
AUTO NO-FAULT AND FIRST-PARTY INSURANCE: ADVANTAGES AND PROBLEMS

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I. INTRODUCTION

The modern movement for American auto no-fault began, interestingly enough, with a study prepared by academics—*Basic Protection for the Traffic Victim*, by Robert Keeton and Jeffrey O’Connell, published in 1965.¹ In 1971 Massachusetts became the first state to

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1. ROBERT E. KEETON & JEFFREY O’CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965) [hereinafter BASIC PROTECTION]. All agree that the Keeton-O’Connell study put auto no-fault on the American political map. See, e.g., U.S. DEP’T OF TRANSP., STATE NO-FAULT AUTOMOBILE INSURANCE EXPERIENCE: 1971-77, at 2 (1977) [hereinafter 1977 DOT REPORT]. Moreover, the study innovated by recommending a hybrid form of

implement a no-fault program.² The leading force within the legislature was Michael Dukakis, who had been heavily influenced by the Keeton-O'Connell study.³ During the 1970's, no-fault plans proliferated among American states.⁴ By 1980, however, the no-fault movement had stalled. Since 1980, no new states have added themselves to the ranks of no-fault, and there have even been a limited number of repeals.⁵ Even so, no-fault programs remain in effect in important states such as New York, Florida, and Michigan. Moreover, no-fault is now back in the political spotlight, this time at the federal level. A federal proposal,⁶ with impressive bipartisan support,⁷ would presumptively establish a national no-fault program.⁸

no-fault—a recommendation that was then accepted by many states. (It is not the case that those states adopted the Keeton-O'Connell plan as such. *See infra* note 23. Rather, the states embraced the basic hybrid concept advanced by Keeton & O'Connell.)

Within personal injury law, it is hard to identify any other book by legal academics that has exerted such a significant effect on public policy. Moreover, the arguments that the book formulated against the tort system and in favor of the no-fault alternative remain in many respects authoritative: With or without attribution, they are largely accepted and repeated in later no-fault commentary. Taking these formulations seriously is hence quite warranted.

2. *See* ROBERT H. JOOST, *AUTOMOBILE INSURANCE AND NO-FAULT LAW* § 2:17 (2d ed. 1992).

3. From recent conversations with Judge Keeton and Professor Dukakis, I have learned the following. As a Harvard law student, Dukakis had taken one of Keeton's courses. Later, as a (young) member of the state Assembly, Dukakis learned through an intermediary of the Keeton-O'Connell study, which had not yet been published. Having secured a copy, Dukakis concluded that no-fault was an issue he wanted to make his own. During the next several years, Dukakis frequently turned to Keeton for advice as he shepherded no-fault through the Massachusetts legislative process.

Decades later, Dukakis remains a no-fault advocate, testifying in favor of no-fault in Congressional hearings. *See, e.g., The Auto Choice Reform Act of 1999: Hearings on S. 837 Before the Comm. on Commerce, Science & Tech., 106th Cong. (1999)* (statement of Michael Dukakis).

4. Twenty-five states enacted some version of no-fault. *See* JOOST, *supra* note 2, §§ 2:18, 2:19. In ten of these states, no-fault was a mere add-on. *See id.* § 2:19.

5. For example, Nevada in 1980 and Georgia in 1991. *See id.* § 2:20. Pennsylvania was a hybrid no-fault state in 1980. In 1984, it shifted to mere no-fault add-on. *See infra* note 34. In 1990 it moved to a "choice" no-fault plan.

6. *See* S. 837, 106th Cong. (1999).

7. The proposal's Senate sponsors are Joseph Lieberman, John McCain, Mitch McConnell, and Daniel Moynihan. Supporters in the House include Dick Armey and Jim Moran. *See also supra* note 3, describing Michael Dukakis' advocacy. For discussion of Senator Lieberman and the politics of no-fault, see Gregg Easterbrook, *Not Your Average Joe*, *NEW REPUBLIC*, Nov. 2, 1998, at 22, 23-24.

8. For federalism purposes, the presumption is curiously weak. To reject the federal program, all a state would need to do is pass a statute explicitly declaring the state's preference that the federal program "not apply." *See* S. 837 § 10(a)(1)(B)(1989). The statute seemingly must vote the federal program up or down: Any statute rejecting the program must contain "no other provision." *See id.* at § 10(a)(1)(C). Nothing, however, would prevent the state from rejecting the federal program outright on Monday and then passing a statute on Wednesday adopting as its own some modified version of the federal program.

The apparent hope of those supporting Senate Bill 837 is that if approved by Congress, the cost savings it would make available to motorists at the state level would be so substantial as to make it

While my general attitude towards no-fault is clearly sympathetic, the purpose of my Article is not to present a final answer to the no-fault question, but rather to strengthen and deepen the debate about no-fault. It achieves this by presenting (in Part II) a taxonomy of no-fault plans, and then by providing (in Part III) an extended evaluation of the advantages commonly ascribed to those plans. Part III concludes, in brief, that these advantages, although substantial, have frequently been overstated or oversold. Then (in Part IV) the Article develops certain important points that have been largely absent in previous no-fault discussions. Of concern here is the most conspicuous objection to no-fault plans—that they impugn the fairness and deterrence goals of a tort system. In response, Part IV shows how no-fault insurance premiums—in this regard, surprisingly resembling liability insurance premiums—can be expected to take both the reality and the prospect of bad driving into account. In light of this resemblance, the threat that no-fault poses to the core tort values of fairness and deterrence is much less than has commonly been supposed.

For no-fault purposes, that is the good news. The bad news concerns the dramatic difference between tort and no-fault in terms of how they are inclined to apportion insurance costs between heavier and lighter vehicles. All of this poses a very serious problem for no-fault programs—a problem that no-fault advocates so far have failed to solve, and have commonly failed even to address. Interestingly enough, though, it turns out that the tort system may be affected by a similar problem. Part V highlights the importance of the uninsured motorist problem in thinking about the choice between tort and no-fault. For example, to the extent that uninsured

politically difficult for state lawmakers to opt out of the federal program. Moreover, opting out would require that both the state legislature and the state governor oppose no-fault. In the absence of the federal program, the opposition of either would prevent the state from affirmatively adopting no-fault. Nevertheless, given the state's clear right to opt out, it is a disservice for Ralph Nader to claim—in an op-ed piece opposing the federal proposal—that it would “automatically override all state insurance laws.” Ralph Nader, *No-Fault Has Failed; It Should Be Repealed*, BOSTON SUNDAY GLOBE, Oct. 11, 1998, at D7.

It should be noted that the federal proposal not only creates a state opt-out right, but also specifies that the federal program will not take effect within a particular state if the state's insurance commissioner finds that the program will not reduce average premiums for bodily injury insurance by at least 30%. See S. 837 § 10(b)(1)(A).

The findings of fact that tend to support the bill's constitutionality are set forth in sections 2(13) through (16), including findings that the federal government spends large sums for highway construction, and that auto insurers operate in interstate commerce. Such findings may or may not be sufficient to justify a conclusion of constitutionality. If it is assumed, *arguendo*, that a mandatory federal no-fault program would not be constitutional, a further question is whether the state opt-out right contained in the current bill renders that bill constitutional. This range of questions is beyond the scope of this Article.

motorists lack adequate solvency, the tort system necessarily fails in its effort to provide corrective justice. That Part considers various ways in which no-fault might reduce the number of uninsured motorists and in that and other ways lessen the problems such motorists occasion. Hence, in this regard as well no-fault is socially beneficial.

As this Article discusses no-fault as an alternative to tort, the Article frequently relies on several basic points about auto accidents and the auto sector of the tort system which distinguish that sector from other sectors of American tort law. Given these distinguishing features, auto accidents may well be a special case. That is, it might be quite plausible to favor auto no-fault as an alternative to tort while still supporting the tort system in its other major applications.

One distinguishing feature is the following. Motorist behavior is covered in an almost comprehensive way by the state's motor vehicle code. Almost every instance of motorist negligence violates some provision in that code, and hence exposes the negligent motorist to public law penalties. In no other sector of tort law is there such an extensive system of public regulation paralleling the tort system. Manufacturers, for example, are subject to a significant but still limited number of regulatory controls, mainly promulgated by federal agencies. Physicians, in turn, are largely unregulated with respect to particular acts of malpractice which they might commit. The prevalence of public regulation with respect to motorist behavior enters into my analysis of auto no-fault at several important junctures.

A second distinguishing feature is that in a modern auto-accident tort regime almost all liability is filtered through liability insurance. In such a regime, it is rare for the plaintiff to collect anything from the defendant's personal assets.⁹ Liability insurance is compelled by law in at least forty states, and is quasi-compelled by financial responsibility laws in the remaining states.¹⁰ Though motorists purchase insurance only at the minimum levels required by law, larger numbers of motorists—with significant assets to protect—purchase additional amounts of liability insurance.¹¹ While many motorists ignore the mandate and illegally fail to

9. "In principle, [a victim can] seek compensation from the other driver's personal assets. However, as a practical matter, this rarely happens." STEPHEN J. CARROLL & JAMES S. KAKALIK, NO-FAULT AUTOMOBILE INSURANCE: A POLICY PERSPECTIVE 5 n.2 (1991).

10. See JOOST, *supra* note 2, § 1:8 (1997 Supp.).

11. For data on the distribution of bodily injury policy limits, see STEPHEN J. CARROLL, ALLAN ABRAHAMSE & MARY VAIANA, NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN

acquire liability insurance, these are typically motorists who are not sued when they negligently cause harm, because they are essentially judgment-proof. In various areas of institutional tort liability, self-insurance has become increasingly common;¹² yet meaningful self-insurance is almost unheard of in the ordinary world of auto accident litigation.¹³ The prevalence of liability insurance as the source for liability payments in auto accident cases is a point that dominates the comparison of tort and no-fault in Part IV below.

A third feature that characterizes the auto accident sector of tort law concerns the interchangeability of motorists as potential injurers and motorists as potential victims. At least in some general sense, almost all of us on the road are—at the beginning of the year—both potential plaintiffs and potential defendants. Various possible tort reforms—such as limitations on damage recoveries—both detriment us as potential plaintiffs and benefit us as potential defendants. The factual reality of this general interchangeability reduces the distributional impact of various tort modifications that might be implemented.

This feature, however, does not really serve to distinguish auto accidents: For there are other fields of tort law in which plaintiffs and defendants—victims and injurers—tend over time to be interchangeable. One such field is the liability of residential landowners. For example, just as Joan, as a homeowner, bears potential liability to her social guests for any injuries they incur, so Joan as a social guest in the homes of her acquaintances can potentially file claims for her own injuries. Yet for highway accidents there is a more specific type of interchangeability that indeed renders such accidents unique as a tort-law field. Take the motorist who is driving negligently by operating his car at a dangerous speed. This specific instance of bad driving endangers third parties, but it also simultaneously endangers the motorist himself.¹⁴ In legal parlance, negligent motorist conduct is almost always contributorily negligent as

AUTOMOBILE ACCIDENTS 100-05 (1991) [hereinafter NO-FAULT APPROACHES]. Thirty-four percent of all motorists buy \$100,000 in insurance, which everywhere is well above the required minimum.

12. See Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 315-16 (1990).

13. This is true, at least, for ordinary private motorists. There is a large measure of self-insurance for commercial vehicles.

14. This point about highway accidents is emphasized in a previous article that discusses the choice between negligence and strict liability. See Jennifer H. Arlen, *Liability for Physical Injury When Injurers as well as Victims Suffer Losses*, 8 J.L. ECON. & ORG. 411 (1992). My own Article, concerned as it is with the choice between negligence liability and first-party no-fault, does not consider the strict liability issue.

well. Equally, motorist conduct that is contributorily negligent is almost always negligent. The extent to which negligent driving concurrently imperils both the driver and third parties is a point that plays an essential role in the analysis in Part IV.

