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When the Clouds Hung Oppressively Low in the Heavens: Unhealthy Cost-Cutting in France and in the U.S.

*Pierre Loiseau**

During the whole of a dull, dark, and soundless day in the autumn of the year, when the clouds hung oppressively low in the heavens,¹ I had been passing alone, on horseback, through a singularly dreary tract of country; and at length found myself, as the shades of the evening drew on, within view of the melancholy House of Usher. I know not how it was—but, with the first glimpse of the building, a sense of insufferable gloom pervaded my spirit.²

There is an enduring assumption that the United States and France are, and will remain, at the two extremes of the health care social spectrum: private scarcity versus public laxity. The picture presented today, however, tells us quite a different story about what is covered, i.e., the various “slices” of the population covered by health insurance: in the U.S., 59.3% are covered by the

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1. Translated by author from a famous verse: « Quand le ciel bas et lourd pèse comme un couvercle ». CHARLES BAUDELAIRE, *Spleen*, in LES FLEURS DU MAL 106–07 (Claude Pichois ed., 1996) (1861) (« Quand le ciel bas et lourd pèse comme un couvercle/Sur l’esprit gémissant en proie aux longs ennuis,/Et que de l’horizon embrassant tout le cercle/Il nous verse un jour noir plus triste que les nuits »).

2. EDGAR ALLEN POE, *The Fall of the House of Usher*, in THE COMPLETE WORKS OF EDGAR ALLEN POE 262, 262–63 (Edward H. O’Neill ed., 1992).

“salaried scheme,”³ 13.8% by Medicare, 13.2% by Medicaid, 8.9% by the “self-willed scheme,” and 15% of the population is not covered at all. In France, 80% are covered by the “salaried scheme,” 9% by the “farming scheme,” 11% by the “not-salaried-not-farming” schemes,⁴ 0% by the “self-willed scheme,” at least in theory, because health insurance⁵ is mandatory. 100% of the population is therefore covered.⁶

In the U.S., Medicare and Medicaid are solely financed—through state and federal budgets⁷—by taxpayer contributions, often by contributions from salaried workers.⁸ In France, the farming scheme and the not-salaried-not-farming schemes are largely financed—in the name of solidarity—by contributions of the “richest scheme,” always the salaried scheme.

3. The U.S. salaried scheme is a very heterogeneous scheme, in opposition to France where the salaried scheme is notoriously monobloc, yet private: surprisingly, there is not such a thing as a “public option” in France. Any given French health scheme, despite its public mission, remains a private entity. Note also that such a blessed “public mission” never prevented any major French scheme to be far greedier than, for example, the late “Generous” Motors. See Sophia Koropecj, *Generous Motors’ Retirees Face Bankruptcy Questions*, DISMAL SCIENTIST, June 2, 2009, http://www.economy.com/home/login/ds_pro/Login_5.asp?script_name=/dismal/pro/blog.asp&cid=115517&tkr=1002151540.

4. For some obscure reasons the not-salaried-not-farming scheme *stricto sensu* has been circumscribed to the self-employed (storekeepers, craftsmen, etc.), the other not-salaried-not-farming schemes becoming only designated by the adjective “special.” The fact that these penniless schemes (like the one of the Senators) are extremely generous has probably nothing to do with it. The U.S. is not hostile to special schemes: 3.7% of the population is covered by an “army scheme.”

5. With the “over sixty-five” using sixty-five percent of the health resources, the mandatory health insurance premium paid by the average working person is very close to a tax.

6. KAISER FAMILY FOUND., HEALTH INSURANCE COVERAGE IN AMERICA, 2007: 2007 ONLINE CHARTBOOK, available at <http://facts.kff.org/chartbook.aspx?cb=55>; YVES SAINT-JOURS, TRAITÉ DE SÉCURITÉ SOCIALE (1990); Otto Kaufmann, *Reform der sozialen Sicherung im Vergleich—Anmerkungen zum Verfahren*, 17 ZIAS 276 (2003).

7. APRIL GRADY, CRS REPORT FOR CONGRESS RS2210, STATE MEDICAID PROGRAM ADMINISTRATION: A BRIEF OVERVIEW 1 (2008) (“Combined federal and state spending on the Medicaid program currently exceeds \$300 billion each year. It is the largest or second-largest item in state budgets, and is second only to Medicare in terms of federal spending on health care.”).

8. Is it still necessary to mention the impact of the industrial revolution on the labouring pattern of the U.S.? Between 1820 and 1870, the percentage of salaried workers rose dramatically. Alexander Keyssar, *Unemployment Before and After the Great Depression*, SOC. RES., Summer 1987, at 203–12. According to the U.S. Census Bureau, there are only fourteen million “unattached” workers in the U.S.; moreover, the average income of this population is no more than \$30,000. In other words, only a small majority of these freelancers is rich enough to pay taxes.

Of course, this Essay presents the healthcare issue in the form of a caricature, since being overly detailed in such a complex area of the law will not necessarily give the reader the best view from which to analyze the system. The salaried worker shows a tendency to foot the bill;⁹ comparative studies tend to affirm this notion. This is a running paradox; every time our health care system is keen to expand, there is, to some extent, some retraction in the air. In its embryonic stage, “nationwide health insurance” is indeed a raggedy patchwork.¹⁰

The U.S. is now facing the same challenge that confronted France at the end of the 1970s: to stretch that patchwork to cover 100% of the population. France’s victory was a pyrrhic victory; soon after the effective “generalization” of the health care cover, a “definitive plan” came to eradicate the deficit forever—then another one, and still another followed. The same thing is likely to happen in the U.S.,¹¹ with the same cortege of disarray: this endless stack of “deficit remedies” has driven France to very uncertain waters. There is still hope, however, to find a two-fold lifeboat.

