use their damage recoveries for any specific purpose. See John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1236–40 (2007).

16. See, e.g., *Molzof v. United States*, 6 F.3d 461, 468 (7th Cir. 1993). But cf. *Rufino v. United States*, 642 F. Supp. 84, 86 (S.D.N.Y. 1986) (allowing offset), *aff’d in part, rev’d in part on other grounds*, 829 F.2d 354 (2d Cir. 1987). Interestingly, the court in *Rufino* did not even mention New York’s collateral source rule in its opinion. Instead, the court used a balancing test in determining that the veteran’s lack of dissatisfaction with the VA system meant he would more likely than not use the free VA medical care in the future. *Id.*

17. See *infra* Part IV.B–C.

18. Plaintiff’s Trial Brief at 10, *Schoenfeld v. Quamme*, No. 3:02CV00819 (S.D. Cal. Nov. 23, 2008), 2008 WL 7022606 (quoting a medicine and rehabilitation expert who analogized the veteran-plaintiff’s leg injuries to “a wooden frame structure where the frame is suffering from dry rot and the attached lumber is coming loose and falling off” and followed the analogy with his prognosis that “[a]ny attempt to reattach the lumber on the frame structure with either nails, glue, or other devices[] will be met with poor results because the frame is not adequate”).

19. See G. Michael Harz, Comment, *The Liability of the United States Government Under the Federal Tort Claims Act*, 66 DENV. U. L. REV. 601, 617–18 (1988) (noting that the government exists to serve the people fairly and “justice” would be “denied” if the United States did not have to pay for a veteran’s future medical expenses).

20. See JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43–44 (Frederick Pollock ed., Quaritch 1927) (1689) (reducing equity to a subjective measure that changes from person to person, as the size of the “Chancellor’s foot” varies from chancellor to chancellor).

In this Comment, I aim to expose the jurisprudential flaws in this area of the law and advocate as my prescription a refocused jurisprudence. Part II describes how courts have historically come to the conclusion that veterans suing under the FTCA should be awarded future medical expenses despite their entitlement to VA medical care. In sorting through several pertinent cases, this Part summarizes the framework courts have used when awarding future medical expenses to veterans under the FTCA.

Part III addresses a threshold issue: the extent to which courts using this framework have overcompensated veterans. Overcompensation occurs only insofar as veterans in fact pocket the damage award and continue to rely on the VA medical care to which they are entitled. Yet factual data on this point does not exist. That reality grounds my analysis, and in this Part, I ask instead whether veterans who are awarded damages for future medical expenses are *likely* to use that money to seek private medical care. The object of this “likely” standard is analysis that probes the extent to which veterans are satisfied with the VA system. This Part finds that veterans are very satisfied with the VA system and thus concludes that veterans will ultimately pocket the cash award and rely on the VA medical care to which they are entitled. This scenario results in overcompensation.

Having established that overcompensation is likely, I address in Part IV why overcompensating veterans under the FTCA matters on a policy level. This Part identifies a trend under which expanded government liability and voluminous claims against the United States exacerbate the pattern of overcompensation discussed above. It concludes that the issue needs to be addressed and that the outcome should be changed.

Part V exposes the problems with the courts’ jurisprudence and provides a solution that breathes meaning into the FTCA’s text, a text that courts largely have abandoned as a collection of catchword phrases. In hewing more closely to the FTCA’s text, this solution would supplant the courts’ former reasoning, such that veterans suing under the FTCA would be unable to recover future medical expenses to the extent that they are entitled to receive free VA medical care.

## II. TRACING THE COURTS’ MODERN JURISPRUDENCE

### A. *The Collateral Source Aspect*

A logical starting point in tracing the courts’ modern jurisprudence is the text of the FTCA, which explains that the substantive law of the state

in which the tort took place governs in FTCA actions.<sup>21</sup> Accordingly, state collateral source rules apply under the FTCA.<sup>22</sup> Although several states have statutorily abolished or modified the collateral source rule,<sup>23</sup> numerous others have retained the rule. Each state has variations in its collateral source rule, but the rule generally provides that “if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.”<sup>24</sup> In other words, courts will not reduce a plaintiff’s damage award by any compensation the plaintiff has received from a source wholly independent of the tortfeasor.

Although the paradigm that the collateral source rule seeks to create is rather simple, a level of complexity arises when determining whether government benefits are collateral to a plaintiff’s damage award in an FTCA action.<sup>25</sup> This is because state collateral source rules “do[] not necessarily take into consideration cases in which the United States is a defendant—as well as the payer of . . . benefits—nor would [they] since federal courts have exclusive jurisdiction over injury claims against the United States for money damages.”<sup>26</sup>

Thus, to remedy the awkward application of state collateral source rules to government benefits in FTCA actions, federal courts have fashioned a body of federal common law in an attempt to define whether and when government benefits are collateral in FTCA actions.<sup>27</sup> In this

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21. 28 U.S.C. § 1346(b)(1) (2006), *construed in* Richards v. United States, 369 U.S. 1, 9–12 (1962).

22. *See, e.g.*, Molzof v. United States, 6 F.3d 461, 467 (7th Cir. 1993) (applying Wisconsin’s collateral source rule in an FTCA action). Despite their evidentiary components, state collateral source rules are considered substantive laws. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4512 (2d ed. 1996).

23. For an exhaustive list of states that have modified their collateral source rules, see Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL’Y 57 app. I at 71–79 (2005).

24. Helfend v. S. Cal. Rapid Transit Dist., 465 P.2d 61, 63 (Cal. 1970) (citing *Peri v. L.A. Junction Ry.*, 137 P.2d 441, 452 (Cal. 1943)).

25. *See, e.g.*, Amlotte v. United States, 292 F. Supp. 2d 922 (E.D. Mich. 2003).

26. *Id.* at 927 (citing 28 U.S.C. § 1346(b)(1)).

27. Note, *supra* note 8, at 741 n.7 (noting that the test sought to resolve “problems of identity” that arose “[w]hen one branch of the government is the tortfeasor and another branch pays for the loss”). Inherent in this analysis is the demonstrable fact that courts did not create the federal test blindly. Instead, the federal test is based on the spirit of state collateral source rules. For example, most state collateral source rules



Comment I refer to that body of law as the “federal test.” Under the federal test, courts have held that government benefits are collateral—and thus cannot be used to reduce a plaintiff’s damage award—if (1) the benefits “come[] from a specially funded source distinct from the unsegregated general revenues” of the U.S. Treasury,<sup>28</sup> or (2) the plaintiff has contributed to the benefits.<sup>29</sup>

To give an example of the federal test as applied, plaintiffs in FTCA actions can recover damages for medical expenses without a judicially mandated reduction of the award by the value of the Medicare benefits to which they are entitled.<sup>30</sup> This is because the government distributes Medicare benefits out of a fund to which Medicare recipients contribute; this fund is supplied by social security taxes, which Medicare recipients have paid.<sup>31</sup> To give another example, under the FTCA courts will reduce a veteran’s damage award for medical expenses by the value of TRICARE benefits to which the veteran is entitled primarily because “[a]ll of the money for the [TRICARE] program comes from the general treasury of the United States.”<sup>32</sup>

Logically, then, under the federal test, baseline VA medical benefits are not collateral to an FTCA award. This is true because (1) VA medical

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require the source of the collateral payments to be “wholly independent” from the tortfeasor. *See, e.g., Helfend*, 465 P.2d at 63 (citing *Peri*, 137 P.2d at 452). *United States v. Harue Hayashi* suggested a federal equivalent—collateral payments are those payable from specially funded revenues, and noncollateral payments are those funded by the U.S. Treasury. 282 F.2d 599, 603 (9th Cir. 1960). Additionally, many state collateral source rules require collateral benefits to be those to which the plaintiff has contributed. *See, e.g., Kickham v. Carter*, 335 S.W.2d 83, 90 (Mo. 1960) (“Upon principle there would appear to be no logical reason for defendant to receive the benefit of hospitalization payments (in the nature of insurance) made by an organization such as Blue Cross to which plaintiff had no doubt made contributions in accordance with a membership agreement.”). The Eight Circuit, in adopting that very same principle, has supplied the federal equivalent. *See Overton v. United States*, 619 F.2d 1299, 1305–06 (8th Cir. 1980).

28. *Molzof v. United States*, 6 F.3d 461, 466 (7th Cir. 1993) (citing *Harue Hayashi*, 282 F.2d 599).

29. *Id.* (citing *Overton*, 619 F.2d 1299). Most courts have held that a veteran’s service in the U.S. military does not qualify as a “contribution” within the meaning of this test. *See, e.g., Mays v. United States*, 806 F.2d 976, 977 (10th Cir. 1986).

30. *Berg v. United States*, 806 F.2d 978, 985 (10th Cir. 1986). Although the court in *Berg* began its discussion by addressing Colorado’s collateral source rule, it did not rely on state law to decide the issue. *See id.* at 984 (quoting *Kistler v. Halsey*, 481 P.2d 722, 724 (Colo. 1971)). Instead, the court relied on federal cases from other circuits that had applied the federal test. *See id.* at 985 (collecting cases).

31. *Id.*

32. *Mays*, 806 F.2d at 977. As it did in *Berg*, the Tenth Circuit first addressed Colorado’s collateral source rule. *See id.* (quoting *Kistler*, 481 P.2d at 724). It then decided the issue by considering the “source of the funds” as it related to the federal test. *See id.* at 977 n.3. For a discussion of what TRICARE is, see *infra* Part IV.C.

benefits are paid from the General Treasury of the United States,<sup>33</sup> and (2) veterans do not contribute monetarily to their baseline VA medical benefits.<sup>34</sup> But if VA medical benefits are not collateral, why do courts allow veterans to recover future medical expenses under the FTCA? After all, courts allowing recovery generally agree that VA medical benefits are not collateral within the meaning of the federal test.<sup>35</sup> It is against this backdrop that Part II.B traces the modern jurisprudence to which courts adhere.

### B. Brooks v. United States

As previously discussed, courts generally allow veterans to recover future medical expenses under the FTCA.<sup>36</sup> To get to that outcome, however, courts have departed from the Supreme Court's dicta in *Brooks v. United States*.<sup>37</sup> In *Brooks*, the Court held that statutory provisions for veterans' disability payments did not forbid veterans from suing under the FTCA.<sup>38</sup> The Court then remanded the case to the Fourth Circuit to determine whether veterans' disability benefits should offset their damage awards.<sup>39</sup> In so remanding, the Court hinted that it saw "no indication that Congress meant the United States to pay twice for the same injury" when veterans sued under the FTCA.<sup>40</sup> On remand, the Fourth Circuit deducted the veteran's disability benefits from his damage award.<sup>41</sup> The court's reasoning mirrored the Supreme Court's dicta:

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33. Note, *supra* note 8, at 741 n.7.

34. *Determine Cost of Care*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/healthbenefits/cost/> (last visited Apr. 7, 2012).

35. See, e.g., *Walsh v. United States*, No. 07-CV-568-PJC, 2009 WL 3755553, at \*4 (N.D. Okla. Mar. 31, 2009) (allowing the plaintiff to recover future medical expenses "[r]egardless of whether the medical benefits . . . constitute a collateral source"). *But cf.* *Molzof v. United States*, 6 F.3d 461, 468 (7th Cir. 1993) (holding, in the alternative, that VA medical benefits are collateral under the federal test because veterans contribute to them). The *Molzof* court concluded that veterans contribute to their VA medical benefits through the blood, sweat, and toil of their military service. *Id.* at 467.

36. See *supra* Part I.

37. 337 U.S. 49, 53 (1949). Perhaps to justify their departure from the Supreme Court's reasoning, other courts have downplayed *Brooks*'s significance with sleights of hand, and most notably so in *Feeley*, in which the court thought it "clear that [the language in *Brooks*] is not holding, or even dictum." 337 F.2d 924, 933 (3d Cir. 1964).

38. *Brooks*, 337 U.S. at 53.

39. *Id.* at 54.

40. *Id.* at 53–54.

41. *United States v. Brooks*, 176 F.2d 482, 484 (4th Cir. 1949).

It seems perfectly clear that in making the award of damages to plaintiff nothing should be included on account of hospital or medical expenses which the government has paid . . . . It seems equally clear that the award should be diminished by the amount which he has received *or is to receive* from the government by way of disability benefits.<sup>42</sup>

The Supreme Court and Fourth Circuit in *Brooks* clarified the framework courts should use in approaching windfall scenarios arising in FTCA actions. First, as the Fourth Circuit did on remand, courts must follow the FTCA's textual requirements and look to the substantive law of the state where the tort occurred.<sup>43</sup> In *Brooks*, for example, North Carolina law precluded a plaintiff from recovering damages from a tortfeasor if another defendant had already compensated the plaintiff for injuries suffered.<sup>44</sup> Second, *Brooks* clarified that courts should resolve issues arising under the FTCA in light of the policy that Congress, in passing the FTCA, had no intention of forcing the United States to pay twice for a single injury.<sup>45</sup>

### C. Feeley v. United States

A few years after *Brooks* in *Feeley v. United States*, the United States, as defendant, asked the Third Circuit to adopt the *Brooks* framework and deduct the value of a veteran's entitlement to VA medical care from a damage award for medical expenses.<sup>46</sup> The United States grounded its position on collateral source law and reasoned the benefits did not come from a source independent of the tortfeasor.<sup>47</sup> In determining the merits, the *Feeley* court first discussed Pennsylvania's collateral source rule.<sup>48</sup>

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42. *Id.* (emphasis added). For these propositions, the court cited *Holland v. Southern Public Utilities Co.*, which held that under state law the amount another defendant pays the plaintiff should be credited against what the plaintiff otherwise would recover for his or her injury. 180 S.E. 592, 593–94 (N.C. 1935).