II. NO-FAULT: PURE, HYBRID AND “CHOICE”

In considering no-fault, there is an obvious need to define terms. No-fault can be compared to a modern tort system. In such a system, the traffic victim's opportunity to secure compensation for her losses depends on her ability to establish the fault or negligence of the other driver. That driver's potential liability is backed by compulsory liability insurance, up to a limited amount. Even if the driver is negligent, the victim's recovery can be reduced to take the victim's contributory negligence, if any, into account.¹⁵ The modern tort system is in effect in over half of all American states, including major states such as California, Illinois, and Ohio.¹⁶

By contrast, in a jurisdiction that has adopted what can be called pure no-fault, a motorist (or his passengers, or even a pedestrian) who suffers injury recovers automatically, without regard to fault, from the motorist's own no-fault insurer. Additionally, the purchase of no-fault insurance is compulsory. Under pure no-fault the victim's recovery for economic losses—medical expenses and income interruption—can be for very large, or perhaps even unlimited, amounts. But recovery is limited to economic losses; the victim's noneconomic pain and suffering is ignored. Pure no-fault, as described here, does not currently exist in the United States. Nevertheless, the description largely covers the no-fault plan that was recommended by the American Insurance Association in 1968;¹⁷ the no-fault plan voted down by the California electorate in 1996;¹⁸ and the

15. For states with “modified” comparative negligence, the victim recovers nothing if his negligence exceeds that of the defendant.

16. See JOOST, *supra* note 2, at ch. 4. An early Illinois no-fault statute was found to be unconstitutional. See *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972). This, by the way, is an isolated holding: Other state courts have found no-fault to be generally constitutional. See JOOST, *supra* note 2, § 2:21.

17. See AMERICAN INS. ASS'N, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS (1968).

18. This was Proposition 200 on the ballot. See *infra* note 61. A pure no-fault plan was approved by the Hawaii Legislature in 1995, but was vetoed by the Governor; the Legislature then came within one vote of a successful override. See JOOST, *supra* note 2, § 1:2D (1998 Supp.).

Let me return to California's Proposition 200. Its “standard” no-fault coverage would have been \$1 million. But it would have allowed motorists the option of buying “minimum limits” coverage of only \$50,000. Its sponsors' expectation was that the cost savings entailed by the minimum policy would have been so modest as to result in most motorists' accepting the \$1 million “standard” or default

plans now in effect in countries like Israel¹⁹ and Canadian provinces such as Quebec, Manitoba and Saskatchewan.²⁰ From all one can tell, persons living (and driving) in those jurisdictions are generally satisfied with the no-fault arrangements.²¹

In general, when American states have moved away from traditional tort, what they have adopted is not pure no-fault but rather—in line with the Keeton-O’Connell recommendation—a hybrid of no-fault and tort. Under such a hybrid,²² the victim who suffers economic losses recovers no-fault benefits up to a “cap” established by the no-fault program. Above the cap, the victim’s opportunity to recover for further economic losses is covered by what remains of the tort system. Pain and suffering claims are not reimbursed by no-fault itself. Moreover, the negligent motorist’s liability for pain and suffering is abolished, but only if the victim’s injury is below the “threshold” defined by the no-fault statute. If the victim’s injury exceeds the threshold, then the victim is able to bring a tort claim against the negligent motorist for pain and suffering. The threshold can take a “dollar” form, expressed in terms of the cost of the medical services the victim receives on account of the accident. Or the threshold, in a “verbal” way, can describe the seriousness of the victim’s injury. In Michigan, for example, the victim can recover for pain and suffering only if the victim has incurred a “serious impairment of body function.”²³

coverage. My Article defines pure no-fault as a plan with very generous, if not unlimited, coverage of economic losses. Accordingly, Proposition 200 straddles the line of my definition.

19. See Israel Gilead, *Tort Law*, in THE LAW OF ISRAEL: GENERAL SURVEYS 400-09 (Itshak Zamir & Sylviane Colombo eds., 1995). See also David Kretzmer, *No-Fault Comes to Israel: The Compensation for Victims of Road Accidents Law*, 11 ISRAEL L. REV. 288 (1976); Izhak Englard, *Traffic Accident Compensation in Israel*, in COMPENSATION FOR PERSONAL INJURY IN SWEDEN AND OTHER COUNTRIES 155 (Carl Oldertz & Eva Tidefelt eds., 1988).

20. See JOOST, *supra* note 2, §§ 7:5-7:7.

21. See Electronic Mail Letter from Israel Gilead, Dean of the Hebrew University Law School, to author (June 25, 1999) (on file with author) (“Generally speaking, Israelis are satisfied with the no-fault liability arrangement. . . . Coverage is almost full, premiums are low, prompt payments provide immediate remedy, litigation costs are relatively low. No one even thinks of returning to tort.”). See also Daniel Gardner, *Quebec Automobile No-Fault System: A Whole Different World next Door*, CROSSROADS (Auto Accident Compensation Project, Milwaukee, Wis.), Apr. 1998, at 1, 2 (“Nobody in Quebec wants to go back to the old tort system, even the private insurance companies who lost an important part of the insurance market.”). Gardner is on the Law Faculty at the Université Laval in Quebec.

22. Others use the language of “modified” no-fault or “mixed” no-fault. See Stephen D. Sugarman, *Quebec’s Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow*, 39 LES CAHIERS DE DROIT 303, 306 & n.8 (1998). The language of “hybrid” seems much more expressive.

23. Alternatively, death, or “permanent serious disfigurement.” MICH. COMP. LAWS § 500.3135(1) (1993). Michigan, New York, and Florida are the three states whose thresholds are exclusively “verbal.”

A hybrid no-fault plan obviously adds to the costs otherwise entailed by a tort system by providing substantial compensation for economic losses to many victims who would be unable to recover for those losses in a modern tort system. However, given the extent to which hybrid no-fault eliminates the negligence issue, it significantly reduces the cost of processing claims. Moreover, whenever an accident produces an injury that is below the cap, hybrid no-fault economizes by eliminating motorist liability for pain and suffering. The public policy literature supporting hybrid no-fault urges that the "cap" and the "threshold" be kept in "balance":²⁴ If this is done, then hybrid no-fault results in insurance costs for bodily injury that at the least do not exceed the insurance costs of modern tort.²⁵

In hybrid no-fault, then, everything obviously depends on the level of the cap and the threshold. The original Massachusetts no-fault plan fixed its cap at \$2,000 and defined the threshold in terms of whether the victim had incurred at least \$500 in medical bills.²⁶ Given the low cap and threshold, this was a very modest no-fault plan; and as late as the mid-1980s, the no-fault portion of the motorist's insurance policy in Massachusetts accounted for no more than 10% of the policy's overall premium for bodily injury.²⁷ New York's no-fault plan is considerably

Other states provide a "dollar" threshold, combined with a verbal threshold, available as alternatives. However, the dollar threshold is generally the easiest to satisfy. Hence, these jurisdictions are predominantly dollar threshold states. In Minnesota, for example, the victim can recover pain and suffering damages in tort if health care expenses exceed \$4,000, *or* if the victim has incurred a permanent injury, or a scar, or a disability lasting 60 days or more. *See* MINN. STAT. § 65B.51 subd. 3 (1996) (note that the last of these is a verbal threshold that includes a numerical component). Problems of proof under the Minnesota threshold are discussed in Lawrence M. Rocheford & Mark D. Malloy, *Tort Thresholds, Auto Claim Behavior and Auto Choice Reform: Are Tort Thresholds Working?*, 24 WM. MITCHELL L. REV. 965 (1998). *See also* Michael L. Weiner, *No-Fault Tort Thresholds: The Plaintiff's Perspective*, 24 WM. MITCHELL L. REV. 985 (1998).

The original Keeton-O'Connell plan allowed a \$5,000 "deductible" on pain and suffering damages. The victim could recover in tort for pain and suffering only if it exceeded \$5,000, and only for the amount of that excess. *See* BASIC PROTECTION, *supra* note 1, at 274-75 (1965). This particular version of a threshold has not been implemented in any state.

24. *See* U.S. DEP'T OF TRANSP., COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 4 (1985) [hereinafter 1985 DOT REPORT].

25. This result holds so long as no-fault does not increase the highway accident rate. An assumption to this effect is sometimes made explicit in no-fault cost estimates. *See, e.g.*, Stephen J. Carroll & James S. Kakalik, *No-Fault Approaches to Compensating Auto Accident Victims*, 60 J. RISK & INS. 265, 274 n.19 (1993).

26. The original Massachusetts statute was found constitutional in *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971).

27. *See id.* In 1988, the statute was amended to raise the cap to \$8,000 and raise the dollar threshold to \$2,000. *See* MASS. GEN. LAWS ANN. ch. 90, § 34M (West 1999). Phone calls I made to Boston insurance brokers in fall 1998 (posing as an insurance applicant) yielded premium quotations

more ambitious than that in Massachusetts. Its cap is \$50,000, and its threshold is a “verbal” threshold set at a reasonably high level.²⁸ Even so, in New York no more than one-third of a motorist’s bodily injury insurance premium covers the no-fault portion of his policy.²⁹ Michigan is the state with the most ambitious American no-fault program. (Within Michigan, the program is regarded as generally successful, although improvable.)³⁰ The victim can recover for unlimited medical expenses in no-fault.³¹ Wage loss benefits, determined in accordance with a formula, can exceed \$120,000.³² Moreover, the Michigan threshold, described above,³³ is set at a comparatively high level. As a result, in Michigan about half of the motorist’s premium for bodily injury relates to no-fault.³⁴

The no-fault plan currently under consideration by Congress involves a new form of hybrid. Under the plan, the victim can recover for economic

indicating that the no-fault portion of the total cost of bodily injury insurance is now more than 20%. See also *infra* note 121.

28. In fact, the threshold can be exceeded in any of eight ways, including death, a fracture, or permanent loss of the use of a body organ or function. See N.Y. INS. LAW § 5102(d) (McKinney 1999-2000).

29. See 1985 DOT REPORT, *supra* note 24, at 37. See also Jeffrey O’Connell, *Michigan’s No-Fault Auto Law: Too Much of a Good Thing?—And a Way for Some to Cut Back*, 70 MICH. B.J. 938, 939 (1991) (in New York, no-fault constitutes 36% of the pure premium for bodily injury).

30. In 1997, Governor John Engler recommended that the program be amended along the lines of the federal proposal, described below. See Guila Parker, *Governor Proposes Changes to Model Michigan No-Fault*, CROSSROADS (Auto Accident Compensation Project, Milwaukee, Wis.), June 1997, at 1-2.

31. In 1994, a voter referendum displaced a state statute that would have capped reimbursable medical expenses at \$1 million. See JOOST, *supra* note 2, § 6:25.

32. See MICH. COMP. LAWS § 500.3107(1)(b) (1999-2000 Supp.).

33. See *supra* note 23 and accompanying text.

34. At least this was true as of the mid-1980s. See 1985 DOT REPORT, *supra* note 24, at 34.

In reality, no-fault plans can differ from the models described above. In both Quebec and Israel, for example, motorists can recover—from their own no-fault insurers—at least limited compensation for their pain and suffering: up to \$17,000 in Israel and in excess of \$135,000 in Quebec. See JOOST, *supra* note 2, §§ 7:3, 7:5 (1992 & 1998 Supp.).

Secondly, a number of American states have adopted plans pursuant to which no-fault is an “add-on.” Add-on no-fault, like hybrid no-fault, provides the motorist with an automatic recovery for economic losses up to the no-fault insurer’s cap, and preserves the motorist’s tort action for economic losses above the cap. Unlike hybrid no-fault, however, add-on no-fault preserves all the motorist’s tort actions for pain and suffering. (Add-on displaces tort only insofar as compensation received through add-on is subtracted from the tort recovery.) By imposing added compensation obligations on insurers without providing them with any relief from pain and suffering liability, add-on no-fault significantly increases bodily injury insurance costs. See DON DEWEES, DAVID DUFF & MICHAEL TREBILCOCK, *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* 61 (1996). Partly because of this, add-on no-fault has no supporters among academics or in those research units that focus on auto liability issues. Add-on no-fault is perhaps explainable in terms of the legislative outcome when effective no-fault advocacy encounters effective opposition in the legislature by the trial lawyers’ bar (and by others who for reasons of principle are supporters of the tort system).

losses in no-fault up to the cap and can then sue in tort for economic losses above the cap. However, for motorists within the no-fault program, the new hybrid negates all tort recoveries for pain and suffering.³⁵ In addition, the federal plan introduces an important new no-fault feature: According to its proponents, it offers no-fault as a matter of “choice.”³⁶ No-fault by choice was first recommended by Jeffrey O’Connell and Robert Joost in 1986.³⁷ Under the proposed federal plan, individual motorists can choose no-fault in the updated hybrid form—no-fault benefits up to the cap; tort compensation for economic losses above the cap; and no tort liability for pain and suffering. But the motorist who is dissatisfied with the benefits available under no-fault—especially the denial of damages for pain and suffering—can elect to remain in a tort situation (at least insofar as the motorist’s potential benefits are concerned).³⁸

How, then, does choice no-fault work? If a motorist with no-fault is involved in an accident with another no-fault motorist, there are no problems and no-fault applies to all claims. There likewise are no problems if a motorist who has chosen tort is involved in an accident with another tort motorist; tort rules apply across the board. What happens, however, when a motorist who has chosen no-fault is involved in a two-car collision with a motorist who has elected tort?