Few, indeed, will pretend that health law is not somewhere between law and medicine; it would be, therefore, a clean cut to sever said cost-cutting into only two parts: “legal” and “medical.” We will try to go further and add a third part. What is going to happen next? The “Three Sisters” have the answer.

I. “LEGAL” COST-CUTTING

He held them sixpence all too dear,
With that he call'd the tailor low.
He was a wight of high renown,
And thou art but of low degree:
'Tis pride that pulls the country down;
Then take thine auld cloak about thee.¹²

9. Not to mention that the French salaried scheme also has the burden of the French equivalent of Medicaid and is open to anyone living in France for more than three months. C. de la Sécurité sociale, arts. L161-8, R161-3. Note that there is a little bit of Medicare in every French scheme.

10. In France, reaching a nationwide status has been achieved only by artificially patching up the existing insurance schemes: the (in)famous deficit starts there. In France, health care cost is now reaching 9.5% of the GDP, compared to 7% in the UK, 10.5% in Germany, 11.9% in Canada, and, surprisingly, 15% in the U.S.

11. On Sunday, June 14, 2009, \$313 billion in proposed savings was already announced to help reform health care. The savings will be made by cutting waste in the Medicare and Medicaid programs.

12. WILLIAM SHAKESPEARE, *OTHELLO* act 2, sc. 3.

Legal cost-cutting is plain and simple: access to health care is denied because the insurer says so. The law (contract law in the U.S., statutory law in France) simply says that you are not entitled to coverage and that is that. The so-called therapy you are looking for may, or may not, be necessary: insurers do not care. Note that one may derive some benefit from this miserliness: the treatment turned down may have been iatrogenic. Insurers do not care: cost-cutting is their one and only goal.

Some U.S. insurers offer discounted premiums by making payment for state-of-the-art treatments, such as grafts or transplants, very difficult;¹³ very recently French insurers have taken more drastic measures, as depression and back pain are no longer covered.¹⁴ This is a reminder that France is mainly a nation of salaried workers: under productivity pressure, blue-collar workers suffer from back pain while white-collar workers suffer from depression.¹⁵ Legal cost-cutting is, therefore, self-explanatory.

But legal cost-cutting is not doomed to be aimed against the patient. An overlooked form of legal cost-cutting is the enforcement of public health guidelines; the percentage of salt in industrial, or collective, food may be, by law, reduced by five percent every year. The subsequent reduced incidences of arterial hypertension would then be so substantial that the corresponding savings would likely solve most of the actual lack of funding. Correlatively, when the tobacco industry is sued in the U.S., the quest for damages does not take the patient into consideration. Despite its assumed intrusiveness, legal cost-cutting is, at least, expected to be straightforward.

The French health care scheme has a so-called public mission. Authorities are reluctant to say that the insured cannot receive certain treatments; instead, a variable percentage of the health care treatments are not reimbursed, supposedly to educate the patient—to teach him moderation, and probably wisdom. “Lifestyle”

13. But, according to the co-chairman of the Middle Class Caucus, payment of such treatments is not difficult enough. “Leaving private insurance companies the job of controlling the costs of health care is like making a pyromaniac the fire chief.” Nice quote from Weiner, http://www.correntewire.com/nice_quote_weiner (Aug. 17, 2009, 09:14 EST) (quoting Rep. Anthony Weiner, co-chairman of the Middle Class Caucus).

14. Gilles Lockhart, *Assureurs: Leurs ficelles pour doper leurs comptes*, L’EXPANSION, Sept. 2004, at 132.

15. ASSOCIATION PARITAIRE POUR LA SANTE AU TRAVAIL/INSTITUT DE RECHERCHE ROBERT-SAUVE EN SANTE ET EN SECURITE DU TRAVAIL, EVALUATION DE LA SANTE PSYCHOLOGIQUE DES EMPLOYES COLS BLANCS ET DES CADRES DU SECTEUR MUNICIPAL DU QUEBEC 15 (2005).

backlash is the Anglo-Saxon response to this educational argument.¹⁶

It has become clear that the unreimbursed percentage is not pedagogical any longer; this percentage has reached such a size that the would-be patient has to subscribe to a “complementary” health insurance plan. As expected, this intrusion of private protagonists has been, and continues to be, ever-growing: public authorities have finally been forced to reverse this trend by creating a public complementary health insurance plan for indigents.¹⁷

In order to prevent cost sharing from penalizing people with serious medical problems—the way Health Savings Accounts threaten to do—the [French] government limits every individual’s out-of-pocket expenses. In addition, the government has identified thirty chronic conditions, such as diabetes and hypertension, for which there is usually no cost sharing, in order to make sure people don’t skimp on preventive care that might head off future complications.¹⁸

As expected, the number of “beneficiaries” of the said “thirty chronic conditions” soon became too high. In order to reduce the impact, the drug prescriptions form was split into two different zones: a full-reimbursed zone, and a partly-reimbursed zone, dedicated to the drugs not “directly linked” to one of the already mentioned “thirty chronic conditions.” Consequently, family doctors do not have enough time to complete these new forms properly, while the French national health insurance system does not have enough advising doctors to check them.