43. *See* *Richards v. United States*, 369 U.S. 1, 9–12 (1962).

44. *See* *Holland*, 180 S.E. at 593–94.

45. 337 U.S. at 53–54.

46. 337 F.2d 924, 934 (3d Cir. 1964).

47. *See id.* at 927–28.

48. *Id.* at 928. The court purported to research whether, in a lawsuit against a private defendant, Pennsylvania law would require the plaintiff's damage award to be offset by the VA medical care that the plaintiff had received. *Id.* at 927. Curiously, the court also noted that it could not find any Pennsylvania cases in which the *state* was both a defendant and payer of medical benefits. *Id.* at 932. Using the state as an analog misses the point because the FTCA holds the United States liable to the same extent as a private individual—not a government entity—under like circumstances. *See* 28 U.S.C. § 2674 (2006). Indeed, the Supreme Court has interpreted the words of the FTCA to “mean what they say, namely, that the United States waives sovereign immunity ‘under circumstances’ where local law would make a ‘private person’ liable in tort.” *United States v. Olson*, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. § 1346(b)(1) (2006)).

It then declared Pennsylvania's collateral source rule to be "of little help" and looked to *Brooks* to guide its inquiry.<sup>49</sup>

In considering *Brooks*, the court agreed to deduct *past* medical expenses from the award.<sup>50</sup> But it refused to follow *Brooks*'s rationale on *future* medical expenses, primarily because the court thought it "unconscionable" to force plaintiffs to choose between using public hospitals and bearing the costs of the medical expenses themselves.<sup>51</sup> The court's language deserves quotation here at length:

[A]cceptance of the government's position would result in forcing the plaintiff, financially speaking, to seek only the available public assistance. Private medical care would be obtained at the plaintiff's own expense. We think that this is an unconscionable burden to place on the plaintiff. A victim of another's tort is entitled . . . to choose . . . his own doctor . . .<sup>52</sup>

#### D. Molzof v. United States

The Seventh Circuit confronted this same issue in *Molzof v. United States*.<sup>53</sup> The Seventh Circuit first explained the interplay between state collateral source rules and awarding future medical expenses.<sup>54</sup> The court may have felt obligated to address Wisconsin's collateral source rule because the Supreme Court remanded the case to the Seventh Circuit with specific instructions to "evaluate the recoverability of [damages

49. 337 F.2d at 932–33.

50. *Id.* at 933–34.

51. *Id.* at 935.

52. *Id.* at 934–35. Following *Feeley*'s lead, a district court in Connecticut awarded future medical expenses to a veteran who sued the United States for medical maltreatment he received at a VA hospital. *See Powers v. United States*, 589 F. Supp. 1084, 1108 (D. Conn. 1984). At that time, the collateral source rule in Connecticut applied to "medical payments" and had "long been in effect in th[at] jurisdiction." *Gorham v. Farmington Motor Inn, Inc.*, 271 A.2d 94, 96 (Conn. 1970). Unlike the *Feeley* court, however, the *Powers* court did not analyze Connecticut's collateral source rule. In fact, the court did not even mention the collateral source rule, nor did it cite to any Connecticut cases. Instead, *Powers* simply explained that future VA medical benefits were "far too speculative" to determine with any certainty. 589 F. Supp. at 1108. It also agreed with *Feeley* that veterans have a right to select a doctor of their choice. *Id.* (citing *Feeley*, 337 F.2d at 934–35). Specifically, the court stated that deducting the plaintiff's VA medical benefits from the damage award for future medical expenses would "unduly limit and virtually pre-determine . . . the source of such medical care." *Id.*

53. 6 F.3d 461, 468 (7th Cir. 1993).

54. *Id.* at 464.

for future medical expenses] under Wisconsin law.”<sup>55</sup> The Court also hinted that a setoff might be necessary, opining that Wisconsin law might “require[] a setoff when a [private] defendant already has . . . agreed to pay[] expenses incurred by the plaintiff.”<sup>56</sup>

Despite the hint, the Seventh Circuit held that Wisconsin would categorize a veteran’s VA medical benefits as collateral.<sup>57</sup> In so concluding, the court grounded its analysis on a Wisconsin state case, *Smith v. United Services Automobile Ass’n*.<sup>58</sup> In that case, a serviceman received free medical care at a naval hospital after he and the defendant collided in a car accident.<sup>59</sup> The serviceman sued to recover the value of those services under his father’s insurance policy, which covered medical expenses.<sup>60</sup> The insurance company denied liability, contending the serviceman did not incur any expenses while hospitalized.<sup>61</sup> Siding with the serviceman, the Wisconsin Supreme Court held that the policy required the insurer to pay up.<sup>62</sup> In ruling, the court noted that state precedent differentiated between “gratuitously provided” services and services for which a plaintiff had paid consideration.<sup>63</sup> Because, the court reasoned, veterans were entitled to medical care as “compensation for services rendered,” not as a gift, the state precedent governing gratuitous services was inapplicable.<sup>64</sup>

On this logic, the Seventh Circuit in *Molzof* concluded that VA medical benefits were collateral because veterans did not receive those benefits without first “contributing part of [their] salary to sustain the program.”<sup>65</sup> According to the court, veterans “contributed” to the VA benefits insofar as they received “lower salar[ies] in order to defray the costs” of their medical care.<sup>66</sup> In other words, the court argued, veterans contribute to the VA medical benefits to which they are entitled through the blood, sweat, and toil of their military service.<sup>67</sup>

The court could have stopped at that point in the opinion because *Smith* appeared to preclude the United States from reducing the plaintiff’s damage award by his VA medical benefits. But on the opinion went,

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55. 502 U.S. 301, 312 (1992). The Supreme Court did not resolve the issue because the lower courts did not address it. *Id.*

56. *Id.*

57. *Molzof*, 6 F.3d at 467.

58. 190 N.W.2d 873 (Wis. 1971).

59. *Id.* at 873.

60. *Id.*

61. *Id.* at 874.

62. *Id.* at 875.

63. *Id.* at 874–75.

64. *Id.* at 875.

65. 6 F.3d 461, 467 (7th Cir. 1993).

66. *Id.*

67. *Id.* (noting that a veteran’s “consideration is his service”).

presumably because the court believed state law's garb was insufficient to adequately clothe its decision. Indeed, the court went on to justify its holding in light of the *Feeley* framework.<sup>68</sup> It first noted that other cases consistently had held that *past* medical benefits were not collateral to an FTCA award.<sup>69</sup> It then reasoned that those cases were inapposite because "[t]he plaintiff here . . . does not seek compensation for past medical treatment, only future medical treatment."<sup>70</sup> For that proposition, the court cited *Feeley* and held that the plaintiff could recover future medical expenses from the United States despite his entitlement to VA medical care.<sup>71</sup>

### E. Modern Jurisprudence

Taken together, *Feeley* and *Molzof* clarify the framework courts use in determining whether a veteran may recover future medical expenses in an FTCA action—the modern jurisprudence to which courts adhere. First, most courts begin the inquiry by addressing the collateral source rule of the state where the tort occurred.<sup>72</sup> The inquiry is almost superficial, however, because these courts consistently conclude that state collateral source rules do not help answer whether VA medical benefits are collateral to an FTCA damage award.<sup>73</sup> Next, courts look

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68. *Id.* at 467–68 (citing *Feeley v. United States*, 337 F.2d 924, 935 (3d Cir. 1964)).

69. *Id.* at 467.

70. *Id.*

71. *Id.* at 468 (citing *Feeley*, 337 F.2d at 935). FTCA claimants have looked to *Molzof* as the “most important case in understanding the effect of the collateral source rule and its application when a[n FTCA] plaintiff . . . is entitled to future medical care through the VA.” Memorandum of Points & Authorities in Opposition to Defendant’s Post-Trial Memorandum of Points & Authorities Showing that the Court Should Deduct the Value of Past and Future Federal Benefits from Any Potential Award or Damages at 2, *Schoenfeld v. Quamme*, No. 3:02CV00819 (S.D. Cal. Sept. 14, 2009), 2009 WL 3500910 [hereinafter *Opposition*]. Some have even referred to it as a “mandate” that had to be followed. *See, e.g., id.* at 4. As the defendant in FTCA actions, however, the United States has taken a different view of *Molzof*, referring to it as a case that “turned on an estimate of a then-nonexistent state court interpretation of Wisconsin collateral source law.” Defendant’s P&A, *supra* note 9, at 4; *accord* United States’ Response to Plaintiff’s Motion for Partial Summary Judgment at 14–15, *Taylor v. United States*, No. 2:09-CV-00065-J (D. Wyo. Feb. 12, 2010), 2009 WL 4459755 [hereinafter *Response*] (arguing *Molzof*’s application of Wisconsin’s collateral source law was “questionable” and “not well-reasoned”).

72. *See, e.g., Molzof*, 6 F.3d at 467; *Feeley*, 337 F.2d at 927.

73. *See, e.g., Feeley*, 337 F.2d at 932–33 (noting that “[m]ost cases involving the United States as a defendant will be litigated in a federal forum and, certainly, all Federal

past state law to the federal test, a body of federal common law that has attempted to define whether and when government benefits are collateral in FTCA actions.<sup>74</sup>

Using the federal test, several courts have held that VA medical benefits are not collateral to an FTCA damage award “because the benefits do not come from a specially funded source and ostensibly because the veteran did not contribute to [the] medical benefits.”<sup>75</sup> Thus, as to a veteran’s *past* medical expenses, courts inquire no further and allow an offset.<sup>76</sup>

Courts ruling on a veteran’s request for *future* medical expenses, however, generally allow recovery because “forc[ing] a plaintiff to choose between accepting public aid or bearing the expense of rehabilitation himself” presents the plaintiff with “an unreasonable choice.”<sup>77</sup> In so reasoning, these courts add a consideration of purported fairness—although VA medical care is not collateral, courts do not allow an offset because a “victim of another’s tort is entitled . . . to choose . . . his own doctor.”<sup>78</sup>

### III. THE EXTENT TO WHICH COURTS OVERCOMPENSATE VETERANS UNDER THE FTCA

Courts using the framework discussed above to allow veterans to recover future medical expenses when they are entitled to VA medical care do not overcompensate them *per se*. For instance, veterans who use their damage awards to seek private medical care outside the VA system

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Tort Claims Act cases will be in the federal courts”); *Walsh v. United States*, No. 07-CV-568-PJC, 2009 WL 3755553, at \*3 (N.D. Okla. Mar. 31, 2009).

74. See *Walsh*, 2009 WL 3755553, at \*4.

75. *Molzof*, 6 F.3d at 466.

76. See, e.g., *Feeley*, 337 F.2d at 934; *Green v. United States*, 530 F. Supp. 633, 644 (E.D. Wis. 1982), *aff’d on other grounds*, 709 F.2d 1158 (7th Cir. 1983).

77. *Feeley*, 337 F.2d at 934. In the context of medical negligence cases arising under the FTCA, courts are especially loath to allow an offset because doing so would “force the plaintiff to undergo treatment at a [VA] facility whose sister facility . . . caused the plaintiff to suffer [injuries].” *Powers v. United States*, 589 F. Supp. 1084, 1108 (D. Conn. 1984).

78. *Feeley*, 337 F.2d at 935. Ironically, courts adding this fairness consideration emphasize the need for judicial restraint in the same breath. See, e.g., *Molzof*, 6 F.3d at 468 (opining that Congress, and not the court, should require FTCA damage awards for future medical expenses to be offset); *Ulrich v. Veterans Admin. Hosp.*, 853 F.2d 1078, 1084 (2d Cir. 1988) (“That this might result in a windfall for [the veteran] is a matter for Congress, not the courts.”); *Powers*, 589 F. Supp. at 1108–09 (“The Court wishes to emphasize, however, that proper Congressional action, such as tying in the set-off provision of 38 U.S.C. § 351 . . . to the medical treatment available to veterans under [the VA system] would eliminate not only the windfall conundrum which confronts and concerns federal courts under these, or similar circumstances, but also protect the federal treasury from the threat of an unnecessary double payment for the same injury.”).

are not overcompensated at all. Overcompensation, in this sense, occurs only insofar as veterans *in fact* rely on VA medical care after receiving their damage awards.

Quantifying and qualifying the phenomenon of overcompensation poses substantial problems, primarily because case-by-case research of it yields imperfect results. Indeed, we cannot draw reliable conclusions from the mere fact that, in one case, a veteran seeking future medical expenses conceded he would continue to rely on the VA medical care to which he was entitled.<sup>79</sup> Similarly, we cannot extrapolate anything meaningful from the fact that, in another case, a veteran seeking future medical expenses lived in Europe, experienced difficulties in traveling to VA facilities, and advised the court that he would seek private medical care in the future.<sup>80</sup>

Instead, mining the collective conscience of veterans—and their satisfaction with the VA system—appears to provide a more reliable metric, even if it does not conclusively establish whether veterans will in fact rely on VA care. At a minimum, it reliably indicates the extent to which veterans recovering future medical expenses are likely to rely on their VA benefits, thereby pocketing the cash award and exacerbating the windfall problem. In that vein, this Part seeks to measure veteran satisfaction with the VA system.