The solution that Professor O’Connell—and the federal proposal—offer is quite interesting. After such a collision, the no-fault motorist recovers no-fault benefits from her own insurance company. In the meantime, the motorist who has chosen tort has done so by purchasing “tort maintenance” insurance from his own insurer. Should he be involved in an accident caused by the negligence of a motorist who has elected no-fault, the tort maintenance motorist—having proved that negligence—can recover from his own insurer for his own economic losses and also his own pain and suffering. While this entitlement obviously imposes first-party insurance costs on the tort maintenance motorist, at least his liability

35. With one relevant exception: pain and suffering recoveries can be secured against motorists driving under the influence. *See* S. 837, 106th Cong. § 8(e)(1)(A) (1999).

36. The choice feature is programmatically connected to the no-fault elimination of all pain and suffering damage recoveries: Motorists who are unhappy with the latter result can take advantage of “choice.”

37. *See* Jeffrey O’Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986). As this article acknowledges, a somewhat primitive form of “choice” no-fault was already available in Kentucky. *See id.* at 77 & n.50. Under the Kentucky plan, the burden on the motorist who seeks to choose in favor of no-fault is quite substantial.

38. This is the case, at least, if the motorist is in a jurisdiction (such as California) that is currently all tort. Motorists in current hybrid no-fault jurisdictions (such as New York) would be offered a choice between their own state’s hybrid and the new federal no-fault plan.

insurance costs are reduced by his freedom from liability to the no-fault motorist in the accident. O'Connell acknowledges there is a "Rube Goldberg feel" to all of this, but defends it by way of an analogy to uninsured motorist coverage.³⁹

This solution, while certainly clever, may be too clever by more than half. The solution might be rendered unsatisfactory by problems of adverse selection, as motorists sort themselves out into the no-fault and the tort maintenance camps.⁴⁰ Practical problems of adverse selection apart, the choice may be bogus, or at least inadequate. Consider the motorist who believes she should recover pain and suffering damages if she is injured by the negligence of another motorist. The basis for her belief may stem from her perception that when she has been wronged by the negligent conduct of another motorist, the compensation for pain and suffering she receives from that motorist serves to remedy or rectify that wrong. Additionally, perceiving herself as a potential victim, she may believe that the threat of liability for all the harms (including pain and suffering harms) caused by negligence will discourage others from driving negligently in the first place. Either way—whether the motorist cares about justice or deterrence or both—the choice offered by the federal no-fault plan may not entail a real choice, since the liability for pain and suffering rests on the victim's own insurance company and not on the negligent motorist or the motorist's own insurer.⁴¹ In fact, while the supporters of that plan occasionally refer to the variety of tastes and preferences among motorists who would end up making the choices,⁴² most supporters of the choice plan seem to assume that the "tort maintenance" option will be (and should be) turned down by the vast majority of motorists.⁴³

39. See Peter Passell, *A Call for 'Auto Choice' and Lower Insurance Premiums*, N.Y. TIMES, Aug. 30, 1998, § 3, at 9 (quoting O'Connell). O'Connell has also attempted a more philosophical defense of choice no-fault. See Jeffrey O'Connell & Christopher J. Robinette, "Choice Auto Insurance": *Do Theories of Justice Require Linkage Between Injurers and the Injured?*, 1997 U. ILL. L. REV. 1109.

40. See Jack L. Carr, *Giving Motorists a Choice Between Fault and No-Fault Insurance: An Economic Critique*, 26 SAN DIEGO L. REV. 1087 (1989). Yet the discussion in Part IV—by showing the surprising extent to which no-fault insurance premiums resemble liability insurance premiums in their response to the prospect of bad driving—suggests that Carr overstates the extent of the likely adverse selection problem.

41. For stronger statements of this position, see Harvey Rosenfeld, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 86 (1998); Nader, *supra* note 8. Here again, however, if Part IV is correct in explaining how no-fault insurance resembles liability insurance, then no-fault by choice becomes more supportable.

42. See O'Connell & Joost, *supra* note 37, at 82-83.

43. O'Connell and Joost describe those persons whose values would lead them to choose no-fault, and also those whose values would support the tort maintenance system. See *id.* It is clear from

Overall, the choice proposal can best be understood in political terms—as a proposal extended by no-fault advocates in an effort to accommodate those who have objected to no-fault plans on grounds that they limit or preclude compensation for pain and suffering.⁴⁴ Yet those objections may well rest on concerns about how no-fault would impair the fairness and deterrence functions of the tort system—and choice seems unable to allay those concerns. The actual strength of such concerns is addressed in Part IV. Yet before considering the possible disadvantages of no-fault, consideration should be given to its apparent advantages. The next Part identifies and evaluates the key advantages commonly ascribed to no-fault.

III. NO-FAULT PUBLIC-POLICY BENEFITS

The primary arguments on behalf of auto no-fault stress that a no-fault plan is far more effective than the tort system in compensating the victims of auto accidents, and that such a plan sharply reduces the excessive administrative costs associated with that system. These no-fault benefits are evaluated below.

A. VICTIM COMPENSATION

No-fault rests on the premise that all auto accident victims should be compensated for their economic losses. This premise itself can be seen as resting on either a liberal, humane concern for cushioning the consequences of hardship; or on a theme of “horizontal equity,” pursuant to which people with equivalent needs should receive equivalent benefits;⁴⁵ or in economic notions concerning efficient insurance.⁴⁶ Certainly, highway traffic is one of the most significant sources of accidents—and serious accidents—within American society. About 18% of all accidental personal injuries incurred

these descriptions that O’Connell and Joost regard the no-fault choosers as by far the more rational and sensible. Statements by supporters of no-fault-by-choice often tend to assume that all motorists will select the no-fault option. See *infra* note 107 and accompanying text.

44. See also *supra* note 34 for the “political” explanation for add-on no-fault.

45. This theme is implicitly relied on in Mark M. Hager, *No-Fault Drives Again: A Contemporary Primer*, 52 U. MIAMI L. REV. 793, 796 (1998), and is explicitly identified and discussed in Michael J. Trebilcock, *Incentive Issues in the Design of “No-Fault” Compensation Systems*, 39 U. TORONTO L.J. 19, 20-21 (1989). Acceptance of this theme makes it possible for no-fault supporters to deride the tort system as a mere “lottery.” See, e.g., P.S. ATIYAH, *THE DAMAGES LOTTERY* (1997); TERENCE ISON, *THE FORENSIC LOTTERY: A CRITIQUE ON TORT LIABILITY AS A SYSTEM OF PERSONAL INJURY COMPENSATION* (1967); JEFFREY O’CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1977).

46. An efficient insurance rationale for no-fault assumes there is some failure in the market for first-party insurance.

by Americans involve motor vehicles.⁴⁷ Furthermore, motor vehicle accidents—like work accidents—are far worse in their average severity than ordinary accidents that occur at home or in the course of recreational activities.⁴⁸ Moreover, the economic losses resulting from personal injuries inflicted by highway accidents are enormous. One estimate places the cost at \$37 billion a year,⁴⁹ and another at \$50 billion a year.⁵⁰

This Article accepts, for purposes of discussion, the social or public-policy ideas that underlie auto no-fault proposals. Even so, and despite the enormous cost figures presented above, auto no-fault in fact fills a compensation need only insofar as victims' economic losses go uncompensated by the tort system and by other reimbursement sources. Begin with the former: Given the criteria on which the tort system relies, how many highway accident victims are able to recover in tort? Keeton and O'Connell reviewed various previous studies, the most recent and extensive of which had found that only 37% of all highway accident victims received some tort compensation.⁵¹ In explaining this low rate of victims compensated, Keeton-O'Connell highlighted a "thicket of common law doctrines" that can bar a victim's recovery, even when another motorist has driven negligently.⁵² These doctrines included contributory negligence as a full defense; charitable, government, and familial immunities; and guest statutes (or common law guest doctrines) that blocked the tort claim of the passenger.

From the perspective of this Keeton-O'Connell observation, a relevant point is that tort law has itself changed substantially between 1965 and

47. See DEBORAH R. HENSLER, M. SUSAN MARQUIS, ALLAN F. ABRAHAMSE, SANDRA H. BERRY, PATRICIA A. EBENER, ELIZABETH G. LEWIS, E. ALLAN LIND, ROBERT J. MACCOUN, WILLARD G. MANNING, JEANETTE A. ROGOWSKI & MARY E. VAIANA, COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 31 (1991).

48. See *id.* at 105.

49. See *id.* at 26. This study concerned injury losses incurred during the year 1989.

50. See NO-FAULT APPROACHES, *supra* note 11, at 1.

A \$192 billion highway accident cost figure is provided in NATIONAL SAFETY COUNCIL, INJURY FACTS 78 (1999 ed.); and this is for 1998. But this figure includes property damage as well as personal injury, and likewise seems to include a variety of indirect costs not themselves borne by accident victims.

51. See BASIC PROTECTION, *supra* note 1, at 43 (discussing the Conard study, ALFRED F. CONARD, JAMES N. MORGAN, ROBERT W. PRATT, JR., CHARLES E. VOLTZ & ROBERT L. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPARATION 149 (1964)).

52. BASIC PROTECTION, *supra* note 1, at 26.

today in terms of liberalizing opportunities for recovery.⁵³ Contributory negligence as a full defense has been replaced in almost all jurisdictions with comparative negligence as a partial defense;⁵⁴ guest statutes and doctrines have been repealed or abolished throughout the country; the various immunities have receded to the point where they rarely apply to a highway accident claim.

One would expect these changes in liability rules to significantly increase the tort recovery rate.⁵⁵ In fact, for whatever reasons, more recent estimates of that rate have yielded higher numbers. Indeed, a 1991 study prepared by the Rand Corporation's Institute for Civil Justice reaches the striking finding that almost 73% of all auto accident victims now receive something by way of a tort recovery.⁵⁶ Apparently, however, the Rand 73% figure includes compensation that auto accident victims derive from their own uninsured motorist coverage—compensation which is justified by third-party liability rules, yet which, on account of the insolvency of negligent motorists, nevertheless comes from a first-party insurance source; the actual number of victims recovering something from the tort system as such is therefore somewhat less than 73%. The current congressional proposal, in one of its introductory findings, reports that the tort system “pays no liability benefits to more than 30 percent of all [highway] accident victims.”⁵⁷ That bill hence concedes that close to 70% of all victims do now receive some compensation from the tort system.

53. It may well be that no-fault played some role in all of this: The emphasis by no-fault advocates on auto accident victims' need for compensation may have influenced courts and legislatures to abolish guest doctrines and shift to comparative negligence.

54. To be sure, many jurisdictions have adopted modified comparative negligence, pursuant to which the party who is more at fault remains unable to recover. Still, studies have shown that the shift to comparative negligence increases the number of auto accident victims who can recover in tort by some figure in the range from 10 to 25%. See DEWEES ET AL., *supra* note 34, at 30, 71 n.140 (discussing studies).

55. A multi-year study by the U.S. Department of Transportation yielded (in 1971) a finding that about 48% of all auto accident victims secure some compensation from the tort system. See U.S. DEP'T OF TRANSP., *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* 36 (1971) [hereinafter 1971 DOT REPORT]. This study concerns data from 1967, which would not have been affected by the doctrinal changes that largely took place during the 1970s. This finding suggests that the 37% figure relied on by Keeton and O'Connell was itself too low.