16. This is true only on paper; the main purpose of “lifestyle rationing” is to hide a highly variable waiting list. Only six million of British citizens (from specific areas) are affected by what they called the “postcode lottery.” Thomas Moore, *“Too Fat” Patients Are Denied NHS Operations*, SKY NEWS, Feb. 27, 2008, http://news.sky.com/skynews/Home/Too-Fat-Patients-Are-Denied-NHS-Operations/Article/20070441263268?lid=ARTICLE_1263268 ‘Too Fat’ Patients Are Denied NHS Operations&lpos=Home_0 (“Patients are being denied operations on the NHS simply because they are overweight or smoke, a Sky News survey has found. Nine primary care trusts have a specific policy to refuse joint replacements to obese patients. And four will not consider orthopaedic surgery if patients smoke. In all, six million patients live in areas affected by so-called lifestyle rationing.”); see also Nancy Lofholm, *Weighing in on health care; Parents of a big infant who is being denied insurance view the system as “absurd,”* DENVER POST, Oct. 10, 2009, at B1.

17. C. de la Sécurité Sociale, art. L380-1.

18. JONATHAN COHN, *SICK: THE UNTOLD STORY OF AMERICA’S HEALTH CARE CRISIS—AND THE PEOPLE WHO PAY THE PRICE* (2007).

This is a general rule: entropy is always increasing. On top of that, dealing with expensive and inexpensive items at the same time generates a “supplement” of unwanted heat.

The new U.S. public health insurance program is envisioned to be offered alongside existing private insurance plans.¹⁹ The French experiment suggests that these mixed, new programs which combine public and private insurance will run out of money sooner or later: a nationwide health insurance scheme may, therefore, be the best and most efficient way to increase coverage for all medical conditions, from expensive diseases, i.e., those that are severe and chronic, to inexpensive ones, i.e., those that are mild or acute.

Almost everyone is wealthy enough to afford treatment for the flu; however, almost no one is rich enough to pay for cancer or chronic arthritis treatment. Nobody can deny that private insurers are eager to cover the “inexpensive” diseases,²⁰ so is it the duty of the public sector to cover what the private sector is not keen to insure? Case law lightens up the shaded zones, and a sharp separation²¹ between two distinct “health fields” (i.e., public and private) will, like in Germany,²² hopefully result. Covering inexpensive diseases is a very lucrative business, so the private health insurers will be affluent enough to pay the tax financing²³ that the public scheme must commit to treating expensive diseases.

19. This would arguably give consumers a real choice in deciding whether the government or the private sector is better at providing medical coverage; a new National Health Insurance Exchange (NHIE) would be created, which would function as a fifty-state clearinghouse in which people could connect with insurers. Through the NHIE, participants would be able to purchase private coverage or buy into a new federal insurance program.

20. The French insurers can hardly wait; the former director of the “salaried scheme” has already been hired. See *Gilles Johanet quitte AGF pour prendre la présidence d'Apria*, AGENCE FRANCE PRESSE, June 6, 2007.

21. A British reader may note that the private scheme will be less tempted to steal the experienced physicians trained by the public scheme.

22. In Germany, persons taking a very high “excess option” (Selbstbeteiligung), are covered for all serious medical problems, but they pay for all prescriptions and ordinary consultations of a doctor out of pocket. A person can indeed lower his premium by using “excess options,” which means that he is willing to pay, for instance, the first 300 Euros every year out of pocket and receive reimbursement only for the costs in excess of that 300 Euros. An average excess option is between 300 and 750 Euros per year, but may reach 2,400 Euros per year. But there is a catch: a person cannot elect to leave the public health insurance system and get a private health insurance plan if he does not earn more than the threshold of 4,050 Euros in gross salary per month. See Health insurance, http://www.toytowngermany.com/wiki/Health_insurance.

23. Hopefully, the private health insurers will be able to pay most of it; a tax on the pharmaceutical industry may be added.

But this hypothesis will remain just that, a hypothesis, as long as there continues to be more substantial medical cost-cutting.

II. "MEDICAL" COST-CUTTING

"There is nothing worse than half-measures."²⁴

Medical cost-cutting is somewhat more subtle: access to health care is denied for one's own good. The insured, so they say, is *entitled* to the prescribed treatment, but medical infallibility says otherwise. The so-called "therapy" that is sought by the patient may be frivolous, or, at worst, harmful. The insurer suggests that this denial of treatment is only aimed to protect the insured and that the idea of cutting costs never crossed the insurer's mind.

Medical cost-cutting has many disguises;²⁵ it remains, however, the stubborn synthesis of four pots of money: the money saved by avoiding the costly procedure, test, or treatment; the money lost if the "cheaper" patient sues and wins;²⁶ the money lost by damaging the patient; and the money saved by killing the patient.

The fourth parameter is highly controversial, yet not really new to the medical cost-cutting conversation.²⁷ Moreover, the British press made this issue almost impossible to avoid.