Research suggests that veterans entitled to VA health benefits “consistently outrank[] private health” care recipients as the most content sector of the U.S. health care population.<sup>81</sup> As polled, areas of satisfaction include quality of overall health care, service timeliness, equipment and supply efficiency, treatment effectiveness, and safety in conducting procedures.<sup>82</sup> According to the American Customer Satisfaction Index, eighty-five percent of inpatients at VA medical centers and eighty-two percent of outpatients at VA clinics are satisfied with the care given at those facilities.<sup>83</sup> Although it may be surprising to some, this

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79. *Rufino v. United States*, 642 F. Supp. 84, 85–86 (S.D.N.Y. 1986), *aff’d in part, rev’d in part on other grounds*, 829 F.2d 354 (2d Cir. 1987).

80. *Opposition*, *supra* note 71, at 7–8.

81. Lynn Goya, *Veterans To Be Offered a Personalized Veterans Health Benefits Handbook*, VETERAN J. (Dec. 16, 2010), <http://www.veteranjournal.com/veterans-health-benefits-handbook/>.

82. *Id.*

83. *ACSI Scores for U.S. Federal Government 2010*, AM. CUSTOMER SATISFACTION INDEX (Jan. 25, 2011), <http://www.theacsi.org/index.php?option=com>



satisfaction is not surprising to health care experts, many of whom “have . . . looked to the VA’s remarkable success for significant lessons applicable to the broader U.S. health care system.”<sup>84</sup>

Veteran satisfaction with the VA system can be attributed in part to the Veterans Equitable Resource Allocation (VERA) program, a capitated budgeting system in which VA facilities are given a set amount of resources per enrolled veteran patient.<sup>85</sup> As a capitated budgeting system, VERA does not give VA facilities incentives to maximize billable services.<sup>86</sup> Thus, without any need to produce revenue, VA facilities do not have to forgo, and instead can focus on, the quality of care they are providing.<sup>87</sup>

The high percentage of veterans satisfied with VA care might also be attributable to the advanced health information technology that the VA uses.<sup>88</sup> Most private health care providers in the United States keep only paper records, which often do not fully inform physicians of services that patients have received at other medical facilities.<sup>89</sup> Inadequacies in paper records mean that physicians might duplicate laboratory tests, skip over significant events in a patient’s medical history, or prescribe an inappropriate drug or pharmaceutical.<sup>90</sup> Under the VA system, however, every patient has an electronic health record.<sup>91</sup> That electronic record is found in a department-wide database known as the Veterans Health Information Systems and Technology Architecture (VistA).<sup>92</sup> Full access to a veteran patient’s health record under VistA is vitally important to the VA’s capacity to provide adequate care and is “often cited by VA officials as a key to the department’s efforts to achieve high quality ratings.”<sup>93</sup>

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\_content&view=article&id=238:asci--scores-for-us-federal-government-2010&catid=14:asci-results&Itemid=298.

84. Michael J. Jackonis et al., *War, Its Aftermath, and U.S. Health Policy: Toward a Comprehensive Health Program for America’s Military Personnel, Veterans, and Their Families*, 36 J.L. MED. & ETHICS 677, 678 (2008) (citing Gary J. Young et al., *Quality Improvement in the US Veterans Health Administration*, 9 INT’L J. FOR QUALITY HEALTH CARE 183, 183–88 (1997), available at <http://intqhc.oxfordjournals.org/cgi/reprint/9/3/183.pdf>); accord Catherine Arnst, *The Best Medical Care in the U.S.*, BUS. WK. (July 17, 2006), [http://www.businessweek.com/magazine/content/06\\_29/b3993061.htm](http://www.businessweek.com/magazine/content/06_29/b3993061.htm).

85. CONG. BUDGET OFFICE, PUB. NO. 3016, *THE HEALTH CARE SYSTEM FOR VETERANS: AN INTERIM REPORT 15* (2007), available at [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/88xx/doc8892/12-21-va\\_healthcare.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/88xx/doc8892/12-21-va_healthcare.pdf).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* Indeed, electronic health records address several common problems in health care today, including inadequacies in access to health information, results

Further, veteran satisfaction with the VA system can be attributed to increased government funding in the last decade. The Bush administration coupled the VA's medical care mission with military efforts in Afghanistan and Iraq, and in fiscal year (FY) 2003, the administration dedicated \$24 billion of the total budget to hospital and medical care for veterans.<sup>94</sup> Anticipating thousands of veterans returning from service overseas, the Bush administration allotted \$67 billion to the VA in FY 2005 and reserved \$27 billion for hospital and medical care.<sup>95</sup> The President's FY 2008 budget for the VA proposed \$83 billion,<sup>96</sup> citing the need to "[p]rovide[] medical care to over 155,000 returning . . . servicemembers."<sup>97</sup>

In FY 2009, the Obama administration set aside \$92 billion for the VA, with \$41 billion dedicated to medical care.<sup>98</sup> The administration set aside even more in FY 2011, increasing the VA's budget authority to \$124 billion, with \$51 billion reserved for medical care.<sup>99</sup> President Obama pledges that within five years he will increase the VA's overall budget by roughly \$25 billion.<sup>100</sup>

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management, and connectivity. *Id.* "In theory, an [electronic health record] could give providers up-to-date information about a patient at the point of care, including his or her history, allergies, and medications, along with the relevant diagnoses and laboratory tests, enabling providers to . . . avoid duplicate tests and adverse drug interactions." *Id.* at 16.

94. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, at 288 (2002), *available at* <http://www.gpo.gov/fdsys/pkg/BUDGET-2003-BUD/pdf/BUDGET-2003-BUD-3-14.pdf>.

95. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, at 289-90 (2004), *available at* <http://www.gpo.gov/fdsys/pkg/BUDGET-2005-BUD/pdf/BUDGET-2005-BUD-26.pdf>.

96. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2008, at 120 (2007), *available at* <http://www.gpoaccess.gov/usbudget/fy08/pdf/budget/veterans.pdf>.

97. *Id.* at 117.

98. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2009, at 109, 111 (2008), *available at* <http://www.gpo.gov/fdsys/pkg/BUDGET-2009-BUD/pdf/BUDGET-2009-BUD-24.pdf>.

99. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2011, at 119 (2010), *available at* <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/veterans.pdf>.

100. *U.S. Department of Veterans Affairs*, OFFICE OF MGMT. & BUDGET, [http://www.whitehouse.gov/omb/fy2010\\_department\\_veterans](http://www.whitehouse.gov/omb/fy2010_department_veterans) (last visited Apr. 7, 2012). President Obama also has assured veterans that his new health care plan will not change their access and entitlement to VA health care. See Tom Philpott, *Obama: Health Plan Won't Hurt Vet Care*, MILITARY.COM (Aug. 5, 2009), <http://www.military.com/features/0,15240,197017,00.html>.

Despite these budgetary developments, several studies have noted three particular grievances that veterans have with the VA health care system. First, VA health care services are sometimes not available in localities in which eligible veterans live.<sup>101</sup> Second, eligible veterans do not always enroll in the VA health care system, either because they are indifferent or unaware.<sup>102</sup> Third, Congress's slow hand in approving budgets sometimes means that the VA must skimp, operating for extended periods of time without the supplies or funds necessary to run facilities or purchase medical equipment that may save veterans' lives.<sup>103</sup> The government is currently attempting to address all three issues. As to the first concern, the Obama administration promises to open VA facilities in localities where veterans might live, with the hope that with easy access will come more enrollment.<sup>104</sup> As to the second concern, Obama promises to reach out to veterans more aggressively in order to educate them on their eligibility for VA medical benefits.<sup>105</sup> As to the third concern, the VA asked Congress to advance a release of \$50.6 billion of the FY 2011 \$57 billion total budgetary allowance for VA medical care so that funding delays would not obstruct veterans' access to medical care.<sup>106</sup>

Veteran satisfaction with and government attention to the VA system make it likely that veterans recovering future medical expenses under the FTCA will continue to rely on the VA medical care to which they are entitled, thereby pocketing the cash award. This results in overcompensation.

#### IV. WHY OVERCOMPENSATING VETERANS MATTERS

At first blush, whether courts should overcompensate veterans for their losses under the FTCA seems microcosmic. In fact, overcompensating plaintiffs in tort is somewhat commonplace.<sup>107</sup> But I am not addressing the drawbacks of overcompensation per se. Instead, I am seeking to identify the dangers of overcompensating veterans in a world shot through with alarming social developments.<sup>108</sup> In this Part, I discuss

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101. David Goldstein, *For Veterans in Rural Areas, Health Care Can Be a Battle*, McCLATCHY (June 7, 2011), <http://www.mcclatchydc.com/2011/06/07/115409/for-veterans-in-rural-areas-health.html>.

102. Philpott, *supra* note 100.

103. *Id.*

104. *Id.*

105. *Id.*

106. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *supra* note 99, at 117.

107. *See, e.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 391 (Ct. App. 1981) (awarding punitive damages).

108. *See infra* Part IV.C.

those developments at length and articulate the dangers that attend overcompensation at this moment in history.

#### A. Justice Traynor's Tradeoff

The tort system often expands or contracts, as the case may be, to effectuate policy preferences.<sup>109</sup> Sometimes, it does both simultaneously. Workers' compensation<sup>110</sup> and the September 11th Victim Compensation Fund (Fund)<sup>111</sup> are examples of this phenomenon, and both operate under the framework of a "tradeoff" system.<sup>112</sup> This tradeoff is a simple one: lawmakers who choose to expand an entity's liability for tortious

109. Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 230–32 (1981).

110. Each state has its own statutory workers' compensation framework. For a fairly representative framework, see CAL. LAB. CODE §§ 3600–3605 (West 2011 & Supp. 2012).

111. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 401–409, 115 Stat. 230, 237–41 (2001) (codified as amended at 49 U.S.C. § 40101 note (2006)).

112. The workers' compensation system allows employees to recover damages without having to prove negligence, but employees are entitled only to scheduled damages for wage loss and cannot recover for their pain and suffering. JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 267 & n.67 (2003) (quoting RICHARD EPSTEIN, *CASES AND MATERIALS ON TORTS* 860 (7th ed. 2000)).

The Fund has yielded a similar result. Congress passed the Fund to "serve as a national expression of unity in the face of a tragedy unique in American history, as well as to help survivors." Michael I. Meyerson, Op-Ed., *Losses of Equal Value*, N.Y. TIMES, Mar. 24, 2002, § 4, at 10, available at 2002 WLNR 4432480. The Fund entitled those who had suffered physical injury and families of those who had died in the September 11th attacks to compensation on a no-fault basis. Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 144 (2005). The Attorney General appointed a Special Master to administer the Fund and to distribute its moneys to each eligible claimant according to "the extent of the harm to the claimant, . . . the amount of compensation to which the claimant is entitled based on the harm to the claimant, the facts of the claim, and the individual circumstances of the claimant." Air Transportation Safety and System Stabilization Act § 405(b)(1). But the Fund had tradeoffs built into it. Professor Ackerman recapitulates these tradeoffs in his piece, explaining that negligence would not be considered an aggravating factor, the court would not award punitive damages and would reduce the total recovery by collateral benefits received, and the Special Master's decisions would "not [be] subject to judicial review." Ackerman, *supra*, at 144–45. For an application of the Fund's framework to victim compensation funds remedying other disasters, including Hurricane Katrina, see generally Nathan Smith, Comment, *Water, Water Everywhere, and Not a Bite To Eat: Sovereign Immunity, Federal Disaster Relief, and Hurricane Katrina*, 43 SAN DIEGO L. REV. 699 (2006).

conduct should simultaneously limit the damage awards to which plaintiffs are entitled.<sup>113</sup>

Perhaps no one understood this tradeoff system better than Justice Roger Traynor of the California Supreme Court.<sup>114</sup> In *Muskopf v. Corning Hospital District*, Justice Traynor led the California Supreme Court to abolish the doctrine of state governmental immunity.<sup>115</sup> In his opinion for the court, Justice Traynor justified expanding the government's liability by reasoning that the government could spread the loss without much difficulty: "If the reasons for [sovereign immunity] ever had any substance they have none today. Public convenience does not outweigh individual compensation, and a suit against [the government] is against an entity legally and financially capable of satisfying a judgment."<sup>116</sup> The result was an enormous expansion of California's governmental liability.<sup>117</sup>

But Justice Traynor did not expand liability unthinkingly. He also fervently understood the need to curtail damage awards.<sup>118</sup> For that reason, in *Seffert v. Los Angeles Transit Lines* Justice Traynor complained that pain and suffering damages in negligence cases were "increasingly anomalous as emphasis shift[ed] in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation."<sup>119</sup> He realized these "losses [were] borne by a public free of fault" and would be distributed among the public as "part of the price" of doing business.<sup>120</sup> In other words, if Los Angeles Transit Lines had to pay a substantial money judgment, it would be forced to defray those costs by charging more for its bus fares. Likewise,

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113. Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 473–77 (1996).

114. Justice Traynor rarely missed an opportunity to expand an entity's liability. See, e.g., *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964) (holding retailer strictly liable); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900–01 (Cal. 1963) (holding manufacturer strictly liable); *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282, 285–86 (Cal. 1952) (holding that plaintiffs no longer needed to prove physical harm to recover for intentional infliction of emotional distress); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) ("In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market . . . proves to have a defect that causes injury to human beings.").