56. See NO-FAULT APPROACHES, *supra* note 11, at 200 (72.8%).

Note, however, that another Rand study issued in the same year indicates that no more than 31% of all highway accident victims secure any tort compensation. See HENSLER ET AL., *supra* note 47, at 108. As far as auto accident victims are concerned, the sample size in the study that yielded the 73% finding was much larger than Hensler's sample size. Moreover, the Hensler study relied on the victims' recollections as to the sources of compensation they received; this recall may well have been insufficient. In addition, the Hensler study included victims in no-fault states who (because of no-fault) were not in a position to sue in tort.

57. S. 837, 106th Cong. § 2(2)(a) (1999).

Indeed, as one considers contemporary tort doctrine, the only significant category of auto accident victims who are necessarily ineligible for tort compensation consists of those who are injured in accidents caused exclusively by their own negligence. Observe, moreover, that significant injuries tend to be the consequence of the motorist's more serious negligence. Absent-mindedly taking one's eyes off the road is likely to bend one's fender. By contrast, real speeding can easily result in the driver incurring a significant personal injury. Of course, many compensation plans, such as the federal Social Security disability programs, routinely include within their general coverage injuries that are incurred because of the victims' own negligent conduct. Yet it is one thing for a compensation program to define its coverage so broadly that injuries caused by the victims' own negligence are included; it is something else to propose or adopt a compensation program whose primary beneficiaries are persons whose injuries are exclusively due to their own negligence⁵⁸ (often serious negligence).⁵⁹ This circumstance makes it difficult to contend that the principle of horizontal equity should focus only on the victim's need rather

58. The Keeton-O'Connell study identifies as the first "shortcoming" of the tort system that "[s]ome injured persons receive no compensation." BASIC PROTECTION, *supra* note 1, at 1. The study later considers whether these uncompensated victims can properly be regarded as deserving. Here the study refers to the motorist who loses control of his car after an insect strikes his eye. *See id.* at 225. Accidents such as this can occasionally happen—yet when they do they are so exceptional as to be newsworthy. *See, e.g., Trucker Stung By Bee Drives Into House*, L.A. TIMES, June 14, 1987, § 2, at 8.

The best example I can identify of a completely faultless auto accident involves the motorist who loses control of his car when road conditions are quite icy. But even this example is only partially valid and useful. For one thing, when there is ice on the road, reasonable non-negligent motorists know they should drive much more carefully. Furthermore, in light of its attributes, the example has relevance for only a few periods a year in much of the country—and is never relevant in my own Southern California.

59. The Keeton-O'Connell study recommended that drunk drivers not be excluded from the compensation coverage of no-fault. *See* BASIC PROTECTION, *supra* note 1, at 396. However, other no-fault initiatives—including the current Congressional proposal—are hesitant about this inclusion: Senate Bill 837 authorizes no-fault insurers to exclude from coverage persons whose injuries are caused by driving under the influence of alcohol or drugs. *See* S.837 § 6(d)(1)(B)(i). That proposal also deprives drunk drivers of the protection against tort liability that no-fault otherwise provides. *See id.* § 8(e)(1)(A).

A 1977 U.S. Department of Transportation study, in commending no-fault, identified four victims who were uniquely benefitted by one state's no-fault program. The first case involved an insured who was driving on the wrong side of the road, resulting in a head-on collision; the second involved an insured who suffered serious injuries in an "at-fault head-on collision." 1977 DOT REPORT, *supra* note 1, at 25.

Notice that in the first case no explanation is given as to why the insured was on the wrong side of the road; in the second case, the motorist's fault is presented as a mere abstraction. In each of the two cases, the passenger in the insured's car also suffered injuries. Why these passengers could not recover in tort from the plainly negligent motorists is not made clear. Perhaps a guest statute was then in place; if so, it has subsequently been repealed.

than on the victim's conduct that gives rise to that need.⁶⁰ Likewise, the circumstance certainly reduces the public appeal of no-fault. I have lived through two referenda campaigns in California seeking voter approval of auto no-fault—first in 1988, and then in 1996,⁶¹ and I can report that the need to assure that all accident victims (including those injured by their own negligence) receive appropriate compensation for their injuries played almost no role in the campaign conducted by no-fault advocates.

Moreover, auto accident victims obviously have sources of compensation other than the tort system. Noting in 1965 the “meteoric growth” of such compensation sources as health insurance and government disability programs, the Keeton-O’Connell study reported that conditions had “reached the point” at which non-tort sources provided about one-half of the total reparation available to traffic victims.⁶² The expansion of private and public first-party insurance has of course continued since then. Although the percentage of Americans without health insurance has risen slightly in recent years, almost 84% of all Americans remain covered by health insurance.⁶³ (For older and for poorer Americans, the sources of this insurance are the Medicare and Medicaid programs, enacted by Congress in 1965—the very year in which the Keeton-O’Connell study came out.) Most Americans injured in auto accidents, then, have access to health insurance to pay their health-care bills.⁶⁴ Moreover, if a person without insurance is seriously injured in an auto accident and is then taken to a hospital emergency room, under the general rules provided by EMTALA (approved by Congress in 1986), the emergency room is required to provide treatment without regard to the victim's inability to assure payment.⁶⁵ Private disability insurance remains relatively limited;⁶⁶ and

60. The circumstance also impairs the efficient insurance rationale on behalf of no-fault. By (merely) abstaining from negligent driving, the potential victim can conveniently avoid the accident, and hence dispense with the need for insurance.

61. The 1988 proposal secured only 26% of the vote—it was in competition with another referendum that proposed cracking down on insurance companies. *See* Sugarman, *supra* note 22, at 310. The 1996 proposal received 35% of the vote—it was part of a package of initiatives, all of which were billed as being anti-lawyer. *See id.*

62. *See* BASIC PROTECTION, *supra* note 1, at 42-43.

63. *See* Robert Pear, *More Americans Were Uninsured in 1998*, *U.S. SAYS*, N.Y. TIMES, Oct. 4, 1999, at A1.

64. In addition, in tort states a substantial fraction of all motorists volunteer to buy “medical payments” insurance, covering health care costs of vehicle occupants, typically for limited amounts such as \$5,000 or even \$500.

65. EMTALA is The Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (1994). EMTALA applies to every hospital that participates in the federal Medicaid program; and almost all hospitals do so participate.

interruptions in income due to auto accidents do create a need to which no-fault programs can advantageously respond. Nevertheless, many Americans are protected by sick leave for short-term work interruptions, while most workers receive at least limited protection from the federal Social Security program with respect to longer-term interruptions.⁶⁷ As for the compensation that comes through the tort system, a quite important disadvantage is that the delivery of this compensation is often much delayed. By contrast, various forms of first-party insurance, health insurance in particular, usually pay quite promptly.

In light of the combination of the tort system and other compensation sources, an auto no-fault plan is no more than partially *necessary* in order to achieve the goal of compensating highway accident victims. A further

66. See Kenneth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75, 81-82 (1993).

67. See *id.* at 83-85.

Because Keeton and O'Connell perceived their recommendation as filling unmet compensation needs, they proposed that no-fault be excess insurance rather than primary insurance: That is, no-fault would kick in only after other compensation sources had been exhausted. See BASIC PROTECTION, *supra* note 1, at 278. As policymakers considered this proposal, however, they identified practical problems. Auto no-fault insurers would experience considerable difficulties in affirming whether their insureds are in fact covered by health insurance policies, what the terms and conditions are of those policies, and whether those health policies will remain in effect during the time covered by the no-fault policy. By contrast, once a no-fault plan has been adopted, a private health insurer can count on a certain level of no-fault benefits being automatically available to its own insureds whenever they suffer injury in an auto accident. In all, then, the burden of acquiring information and conducting monitoring is apparently much lower if no-fault is primary rather than excess insurance. In America, no-fault programs were set in place at the state level during the 1970s, and each of those programs deems no-fault benefits to be generally primary. See JOOST, *supra* note 2, § 3:14. To be sure, in two leading no-fault states—Michigan and New York—motorists can elect to render no-fault secondary to health insurance in exchange for a premium discount. See MICH. COMP. LAWS § 500.3109a (1993); N.Y. INS. LAW § 5103(c) (McKinney 1999-2000).

Legislators' choice to reject the original Keeton-O'Connell recommendation significantly raises the cost of no-fault. To illustrate, health care expenses comprise perhaps two-thirds of all the economic losses experienced by traffic accident victims. See HENSLER ET AL., *supra* note 47, at 105. See also *infra* note 166. Begin with the fact that 85% of the public is covered by health insurance; and assume further that insurance, when available, defrays 75% of all health-care costs. Accordingly, rendering health insurance primary to no-fault could reduce the aggregate of no-fault injury coverage costs by as much as 40%.

Of course, if rendering no-fault primary increases the cost of no-fault insurance, it correspondingly decreases the cost of health insurance. This is the case, at least, so long as victims can be prevented from receiving double or duplicate compensation. Double-dipping can occur if health insurers in no-fault states fail to take steps to render health insurance secondary to no-fault, or fail to take those further steps that are needed so as to monitor and enforce this provision. Also, double-dipping can be avoided if injured motorists—sensing its inappropriateness—simply decline to apply for private insurance benefits when they know they are covered by no-fault. See ALAN I. WIDISS, JOSEPH W. LITTLE, ROGER S. CLARK & THOMAS C. JONES, NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN 47-48 (1977).

point is that the American hybrid form of no-fault is not *sufficient* to achieve that goal. After all, hybrid no-fault guarantees compensation only up to its cap. It therefore leaves victims without no-fault compensation when their economic losses exceed the cap. From the perspective of appropriate social insurance, this seems perverse. It is exactly the most serious, low-likelihood accidents that are most likely to impose a devastating impact on unprepared victims and their families.

No-fault proponents, such as Keeton and O'Connell, commonly include in their indictment of the tort system the fact that it overcompensates the victims of minor injuries relative to the victims of major injuries.⁶⁸ This characterization of the American tort system is accurate enough. Nevertheless, the resulting criticism of the tort system seems ironic, if not hypocritical, when it is advanced by supporters of no-fault,⁶⁹ for auto no-fault programs suffer from essentially the same problem. They guarantee full compensation for victims whose economic losses are less than the cap; but as injuries become more serious, the percentage of all economic losses covered by hybrid no-fault diminishes. Indeed, the similarity of the problems under tort and no-fault is in a sense structural rather than coincidental. A key reason why the American tort system undercompensates for more serious accidents relates to the fact that the system requires liability insurance, but only in limited amounts. In California, \$15,000 is required per victim.⁷⁰ As a practical matter, tort systems frequently limit liability to the maximum of required insurance.⁷¹ This practice, in turn, made it convenient for reformers to originally conceptualize no-fault plans which include a cap on compensation benefits. Indeed, as hybrid no-fault plans have been developed, the cap has sometimes been set exactly at the level equal to the amount of liability insurance that the state's tort system had required.⁷² There is a direct connection, then, between the undercompensation of serious injuries for

68. See BASIC PROTECTION, *supra* note 1, at 2.

69. This was first pointed out in Walter J. Blum & Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341, 348 [hereinafter *Ceilings*].

70. A common figure in other states is \$25,000. See NO-FAULT APPROACHES, *supra* note 11, at 110.

In England—where personal injury verdicts are both more moderate and more consistent in their amounts—auto insurance policies are written with no cap on coverage. For instance, English observers regard \$15,000 as a “joke figure.” See Electronic Mail Letter from W.V.H. Rogers, the current author of WINFIELD & JOLOWITZ ON TORT (W.V.H. Rogers ed., 15th ed. 1998), to author (Aug. 15, 1999) (on file with author) [hereinafter Rogers e-mail].

71. Moreover, even those motorists who prefer to buy additional insurance find that insurers are unwilling to write policies for more than certain amounts: for example, \$100,000 per victim.

72. This is the case, for example, with the current Congressional proposal. See S. 837, 106th Cong. § 6(a)(1)(A) (1999).

which the tort system is reproached by no-fault reformers and the undercompensation of serious injuries for which hybrid no-fault can itself be properly reproached.

Yet whatever the precise explanation, the overall evaluation seems clear enough: Insofar as a social policy in favor of victim compensation is the policy that supports auto no-fault, the hybrid forms of no-fault relied on by American jurisdictions are clearly inferior to pure no-fault. Those who support no-fault should support pure no-fault.