"Sentenced to death by the NHS" (National Health Service) was not a title from the tabloids, but from the respectable *Daily Telegraph*. The article went on:

Under NHS guidance introduced in England, medical staff can withdraw fluid and drugs from dying patients and many are put on continuous sedation until they pass away. But this approach can also mask signs of improvement Patients are being assessed as close to death "without regard to the fact the diagnosis could be wrong. . . ." It was recommended as a model by the National Institute for Health and Clinical Excellence (Nice)²⁸

24. Dr. Hannibal Lecter (fictional character from Thomas Harris' 1988 novel *Silence of the Lambs*).

25. When it comes to disguise, the French authorities do not have a lot of imagination: it is always "quality of care."

26. If the insurer is lucky enough to insure both the patient [health insurance] and his physician [medical liability], he may monitor in real time the comparison between the gain (first parameter) and the loss (second parameter). This hypothesis is becoming everyday more likely, with big international insurance groups swallowing their counterparts across the planet.

27. MIKE BROGDEN, *GERONTICIDE: KILLING THE ELDERLY* (2001).

28. Kate Devlin, *Sentenced to Death on the NHS*, THE DAILY TELEGRAPH, Sept. 3, 2009, at 1.

Another article published in the *Daily Telegraph* went on to state that “one job in every 10 in the health service needs to be cut within five years to meet pounds 20 billion efficiency targets.”²⁹

One’s first impression, however, is that “killing” is most of the time an excessive word: “disdain for an eventual death” is a more appropriate description. After all, everybody agrees that the health system, even with unlimited funding, may be deadly: trying desperately to eradicate risks is a very risky thing. The issue, therefore, relates to the degree of knowledge of the death probability.

Real theoretical progress came with a paper published in *Les Echos* and named “*Elegy of the Heat Wave*.” This paper was following the heat wave induced dehydration that killed 15,000 people during the month of August 2003.³⁰ “From a human point of view, a death is a death, whatever the cause. It is a disaster, whether individual or collective.”³¹ But from a “cost-conscious” point of view, the heat wave:

[C]onstitutes indeed the welcomed counterpoint to the therapeutic relentlessness of certain physicians to hold in life demented senile and terminally ill patients. Then and therefore, the raise of the rate of mortality has filled the coffers of the state in, through the collect of rights of succession among the most elevated of Europe, contributing thus to reduce the budgetary deficit. In third place, the liberation of a high number of dwellings contributes to lower the prices of the accommodations for sale, thus bottoming the marketplace out and facilitating access to property of unassuming people³²

From such a point of view, the ancient stratagem “one out of ten” seems to be fashionable again³³; “one out ten” would be, from this perspective, an “acceptable” figure.³⁴

29. Kate Devlin, *NHS Target Will Cost ‘One Job in 10,’* THE DAILY TELEGRAPH, Sept. 3, 2009, at 2 [hereinafter Devlin, *NHS Target*].

30. Benoît Misset et al., *Mortality of patients with heatstroke admitted to intensive care units during the 2003 heat wave in France: A national multiple-center risk-factor study*, 34 CRITICAL CARE MED. 1272–73 (2006).

31. Olivier Moréteau, *Policing the Compensation of Victims of Catastrophes: Combining Solidarity and Self-Responsibility*, 54 LOY. L. REV. 93 (2008).

32. Olivier Debouzy, *Idées, Apologie de la canicule*, LES ÉCHOS, 25 août 2003, at 33.

33. To impress the minds at a low cost, the victorious Roman army used to kill one defeated man out of ten; this is precisely the original meaning of the verb “to decimate.”

34. “One job in every 10 in the health service needs to be cut” Devlin, *NHS Target*, *supra* note 29.

In other words, naivety is something we cannot afford any longer; this is the price to pay to make the system work. But without being ingenuous, one may notice that all the modern versions of this ancient stratagem have the same problem: the “capacity wall”³⁵

Real estate has little to do with healthcare. Notwithstanding, a very classical “one out of ten” scheme bumped into a “capacity wall” in the housing context.

According to a former French prime minister, the “housing credit” cannot exist without evicting one family out of ten.³⁶ This form of credit becomes highly popular because it is so secure: one can always take the house back, so the wealth of the borrower is not at issue.

The sub-prime credit was the result of the logical evolution of the above; contrary to general belief, it was crisis-proof. Give some poor fellow credit,³⁷ knowing he will fail, sooner or later, to keep up with the payments, and get the interest while he is still able to pay. Then take the capital back by repossession, with a bonus because the resulting wave of artificial buyers has pushed the price of the property up.

The system worked perfectly well up to 2007; during that year, repossession affected 1.7 million American families. So what went wrong? Well, an inopportune problem of capacity: the courts became totally saturated. With 3.5 million American families thrown out of their homes, the banks would have found their balance back.³⁸ In short, the U.S. did not have enough “repossession” courts of law; France, during the heat wave, did not have enough fridges.³⁹

Correlatively, medical cost-cutting has to put in perspective the money saved by killing the patient, and the money lost by

35. An expression used to describe airport congestion may also explain why Keynes' stimuli doesn't work all the time; real life economy may absorb a certain amount of boosting money, but no more. See Anne Paylor, *Toppling the 'Capacity Wall,'* AIR TRANSPORT WORLD, May 2006, at 639.

36. Michel Rocard, *L'Interview de Beigberder*, GQ, Avr. 2009, at 105.

37. The “ninja” credit is at the very end of that logic; ninja is an acronym for No Income, Job, or Assets.

38. Rocard, *supra* note 36, at 104. This assumes that an army of 3.5 million buyers would have been willing to pay the full price.