115. 359 P.2d 457, 458 (Cal. 1961). After much ado, in 1963 the legislature passed the Tort Claims Act, which presently governs tort claims against the State of California and its agencies and employees. CAL. GOV'T CODE §§ 810–997 (West 2005 & Supp. 2012).

116. *Muskopf*, 359 P.2d at 459.

117. See Laura Oren, *Signing into Heaven: Zinermon v. Burch, Federal Rights, and State Remedies Thirty Years After Monroe v. Pape*, 40 EMORY L.J. 1, 53 n.301 (1991) (referring to Justice Traynor's *Muskopf* opinion as "pathbreaking").

118. Nolan & Ursin, *supra* note 113, at 474–75.

119. 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting).

120. *Id.*

its liability insurer, who ultimately would end up paying the money judgment, would pass along those costs by raising its insurance premiums.

Justice Traynor teaches an important lesson in *Muskopf* and *Seffert*: if courts are willing to expand liability, they should be cognizant of the effect that high damage awards may have on the general public.<sup>121</sup> But this tradeoff system begs two questions. First, is liability really expanding? Second, do social developments warrant limiting damage awards?

### B. Expanding Liability

Congress fundamentally expanded the United States' tort liability when it passed the FTCA in 1946.<sup>122</sup> Before that time, a person could not sue the United States to collect monetary damages because "the king [could] do no wrong."<sup>123</sup> And although lawmakers preserved some aspects of the United States' sovereign immunity, modern jurists and academics alike have questioned and criticized those exceptions with great fervor.<sup>124</sup> As a result, the United States' limited sovereign immunity is eroding.<sup>125</sup> The path of the law indicates that this decay will continue.<sup>126</sup>

121. Nolan & Ursin, *supra* note 113, at 473–77.

122. James E. Pfander, Iqbal, Bivens, and the Role of Judge-Made Law in Constitutional Litigation, 114 PENN. ST. L. REV. 1387, 1406 n.109 (2010). For a discussion of the extent to which plaintiffs were unable to assert otherwise meritorious claims against the United States before Congress passed the FTCA, see *United States v. Muniz*, 374 U.S. 150, 154 (1963).

123. Reginald Parker, *The King Does No Wrong—Liability for Misadministration*, 5 VAND. L. REV. 167, 167 (1952); accord Edwin M. Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1, 3 (1926). The concept of sovereign immunity has its roots in the English feudal system:

Sovereign immunity began with the personal prerogatives of the King of England. In the feudal structure the lord of the manor was not subject to suit in his own courts. The king, the highest feudal lord, enjoyed the same protection: no court was above him. Before the sixteenth century this right of the king was purely personal. Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state. There is some evidence that the original meaning of the pre-sixteenth century maxim—that the king can do no wrong—was merely that the king was not privileged to do wrong.

The immunity operated more as a lack of jurisdiction in the king's courts than as a denial of total relief. There was jurisdiction, however, in the Court of Exchequer for equitable relief against the crown.

*Muskopf v. Corning Hosp. Dist.*, 359 P.2d 457, 458 n.1 (Cal. 1961) (citations omitted).

124. See, e.g., *infra* text accompanying notes 127–34.

125. For an example of this erosion, see *Sauceda v. United States*, No. CV-07-2267-PHX-DCG, 2009 WL 3756703, at \*1 (D. Ariz. Nov. 5, 2009).

For instance, in *Feres v. United States* the Supreme Court carved an important exception into the FTCA by holding that active duty military members could not sue the government for injuries they sustained “incident to service.”<sup>127</sup> And although the *Feres* decision has come to embody a doctrine that is still intact today, its support has dwindled to dangerous levels in both judicial and academic circles. In fact, its critics fell one jurist short of obtaining a huge victory in *United States v. Johnson*, a case in which four Justices of the Supreme Court voiced their willingness to overturn the *Feres* decision.<sup>128</sup> An odd bedfellow to Justices Brennan, Marshall, and Stevens, Justice Scalia noted that *Feres* had received “widespread, almost universal criticism” and rested on questionable judicial reasoning.<sup>129</sup> Justice Scalia’s concerns have been reiterated in academia, where scholars continually berate the “reluctantly applied”<sup>130</sup> *Feres* doctrine as “too broad,”<sup>131</sup> “inequitable,”<sup>132</sup> and a “labyrinth.”<sup>133</sup> As a result, Congress appears likely to overrule *Feres* in the near future.<sup>134</sup>

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126. Cf. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (describing how the law is predictable in its course). In his seminal work, Justice Holmes explains that legal issues must be resolved in light of practical considerations. Indeed, Justice Holmes thinks it is “revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV,” and he goes on to note that “[i]t is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” *Id.* at 469.

127. 340 U.S. 135, 146 (1950).

128. See *United States v. Johnson*, 481 U.S. 681, 700–01 (1987) (Scalia, J., joined by Brennan, Marshall, & Stevens, JJ., dissenting) (5–4 decision).

129. See *id.* (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)) (internal quotation marks omitted).

130. Flora D. Darpino, *Eroding the Feres Doctrine—A Critical Analysis of Three Decisions*, ARMY LAW., Apr. 1996, at 26, 28.

131. Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 4 (2007).

132. Kenneth R. Wiltberger, *The Carmelo Rodriguez Military Medical Accountability Act of 2009: An Opportunity To Overturn the Feres Doctrine as It Applies to Military Medical Malpractice*, 8 AVE MARIA L. REV. 473, 498 (2010).

133. Helen D. O’Conor, *Federal Tort Claims Act Is Available for OIF TBI Veterans, Despite Feres*, 11 DEPAUL J. HEALTH CARE L. 273, 313 (2008).

134. See, e.g., Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (2009); see also H.R. 1478—Carmelo Rodriguez Military Medical Accountability Act of 2009, OPENCONGRESS, <http://www.opencongress.org/bill/111-h1478/show> (last visited Apr. 7, 2012) (resolving to amend the FTCA to allow claims to be brought against the United States for “damages relating to the personal injury or death of a member of the Armed Forces of the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions . . . that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the government”). The 2009 bill was a successor to a similar bill that failed to pass in 2008. See Carmelo Rodriguez Military Medical Accountability Act of 2008, H.R. 6093, 110th Cong. (2008).

The Supreme Court's decision in *United States v. Olson*<sup>135</sup> is another example of the current trend, the focus of which is to expand the government's liability.<sup>136</sup> The litigants in *Olson* asked the Court to determine whether courts should hold the United States liable to the same extent as a private individual under like circumstances if the government engages in conduct in which a private individual does not ordinarily engage.<sup>137</sup> The Court agreed that courts should, holding that federal mine inspectors are liable under the FTCA to the same extent as "private persons who conduct safety inspections."<sup>138</sup>

*Olson* has "ridiculous" implications because it exposes the United States to broad liability, thus making the case for limited damages more salient.<sup>139</sup> Chelsea Durkin illustrated these implications quite persuasively in her discussion of *Tekle v. United States*, a case in which the Ninth Circuit reversed a judgment entered after the district court granted summary judgment to the United States in an FTCA action in which the plaintiff alleged federal agents falsely arrested him.<sup>140</sup> Applying the *Olson* framework, the court concluded the plaintiff raised genuine issues of material fact as to whether the agents failed to adhere to the standard with which *private individuals* must comply when making citizens' arrests.<sup>141</sup> Thus, according to *Tekle*'s logic, "federal officer[s] must *actually* observe a person committing . . . a misdemeanor in order to arrest the person, because '[r]easonable cause to believe that a misdemeanor has been committed is not sufficient.'"<sup>142</sup> If they do not, any arrest they make will open the United States up to potential liability under the FTCA.<sup>143</sup>

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135. 546 U.S. 43 (2005).

136. See Durkin, *supra* note 3, at 280.

137. See 546 U.S. at 45. More specifically, the Court had to determine whether federal mine inspectors should be held liable to the same extent as a private individual under like circumstances. *Id.*

138. *Id.* at 47.

139. Durkin, *supra* note 3, at 280–81 (discussing those implications at length).

140. *Id.* at 280 (citing *Tekle v. United States*, 457 F.3d 1088, 1091–93 (9th Cir. 2006), *withdrawn and amended by* 511 F.3d 839 (9th Cir. 2007)).

141. *Tekle*, 511 F.3d at 853–56.

142. Durkin, *supra* note 3, at 280 (second alteration in original) (emphasis added) (quoting *Tekle*, 457 F.3d at 1101). Holding federal officers—and by extension, the United States—to this heightened standard may prevent them from fulfilling their duty to keep the peace. *Id.* at 280–81.

143. *Id.* at 280. In a concurring opinion in *Tekle*, Judge Fisher warned that *Olson* improperly "undermine[d]" the "unique obligations of law enforcement officials." *Tekle*, 511 F.3d at 856–57 (Fisher, J., concurring) (citing *Arnsberg v. United States*, 757 F.2d



Perhaps *Sauceda v. United States* provides a more illuminating example of *Olson*'s pitfalls.<sup>144</sup> In that case, the plaintiffs sued the United States under the FTCA, alleging that a Border Patrol agent negligently deployed a controlled tire deflation device—a spike strip—ahead of their approaching vehicle.<sup>145</sup> The United States moved for summary judgment, but the court denied the motion because whether the agent was negligent was a factual determination for the jury: “[T]he alleged actions of [the Border Patrol agent], *if taken by a private person*, could support a finding of negligence. . . . [T]he throwing of an object at a fast-moving vehicle ‘constitutes a gross deviation from the standard of conduct a reasonable person would exercise.’”<sup>146</sup>

*Sauceda*'s logic is inherently flawed. Civilians do not pursue suspected criminals, nor do they throw spike strips when in pursuit.<sup>147</sup> If they did, they would likely be negligent.<sup>148</sup> So if courts hold federal agents to that standard, then logically the agents will be negligent.<sup>149</sup> In turn, courts will hold the United States liable under the FTCA.<sup>150</sup> This expanded liability highlights the importance of limiting damage awards.

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971, 978–79 (9th Cir. 1985)). This was so, according to Judge Fisher, because “a private citizen making a citizen’s arrest does not act under ‘like circumstances’ required by § 2674.” *Id.* at 857 (quoting *Arnsberg*, 757 F.2d at 979). In so arguing, Judge Fisher forcefully criticized *Olson*'s failure to “provide courts with enough flexibility to preserve law enforcement privileges.” *Id.*

144. *Sauceda v. United States*, No. CV-07-2267-PHX-DGC, 2009 WL 3756703 (D. Ariz. Nov. 5, 2009).

145. *Id.* at \*3.

146. *Id.* at \*4 (emphasis added) (quoting *In re Navajo Cnty. Juvenile Delinquency Action No. 89-J-099*, 793 P.2d 146, 147 (Ariz. Ct. App. 1990) (affirming lower court’s finding that juvenile was delinquent because he threw water balloons at moving vehicles)).

147. With this paradigm in mind, it is not surprising that the court could not find any case in which a “private person deployed a [spike strip] in front of a passing vehicle.” *Id.*

148. *See id.* (“A private person’s deployment of a [spike strip] under these circumstances could be found to constitute an unreasonable use of force creating an excessive risk of harm to Plaintiffs.” (citing *Tekle*, 511 F.3d at 854)); *see also* *People v. Piorkowski*, 115 Cal. Rptr. 830, 835 (Ct. App. 1974) (holding that a statute regulating citizens’ arrests did not permit bounty hunter to carry a weapon when arresting a suspected robber).

149. *See Saucedo*, 2009 WL 3756703, at \*4–5.

150. *But cf.* *Indian Towing Co. v. United States*, 350 U.S. 61, 75 (1955) (Reed, J., dissenting) (“[The FTCA] should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress.”). The exact result later reached in *Sauceda* was once decried by Justice Reed, who predicted that the expansive jurisprudential approaches used in determining the scope of the United States’ liability under the FTCA would logically extend liability to “injuries from negligence in pursuing criminals.” *Id.* at 76.

## C. Social Developments

As previously discussed, the FTCA provides plaintiffs with well-laid avenues that can be used to reach into the government's pockets.<sup>151</sup> But that, without more, does not warrant implementing a tradeoff system. Unfortunately, there is more; the government is also faced with a bevy of tort claims that present the potential for double recovery. Though the lingering effects of the Gulf and Vietnam Wars and the U.S. military's efforts in Iraq and Afghanistan surely have sustained the veteran population—in the former case—and ushered in a new generation of veterans—in the latter case—relying on baseline VA medical care,<sup>152</sup> less obvious—and yet, as I will argue, more potent—is the effect that mounting TRICARE costs have had and will have on this windfall problem.