B. OVERHEAD REDUCTION

While providing a guarantee of compensation to all highway accident victims is an objective on which the early supporters of no-fault heavily relied, that objective has subsequently receded in the no-fault debate, probably because of the changed circumstances described in Part III.A. Within that debate, however, another no-fault objective—reducing the administrative costs or overhead of the tort system—has gained in prominence in recent years. The Keeton-O’Connell study found that the tort system was very expensive to operate.⁷³ Moreover, the study implied that given the circumstances of auto accidents, tort litigation for auto accidents is considerably more expensive than tort litigation in other forms. “It is rare in human experience that so much is made to depend upon details that no one involved can clearly recall.”⁷⁴ For a large percentage of all traffic accidents, “realistically applying standards of fault becomes very difficult and expensive.”⁷⁵ Moreover, the inherent difficulties plaguing the fault issue are made worse by “the distortions of trial.”⁷⁶

The Keeton-O’Connell study offered these assessments in order to show that the introduction of no-fault, even while expanding compensation opportunities, would not raise overall insurance costs. Having deferred the cost question until the end, the study finally observed that “the overall cost

73. According to the study, slightly more than half of all liability insurance premiums are diverted to attorneys’ fees and administrative costs. See BASIC PROTECTION, *supra* note 1, at 70. A federal study initiated shortly thereafter yielded a similar but more specific finding: that the overall overhead is 52% of premiums. See 1971 DOT REPORT, *supra* note 55, at 51. However, included within the 52% is ongoing insurance company expenses (including sales commissions and taxes) that are unrelated to the actual processing of tort claims. These expenses are commonly estimated as accounting for about 27% of the overall cost of insurance. See JOINT ECON. COMM., U.S. CONGRESS, AUTO CHOICE: IMPACT ON CITIES AND THE POOR 5 (1998). If this 27% is disregarded, then the findings suggest that the net yield to victims is about 66%.

74. BASIC PROTECTION, *supra* note 1, at 19.

75. *Id.* at 21.

76. *Id.* at 22.

of the new system . . . will be no greater, we believe, and may be substantially less than the constantly rising cost of the present system.”⁷⁷ As the no-fault movement proceeded to unfold in American political life, it was the Keeton-O’Connell suggestion of “substantially less” insurance costs that acquired primacy. As Blum and Kalven observed, “the dominant political rhetoric was to promise virtually all motorists an actual reduction in premiums”⁷⁸ (Premium reductions, of course, depend on some combination of lowering claims processing costs and lowering the level of motorists’ actual liability.)

Undeniably, there are costs involved in managing and litigating auto accident claims. Indeed, given the huge numbers of those claims, the overall expense of claims administration is very high. The administrative-cost savings argument on behalf of no-fault is thus powerful. Still, the force of that argument should be understood in context. Anticipating the argument in 1964, Blum and Kalven contended that auto claims are no more complicated to litigate than tort claims in general.⁷⁹ Let me here go beyond Blum and Kalven and advance the view that auto accident claims are considerably *less* difficult to process than the personal injury average. This view can be supported in various ways. One study prepared for Rand by Kakalik and Pace compares auto accident claims that are filed in court to other tort claims that are so filed. For the latter, only 43% of every dollar in system costs ends up reaching the accident victim; yet for auto accident claims, the figure is 52%.⁸⁰ Moreover, these data merely concern claims that are filed in court. They therefore do not account for claims that are resolved before any court filing; and the overhead involved in the settlement of these claims is obviously much less than the overhead involved in claims that proceed to formal court proceedings. Indeed, according to Rand calculations, for every dollar of “injury coverage costs” incurred by auto tort insurers, 67% is received by victims as net

77. *Id.* at 295. A 1985 federal government report supported the Keeton-O’Connell “no greater” claim. It found that no-fault paid out net to victims 50% of the insurance dollar, while in a tort regime the payout was only 43%. Because threshold no-fault was 16% “more efficient” than tort, a proper no-fault plan can expand compensation for economic losses without increasing insurance premiums. See 1985 DOT REPORT, *supra* note 24, at 83.

78. *Ceilings*, *supra* note 69, at 359.

79. See Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem*, 31 U. CHI. L. REV. 641, 647-48 (1964).

80. See JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 74 (1986). What is referred to here as “system costs” does *not* include ongoing insurance company expenses. See *supra* note 73. However, it *does* include the value of the time of both plaintiffs and defendants.

compensation.⁸¹ A further indication of the comparative ease in administering auto accident claims concerns the number of those claims that end up in actual trials. According to Rand data, of all accident victims in America who receive something by way of tort compensation, 59% have been injured in highway accidents, and highway accident victims receive 75% of all payments made by the tort system to accident victims.⁸² Nevertheless, in a modern tort state such as California, only about 35% of all personal injury cases that go to trial involve highway accidents.⁸³ According to data compiled by the National Center for State Courts, 2.6% of all auto cases filed are finally taken to trial. Yet for non-auto tort cases, the trial figure is 5.3%.⁸⁴

The explanations for the relatively moderate measure of administrative costs in auto accident cases are not hard to come by.⁸⁵ The accident happens at a single time and place; that place is a public location, and the accident is directly observed by the plaintiff and the defendant, and often by others as well. Moreover, the “law” of auto accidents contains very few complications—especially given the elimination of guest statutes (with all their qualifications) and the establishment of comparative negligence, which itself eliminates or subordinates complex doctrines such as last clear chance. About the only factor to which that law attaches significance is the negligence of the parties. In addition, findings of negligence in highway accident cases do not depend on the kind of open-

81. See NO-FAULT APPROACHES, *supra* note 11, at 20. The category of “injury coverage costs” includes neither ongoing company expenses nor the value of the relevant parties’ time.

82. See HENSLER ET AL., *supra* note 47, at 99-100.

83. See Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 13 (1996). One nationwide study of state trial courts has found that about 47% of all tort cases that go to trial are auto cases. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: BULLETIN 2 (1999). Note, however, that this figure is as high as it is partly because products liability generates only 2.7% of all state court trials. See *id.* This figure is as low as it is partly because so many products liability cases are filed in federal court, under diversity jurisdiction. It is rare for a highway accident case to be tried in federal court.

84. See BRIAN J. OSTROM & NEIL B. KAUDER, EXAMINING THE WORK OF STATE COURTS 1995, at 30 (1996) (75 largest urban courts). Interestingly, another study finds that of all auto liability claims, a mere 0.9% were tried to final verdict. See ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 115 (1989), *cited in* DEWEES ET AL., *supra* note 34, at 64 n.32.

85. In one article, Hensler has compared the “world of routine personal injury torts” (mainly auto accidents) to “the world of high stakes personal injury torts” and “the world of mass latent injury torts.” Deborah R. Hensler, *Trends in Tort Litigation: Findings from The Institute for Civil Justice’s Research*, 48 OHIO ST. L.J. 479, 494-95 (1987). She finds that auto accident litigation “is the least problematic by most standards.” *Id.* at 495. “Because of [the] high volume [of auto cases] and the stability of law it has been possible to routinize their processing and resolution. . . . The use of alternative procedures and settlement mechanisms produces the lower transaction costs that we observe, relative to the costs in other tort litigation areas.” *Id.* at 494-95.

ended and ad hoc balancing that characterizes the law of negligence generally. Rather, as emphasized in Part I, provisions in the state's motor vehicle code apply to most instances of bad driving. Given the role of the tort doctrine of negligence per se,⁸⁶ the process of assessing a negligence claim generally involves merely determining which motorist violated which provision in the code itself. More importantly, most of the time the parties themselves do not need to conduct the relevant inquiry; rather, this function is undertaken publicly by law enforcement. Police typically investigate injury-producing auto accidents, and issue citations to the motorists who evidently have violated the motor vehicle code.⁸⁷

Keep in mind, moreover, that American hybrid no-fault preserves a substantial portion of the tort system, with all its overhead. The Rand study, while finding (as noted) that the tort system returns net to victims 67% of original bodily injury insurance costs, also finds that this figure goes up to only 74% in a hybrid no-fault jurisdiction with a moderate cap and a verbal threshold.⁸⁸ This estimated increase in the compensation yield is sufficiently modest as to make it difficult to muster enthusiasm for any shift to hybrid no-fault—given all the complications that any such shift would inevitably entail. Moreover, the Rand estimates are based essentially on simulations, rather than on studies of actual “paired” jurisdictions; and it is not clear that these estimates are confirmed by real world experience. New York, for example, is a no-fault state with a high cap and a strong verbal threshold. According to Rand, overall injury coverage costs in such a state should be about 12% less than they are in a tort regime.⁸⁹ Yet by the late 1990s insurance premiums in New York had become among the highest in the country.⁹⁰ While the evident belief of

86. Consider the negligence per se holding in *Martin v. Herzog*, 126 N.E. 84 (N.Y. 1926), as well as the case's facts—the plaintiff was operating his buggy without the headlights required by a state statute.

87. For similar observations as to how auto claims are dealt with in England, see ATIYAH, *supra* note 45, at 101-02.

88. See NO-FAULT APPROACHES, *supra* note 11, at 20.

Incidentally, no one, including Rand, currently claims that no-fault with a dollar threshold is less expensive than traditional tort. For example, a recent study that compares Minnesota (with dollar-threshold no-fault) and Wisconsin (without no-fault) reports that auto insurance is considerably *more* expensive in Minnesota. See Terry Tyrpin & Diana Lee, *An Analysis of the Minnesota Private Passenger Automobile No-Fault System*, 24 WM. MITCHELL L. REV. 1019 (1998). This comparison seems especially useful, because one would expect that Minnesota and Wisconsin have relatively similar legal cultures.

89. See NO-FAULT APPROACHES, *supra* note 11, at xiv.

90. See JOINT ECON. COMM., U.S. CONGRESS, THE BENEFITS AND SAVINGS OF AUTO-CHOICE 9-10 (1997) (listing New York as second only to New Jersey). Part of the reason for the high cost of

Rand researchers is that in the absence of no-fault New York premiums would now be much higher still, the accuracy of this belief cannot be confirmed with full confidence.

With respect to the problem of litigation costs, the tort system—and likewise hybrid no-fault—can be compared to the alternative of pure no-fault. Recall the Rand findings that the yield to victims is 67% in tort and 74% in hybrid no-fault. However, that yield rises dramatically—to 93%—under pure no-fault.⁹¹

Moreover, relative to tort and hybrid no-fault, pure no-fault achieves important cost savings beyond those considered in the particular Rand study. As for hybrid no-fault, while it reduces overhead in certain respects, it also adds to overhead—given the way in which it needs to mesh together its no-fault portion and its tort portion. In particular, hybrid no-fault generates substantial litigation concerning whether in individual cases the threshold has been satisfied so as to enable the victim to sue in tort for pain and suffering. Michigan adopted no-fault in 1973; by 1999, Michigan courts had been required to produce about eighty reported appellate opinions involving the interpretation and application of Michigan's verbal threshold.⁹²

Moreover, no-fault in a hybrid form occasions other important costs, in terms of victims' manipulation of the rules concerning the threshold. These are costs that can properly be included in any assessment of the "overhead" of the hybrid system. Even in verbal threshold states, there are opportunities for manipulation. A highway accident victim may, for example, shop for a physician who will testify (in Florida) that his injury is "permanent" or (in Michigan) that he has suffered "a serious impairment of bodily function."⁹³

In dollar threshold states, the overhead situation is indeed much worse. In such states, the no-fault hybrid provides victims with powerful incentives to "pad" or "build up" their medical bills in order to accumulate the dollars of medical expenses that will enable them to recover for their pain and suffering.⁹⁴ There is, indeed, strong evidence to the effect that

insurance in New York is that New York requires \$50,000 in liability insurance—a much higher amount than is required in other states.