39. Raymond Charresson, *Le jour où les morts de la canicule ont été entreposés à Rungis*, CIVIS MEMORIA, 9 avril 2008, <http://www.civismemoria.fr/contribution/?module=contrib&contrib=586> (“Le sous-préfet me rappelle dans l'après-midi: «Ecoutez, voilà, on a trouvé une astuce: on a déclaré le territoire de l'entrepôt (frigorifique) exterritorialité de la ville de Paris.»”) (mayor of Rungis, the “fresh food” city, on the requisition of “his” fridges)).

damaging the patient; Indeed, trying to "kill" someone may just exacerbate his medical condition; this is of course unethical, but also counter-productive: damaged patients are more expensive. A simple example demonstrates this premise.

French law⁴⁰ provides: "Il n'y a pas lieu de pratiquer un bilan allergologique initial systématique dans l'asthme, sauf chez l'enfant / There is no need to check allergies initially in asthma, except for children." A doctor who violates this law is fined up to 800 Euros. Suppose, now, that a citizen who is allergic to cat hair, and has no way of diagnosing his condition, wanders into a cat fight. The chances of an acute and severe asthma attack are significant. With the premature death of this expensive citizen, society will save the cost of his life-long allergy treatment. Yet, with his survival, society will probably not lose anything either: the patient's condition will be the same as before. However deadly it may be, an acute and severe asthma attack has no sequels. But when he reads that story, the president of the lung society may start to make a lot of noise. After this missed opportunity, the administration does not want to go backwards or forwards; a sort of "in between" prevails.

Putting aside health care policy,⁴¹ nobody can deny that France and Germany are comparable according to the European Community Health Indicators Project.⁴² Nevertheless, the health care deficit rises eighty times more quickly in France than in Germany. Some may conclude that, hopefully, France has failed to

40. Arrêté du 28 mars 1997 portant approbation de la Convention Nationale des Médecins Généralistes, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 29, 1997; Arrêté du 28 mars 1997 portant approbation de la Convention Nationale des Médecins Spécialistes, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 29, 1997.

41. In Germany, if your gross income is below the threshold (*versicherungspflichtgrenze*) of 4,050 Euros per month, you are automatically insured in a public health insurance scheme. This compulsory membership is protected by European Regulation No. EEC 1408/71, among others. Furthermore, it is laid out in the German Social Insurance Code, Sozialgesetzbuch [SGB] [Social Insurance Code] V Gesetzliche Krankenversicherung § 257. Now, if you are earning more than that threshold, you can elect to leave the public health insurance scheme and get private health insurance. See Health insurance, *supra* note 22.

42. The European Community Health Indicators (E.C.H.I.) Project was carried out in the framework of the Health Monitoring Programme and the Community Public Health Programme; the Survey of Health, Ageing, and Retirement in Europe (SHARE) responds to a communication by the European Commission calling to "examine the possibility of establishing, in co-operation with Member States, a European Longitudinal Ageing Survey."

kill its expensive patients; but only an enemy of progress will suggest that France managed, effectively, to damage them.

III. WAITING FOR THE “THREE SISTERS”

Nobody in this perverse century who can get what he wants; the righteous cannot more satisfy himself with justice than the voluptuous with pleasure. . . . We are lost in exile, thrown in a desert, distraught in the dark, surrounded by perils, forced to feed ourselves with the sweat of our temerity.⁴³

Even Zeus feared Clotho, Lachesis and Atropos, the three daughters of the night.⁴⁴ This fear that ate away generations of sailors and, amongst many others,⁴⁵ is now reaching the economists.

Joining the sailors in describing the Three Sisters as three deadly waves, the European Laboratory of Politic Anticipation is not optimistic:

[W]hat will appear on the horizon is a group of three destructive waves of the social and economic fabric [These sisters’] waves appear as follows: 1. Wave of massive unemployment . . . in America, Europe, Asia, the Middle East and Africa 2. Wave of serial corporate bankruptcies: companies, banks, housing, states, counties, towns 3. Wave of terminal crisis for the US Dollar, US [Treasury] Bond and GBP.⁴⁶

43. BERNARD DE CLAIRVAUX, SERMONS DE DIVERSIS (Sermon XII).

44. “These are Clotho, Lachesis, and Atropos, and they give mortals their share of good and evil.” HESIOD, THEOGONY ll. 905–06. In his *Theogony*, the poet Hesiod claims that the three Moirae (in Greek Μοῖραι, in Roman Parcae or Fata) were the offspring of Nyx, the goddess of Night. Zeus, as well as the other gods and men, must submit to them.

45. The resurgence of the Three Sisters across the lore is countless. Coming out of the blue, the Three Sisters are, for the sailors, three huge waves able to sink any ship. Deemed for a long time as the ballistic equivalent of the kraken, the Three Sisters are now acknowledged by oceanography as a succession of three waves “whose height is more than twice the significant wave height (SWH), which is itself defined as the mean of the largest third of waves in a wave record. Therefore, rogue waves are not necessarily the biggest waves found at sea; they are, rather, surprisingly large waves for a given sea state.” Rogue wave, http://en.wikipedia.org/wiki/Rogue_wave (last visited Feb. 16, 2010).