TRICARE is a comprehensive health care insurance system available to military personnel, retirees, and their dependents.<sup>153</sup> An in-depth discussion of TRICARE is neither useful nor desired, but a typical policy allows its beneficiary to use private health providers, as long as those providers are included in the TRICARE framework and as long as the beneficiary pays a deductible and coinsurance.<sup>154</sup>

151. See *supra* Part IV.B.

152. Today, there are approximately twenty-two million living veterans of the United States military. VA *Benefits & Health Care Utilization*, U.S. DEP'T VETERANS AFFAIRS, [http://www.va.gov/VETDATA/docs/Quickfacts/Winter\\_12\\_sharepoint\\_final.pdf](http://www.va.gov/VETDATA/docs/Quickfacts/Winter_12_sharepoint_final.pdf) (last updated Feb. 3, 2012) ("Projected U.S. Veterans Population"). More than eight million are enrolled in the VA health care system. *Id.* Since 2001, the VA has provided medical care to more than 425,000 military personnel returning from Operation Iraqi Freedom and Operation Enduring Freedom. Paul Sullivan & Lauren Hohle, *More Than 425,000 Iraq and Afghanistan War Veterans Treated by VA—More Than 250 New Patients Every Day*, VETERANS TODAY (Sept. 16, 2009), <http://www.veterans.com/2009/09/16/more-than-425-000-iraq-and-afghanistan-war-veterans-treated-by-va-more-than-250-new-patients-every-day/>. Some have estimated that the VA will treat up to one million veterans before both operations end. *Id.* In addition, veterans from the Vietnam and Gulf Wars are still in need of VA health care. There are currently almost eight million Vietnam-era veterans. *Demographics*, U.S. DEP'T VETERANS AFFAIRS, <http://www.va.gov/VETDATA/Demographics/Demographics.asp> (last updated Sept. 30, 2006) (open "Period of Service" 2L Excel Spreadsheet). The Gulf War involved another 695,000 military personnel, many of whom have had to seek medical care for ailments connected with service, especially Gulf War Syndrome. See Kevin J. Dalton, Comment, *Gulf War Syndrome: Will the Injuries of Veterans and Their Families Be Redressed?*, 25 U. BALT. L. REV. 179, 180–81 (1996).

153. U.S. Dep't of Defense, *What is TRICARE?*, TRICARE, <http://www.tricare.mil/mybenefit/home/overview/WhatIsTRICARE?> (last visited Apr. 7, 2012).

154. *TRICARE Standard and TRICARE Extra*, TRICARE (Jan. 2012), [http://www.tricare.mil/tricaremartfiles/Prod\\_842/TRICARE\\_Standard\\_and\\_TRICARE\\_Extra\\_Fact\\_Sheet\\_2012\\_Lo.pdf](http://www.tricare.mil/tricaremartfiles/Prod_842/TRICARE_Standard_and_TRICARE_Extra_Fact_Sheet_2012_Lo.pdf).

TRICARE is extremely popular among our veterans.<sup>155</sup> And with the current influx of veterans, it is also extremely expensive to implement.<sup>156</sup> Part of the problem is that TRICARE “enrollment fees and cost shares . . . have not increased in a decade.”<sup>157</sup> Benefits offered in the private sector, however, have been met with increased enrollment fees and cost shares.<sup>158</sup> As a result, beneficiaries increasingly have abandoned their private coverage in favor of TRICARE.<sup>159</sup> Reacting to this development, Department of Defense Secretary Robert Gates has noted the Department will include in its 2012 budget request “recommendations to raise TRICARE premiums for some beneficiaries.”<sup>160</sup>

These higher premiums will force veterans to seek other options. In that vein, many veterans may choose to rely on the VA’s baseline medical benefits—free medical care. This makes the windfall scenario more likely because the government will defend more FTCA claims brought by veterans who are entitled to medical care that will not be deducted from their damage awards for future medical expenses.<sup>161</sup> When taken together with the United States’ expanding liability, this development would exacerbate the windfall problem—more veterans, more FTCA suits, more requests for future medical expenses, and more drain on a treasury that is already spinning out of control.

In all, these social developments justify implementing Justice Traynor’s tradeoff system. Jurists and scholars alike have viewed the government’s sovereign immunity with distaste, and that view largely has won out; the government’s liability is expanding.<sup>162</sup> The government also must answer an influx of claims as the veteran population grows and seeks to rely on the VA medical care to which it is entitled. Mathematically, then, we can determine the total costs payable from the Treasury by multiplying the United States’ probable liability by the

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155. See Elisabeth Bumiller & Thom Shanker, *Gates Seeking To Contain Military Health Costs*, N.Y. TIMES, Nov. 29, 2010, at A1, available at <http://www.nytimes.com/2010/11/29/us/29tricare.html>.

156. Vince Patton, *Military Struggling with Rising Health Care Costs*, MILITARY.COM (2005), [http://www.military.com/NewContent/0,13190,RN\\_080305\\_Health,00.html?ESRC=retirees.nl](http://www.military.com/NewContent/0,13190,RN_080305_Health,00.html?ESRC=retirees.nl).

157. *Id.*

158. *Id.*

159. *Id.*

160. Tom Philpott, *Gates Aims To Raise TRICARE Premiums*, DAILY PRESS (Aug. 16, 2010), [http://articles.dailypress.com/2010-08-16/news/dp-nws-milupdate-0816-20100815\\_1\\_health-costs-health-care-tricare](http://articles.dailypress.com/2010-08-16/news/dp-nws-milupdate-0816-20100815_1_health-costs-health-care-tricare).

161. FTCA suits brought by veterans covered under TRICARE do not present a similar windfall problem because courts have generally held that a veteran’s damage award for future medical expenses must be offset by TRICARE coverage. See, e.g., *Mays v. United States*, 806 F.2d 976 (10th Cir. 1986).

162. See *supra* Part IV.B.

probable claims against which it must defend. And just as Los Angeles Transit would charge higher bus fares if it had to compensate claimants for pain and suffering, so too would the government pass along the costs of tort judgments against it to the public.<sup>163</sup> Accordingly, Justice Traynor's tradeoff should apply: courts should be cognizant of the effect that high damage awards have in an era of expanding liability.<sup>164</sup> If courts are willing to expand liability, they should match that willingness with an accompanying aim to limit damage awards.

#### V. A MORE SENSIBLE JURISPRUDENCE

This area of the law is muddled with bleak analysis and an unfocused jurisprudence. By overcompensating veterans under the FTCA, courts have closed their eyes to the statute's express language. First, courts have not held the United States liable to the same extent as a private individual under like circumstances.<sup>165</sup> Second, courts have not applied the substantive law of the state in which the tort took place.<sup>166</sup>

Instead, courts must start their analyses by selecting an appropriate analog. If courts select an inappropriate analog, they will survey the wrong state case law. After courts select the proper analog, they should apply the substantive law of the state where the tort took place, an FTCA requirement that courts often neglect.<sup>167</sup>

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163. See 31 U.S.C. § 1304 (2006) (authorizing Congress to appropriate moneys due under final judgments against the United States in FTCA actions). Some scholars have questioned why the United States, and not the government agency responsible for causing the injury, should be held liable under the FTCA. See, e.g., PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 106 (1983). Professor Schuck contends that holding the United States liable does little to deter negligent agencies and officials. *Id.* His argument rests upon the notion that agencies that do not foot the bill lack incentives to implement deterrent measures. *Id.* For a rebuttal to Professor Schuck's argument, see William P. Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 ADMIN. L.J. AM. U. 1105, 1165-68 (1996).

164. See *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (“[W]hen dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction.”).

165. 28 U.S.C. § 2674 (2006).

166. 28 U.S.C. § 1346(b) (2006), construed in *Richards v. United States*, 369 U.S. 1, 9-12 (1962).

167. See, e.g., *Green v. United States*, 530 F. Supp. 633, 644 (E.D. Wis. 1982) (“[T]he question on which Wisconsin law does not control is whether a benefit received from the government is, in fact, collateral to an FTCA judgment. To answer that question one must look to federal law.”).

A. *Framing the Issue: Selecting a Workable Analog*

Courts awarding veterans damages for future medical expenses fail to hold the United States liable to the same extent as a private individual under like circumstances.<sup>168</sup> Instead, courts erroneously hold the United States liable to the same extent as a private individual under *exact* circumstances.<sup>169</sup> In this sense, courts have misapplied the FTCA's language to the collateral source rule.

The court in *Feeley* seems to have started this trend. In that case, the court thought the appropriate question for resolution was whether, in a lawsuit against a private defendant, state law required the plaintiff's damage award to be reduced by the VA medical care that the plaintiff had received.<sup>170</sup> Later courts followed *Feeley*'s lead, framing the dispositive issue in a manner inconsistent with the FTCA's language. For instance, one court reasoned that "a private defendant cannot escape an award of damages in a civil suit for future medical expenses by contending that a plaintiff, who happens to be a veteran, is entitled to free medical care at a VA Medical Center."<sup>171</sup>

These courts erred. They correctly changed the United States to a private individual but kept the circumstances—free VA medical care—constant. The question is not whether state law would reduce damages that a private defendant must pay by the amount of the plaintiff's VA medical care. Framing the issue that way is not faithful to the FTCA's text, which holds the United States liable to the same extent as private individuals under *like* circumstances.<sup>172</sup> In addition, by keeping the circumstances constant, courts have virtually predetermined the answer in any state that has retained the collateral source rule. In other words, in a state with a collateral source rule, the answer is a simple one: a private defendant cannot reduce the plaintiff's damage award by government benefits to which the plaintiff is entitled.<sup>173</sup>

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168. See 28 U.S.C. § 2674.

169. See *infra* Part V.A.

170. *Feeley v. United States*, 337 F.2d 924, 927 (3d Cir. 1964).

171. Harz, *supra* note 19, at 616 (citing Memorandum Findings of Fact, Conclusions of Law & Order at 14, *Heitzenrater & Heitzenrater v. United States*, No. 86-C-757 (D. Colo. Sept. 12, 1988)).

172. *Cf. id.* According to that article, allowing the government to furnish the claimant with free medical services in lieu of paying a monetary award does not hold the United States liable to the same extent as a private individual. See *id.* at 601–02. This is so, according to the article, because private individuals are not entitled to use the tort system as a "barter exchange." *Id.* at 616.

173. See, e.g., *Feeley*, 337 F.2d at 927 (disallowing offset for future medical expenses on the theory that a private defendant could not reduce a plaintiff's damage award by VA medical treatment plaintiff had received).

Admittedly, selecting an appropriate analog in this situation poses some analytical difficulties. The first difficulty is that comparing the United States with a private individual is imperfect.<sup>174</sup> The United States is a multifaceted entity, replete with numerous departments and agencies; a private individual, on the other hand, is a single organism.<sup>175</sup> And at a certain level, this distinction might matter insofar as the collateral source rule is concerned. For example, some believe the collateral source rule serves as a deterrent: it gives potential tortfeasors the incentive to take precautions in conducting their affairs because courts will not reduce damage awards by benefits to which plaintiffs may be fortuitously entitled.<sup>176</sup> Giving that warning to an individual tortfeasor may compel

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174. *LaBarge v. Cnty. of Mariposa*, 798 F.2d 364, 367 (9th Cir. 1986) (noting that the federal government cannot be “exactly like a private actor”).

175. See SCHUCK, *supra* note 163, at 101–02, 106. Courts have long struggled to reconcile these differences under the FTCA. See, e.g., *Rayonier Inc. v. United States*, 352 U.S. 315, 319–20 (1957) (refusing to hold the United States liable to the same extent as a municipal corporation or other public body, despite similarities between the entities); *Indian Towing Co. v. United States*, 350 U.S. 61, 64–65 (1955) (discarding the government’s contention that the United States is not liable for activities that private individuals do not perform); Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1114 (2009); see also Durkin, *supra* note 3, at 273–79 (discussing the Ninth Circuit’s consistently wrong approaches in determining the extent of the United States’ liability under the FTCA over the decades). These and other difficulties once prompted Judge Max Rosenn of the Third Circuit to refer to the FTCA as a “traversable bridge across the moat of sovereign immunity.” *Jaffee v. United States*, 592 F.2d 712, 717 (3d Cir. 1979). For discussions that expand upon that metaphor, see generally Richard W. Bourne, *A Day Late, a Dollar Short: Opening a Governmental Snare Which Tricks Poor Victims out of Medical Malpractice Claims*, 62 U. PITT. L. REV. 87 (2000), which argues that the FTCA is filled with loopholes such that claimants in medical negligence cases are unable to recover when Congress categorizes medical workers as federal employees, and Dianne Rosky, *Respondeat Inferior: Determining the United States’ Liability for the Intentional Torts of Federal Law Enforcement Officials*, 36 U.C. DAVIS L. REV. 895 (2003), which contends that the doctrine of respondeat superior is ill-suited for application under the FTCA. Some scholars, however, do not share Judge Rosenn’s views and instead believe the FTCA is an example of a federal statute that works. See, e.g., Jeffrey Axelrad, *Litigation Under the Federal Tort Claims Act*, 8 LITIGATION 22, 55 (1981) (“The [FTCA] as a whole is an example—perhaps a rare one—of a statute that generally achieves its intended purpose.”).

176. John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1546–49 (1966). Others take it further, boldly arguing the collateral source rule is punitive in nature. See, e.g., *City of Salinas v. Souza & McCue Constr. Co.*, 424 P.2d 921, 926 (Cal. 1967). This view, I submit in accord with Professor Perillo, is “simply wrong.” Joseph M. Perillo, *The Collateral Source Rule in Contract Cases*, 46 SAN DIEGO L. REV. 705, 716 (2009) (characterizing the collateral source rule as “patently nonpunitive”).

it to be careful.<sup>177</sup> When the tortfeasor is the United States, however, the same warning may have little deterrent effect.<sup>178</sup> This is because the United States qua tortfeasor—the Department of Homeland Security (DHS)—is often different from the United States qua payer of damage awards—the Treasury Department or, more precisely, the taxpayer.<sup>179</sup> In this sense, admonishing the DHS to “take precautions” might be superfluous because some other government branch will be footing the bill for its negligence.<sup>180</sup>

This particular imperfection need not be resolved, at least not here, because it matters only insofar as the collateral source rule *in fact* serves as a deterrent, which is debatable for several reasons. First, advising potential tortfeasors of the collateral source rule’s strictures may nonetheless fail to encourage them to take precautions not to be negligent.<sup>181</sup> Second,

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177. Daena A. Goldsmith, Comment, *A Survey of the Collateral Source Rule: The Effects of Tort Reform and Impact on Multistate Litigation*, 53 J. AIR L. & COM. 799, 801 (1988).