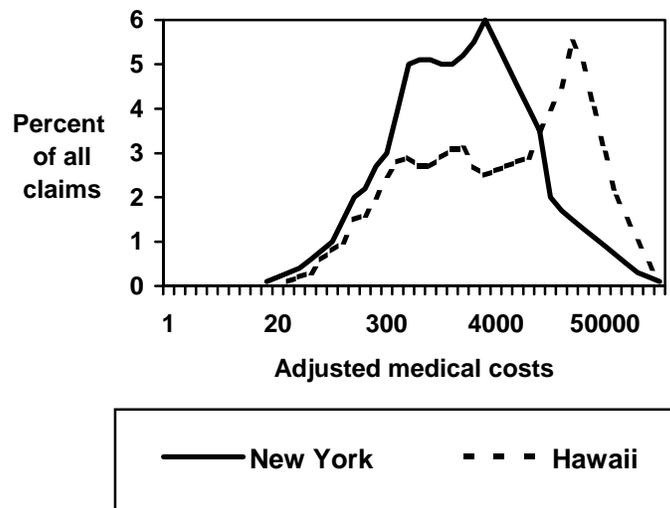
91. See NO-FAULT APPROACHES, *supra* note 11, at xvi.

92. I have counted the cases annotated in MICH. COMP. LAWS ANN. § 500.3135 (West 1993 & 1999-2000 Supp.).

93. See JOOST, *supra* note 2, §§ 6:20, 6:25.

94. Of course, the threshold applies only to "reasonable" medical expenses. Still, an insurance company incurs significant costs when it chooses to challenge the reasonableness of the medical bills

padding is a very common phenomenon. In Massachusetts, for example, the dollar threshold was raised from \$500 to \$2,000 in 1989.⁹⁵ After that, the number of visits to chiropractors and physical therapists by auto accident victims rose dramatically. Because of the “apparent build-up of medical charges,” the legislature’s effort to reduce the number of tort pain and suffering claims largely failed.⁹⁶ Hawaii’s dollar threshold stood at \$6,400 at the time that medical spending in Hawaii was examined by Rand, which prepared the following chart as to the “distribution” of all claims for medical costs for “soft” injuries in New York (whose verbal threshold gives few incentives for padding) and in Hawaii (whose dollar threshold provides ample incentives for padding).⁹⁷



The single-peaked curve for New York seems about right, in terms of reflecting the medical services actually needed by the range of highway accident victims. The twin-peaked curve for Hawaii seems to provide

that a victim submits. Because of those costs, the company will frequently accept those bills without investigation. If it does choose to launch a challenge, this of course adds to the complexity and cost of litigation.

95. See *supra* note 27.

96. Sarah S. Marter & Herbert I. Weisberg, *Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Claims*, 10 J. INS. REG. 462, 463, 487-88 (1992).

97. See STEPHEN CARROLL, ALLAN ABRAHAMSE & MARY VAIANA, *THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES* 15 (1995).

dramatic confirmation of the huge amount of medical cost padding induced by a no-fault plan with a Hawaii-like dollar threshold.⁹⁸

But it should be highlighted here that the padding of medical expenses is not at all a problem that is peculiar to dollar-threshold no-fault. Indeed, it is a very major problem with the tort system as such. This is because insurance claims adjusters in tort jurisdictions evidently have adopted rules of thumb that enable victims of negligent driving to recover for pain and suffering an amount that is equal to two times (or even three times) the medical costs that the victim can document.⁹⁹ That is, “general damages” are some multiple of “special damages.” Such a settlement practice, well understood by plaintiffs’ lawyers, gives those lawyers a powerful incentive to encourage their clients to pad their medical bills. Exactly what the explanation or motive is for this rule of thumb is unclear.¹⁰⁰ The explanation may be the claims adjusters’ perception of how juries would respond if cases are presented at trial; or the explanation may instead relate to instructions that claims adjusters receive from their supervisors to minimize the time they spend in investigating individual cases.¹⁰¹ Whatever the exact explanation, the Rand finding is that in a tort jurisdiction at least 35% of all claimed medical expenses are excessive.¹⁰² This finding is roughly in line with a common insurance industry estimate to the effect that \$8 of every \$50 paid for bodily injury insurance can be attributed to exaggerated soft-tissue injuries.¹⁰³ These are costs that

98. The vertical line marks the Hawaiian \$6,400 threshold. Granted, in dealing with statistics one always needs to worry about alternative explanations; but no such explanations come to mind in considering the Hawaiian twin-peaked curve.

99. *See id.* at 5, 25.

100. The practice has *not* developed in England. *See* Rogers e-mail, *supra* note 70. In England, trial is by judge rather than by jury; and judges follow custom—an informal schedule or tariff—in terms of the size of the pain and suffering award associated with certain types of injuries.

“Schedules” for pain and suffering damages have frequently been recommended as an American law reform. *See, e.g.*, Gary T. Schwartz, *Proposals for Reforming Pain and Suffering Awards*, in *REFORMING THE CIVIL JUSTICE SYSTEM* 416 (Larry Kramer ed., 1996). Implementation of this recommendation would have an effect on the American no-fault debate.

101. *See* Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 924-26 (1992).

102. *See* CARROLL ET AL., *supra* note 97, at 3 (35-42%).

Interesting evidence from one foreign country can be read as suggesting an even higher rate of “excessive” medical expenses. In Lithuania, while there are many highway accidents, there basically is no tort litigation. And in Lithuania, there is no evidence of whiplash injuries suffered by auto accident victims. *See* Harald Schrader, Diana Obelieniene, Gunnar Bovim, Danguole Surkiene, Dalia Mickeviciene, Irena Miseviciene & Trod Sand, *Natural Evolution of Late Whiplash Syndrome Outside of the Medicolegal Context*, LANCET, May 4, 1996, at 347. It is possible, then, that whiplash injuries, as common as they seem to be in the United States, are largely a matter of “social construction.”

103. *See, e.g.*, Nancy Rivera Brooks, *Auto, Health Fraud Probe Nets 13 Arrests*, L.A. TIMES, Aug. 21, 1996, at D-1. This Article reports a California estimate that \$16 out of every \$100 for the

seemingly could be eliminated by the adoption of a pure no-fault program.¹⁰⁴

Pure no-fault, then, should be dramatically less expensive than either tort or hybrid no-fault, partly because of reduced compensation for pain and suffering, but largely because of reduced litigation costs and reduced incentives for padded medical expenses. In 1996, California voters were presented with a pure no-fault plan¹⁰⁵ and Congress is now debating a no-fault plan which approaches pure no-fault, insofar as it displaces all tort liability for pain and suffering. In these circumstances, the savings on insurance premiums have emerged as *the* dominant argument on behalf of no-fault. In California, no-fault supporters relied primarily on a Rand study finding that the implementation of no-fault would reduce by 21% the portion of auto insurance premiums attributable to bodily injury.¹⁰⁶ Supporting the federal no-fault proposal, a recent op-ed essay by Senators McConnell, Moynihan, and Lieberman begins as follows: "Imagine a tax cut that saves \$246 billion over the next five years . . . better yet, the tax cut would not add a penny to the deficit. Impossible? Not really. It's

entire auto insurance package is attributable to fraud, and that \$8 of this \$16 goes for exaggerated soft-tissue injuries. I reduce the \$100 figure to \$50 by relying on the typical understanding that about half the cost of the insurance package concerns personal injury.

The \$16 fraud figure is described as the national average in *Whiplash May Be Fraud or May Be Real: It's Hard to Tell the Difference*, INS. INST. FOR HIGHWAY SAFETY STATUS REP., Sept. 16, 1995, at 8. According to another report, "insurers figure that for every dollar paid on auto claims, about 17 to 20 cents is due to some type of fraud." *Business Bulletin*, WALL ST. J., June 18, 1998, at A1. See also the sources and data compiled in Emerson, *supra* note 101, at 913-15.

104. Medical expense buildup can be regarded as a form of soft fraud induced by the tort system. That system also offers incentives for hard fraud—the staging of auto accidents by would-be victims so that they (or those employing them) can recover not only for their trumped-up medical bills but also for their supposed pain and suffering. Examples include "swoop-and-squat," the "drive down," and the "panic-stop." See generally KEN DORNSTEIN, ACCIDENTALLY, ON PURPOSE (1996). The usual estimate is that of every \$50 in auto insurance, \$3 goes for staged accidents. See Brooks, *supra* note 103.

The opportunity to reduce hard fraud costs has often been seen in recent years as a significant argument on behalf of no-fault. See JOINT ECON. COMM., *supra* note 90, at 4. However, the strength of the argument seems to me uncertain. The move to no-fault would reduce fraud incentives by eliminating pain and suffering recoveries and also by requiring the supposed victim to deal with his own insurer. However, that move would undoubtedly occasion other incentives for fraud. In a tort regime, those abusing the system are required to simulate *both* loss *and* negligence; in a first-party insurance regime, only loss needs to be simulated. "Comprehensive" auto insurance is first-party insurance, covering both fire and theft; and every year, a significant number of car owners fake the theft of their cars so as to collect on their policies.

105. See *supra* note 61.

106. See STEPHEN CARROLL & ALLAN ABRAHAMSE, THE EFFECTS OF A PROPOSED NO-FAULT PLAN ON THE COST OF AUTO INSURANCE IN CALIFORNIA: AN UPDATED ANALYSIS 3 (1996).

called auto choice.”¹⁰⁷ A study released by Congress’ Joint Economic Committee tabulates the state-by-state savings for motorists who elect no-fault under an auto choice scheme; the average reduction in bodily injury coverage costs would amount to 63%.¹⁰⁸

To sum up, while the overhead of the auto tort system is in some respects more moderate than no-fault rhetoric often suggests, that overhead is nevertheless very substantial in its aggregate amount. Reducing that overhead is hence a very worthy public policy goal. The savings on overhead achieved by hybrid no-fault are modest enough as to prompt little enthusiasm. Yet the savings that can be achieved by pure no-fault invite enormous enthusiasm.

IV. NO-FAULT AND THE GOALS OF TORT LAW

A. FAIRNESS AND DETERRENCE

Part III discussed certain public policy objectives of no-fault—the reduction in system overhead and the broad compensation of accident victims. Part III concluded that while hybrid no-fault is somewhat modest in achieving these objectives, pure no-fault is impressive. Yet if the advantages of pure no-fault are dramatic, its disadvantages obviously need to be considered as well. These disadvantages relate to the extent to which no-fault displaces the tort system. A regime of tort liability is generally seen as resting on two objectives. One is fairness, or corrective justice:¹⁰⁹ When the defendant’s negligent conduct has caused the plaintiff to suffer injury, the defendant should bear the burden of assuring that the plaintiff receives compensation for that injury.¹¹⁰ The second objective is deterrence: to discourage or prevent potential defendants from engaging in

107. Mitch McConnell, Daniel Patrick Moynihan & Joseph I. Lieberman, *Auto Insurance: A Better Way*, WALL ST. J., Sept. 22, 1997, at 22.

108. See JOINT ECON. COMM., *supra* note 90, at 9-10 (1997). This study draws on data analyzed by Rand. A review by Rand of more recent data has resulted in a revised estimate: The federal plan would reduce bodily injury coverage costs by 55%. See STEPHEN J. CARROLL & ALLAN F. ABRAHAMSE, *THE EFFECTS OF A CHOICE AUTOMOBILE INSURANCE PLAN ON INSURANCE COSTS AND COMPENSATION: AN UPDATED ANALYSIS* xiv (1998).

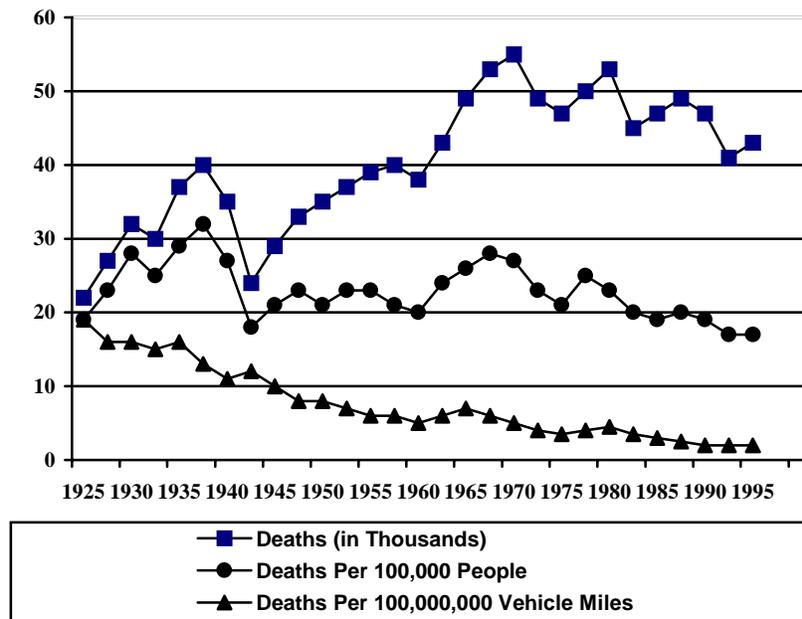
In addition to personal injury coverage, motorists are generally required to buy property damage liability insurance, and they commonly buy collision and comprehensive insurance. The bodily injury portion of the total auto insurance premium is typically about half of the total insurance premium.