46. “As anticipated by LEAP/E2020 as early as October 2008, on the eve of summer 2009, the question of the US and UK capacity to finance their unbridled public deficits has become the central question of international debates, thus

The unprecedented rise of worldwide unemployment⁴⁷ seems to suggest that the first wave is on his way; of course, “an economist is an expert who will know tomorrow why the things he predicted yesterday didn’t happen today.”⁴⁸ But at this juncture, this attempt has at least the merit to summon the shadows of the past. Philippe the Fair⁴⁹ was indeed a forerunner.

Long ago, there was no difference between gold and cash; serious payments were made in gold or silver coins. The seal of the king certified that these coins were, indeed, made of pure metal.⁵⁰ But Philippe the Fair was a clever king. Although he was not trying to eradicate the health care deficit, he was doing his best to find money. His seal was put on coins that were not made of pure metal—“de mauvais aloi”—literally, from bad alloy.⁵¹ This shrewdness worked perfectly well in the beginning, but, after a while, medieval hoarders refused to suffer this questionable “denier tournois” any longer.⁵²

The protagonists would have lost their temper over such trivialities.⁵³ Consequently, Philippe the Fair started to think of the

paving the way for these two countries to default on their debt.” *Global systemic crisis in summer 2009: The cumulative impact of three « rogue waves »*, GLOBALEUROPE ANTICIPATION BULLETIN, June 17, 2009.

47. See INT’L LABOUR ORG., GLOBAL EMPLOYMENT TRENDS JANUARY 2010 (2010).

48. Laurence J. Peter (1919–1990).

49. Philippe IV the Fair (1268–1314), King of France. Was his nickname due to the fact he had abolished slavery? See DUC DE LEVIS MIREPOIX, LE SIECLE DE PHILIPPE LE BEL 147 (1961) (in an ordinance freeing the serfs of Valois, Philippe the Fair wrote: “Attendu que toute créature humaine qui est formée à l’image de Notre-Seigneur doit généralement être franche par droit naturel”).

50. E. BABELON, 38 LA THEORIE FEODALE DE LA MONNAIE 339–40 (1909).

51. FRANTZ FUNCK-BRENTANO, THE MIDDLE AGES 407 (Elisabeth O’Neill trans., William Heineman 1922) (describing Phillippe the Fair’s assessment of the currency problem, “We have been obliged to have a coinage of alloy which lacks something of the weight and of the alloy that our predecessors put into it.”).

52. In 1306, after a long period of forgery, and almost five centuries before Bastille Day, Paris was revolting against the king and his dubious coins. The repression was ferocious, and twenty-eight rioters were hanged at the doors of the capital.

53. In December 1301, Boniface issued his bull *Ausculda fili* in which he claimed that God had put the Pope over the kings, their kingdoms, and their treacherous seals. In February 1302, Philippe the Fair burned the *Ausculda fili* bull. In November 1302, on a similar issue, the Pope’s *Unam sanctum* bull reasserted both spiritual and temporal power. In March 1303, Philippe the Fair presided over the assembly in Paris that accused Pope Boniface of a long list of wrongs, including heresy, sorcery, murder, urging war crimes, and hatred of

Templars; their hidden gold was even more intriguing than their uncanny influence.⁵⁴ On Friday, October 13, 1307, the Templars were arrested,⁵⁵ and the King seized their assets. Accused of heresy, the Templars were tormented⁵⁶ and burned alive—not without casting a famous curse: “Doomed! Doomed! You will be all doomed!”⁵⁷

And now the Three Sisters are coming. Although our “doom” remains to be seen, Philippe the Fair and his phony money are the ones to blame.

So how about creating gold instead of stealing it? The kings across Europe became obsessed with the idea of changing lead into gold. An army of alchemists was hired,⁵⁸ and Nicolas Flammel achieved it.⁵⁹ His success is easy to demonstrate.

Today you can create gold if the others believe, or are constrained to believe, that you can do so. It is what happens when you are lucky enough to have your currency be the “world currency.”

France. The next month Boniface threatened Philippe the Fair with excommunication.

54. The British press, by the way, likes to describe Goldman Sachs as the modern Templars. Stephen Foley, *How Goldman Sachs Took Over the World; Whether It's a Credit Crunch to Fix or an Olympics to Plan, the List of Goldman Sachs Alumni Is Sure to Have a Candidate*, THE INDEPENDENT, July 22, 2008, at 40 (“If there’s something weird in the financial world, who you gonna call? Goldman Sachs.”).

55. Ernest Renan, *Guillaume de Nogaret*, in HISTOIRE LITTÉRAIRE DE LA FRANCE 233–71 (1877).

56. Seemingly, the Templars did not tell where their gold was hidden. Rennes-le-chateau is a lovely village in the south of France, lovely but full of holes. A swarm of code-breaking forty-niners, helped by a map of the Saint-Sulpice church, dug like hell to find the Templars’ gold. “Bien gaingnié l’avoient celz, Se voirs estoit qu’en disoit d’elz . . .”

57. Jacques de Molay, grand-master of the Templars, declared this curse on his bonfire, which was ignited on March 11, 1314. V. Langlois, *Le Proces des Templiers*, REVUE DES DEUX MONDES, Jan. 15, 1891, at 382–421. A long string of gruesome deaths follows this curse. The Pope Clément V died one month later (April 20, 1314) from a mysterious and terrible disease. Guillaume de Nogaret, the high executioner, was poisoned shortly hereafter on April 27, 1314. Phillippe the Fair, himself, suffered a deadly fall from his horse while hunting a boar on November 29, 1314, and his entire lineage suffered a tragic or early death: it was the end of the Capetian dynasty.