178. SCHUCK, *supra* note 163, at 106 (“The United States Treasury, the liability point in the current system, is too remote from officials’ operating conditions in the field; it neither understands particular programmatic functions and techniques nor possesses the administrative resources necessary to implement such knowledge at street level.”). In other words, the entity providing veterans with medical care—the VA—is quite apart from the entity that caused them to suffer injuries—the Department of Homeland Security. Nominally, both fall under the visage of the all-encompassing U.S. government, but in very real respects, they are different.

Somewhat playfully, we can expand this conundrum. Within a given veteran-plaintiff’s FTCA claim, we can identify up to five relevant entities. Suppose again that the DHS injured the plaintiff and that, as a veteran, the plaintiff will receive medical care from the VA. At this point, we have identified the tortfeasor and the supposed collateral compensator. Who else remains? The Department of Justice, the entity sitting at the defense table. The U.S. Treasury, the entity that will directly pay the damage award. And the taxpayer, who will indirectly pay the damage award. At least from a deterrence perspective, these distinctions surely matter, but I leave an in-depth analysis for another day.

179. *Id.*

180. *Id.* at 102–03. In so arguing, Professor Schuck overlooks several valid points that are recapitulated in Kratzke, *supra* note 163, at 1165–68. First, the FTCA waives the United States’, not the at-fault agency’s, sovereign immunity, *id.* at 1166, which implies that Congress did not intend the FTCA to serve as a deterrent, *id.* at 1167 (“In the event that Congress wants tort suits to deter agency misconduct, it can make its will understood.”). Additionally, shifting the costs of tort judgments to the negligent agency does not take into account the reality that government agencies often reorganize. *Id.* (“In the event of reorganization, both the responsibilities and the risks of liability for injury-causing misconduct are shifted from one agency to another.”). Finally, the doctrine of respondeat superior—upon which the FTCA is based—rests upon the notion that the “entity that reaps the benefits should be the one that bears liability for injuries caused by employee misconduct.” *Id.* at 1166. For purposes of this discussion, that entity is the United States, not the negligent agency.

181. Whether society can deter negligent conduct is a question to which no satisfactory answer has been given. Compare Fleming, *supra* note 176, at 1548 (noting that deterrence as a justification for tort liability should be “confined to situations where it can realistically perform an admonitory function, namely, only against defendants guilty of serious misconduct”), with *Thompson v. Sun City Cmty. Hosp., Inc.*, 688 P.2d

even if the collateral source rule sufficiently deters tortfeasors, it makes larger damage awards more likely and thus fails to deter potential *victims*; “[i]f tort awards are ‘too high,’ potential victims may have reduced incentives to take efficient precautions against injury.”<sup>182</sup>

The second analytical difficulty is to determine the extent to which courts should generalize the analog. The analog cannot be “free VA medical care,” as *Feeley* and other courts have posited, because the FTCA holds the United States liable to the same extent as a private individual under like, not exact, circumstances.<sup>183</sup> Perhaps it would be correct to ask whether state law would reduce a plaintiff’s damage award by moneys the defendant has agreed to pay the plaintiff in order to “rectify the imbalance he [has] caused.”<sup>184</sup> But that analog is also incorrect because the United States’ obligation to pay preexists its negligence in the situation at bar.

*Instead, the issue, properly framed, is whether state law would reduce a plaintiff’s damage award for future medical expenses if, independent of tort, the defendant has already agreed to pay those expenses.* As framed, the issue accounts for the United States’ preexisting obligation to pay for a veteran’s medical expenses. It purposefully avoids asking whether the defendant has *gratuitously* promised to pay for the plaintiff’s medical expenses because so framing the issue does not account for the United States’ irrevocable obligation to pay a veteran’s medical expenses.

Further, the issue, as I have framed it, finds judicial support of the highest order; in *Molzof*, the Supreme Court expressly agreed with this construction.<sup>185</sup> In remanding the case to the Seventh Circuit, the Court noted that Wisconsin law might have “require[d] a setoff when a [private] defendant already has . . . agreed to pay[] expenses incurred by the

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605, 615 (Ariz. 1984) (reasoning that “deterrence of negligent conduct” is a tort objective), and RESTATEMENT (SECOND) OF TORTS § 901(c) (1979) (providing that one goal of the tort system is to deter wrongful conduct). In other contexts, courts have warmed to the view that negligent conduct cannot be deterred. *See, e.g.*, *Herring v. United States*, 555 U.S. 135, 144–45 (2009) (reasoning that the exclusionary rule, the purpose of which is to deter police misconduct, had no place in a situation in which law enforcement unlawfully seized evidence because the misconduct—negligently failing to delete defendant’s arrest warrant from law enforcement database—could not have been adequately deterred).

182. Krauss & Kidd, *supra* note 11, at 21.

183. *See* 28 U.S.C. § 2674 (2006).

184. Krauss & Kidd, *supra* note 11, at 48–50.

185. *See Molzof v. United States*, 502 U.S. 301, 312 (1992).



plaintiff.”<sup>186</sup> The Court did *not* ask the Seventh Circuit to decide whether Wisconsin law would require a setoff if a plaintiff in an action against a private defendant has received VA medical care.<sup>187</sup> Doing so would not have been faithful to the FTCA’s command, which holds the United States liable to the same extent as private individuals under like, not exact, circumstances.<sup>188</sup>

Additionally, generalizing the analog from “free VA medical care” to “preexisting obligation to pay”—as I do in framing the issue—stays true to the framework enunciated in *Indian Towing Co. v. United States*.<sup>189</sup> In *Indian Towing*, plaintiffs sued the Coast Guard for a host of maladies, including failing to check and repair a lighthouse’s battery.<sup>190</sup> The Supreme Court held that the proper analog was a private person who “undertakes to warn the public of danger and thereby induces reliance.”<sup>191</sup>

*Indian Towing*’s teaching is simple: the FTCA must be read logically. The Court in *Indian Towing* could have held the United States liable to the same extent as a private defendant who owned a lighthouse and failed to check its battery and sun relay system. It did not, however, because private individuals do not normally own or operate lighthouses, and even fewer private individuals own lighthouses *and* fail to maintain them properly.<sup>192</sup>

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186. *Id.* (emphasis added).

187. Unfortunately, on remand, the Seventh Circuit glossed over the Supreme Court’s instructions. The court failed to apply the correct analog and thus looked to state law that had no bearing on the issue before the court. *See* Response, *supra* note 71, at 14–15 (arguing *Molzof*’s application of Wisconsin’s collateral source law was “questionable” and “not well-reasoned”). The *Molzof* court asked the wrong question; it asked whether a plaintiff could recover from a private defendant for medical expenses incurred, even though the plaintiff was entitled to free treatment at a naval hospital. 6 F.3d 461, 467 (7th Cir. 1993). In failing to ask whether Wisconsin would “require[] a setoff when a [private] defendant already has paid (or agreed to pay) expenses incurred by the plaintiff,” the court failed to hold the United States liable to the same extent as a private individual under *like* circumstances. 502 U.S. at 312. To the extent that it improperly framed the issue, *Molzof*’s disposition is incorrect. For a more detailed analysis of the state law to which *Molzof* erroneously adhered, see *infra* Part V.B.2.

188. *See* 28 U.S.C. § 2674.

189. 350 U.S. 61, 62–65 (1955).

190. *Id.* at 62 (repeating in the Court’s opinion plaintiff’s allegations that the Coast Guard failed to “check the battery and sun relay system”; “check[] the lighthouse . . . to make a proper examination of the connections which were ‘out in the weather’”; “repair the light”; or warn the public of the various malfunctions).

191. *Id.* at 64–65.

192. Recognizing this paradigm, the government in *Indian Towing* contended it was not liable because private individuals do not operate lighthouses and thus no analog existed. *Id.* at 64. In so arguing, the government asked the Court to adopt a framework in which the government, its agencies, and employees would not be liable for negligent performance of “uniquely governmental functions.” *Id.* The Court disagreed. *Id.* at 69. Alternatively, in *Indian Towing*, the United States argued it should be liable to the same extent as a municipal corporation. *Id.* at 65. The dissenting Justices found the argument

As in *Indian Towing*, applying a narrow analog to the scenario I have developed in this Comment is illogical. Courts should not ask whether state law would reduce a plaintiff's damage award by the VA medical care to which he or she is entitled because so framing the issue does not account for the most critical aspect of the collateral source rule: the benefit provider, who can be either the defendant or an independent source. Reading out the source of the benefit produces only one answer: a state applying a traditional collateral source rule would not reduce a plaintiff's damage award in a suit against a private defendant by VA medical care the plaintiff had received or was to receive.<sup>193</sup> The collateral source rule clearly forecloses such an offset.<sup>194</sup>

On the other hand, asking whether state law would reduce a plaintiff's damage award for future medical expenses by medical expenses the defendant has an obligation to pay to the plaintiff does not presuppose one answer. Instead, it requires courts to survey state law and make a meaningful determination. Additionally, only after generalizing the analog will courts survey the appropriate state law, namely, the extent to which state law allows a plaintiff to recover future medical expenses when a private defendant has already agreed to pay those expenses.

### *B. Resolving the Issue: Applying State Law*

After framing the issue properly, the next step is to resolve it. Consistent with the FTCA, I suggest courts should apply the substantive

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persuasive, contending that under state law a municipal corporation was not liable for injuries sustained as a result of negligent failure to maintain traffic lights. *Id.* at 75–76 (Reed, J., dissenting). The dissent then analogized street traffic lights to “navigation lights,” which were at issue in the case at bar. *Id.* at 76. Concluding that municipalities would not be held liable for failing to maintain navigation lights under state law, the dissent would not have held the United States liable for its failure to properly maintain the lighthouse. *Id.* Consistently, however, the Supreme Court has refused to adopt the position that the dissent advocated in *Indian Towing*. See, e.g., *United States v. Olson*, 546 U.S. 43, 44 (2005). Instead, under the prevailing view, the words of the FTCA “mean what they say, namely, that the United States waives sovereign immunity ‘under circumstances’ where local law would make a ‘private person’ liable in tort.” *Id.* (quoting 28 U.S.C. § 1346(b)(1) (2006)).

193. See, e.g., *Molzof v. United States*, 6 F.3d 461, 467 (7th Cir. 1993) (considering that issue, as framed, and holding VA medical benefits are collateral under Wisconsin law).

194. This is so because the collateral source rule operates as a mechanism by which the tort system ensures the tortfeasor bears the entire loss without benefitting from the plaintiff's good fortune. See Note, *supra* note 8, at 741.

law of the state where the tort occurred.<sup>195</sup> A review of each state's applicable law is too ambitious a task for this Comment, but some examples are apropos. To that end, this Part reexamines *Feeley* and *Molzof* from the correct perspective.

### 1. *Feeley Reconsidered*

In *Feeley*, an on-duty U.S. Post Office employee negligently injured a veteran in Pennsylvania.<sup>196</sup> In determining whether the veteran could recover future medical expenses despite his entitlement to VA medical care, the court began its analysis by framing the issue incorrectly, asking whether “Pennsylvania state law requires that in a suit against a private defendant the hospital and medical care conferred by the [VA] be deducted from the [damage] award.”<sup>197</sup> The court then cited to Pennsylvania's collateral source rule, which states that the “victim of a tort is entitled to receive from his tortfeasor the full amount he is entitled to . . . regardless of what the former receives from other sources.”<sup>198</sup> Reciprocally, under Pennsylvania law, if a tort victim receives compensation from the tortfeasor, then the victim is not entitled to receive from the tortfeasor the full amount to which the victim would otherwise be entitled.<sup>199</sup>

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195. See *Richards v. United States*, 369 U.S. 1, 9–14 (1962).

196. 337 F.2d 924, 926 (3d Cir. 1964).

197. *Id.* at 927.

198. *Id.* at 928 (quoting *Boudwin v. Yellow Cab Co.*, 188 A.2d 259, 259 (Pa. 1963)) (internal quotation marks omitted).