109. See JULES COLEMAN, *RISKS AND WRONGS* (1992); ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

110. I have referred to this objective in terms of “compensatory justice” to emphasize how the furnishing of compensation ordinarily discharges the justice obligation. See Schwartz, *supra* note 12, at 328.

negligent conduct that brings about accidents in the first place.¹¹¹ The standard argument against no-fault, then, is that by subordinating tort law it would undermine the achievement of fairness and deterrence.¹¹²

As far as deterrence is concerned, notice can be taken here of occasional suggestions that the rise of modern industrial society has brought about a basically inevitable high rate of accidents.¹¹³ To dispute any notion of inevitability in its application to highway accidents, data are presented here on the number and rate of auto fatalities in the United States over time.¹¹⁴



As the chart shows, the number of fatalities (both overall and as a percentage of the population) has declined significantly since 1966, and the death rate per 100,000,000 miles has declined dramatically from 5.70 in

111. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

112. For a recent statement of the fairness or "individual responsibility" argument against no-fault, see Rosenfeld, *supra* note 41. For an early article criticizing no-fault from a deterrence perspective, see Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49 (1982).

113. See ROYAL COMM'N OF INQUIRY, *REPORT: COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND* 40 (1967) ("Modern society [engages in activities that] year by year exact a predictable and inevitable price in bodily injury, [injuries incurred by] random but statistically necessary victims.").

114. See NATIONAL SAFETY COUNCIL, *supra* note 50, at 105.

1966 to 1.57 in 1998, a reduction of more than 70%.¹¹⁵ Exactly what the explanations are for this reduction—and whether tort law provides any part of the explanation—is quite unclear.¹¹⁶ But the precise explanations apart, the dramatic decline seemingly confirms that the rate of highway fatalities is anything but inevitable,¹¹⁷ and that that deterrence or prevention of highway accidents can properly be seen as a primary goal for public policy.¹¹⁸

Deterrence, then—and fairness as well—are hence quite important goals in thinking about how liability law should respond to the problem of highway accidents.¹¹⁹ The next relevant point is that under *either* modern

115. To be sure, it can be noted that the rate has been generally declining since the data were first collected in the 1920s. An interruption in this general decline occurred between 1961 and 1966, when the rate went up from 5.16 to 5.70. One likely explanation for this increase was the bulging numbers of baby boomers who became teenage drivers.

Note also that the declines have decelerated since 1992: The rate went from 1.83 in that year to 1.57 in 1998. Several explanations have been offered for this deceleration. One points to a slight increase in the number of teenage drivers. Another emphasizes the effects of increased speed limits. See, e.g., NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., THE EFFECT OF INCREASED SPEED LIMITS IN THE POST-NMSL ERA (1998); *Limits Up, Speeds Up, Deaths Up*, INS. INST. FOR HIGHWAY SAFETY STATUS REP., Oct. 11, 1997, at 1.

116. Something called “Smeed’s Law” professes to express the fatality rate as the product of a constant formula that takes into account both the population within the jurisdiction and its number of registered motor vehicles. See R.J. Smeed, *Some Statistical Aspects of Road Safety Research*, J. ROYAL STAT. SOC’Y, ser. A, pt. I, 1 (1949), discussed in JOHN J.U. ADAMS, RISK AND FREEDOM 19-28, 102-15, 139-41 (1985). There are at least two problems with Smeed’s Law. First of all, it frequently does not work: It fails to explain the relevant changes in the fatality data. Secondly, even when it does work, no one (including Smeed and Adams) has succeeded in explaining what forces are driving it.

117. A finding of non-inevitability also comes from the variety of fatality rates among various countries. The 1.57 in this country (as of 1998) compares to 2.3 in Japan (as of 1996), 2.5 in Germany, 8.6 in Poland, and 21.3 in Turkey. Yet there are countries whose fatality rates are lower than the United States, including the United Kingdom with 1.4 and Finland with 1.5. See AMERICAN AUTO. MFRS.’ ASS’N, MOTOR VEHICLE FACTS & FIGURES 91 (1998).

For dramatic descriptions of driving in certain foreign countries, see Kenneth Freed, *Argentina’s Motorists Drive with Deadly Enthusiasm*, L.A. TIMES, Jan. 18, 1981, § I-A, at 1; Stefan Fatsis, *Albanian Motorists Take a Crash Course Called Driver’s Ed: After Decades Without Cars, a Big Question Lingers: Which Pedal Is the Brake?*, WALL ST. J., July 29, 1996, at A1.

118. Writing in 1986, two leading scholars declared that measures aimed at drunk driving probably play an “insignificant” role in reducing auto fatalities. See H. Laurence Ross & Graham Hughes, *Drunk Driving: What Not To Do*, NATION, Dec. 13, 1986, at 663. In fact, the percentage of all traffic fatalities that are alcohol-related has declined from about 54% in 1986 to about 39% in 1997. See NATIONAL SAFETY COUNCIL, *supra* note 50, at 86-87. During this period the overall auto fatality rate has declined as well. Almost certainly, tougher penalties for drunk drivers and the public campaign to socially discredit drunk driving have been effective in significantly reducing auto fatalities.

119. To be sure, in assessing these goals in context, the special circumstances relating to highway accidents need to be taken into account. First, the negligently driving motorist imposes the risk of injury on both third parties and self. The fear of self-injury gives the motorist a quite substantial incentive to avoid negligent conduct; this is a first-party safety incentive that is lacking in other sectors of tort law. (Obviously, in those sectors there often are first-party incentives for the avoidance of

tort *or* auto no-fault, the motorist's insurance policy plays a crucial role in intermediating between the motorist himself and whatever financial burdens the motorist finally bears. This point is axiomatic in no-fault: It is a basic concept in no-fault plans that no-fault insurance is obligatory.¹²⁰ Similarly, as Part I has observed, in a modern tort regime almost all liability is derived from liability insurance. Accordingly, whatever tort law achieves by way of deterrence and fairness it achieves through the mechanism of liability insurance, and the pattern of premiums which that insurance occasions.

Consider, then, the speeding by Motorist A that may lead to a collision with Motorist B. In a modern tort system, A's liability insurer can be required to pay for B's injury. Yet note here one of those circumstances unique to motoring—the interchangeability of conduct that imperils others and conduct that imperils the actor's own self. The collision between A and B, while injuring B, will likewise injure A. Indeed, in a before-the-fact way, the risk which A's negligent driving imposes on B may be about equal to the risk to which A is subjected. The more excessive A's speed, the more likely it is that in the resulting collision both A and B will suffer serious injuries.

Ponder, then, how insurance companies would respond under tort and under no-fault to an instance of bad driving (in the sense of either an

negligence. Thus, manufacturers avoid defective products in order to avoid a loss of sales; and physicians avoid malpractice in order to enhance their self-respect. Still, the motorist's first-party safety incentive is "commensurate" with the interest in third-party safety in a way that these other first-party incentives are not.)

Secondly, the motorist who drives negligently is almost certainly violating some provision in the state motor vehicle code. The prospect of being ticketed for that violation gives the motorist an incentive to avoid negligent driving. Indeed, if the negligent driving brings about an injury accident, that accident will itself prompt a police investigation, which can lead to the motorist being cited for a code violation. The desire to avoid that citation gives the motorist a special incentive to avoid negligent driving that brings about an injury. Moreover, the penalty imposed on the motorist because of that injury provides some measure of justice to the motorist's victim. (Admittedly, this may classify as retributive justice, rather than corrective justice as such.)

In the particular context of auto accidents, then, it may be that society has a somewhat lesser need to rely on tort law in order to achieve its basic objectives of fairness and deterrence. Still, this article assumes that even in the highway setting, tort law (or liability law) has an important role to play.

120. See BASIC PROTECTION, *supra* note 1, at 9.

Note, however, the interesting Massachusetts variation. The no-fault cap in Massachusetts is \$8,000. MASS. GEN. LAWS ANN. ch. 90, §§ 34A, 34M (West 1999). The purchaser of insurance, however, is allowed to elect a deductible as high as \$8,000. See *id.* In Massachusetts, then, no-fault seems largely optional—though the motorist still is required to buy no-fault insurance to protect pedestrians and non-family-member passengers. Interestingly, in October 1998, when I called two Boston insurance agents to request no-fault premium quotes, and in doing so asked whether no-fault is waivable, I was told flat-out that it is not.

at-fault accident or a traffic citation). In a tort regime, A's liability insurer would regard such an instance as somewhat predictive of A's bad driving in the future.¹²¹ Because this bad driving might endanger third parties, this prospect will lead the liability insurer to increase the future liability insurance premium it charges the driver.¹²² Yet even if the driver's jurisdiction has no-fault, the instance of bad driving remains equally predictive of future bad driving. Moreover, because that bad driving might result in an injury to the driver himself, the driver's no-fault insurer will likewise increase its premium for the driver. And because, from a before-the-fact perspective, the risk to third parties is roughly equivalent to the risk to the driver, the premium increases in the two regimes will be roughly similar.¹²³

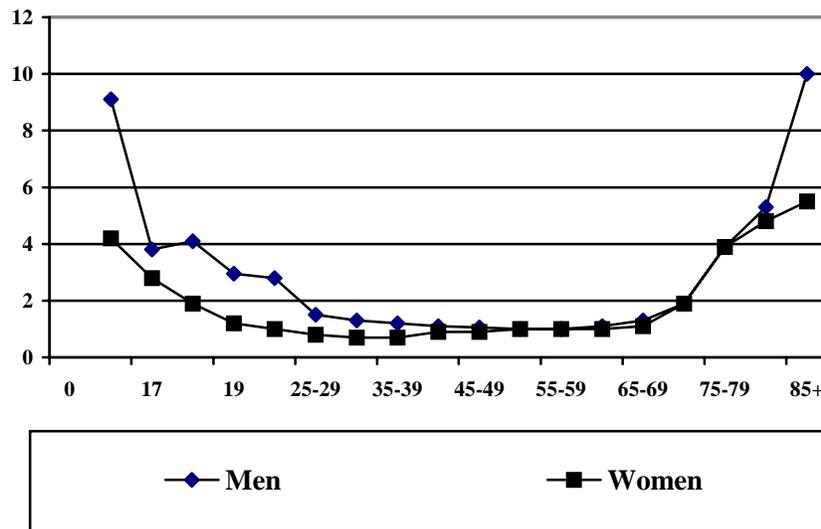
What has been said above about how insurance companies in tort and in no-fault would respond to instances of bad driving can also be said as to how they would respond to categories of drivers which for various reasons seem to involve a higher risk of accidents. The chart set forth below provides data on the serious crash involvement per year for a million licensed drivers of various ages and genders.¹²⁴

121. Recent convictions for traffic violations are indeed a fairly good predictor of future instances of faulty driving. See LEON S. ROBERTSON, INJURIES: CAUSES, CONTROL STRATEGIES AND PUBLIC POLICY 60 (1983); T.M. Muller & Donald H. Schuster, *Long-Term Predictability of Driver Behavior*, 15 ACCID. ANAL. & PREV. 11 (1983).

122. According to one recent study, experience rating—the practice of raising insurance premiums to take account of a drunk driving charge—has a significant effect in deterring drunk driving. See Frank A. Sloan & Penny B. Githens, *Drinking, Driving, and the Price of Automobile Insurance*, 61 J. RISK & INS. 33 (1994).

123. This point is suggested by Michael Trebilcock—who, however, does not quite make the point explicitly. See Trebilcock, *supra* note 45, at 28. See also DEWEES ET AL., *supra* note 34, at 56.