58. Without the protection of the kings, only few ashes would have remembered the alchemists. HUGH TREVOR-ROPER, *EUROPE’S PHYSICIAN: THE VARIOUS LIFE OF SIR THEODORE DE MAYERNE* (2006).

59. Long before conspiring with Albus Dumbledore to save the Muggles and their silly banks, Nicolas Flammel used to live in Paris at the number 51, Rue de Montmorency.

According to Sir Roy Harrod, the dollar's hegemony forced "other countries to furnish the United States with goods and services, year after year, in exchange of pieces of paper. Printing that paper allows a profit or seigniorage of 100%, far beyond the gain of the feudal lords from medieval time"⁶⁰ *Seigniorage*⁶¹ is resolutely an English world, derived directly from the old French *seigniorage*.⁶²

Imitating, in a way, the former kings, European's leaders have been haunted, therefore, since the end of the last world war, by the "idea that a common currency will free Europe from being a vassal."⁶³ Then came the Euro: to supplant the dollar, the Euro had to be strengthened by economic harshness.

France was too ailing to meet these harsh "Euro convergence criteria" when the Euro was introduced;⁶⁴ the only way up⁶⁵ was to

60. ROY HARROD, *MONEY* (1969).

61. Annie Corbin, *Statut de monnaie de réserve du dollar et seigniorage américain: Bilan et perspectives* (unpublished manuscript), available at <http://sceco.univ-poitiers.fr/franc-euro/articles/ACorbin.PDF> ("Neither the official suspension of the convertibility [in gold] of the US Dollar, on August 13, 1971, nor even the switch to floating change rates in 1973, haven't ended the U.S. seigniorage." [trans. by author]). If one may obtain goods with a garish piece of paper that cannot even be converted in gold, he has for sure found the philosopher's stone.

62. See OLIVIER MORETEAU, *L'ESTOPPEL ET LA PROTECTION DE LA CONFIANCE LEGITIME* (1990).

63. Michel Dupuy, *La question du Seigniorage dans les pays de la cee*, 15 J. EUR. INTEGRATION 195–216 (1992). For a similar pleading, see F. A. HAYEK, *DENATIONALISATION OF MONEY: AN ANALYSIS OF THE THEORY AND PRACTICE OF CONCURRENT CURRENCIES* (1975).

64. The Euro convergence criteria are based on Article 121(1) of the European Community Treaty (they are also known as the Maastricht criteria). These criteria have to be met by European Union member States to enter the third stage of European Economic and Monetary Union (EMU) and adopt the Euro as their currency. The main criteria are (1) an inflation rate no more than 1.5 percentage points higher than the average of the three best performing (lowest inflation) member States of the European Union; (2) the ratio of the annual government deficit to gross domestic product (GDP) must not exceed three percent at the end of the preceding fiscal year; (3) the ratio of gross government debt to GDP must not exceed sixty percent at the end of the preceding fiscal year; (4) applicant countries must join the exchange-rate mechanism (ERM II) under the European Monetary System (EMS) for two consecutive years and must not devalue their currency during that period; and (5) the nominal long-term interest rate must not be more than two percentage points higher than in the three lowest inflation member States.

65. France's deficit for 2010 will reach eight percent of the gross domestic product—five percent more than the European limit. There is a chance France is already in the Euro zone and does not have to meet the European "harsh criteria" again. Note that according to the same criteria, a European country's cumulated debt cannot go beyond sixty percent of the gross domestic product (France has

“extract” the money from the multi-headed health care system⁶⁶ and its annual budget of roughly 400 billion Euros⁶⁷ (France itself has an annual budget of only 300 billion Euros).

It is not a surprise that an equally harsh “deficit potion” had to be invented to “save” the health care scheme. Legal cost-cutting was definitely out of fashion; medical cost-cutting was just starting its irresistible ascension.⁶⁸

Looking backward requires more than just two eyes. A possible way to approach an overhaul of the U.S. healthcare system might be to create a social security system and devalue the dollar by forty percent. From the same point of view, another way might be to improve social security by expanding it to health care and devalue the dollar by more than forty percent.

This may sound like a fairy tale, but we are living in enchanted times. “The total amount of state assistance to the [global] banking system—either through spending or guarantee, is estimated at 1.9 trillion”—i.e., half of all of cash in circulation.⁶⁹

If this paper is a fairy tale, an economic crystal ball may, furthermore, display some interesting chimera. Healthcare reform is often criticized for its “bad timing.”⁷⁰ In a nutshell, the worldwide crisis can’t be denied; one may not choose a worst moment to create a nationwide health insurance.

already reached seventy-six percent). As usual, with a national deficit, the “missing” money must be found somewhere.

66. Covering four risks: disease, maternity, invalidity, and inability to work due to aging.

67. The “social shield” in France, with everything included, reaches 1,000 billion Euros (twenty percent of the GDP); the logic of redistribution is not on the decline. To be fair, one may add that when the health scheme needs money, France is supposed to give the missing amount (but prefers generally to cut the costs).

68. The white-collar crime provisions in the French criminal code are already almost extinct; when the prosecution itself will be totally under control, the “cost-conscious” doctors will be able to “erase” expensive patients without risking anything. As Madoff was sentenced to 150 years in prison, he will, therefore, have plenty of time to regret not being French.