199. In an effort to reform the state's tort system, the Pennsylvania legislature has passed two statutes modifying the collateral source rule in professional liability actions. See 42 PA. CONS. STAT. ANN. § 8553 (West 2007); 40 PA. CONS. STAT. ANN. § 1303.508 (West 2007 & Supp. 2011). Under the first statute, courts must reduce a plaintiff's damage award by benefits a claimant is entitled to receive under an insurance policy. 42 PA. CONS. STAT. ANN. § 8553. This modification does not affect the outcome of *Feeley* because the VA is not a health insurer nor is free VA medical care an insurance benefit. The second statute reforming the collateral source rule in Pennsylvania applies only in the context of medical negligence actions. 40 PA. CONS. STAT. ANN. § 1303.508. Section 1303.508 provides “a claimant in a medical professional liability action is precluded from recovering damages for past medical expenses . . . to the extent that the loss is covered by a private or public benefit or gratuity that the claimant has received prior to trial.” *Id.* This provision does not apply to life insurance policies, pension plans, social security benefits, medical benefits that must be repaid to the Department of Public Welfare, and public benefits “paid or payable under a program which under Federal statute provides for right of reimbursement which supersedes State law for the amount of benefits paid from a verdict or settlement.” *Id.*

Neither statute affects *Feeley*'s reconsidered outcome because *Feeley* was not a professional liability action. See *Feeley*, 337 F.2d at 926 (noting U.S. Post Office employee negligently injured plaintiff). If *Feeley* had involved professional negligence or, more specifically, medical negligence, then one could argue section 1303.508 should apply, especially because it prevents plaintiffs from recovering only *past* medical expenses, thereby implicitly allowing plaintiffs to recover future medical expenses. See 40 PA. CONS. STAT. ANN. § 1303.508. The better analysis, however, is to disregard

In applying the collateral source rule, the court stated the general rule that plaintiffs may recover doubly if they receive payment that is a “true gift.”<sup>200</sup> It then held the plaintiff was not allowed a double recovery because government benefits were not true gifts “bestowed on the veteran.”<sup>201</sup> Oddly enough, the court then declared Pennsylvania law to be unhelpful in determining whether the VA medical benefits were collateral.<sup>202</sup> As previously discussed, the court ultimately allowed the plaintiff to recover future medical expenses after applying the federal test.<sup>203</sup>

The *Feeley* court confused its analysis by asking whether VA medical benefits are collateral.<sup>204</sup> That is simply not the issue before the courts.<sup>205</sup>

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section 1303.508 in medical negligence actions arising under the FTCA for several reasons. First, section 1303.508 refers only to “collateral sources” and does not appear to dictate the result if the tortfeasor is the same source who has paid—or agreed to pay—moneys to the plaintiff. *See id.* Additionally, section 1303.508 should not apply in FTCA actions to the extent that its provisions allow plaintiffs to recover damages despite their entitlement to social security benefits, welfare benefits, and a narrow category of federal benefits for which the government has a right to reimbursement. *See id.* This is so because in enacting these provisions, the legislature probably did not contemplate situations in which the United States is the tortfeasor *and* payer of these benefits. *Accord* *Amlotte v. United States*, 292 F. Supp. 2d 922, 927 (E.D. Mich. 2003). Thus, applying section 1303.508 in FTCA actions ignores the likely legislative intent.

200. 337 F.2d at 930. According to the court, allowing a plaintiff to recover doubly if the plaintiff has received payment as a gift is justified because the donor’s intent necessarily implies that the donor did not give the gift with any intention to compensate the plaintiff. *Id.* at 928. The tortfeasor cannot use gratuities to reduce payments the tortfeasor must make to the plaintiff because “[g]ratuitous payments cannot be linked to the imbalance between the tortfeasor and victim.” *Krauss & Kidd, supra* note 11, at 31.

201. 337 F.2d at 932.

202. *Id.*

203. *Id.* at 935.

204. *Id.* at 932. So framing the issue is particularly problematic because numerous states have modified the collateral source rule by statutorily defining which benefits are collateral. *See, e.g.*, IDAHO CODE ANN. § 6-1606 (2010); ME. REV. STAT. ANN. tit. 24, § 2906 (2000); MICH. COMP. LAWS ANN. § 600.6303(4) (West 2000); N.Y. C.P.L.R. § 4545 (CONSOL. 2007 & Supp. 2012); OR. REV. STAT. § 31.580 (2011). Many states—Michigan, to take one example—have statutorily defined government benefits as collateral to prevent courts and juries from considering them when awarding damages to a plaintiff. *See* MICH. COMP. LAWS ANN. § 600.6303(4). The problem is that when the Michigan legislature passed this statute, “it [did] not necessarily take into consideration cases in which the United States is a defendant—as well as the payer of those benefits—nor would it since federal courts have exclusive jurisdiction over injury claims against the United States for money damages.” *Amlotte*, 292 F. Supp. 2d at 927. Recognizing loopholes like these, several courts have held that the United States may assert state statutory caps on damages even though it does not strictly fit within the statutory framework. *See, e.g.*, *Taylor v. United States*, 821 F.2d 1428, 1431–32 (9th Cir. 1987)

Not to belabor the point, but the issue, properly framed, is whether state law would reduce a plaintiff's damage award for future medical expenses by expenses the defendant has an obligation to pay to the plaintiff.<sup>206</sup> And under Pennsylvania law, victims are not entitled to receive from tortfeasors the full amount to which they are entitled if those victims receive compensation from the tortfeasors.<sup>207</sup> Thus, a defendant who has an obligation to pay the plaintiff's medical expenses is entitled to an offset under Pennsylvania's collateral source rule, which disallows double recovery if the plaintiff receives moneys from the tortfeasor.

## 2. *Molzof Reconsidered*

In *Molzof*, a veteran sued the United States after receiving medical maltreatment at a VA hospital in Wisconsin.<sup>208</sup> In framing the issue, the Seventh Circuit asked whether Wisconsin law allowed a plaintiff to recover future medical expenses in an FTCA action "even though the plaintiff is entitled to free medical care from the government as a veteran."<sup>209</sup> The court held the plaintiff could recover those expenses, reasoning that VA medical benefits were collateral under Wisconsin state precedent.<sup>210</sup> For that proposition, the court relied primarily on *Smith v. United Service Automobile Ass'n*, which held that a plaintiff could recover medical expenses from his insurance company even though he obtained free medical treatment for his injuries at a naval hospital.<sup>211</sup>

As in *Feeley*, the *Molzof* court framed the issue incorrectly and improperly applied state law. The court's consideration of *Smith* demonstrates this error.<sup>212</sup> *Smith* relied solely on *Kopp v. Home Mutual Insurance Co.*, which involved the interpretation of a plaintiff's automobile liability insurance policy.<sup>213</sup> Under the terms of the insurance policy in *Kopp*, the insurer agreed to "pay all reasonable [medical] expenses incurred . . . [t]o or for the named insured."<sup>214</sup> The insurer in *Kopp* contended the policy was not operative because the plaintiff never

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(applying California's \$250,000 statutory cap in medical negligence cases to the United States).

205. See *supra* Part V.A.

206. See *supra* Part V.A.

207. See *Feeley*, 337 F.2d at 928 (quoting *Boudwin v. Yellow Cab Co.*, 188 A.2d 259, 259 (Pa. 1963)).

208. 6 F.3d 461, 462–63 (7th Cir. 1993).

209. *Id.* at 464.

210. *Id.* at 466.

211. See *id.* at 466–67 (citing *Smith v. United Serv. Auto. Ass'n*, 190 N.W.2d 873 (Wis. 1971)).

212. See *id.* (citing *Smith*, 190 N.W.2d at 873).

213. *Kopp v. Home Mut. Ins. Co.*, 94 N.W.2d 224, 225 (Wis. 1959).

214. *Id.*

“incurred” any expenses while hospitalized, as required by the provision.<sup>215</sup> The court disagreed and enforced the provision.<sup>216</sup> According to the court, and as a general principle, the provision did not operate to allow a plaintiff to recover damages for medical services that a third-party volunteer gratuitously bestowed onto the plaintiff.<sup>217</sup> The provision *did* apply in the case before the court, however, because the plaintiff indirectly “incurred” expenses for his hospitalization by paying premiums to his Blue Cross health benefit plan.<sup>218</sup>

*Smith* involved the interpretation of an insurance policy identical to the one in *Kopp*.<sup>219</sup> According to the court in *Smith*, whether the policy allowed the plaintiff to recover hinged on whether the medical care to which the plaintiff was entitled was gratuitous or something for which he had paid a consideration:

If the United States Navy, in providing free hospital and medical services to its personnel, is a “third-party volunteer” providing a gift or gratuity, *Kopp* controls to bar recovery by the plaintiff here. If the Navy-provided hospital and medical services are provided for a “consideration,” and are not gratuitously provided, *Kopp* controls to authorize recovery by the plaintiff here.<sup>220</sup>

*Smith* concluded the provision was operative, reasoning the plaintiff paid a consideration for his medical benefits.<sup>221</sup>

Relying on *Smith*, *Molzof* concluded that veterans paid a “consideration” for their VA medical benefits.<sup>222</sup> The court then pointed to *Smith* for the proposition that a plaintiff is entitled to recover medical expenses if the plaintiff has paid a consideration for them.<sup>223</sup> By grounding its analysis on *Smith*’s fact-sensitive point, however, the Seventh Circuit misread

215. *Id.* The plaintiff did not incur any expenses in connection with his hospitalization because he subscribed to a Blue Cross hospital benefit plan. *Id.* Under that plan, the plaintiff paid quarterly premiums to Blue Cross. *Id.*

216. *Id.* at 226.

217. *Id.*

218. *Id.* at 225.

219. *Smith v. United Serv. Auto. Ass’n*, 190 N.W.2d 873, 874 (Wis. 1971). Under the insurance policy, the insurer promised “[t]o pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services . . . [t]o or for the named insured.” *Id.* at 874 n.1.

220. *Id.* at 874.

221. *Id.* at 875.

222. *Molzof v. United States*, 6 F.3d 461, 466–67 (7th Cir. 1993).

223. *Id.*

*Smith* and *Kopp* as announcing general propositions about the recoverability of damages in Wisconsin. Neither case provides any meaningful generalities, nor does either purport to decide whether and when benefits are collateral; instead, *Smith* and *Kopp* are informative on the subject only insofar as an insurance policy uses the word *incur* ambiguously.<sup>224</sup> If *Molzof* had framed the issue properly, it probably would not have considered *Smith* and *Kopp* at all.

The proper issue before the court in *Molzof* was whether Wisconsin state law would require a plaintiff's damage award for future medical expenses to be reduced by the value of medical expenses that the defendant has a preexisting obligation to pay to the plaintiff. As *Molzof* noted, Wisconsin's collateral source rule provides that "a personal injury claimant's recovery is not to be reduced by the amount of compensation received from . . . sources 'collateral' to the defendant."<sup>225</sup> In other words, under Wisconsin law a plaintiff's recovery *will* be reduced by the amount of compensation the plaintiff has received from sources *not independent* from the defendant. Thus, in a case in which a defendant has a preexisting obligation to pay the plaintiff's medical expenses, Wisconsin's collateral source rule would allow an offset. This means the *Molzof* court should have reduced the plaintiff's damage award for future medical expenses by the value of the VA medical care to which he was entitled.

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224. Thoreson v. Milwaukee & Suburban Transp. Co., 201 N.W.2d 745, 752 (Wis. 1972).

225. *Molzof*, 6 F.3d at 464 (quoting Lambert v. Wrensch, 399 N.W.2d 369, 372 n.5 (Wis. 1987)). In an effort to reform its collateral source rule in the context of medical negligence actions, in 2005 the Wisconsin legislature passed section 893.55, which provides that "[e]vidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice." WIS. STAT. ANN. § 893.55 (West 2006).

In *Molzof*, the plaintiff sustained injuries after receiving medical treatment at a VA hospital. 6 F.3d at 462. Thus, insofar as section 893.55 applies to medical negligence actions, it would be of some utility if *Molzof* were decided today. *How much* utility it would be, however, is less clear. Section 893.55 is purely evidentiary because it merely allows, without more, litigants to *introduce* evidence of a certain kind. And as an evidentiary statute, section 893.55 likely is not the vehicle a court would use to determine whether a damage award should be reduced by benefits to which the plaintiff is entitled because, after all, such a reduction or nonreduction is necessarily *substantive* in nature. Instead, to determine whether a damage award were subject to a setoff, a Wisconsin court deciding *Molzof* today would simply apply Wisconsin case law in accordance with the well-settled principle that state substantive law applies in FTCA actions. See *Richards v. United States*, 369 U.S. 1, 9–12 (1962).

### 3. Justifying the Results

Using this framework to reevaluate *Feeley* and *Molzof* is faithful to the FTCA's command. But that is not the only benefit. This framework also comports with a fundamental objective of the tort system: to make a person whole.<sup>226</sup>

Of course, according to tort reformists, the collateral source rule necessarily contravenes tort law's objective to make a person whole because it often allows a plaintiff to recover a damage award that exceeds his or her injury-related costs.<sup>227</sup> Indeed, the principle that underlies the collateral source rule is that the victim should receive the windfall, and not the tortfeasor, if either party has an opportunity to obtain one—if a source wholly independent of the tortfeasor pays for part of the victim's loss.<sup>228</sup> But what result if *neither* party has an opportunity to receive a windfall? This situation arises if the source who has paid—or agreed to pay—the victim's loss is, coincidentally or not, also the defendant.<sup>229</sup> If society allows the victim to recover that which he or she has already received—or will receive, in the case of an enforceable promise—then that victim necessarily recovers doubly.<sup>230</sup> In the same vein, society also forces the defendant to pay twice.<sup>231</sup>

Some scholars have justified allowing the victim to recover in the latter situation by conceptualizing the make-whole principle narrowly.<sup>232</sup>

226. See *McInroy v. Dyer*, 47 Pa. 118, 121 (1864). See generally George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992).

227. Jamie L. Wershba, *Tort Reform in America: Abrogating the Collateral Source Rule Across the States*, 75 DEF. COUNS. J. 346, 349 (2008). Tort reformists conceptualize the collateral source rule as a mechanism by which society can place the burden of the loss on the tortfeasor, not the helpless victim. See Note, *supra* note 8, at 741.

228. *Adams v. Turner*, 238 F. Supp. 643, 644–45 (D.D.C. 1965).