69. Paddy Allen, *The Global Financial Pyramid Scheme Explained*, THE GUARDIAN, Jan. 29, 2009, <http://www.guardian.co.uk/business/dan-roberts-on-business-blog/interactive/2009/jan/29/financial-pyramid>.

70. “With record debt levels already in place, we can’t afford to put in another ‘untouchable’ spending program, especially one with the capacity to easily pass defense and social security in cost.” *Balancedpolitics.org*, *Should the Government Provide Free Universal Health Care for All Americans?*, http://www.balancedpolitics.org/universal_health_care.htm (last visited Mar. 23, 2010).

With all due respect, one may not choose a better moment. Nationwide health insurance in the U.S. has to be created *precisely because* the economy, and everything else with it, is falling apart.⁷¹ Expanding social security to health care is, paradoxically, more rewarding⁷² on credit: a U.S. treasury bond is not precisely a tranquillizer, but most experts⁷³ agree that investors are scared to death by everything else.

One trillion dollars⁷⁴ in bonds will, of course, deepen the U.S. debt, which is already abysmal. Digging an abyss may be inconsiderate, unless you bet on the “vanishing” of the said abyss—past and new.

The U.S. debt is, indeed, expressed in U.S. dollars; it is not difficult to imagine what will be the effects of a massive devaluation. Consequently, the Euro will not be victorious, but over priced; the temptation to sink it too will be high—Canada is already trying to push down the Canadian dollar.⁷⁵ In the meantime, the U.S. dollar is likely to go up by itself. U.S. products

71. A third of the world economy is said to be a “zombie economy.” A Zombie Bank refers to a financial institution with an economic net worth that is less than zero but which continues to operate because its ability to repay its debts is shored up by implicit or explicit government credit support. The term “Zombie Bank” was first used by Edward Kane in 1987. See EDWARD J. KANE, *THE S&L INSURANCE MESS: HOW DID IT HAPPEN?* (1989); Edward J. Kane, *What Lessons Should Japan Learn from the U.S. Deposit Insurance Mess?*, 7 J. JAPANESE & INT’L ECON. 329–55 (1993). A Zombie company continues to trade thanks to the same mechanism, a Zombie government walks (Dubai?) with the support of his neighbors. A Zombie consumer is an old acquaintance: the resuscitation of a credit card with another one, and so on, is not a new thing.

72. The credibility of the borrower increases. Amongst all of Keynes’ boosters, access to health care is the safest: the injected cash stays “local.” Money for leisure (travel) or for food and clothing (imported goods) may go overseas; money for health care is used around the corner. Nobody will jump on a plane with appendicitis to see a remote discounted surgeon, unless he has no other choice. See generally 26 *THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES* (Donald Moggeridge ed., 1980).

73. See, e.g., Jacques Attali, *Economie de la panique*, LE MONDE, Jan. 14, 1998, available at <http://www.attali.com/eng/index.htm>.

74. This is the estimated cost of U.S. nationwide health insurance. *Obama warns doctors over reforms*, BBC NEWS, June 15, 2009.

75. “Here’s Mr. Shenfeld’s (Avery Shenfeld, an economist from the Canadian Imperial Bank of Commerce) argument in a nutshell. The Canadian dollar is currently artificially high—and he really means compared to the U.S. dollar. This makes manufacturing within these borders prohibitively expensive. This leads companies to shift production from Canada to the United States. Obviously jobs are lost and the industrial base hollowed out.” Michael Hlinka, *Canada’s dollar is not artificially high*, CBC NEWS, Oct. 29, 2009, <http://www.cbc.ca/money/moneytalks/2009/10/>.

will become⁷⁶ more competitive,⁷⁷ and the workers producing them will soon be in better health.⁷⁸

The current *status quo* suggests that the U.S. monetary bomb is very dissuasive. But this bomb is ticking—sooner or later, it will probably explode by itself.⁷⁹ So why not, in the meantime, borrow the money necessary to build a nationwide health insurance system? This sounds like a fairy tale, but fairies do not exist. Any similarity to future events is purely coincidental.

76. There is no need to mention that the price of U.S. products is also expressed in U.S. dollars; all at once, protectionism will become pointless: U.S. products will be cheaper than any imported ones.

77. Not to mention that competition comes most of the time from the current owners of the U.S. debt; it is tough to compete when your assets have just “gone away.” See WILLIAM BONNER & ADDISON WIGGIN, *EMPIRE OF DEBT: THE RISE OF AN EPIC FINANCIAL CRISIS* (2006).

78. One may easily forget that the French health insurance scheme was also created to improve the health of workers; before France started to ration health care, the productivity of a French worker was twice the productivity of an American one. Dan Ackman, *France, Bastion of Productivity*, FORBES, Mar. 22, 2005, http://www.forbes.com/2005/03/22/cx_da_0322topnews.html (“But just how pathetic are the French? . . . According to a 2003 survey of 25 industrialized countries conducted by the Organization for Economic Cooperation and Development (OECD), the French do work less than most others. . . . Still, French workers remain among the most productive in the world, ahead of Britain, Germany, the United States and Japan, according to the European statistics agency Eurostat.”).

79. From January 1, 2010, onward, oil will no longer be paid in U.S. dollars, but in Khaleedji, a new currency created by the countries of the Persian Gulf.