229. *Id.* Society encourages this situation because it means the tortfeasor has “attempt[ed] informally to make amends for [his or her] actions.” *Molzof*, 6 F.3d at 465.

230. Some disagree that the victim recovers doubly in this scenario. See, e.g., Krauss & Kidd, *supra* note 11, at 26–28. That view implies a victim recovers only insofar as the tortfeasor honors the victim's request to be compensated. *Karsten v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 808 F. Supp. 1253, 1258 (E.D. Va. 1992), *aff'd*, 36 F.3d 8 (4th Cir. 1994).

231. See *Adams*, 238 F. Supp. at 644–45.

232. See, e.g., Krauss & Kidd, *supra* note 11, at 26–28 (approaching the problem through the prism of “corrective justice”). For a discussion of the objectives of tort compensation, see Symposium, *Baselines and Counterfactuals in the Theory of Compensatory Damages: What Do Compensatory Damages Compensate?*, 40 SAN DIEGO L. REV. 1091 (2003).



To them, forcing the defendant to pay twice is acceptable if the defendant's duty as tortfeasor does not overlap with the preexisting duty to pay part or all of the victim's loss.<sup>233</sup> For example, Professor Michael Krauss developed a factual scenario in which

Larry negligently prevents Jane from catching her plane to Atlanta, causing Jane to miss a meeting and lose \$1000. Fortunately, Jane had purchased an insurance policy against precisely this sort of occurrence and receives a payment from that insurance carrier in the amount of \$1000. The insurance carrier is a sole proprietorship owned by Larry.<sup>234</sup>

Professor Krauss concludes that Jane may recover \$1000 from Larry because Larry's furnishing Jane with that same amount under the insurance policy is "not a purposeful act in rectification of the imbalance he had created."<sup>235</sup>

As Professor Krauss noted,<sup>236</sup> this view found support in *Karsten v. Kaiser Foundation Health Plan, Inc.*<sup>237</sup> In *Karsten*, the plaintiff brought a diversity lawsuit in federal court against Kaiser for medical negligence, alleging one of its employees negligently delivered her premature stillborn fetus.<sup>238</sup> She sought damages for the costs of a surgical procedure that became necessary after the physicians allegedly botched the delivery of her child.<sup>239</sup> As the plaintiff's health insurer, Kaiser fulfilled its insurance obligation by conducting the procedure free of charge.<sup>240</sup> Thus, Kaiser argued, the plaintiff could not recover the market value of the second procedure because (1) she did not incur any expenses, and (2) Kaiser had already paid these sums.<sup>241</sup> The court disagreed and allowed the plaintiff to recover these damages, reasoning:

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233. Krauss & Kidd, *supra* note 11, at 48.

234. *Id.*

235. *Id.* at 49. Krauss concedes that Larry compensated the victim in "precisely the amount of the harm caused by his negligent act," but he nonetheless argues "the benefit was not meant to rectify the imbalance he caused." *Id.* at 48. With this statement I am reminded of Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1405 (2003), which argues that "remedies that pass as civil and compensatory are not solely concerned with losses, but also provide an outlet for vengeance." Though Krauss stops short of arguing the plaintiff's damage award is a function of outright vengeance, he does seem to imply that a healthy measure of retribution factors into our make-whole principle. See Krauss & Kidd, *supra* note 11, at 50.

236. Krauss & Kidd, *supra* note 11, at 49 (citing *Karsten v. Kaiser Found. Health Plan of the Mid-Atl. States, Inc.*, 808 F. Supp. 1253, 1258 (E.D. Va. 1992), *aff'd*, 36 F.3d 8 (4th Cir. 1994)).

237. 808 F. Supp. 1253.

238. *Id.* at 1254. Because the court's jurisdiction was based on diversity of citizenship, it had to apply the substantive law of Virginia. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 1256.

The first payment of medical bills by the defendant was in its capacity as plaintiff's insurer . . . . The defendant is now being asked to pay these same medical expenses as compensatory damages. Even though the same defendant is being asked to pay the same damages twice, it is patent that the nature of the two payments is different. The nature of the first is as a payment from defendant as insurer to the plaintiff as the insured. The nature of the second is as a payment from defendant as tortfeasor to the plaintiff as the party injured by the defendant's negligence. It is axiomatic that the plaintiff is entitled to receive the benefit of her bargain under the insurance contract, irrespective of the fact that the carrier servicing that contract may also be the tortfeasor.<sup>242</sup>

In narrowly construing the make-whole principle, Professor Krauss's and *Karsten's* views have implications that society is not likely willing to accept.<sup>243</sup> For instance, under this theory of corrective justice,<sup>244</sup> numerous benefits the government has conferred on the plaintiff, including all federal, insurance, and employee benefits, are collateral.<sup>245</sup> In addition, it yields to the victim an unnecessary windfall. This windfall is unnecessary because the plaintiff can be compensated for his or her loss without *either party* receiving a windfall.<sup>246</sup> Perhaps most problematic is that corrective justice relies too heavily on the tortfeasor's mindset in making the victim whole.<sup>247</sup> For one, plaintiffs probably do not care whether

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242. *Id.* at 1257–58 (footnote omitted).

243. As numerous state legislatures have demonstrated, one objective of tort reform is to modify the collateral source rule so as to limit, not expand, its application. See Marshall & Fitzgerald, *supra* note 23, at 71–78 app. I.

244. Krauss & Kidd, *supra* note 11, at 49. Krauss believes the make-whole principle is an incoherent concept. *Id.* at 28. He prefers a tort system that focuses on the tortfeasor's duty to "right the wrongs caused to the victim" instead of one that asks whether the tortfeasor has made the victim whole. *Id.* at 22 (emphasis omitted).

245. Although these benefits are *often* collateral, Krauss and *Karsten* have created a non sequitur in which the benefits are *necessarily* collateral because, under their view, the payer of the benefits did not give them to the victim so as to "rectify the imbalance he caused." *Id.* at 48–50.

246. *Adams v. Turner*, 238 F. Supp. 643, 644–45 (D.D.C. 1965) ("[The underlying principle of the collateral source rule] does not apply in a situation where the collateral source is the defendant himself. Under those circumstances no one gets a windfall and if a recovery were allowed under those circumstances the result would be that the plaintiff would receive a double recovery and that the defendant would be mulcted twice for the same item of damages.").

247. For classic discussions of the theory of corrective justice, under which a tortfeasor's liability is premised on its duty to repay the victim for the injustice it has caused, see generally Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992); Jules L. Coleman, *The Practice of Corrective Justice*, 37 ARIZ. L. REV. 15 (1995); and Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992). I note parenthetically, however, that this philosophy "originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had

tortfeasors *intend* to make them whole; they primarily care that the tortfeasors pay up, one way or another.<sup>248</sup> Society presumably feels the same way, especially because it must absorb the costs of judgments that tortfeasors ultimately pass along to it.<sup>249</sup> Requiring tortfeasors to pay once, then, is in society's interests.

The better result is one that accommodates a main objective of the tort system—to compensate the injured party—as well as the philosophy that underlies the collateral source rule—to burden the tortfeasor with the entire loss.<sup>250</sup> The view I take is that courts should reduce damages if the tortfeasor itself mitigates the victim's loss because that scenario does not conflict with either goal.<sup>251</sup>

As proof that no conflict exists, reconsider Professor Krauss's hypothetical in which Larry negligently causes Jane to incur \$1000 in losses but also reimburses her for the loss as part of his obligation as her insurer.<sup>252</sup> Under my view, reducing Jane's damage award is acceptable because the objectives of the tort system and the collateral source rule are both satisfied. The tort system's objective in compensating Jane for her loss is satisfied because Larry's payments to Jane cover her losses. The collateral source rule's objective in forcing the tortfeasor to bear the entire loss is also satisfied because Larry, and not some other source, puts Jane in the same position she was in before missing the plane.

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

248. See Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275, 275–76 (2001). After all, the plaintiff's primary motivation in filing a lawsuit is to collect damages, not to impress upon the defendant the plaintiff's moral belief that the defendant's conduct was wrongful. *Id.* at 284–85. The economically motivated plaintiff does not care about the tortfeasor's "duty to repair," which carries with it the notion that the tortfeasor must feel the wretch of its wrongdoing. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 365 (1992). *But cf.* Tom Baker, *Teaching Real Torts: Using Barry Werth's Damages in the Law School Classroom*, 2 NEV. L.J. 386, 390–91 (2002) (noting the "individual justice perspective" of tort law views the system as a mechanism by which society can right "individual wrongs" and "restore the moral balance between" the duties a plaintiff and defendant owe each other).

249. *Seffert*, 364 P.2d at 345 (Traynor, J., dissenting) ("[Excessive damages] become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation. Ultimately such losses are borne by a public free of fault as part of the price for the benefits of mechanization.").

250. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 219–20 (5th ed. 1998) (defending the collateral source rule as a mechanism by which society forces tortfeasors to internalize the full costs of their conduct); see also *Molzof v. United States*, 6 F.3d 461, 465 (7th Cir. 1993) (arguing that the collateral source rule does not allow a tortfeasor to "reap the benefits of the plaintiff's foresight in obtaining coverage for future harm or his good fortune in obtaining compensation gratuitously").

251. See Note, *supra* note 8, at 741.

252. See Krauss & Kidd, *supra* note 11, at 48–50.

Under the result that Professor Krauss reaches, however, neither objective is satisfied. The result he advocates leaves Jane *better* off than she was before missing the plane, thus *overly* satisfying the main objective of the tort system.<sup>253</sup> Krauss also ignores the role of the collateral source rule because under his view Larry bears more than the entire loss.

#### 4. *One Last Retort*

I have not yet addressed one lingering issue, one outside the FTCA's black letters, one that veteran-plaintiffs likely would use as a retort to the framework I have proposed and defended in this Comment, one that proceeds as follows: extending the collateral source rule's negative shell to include compensation veterans *will receive at some distant point in the future* is wholly inappropriate and not tailored to our tort system's basic theory of compensation. Reduced to simple terms, the retort is that substituting *future* compensation for *present* compensation is plainly unfair. In my rejoinder, I focus not on the narrow future-present distinction as it pertains to collateral source law but rather on its two broader conceptual equivalents: first, that plaintiffs are not required to use their damage awards for any specific purpose or at any specific time and, second, that plaintiffs are entitled to receive their damage awards not periodically over time but rather in a lump sum at the time of judgment.<sup>254</sup>

Tinkering with these familiar tort principles, and even abrogating them, is not uncommon. Tort reformists, for example, have subjected them to a healthy measure of criticism, arguing these standards regularly allow plaintiffs to recover windfalls by compensating them up front for future losses that, "should [they] die prematurely or should [their] condition[s] unexpectedly improve," may never come to pass.<sup>255</sup> Legislatures, too, have eschewed them altogether. Take, for instance, section 667.7 of California's Medical Injury Compensation Reform Act of 1975 (MICRA), which provides that "future damages" awarded in a

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253. Kenneth W. Simons, *Compensation: Justice or Revenge?*, 40 SAN DIEGO L. REV. 1415, 1416 (2003) ("Overcompensation occurs when . . . benefits conferred by the injurer are not deducted [from the damage award]." (emphasis added)).

254. See *supra* pp. 504–05 and note 15. I note parenthetically that a sustained defense of my views on this tort paradigm would require separate, stand-alone treatment; in this Comment, I opt instead for a superficial glaze, one I believe is sufficient for the reader to understand the issue.

255. See *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547, 1573 (1994).

medical malpractice action are to be paid, at either party's request, not in a lump sum but rather periodically as the plaintiff incurs the losses.<sup>256</sup> MICRA as a whole, it should be recalled, was passed after Governor Jerry Brown complained of "serious problems that had arisen . . . as a result of a rapid increase in medical malpractice insurance premiums,"<sup>257</sup> and section 667.7 is plainly a fruit of that concern. Comparable concerns, though admittedly on a much smaller scale, attend veteran-plaintiffs' recoveries under the FTCA, yet no comparable fruit exists. In this vein, extending the collateral source rule's negative shell to include compensation the United States *will pay* to veterans is conceptually valid and perhaps even appropriate.

## VI. CONCLUSION

Veterans should not be able to recover future medical expenses in FTCA actions to the extent that they are entitled to free VA medical care. By holding otherwise, courts commit errors of policy, law, and logic. On a policy level, the courts drain the U.S. Treasury. Congress must then defray the costs of the damage award by passing them along to the public. This loss-spreading phenomenon is significant because its potential to adversely affect the public increases as the United States' liability expands. Additionally, at a purely legal level, two provisions of the FTCA do not prescribe the result reached by the courts. First, the FTCA requires courts to hold the United States liable to the same extent as a private individual under like, not exact, circumstances. Second, it calls for application of state substantive law, not federal common law. As for logic, the courts allow veterans to receive a windfall. Under the circumstances, savvy plaintiffs will pocket the cash award and avail themselves of the VA care to which they are entitled. This paradigm of overcompensation violates the make-whole principle of the tort system. It similarly untethers the collateral source rule from one of its logical underpinnings, namely, that the tortfeasor should not bear less—or more—than the entire loss.

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256. CAL. CODE CIV. PROC. § 667.7 (West 2012) (applying only to awards totaling at least \$50,000 in future damages).

257. *Am. Bank & Trust Co. v. Cmty. Hosp.*, 204 Cal. Rptr. 671, 673 (1984) (en banc).