124. See LEONARD EVANS, TRAFFIC SAFETY AND THE DRIVER 33 (1991). For a chart showing severe crash involvement not per annum but rather per miles driven, see *id.* at 34. This latter chart shows crash involvement declining from age 16 until age 20; it also narrows the differences between men and women drivers. Because insurance companies write policies on an annual basis with little information about miles driven, the chart in the text is the one that companies would consider most seriously.



Consider, then, the twenty-year-old male who applies for no-fault insurance. The insurer—realizing that the driver applicant is part of a high-risk group—will charge that driver a higher no-fault premium, to take into account the greater likelihood of a driver injury, which itself can lead to a no-fault claim. As for liability insurers in a tort regime, studies show not only that younger drivers are more frequently involved in serious accidents, but that these accidents are disproportionately caused by the younger drivers' negligence.¹²⁵ In short, while tort liability insurers are famous for assigning a sharply increased premium to teenage drivers, teenage drivers in a pure no-fault regime would also be given a substantial premium surcharge.¹²⁶

On balance, then, given the way in which bad driving equally imperils third parties and the driver himself, the premiums for the motorist's insurance policy "move" in a no-fault regime in about the same way that premiums "move" in a tort regime. In both situations, premiums take significantly into account both the insured's bad driving record and his membership in groups with bad driving characteristics.¹²⁷

125. See Allan F. Williams & Ronald S. Karpf, *Teenage Drivers and Fatal Crash Responsibility*, 6 LAW & POL'Y 101 (1984); *All the 16-Year-Olds Didn't Make It Home*, INS. INST. FOR HIGHWAY SAFETY STATUS REP., Dec. 17, 1994, at 5.

126. *But see* text accompanying *infra* note 165.

127. This essential point escapes the attention of George Priest in his recent op-ed condemnation of auto no-fault. George L. Priest, *Why "Auto Choice" Is a Lemon*, WALL ST. J., July 21, 1998, at A14. Priest writes:

Keeping in mind that in the tort system almost all liability is filtered through liability insurance, one can ask how that system can succeed in promoting corrective justice. It does so by providing compensation to accident victims out of an insurance pool which itself is financed by charges on all motorists, and which varies the amount of those charges by taking into account the individual's negligent driving record and the negligent driving characteristics of the groups to which the individual belongs. Yet in a no-fault system the burden of contributing to the pool of resources that is relied on to compensate accident victims is distributed among motorists in much the same way. Accordingly, insofar as the modern tort system contributes to corrective justice, much of that contribution can be achieved by no-fault as well.

Shift now from the objective of corrective justice to the objective of deterrence. Given the intermediation of liability insurance, how might it be that the tort system reduces bad driving? The explanation might be that motorists, concerned about the prospect of insurance premium increases, seek to avoid faulty accidents and faulty driving that might lead to code violations. No-fault insurance, however, gives motorists basically the same incentive. In addition, the tort system, by charging higher premiums to motorists in high-risk categories, undoubtedly discourages some of these motorists from driving in the first place. Yet no-fault insurance also charges these motorists higher premiums, and therefore provides them with a similar element of discouragement.¹²⁸

From the perspective of this analysis, one can analyze a slogan deployed in the 1996 California television campaign against the no-fault initiative. According to the slogan, "His bad driving injures you. No-fault says that the fault is yours, rather than his." This slogan was no doubt effective in mobilizing votes against no-fault in the eventual election.¹²⁹ Yet the slogan, while largely correct in form, is largely incorrect in

You may be the most careful driver in the world, but if your parked car is hit by a drowsy, careless or inexperienced driver, under [no-fault] the repair costs would be built into *your* subsequent insurance premiums, not the offending driver's. . . . If you are hit by a semitrailer on the freeway, [no-fault] would put the burden on you, not the trucking company.

Id. Priest also indicates that teenage males, even though they are very high-risk drivers, would move into the "lowest" insurance premium category under no-fault. *See id.*

128. What is the safety track record of no-fault? Empirical studies of American no-fault plans have produced decidedly inconsistent results; they are reviewed in Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 394-95 (1994). As for pure no-fault in Quebec and elsewhere, see *id.* See also *infra* notes 158-62 and accompanying text. A new study is J. David Cummins, Mary A. Weiss & Richard D. Phillips, *The Incentive Effects of No Fault Automobile Insurance* (Aug. 16, 1999) (unpublished manuscript, on file with author).

129. For the election results, see *supra* note 61.

substance. Under no-fault, the burden of compensating the victim indeed rests on the victim's own insurer, rather than the bad driver's insurer. In substance, however, that accident would not affect the current or future insurance premiums paid by the victim. Rather, it would result in a significant increase in the future insurance premiums paid by the bad driver himself.

Yet the first part of this evaluation deserves further attention. Take an accident in which C is driving properly through an intersection, and C's car is hit by D's car, which is running a red light. C files a no-fault claim, and collects from his no-fault insurer. Is it really true that C's no-fault premiums will not increase? At one level, this should be true. Given the circumstances of the accident, there is nothing that is predictive of C's exposure to accidents in the future. Absent that prediction, there is no rational basis for a premium increase. In fact, there are statutes in place in Hawaii¹³⁰ and in Michigan¹³¹ that prohibit premium increases because of no-fault claims unless the evidence shows that the applicant for benefits was "at fault" (Hawaii) or "substantially at fault" (Michigan) for the accident giving rise to these claims. I have spoken, however, to a representative of State Farm,¹³² the auto insurer with the largest market share nationwide (18.8%);¹³³ to the vice president for auto insurance pricing at Allstate, the second largest insurer;¹³⁴ and to an underwriter at Geico.¹³⁵ They all tell me that in no-fault jurisdictions throughout the country their companies choose to practice what Hawaii and Michigan require by law: They ignore past non-fault accidents in calculating the motorist's future no-fault premiums.¹³⁶

130. See HAW. REV. STAT. ANN. § 431:10C-208 (Michie 1994) (insurance company cannot increase a motorist's no-fault premium if the motorist is "not at fault in the accident").

131. See Mich. COMP. LAWS ANN. § 500.2111(4)(a) (1998) (obliging insurers to create a merit rating plan that provides for "premium surcharges" whenever "information becomes available to the insurer" relating to "substantially at-fault accidents"). This section seems to be understood as prohibiting insurers from imposing premium surcharges when the motorist is not "substantially at-fault."

132. Telephone Interview with Dan Kinney, State Farm Representative (Nov. 24, 1999) [hereinafter Kinney interview]. This builds on a prior telephone interview, Oct. 29, 1998.

133. See Keith Bradsher, *Big Insurers Plan to Increase Rates on Large Vehicles*, N.Y. TIMES, Oct. 17, 1997, at A1 [hereinafter *Big Insurers*].

134. Telephone Interview with Michael LaMonica, Vice President for Auto Insurance Pricing, Allstate (Nov. 2, 1998) [hereinafter LaMonica interview].

135. Telephone Interview with Dick Hospital, Underwriter, Geico (Nov. 9, 1998) [hereinafter Hospital interview].

136. I specifically asked State Farm about an example provided by George Priest: "if your parked car is hit by a drowsy, careless or inexperienced driver, under [no-fault] the repair costs would be built into *your* subsequent insurance premiums, not the offending driver's." Priest, *supra* note 127.

Some might find this practice puzzling, however. One objective commonly associated with no-fault is to reduce the administrative costs of investigating accidents. Given this objective, how can no-fault insurers conveniently learn of the circumstances of the accident that gives rise to a no-fault claim?

To this interesting question, there are two apparent answers—each of which shows the objective carries less weight than is commonly assumed. First of all, almost all no-fault programs—including not only the hybrid American programs,¹³⁷ but the pure programs in effect in Quebec and Israel—preserve the tort system for liability claims for damage to the cars themselves. (To this extent, even a no-fault plan that is “pure” with respect to personal injury retains some hybrid quality.) Accordingly, even in a no-fault regime insurers need to gather enough information about the causes of an accident to enable them to resolve all claims for property damage. This retention of the tort system for property damage claims had indeed been recommended by the original Keeton-O’Connell study, which had acknowledged that an effective system of first-party collision insurance is already in place to deal with what compensation needs might be left unfilled by the tort system.¹³⁸ The non-application of no-fault to property damage claims has been commented on incisively by Blum and Kalven: Whatever justification there might be for requiring individuals to insure themselves against personal injury, it would be unacceptably paternalistic to compel people to purchase insurance to cover their cars.¹³⁹

The second point builds on the observation¹⁴⁰ that injury accidents routinely lead to police reports that identify motor vehicle code violations. No-fault insurers receive these reports, and learn what citations the police have issued; under negligence per se, findings of negligence are largely derived from statutory violations. Moreover, the no-fault insurer routinely receives a statement from its own insured, and can easily receive a statement from the other party. Given all of this, findings about the fault of the insured even in a supposed no-fault regime are in fact “very cut and

As it happens, the example does not work at all, since no-fault does not cover property damage. Assume, however, that you are in the car when it is hit, and you then file a no-fault injury claim. According to State Farm, it is “absolutely clear” that your own subsequent no-fault premiums would be unaffected, while the driver’s premiums would increase. See Kinney interview, *supra* note 132.

137. See 1985 DOT REPORT, *supra* note 24, at 135-36. Michigan is the one partial exception, involving a complicated arrangement. See *id.*

138. See BASIC PROTECTION, *supra* note 1, at 280-81. That is, for collision insurance the study found no obvious elements of market failure.

139. See *Ceilings*, *supra* note 69, at 371.

140. See *supra* note 87 and accompanying text.

dried”; and the “time and expense” involved in making these findings are in fact quite “low.”¹⁴¹

Yet put to one side the cost of investigating particular instances of bad driving. Even if information is available as to the absence of fault, is it really true that no-fault insurers want to ignore accidents not caused by the fault of their own insureds? What if, for example, certain drivers are “accident prone”—in some complicated psychological way serve to attract accidents? The concept of accident proneness was considerably in vogue during the middle of the last century.¹⁴² However, the concept has not fared well since then.¹⁴³ Studies now show that insofar as there are drivers who are accident prone, these are drivers whose accident proneness is due to their aggressive and anti-social backgrounds and attitudes.¹⁴⁴ In short, drivers who are accident prone fall into this classification essentially because they tend to drive badly. That being the case, nothing in the notion of accident proneness would encourage no-fault insurers to raise the premium of a motorist involved in an accident that is plainly not his fault.

Consider, however, a possibility that is somewhat related to the accident prone notion. What about two drivers, neither of whom drives negligently, yet one of whom is more “excellent” than the other in terms of defensive driving—shrewdly avoiding those accidents that would essentially be due to the negligence of other motorists? This is an interesting possibility. Moreover, my own observation is that there are significant variations in the defensive driving skills of various drivers. Even so, it would be very difficult for insurance companies at acceptable cost to render reliable judgments about defensive driving abilities. Further, to infer a deficiency in defensive driving skills from the mere fact of one or two accidents would almost certainly be actuarially unsound.

Still, consider the motorist in a no-fault regime who is involved (say) in three accidents in the course of a year, none of which is evidently his fault. In considering such a motorist, an insurance company could possibly

141. Kinney interview, *supra* note 132.

Note that in making findings of fault for purposes of determining no-fault premiums, the insurer is not burdened with the expense of assessing the extent of the victim’s pain and suffering. This is an expense that adds to the overhead of the auto sector of the tort system.

142. See Fleming James, Jr. & John J. Dickenson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

143. For interesting discussions, see ROBERTSON, *supra* note 121, at 58-63; Frank P. McKenna, *Accident Proneness: A Conceptual Analysis*, 15 ACCID. ANAL. & PREV. 65 (1983).

144. See David W.M. Sorensen, *Motor Vehicle Accidents*, in THE GENERALITY OF DEVIANCE 113 (Travis Hirci & Michael R. Gottfredson eds., 1994). See also EVANS, *supra* note 124, at 144-52 (1991).

perceive there is some problem it needs to take into account: perhaps an absence of defensive driving capacity, or alternatively perhaps some tendency to submit false claims. Nevertheless, such a cluster of non-fault accidents could very easily be merely a random outcome. What State Farm, Allstate, and Geico all tell me¹⁴⁵ is that their practice is to ignore the non-fault accidents of its insureds both in offering a policy for the following year and in setting the premium for that policy. To be sure, if the three seemingly non-fault accidents appear on the record of a new customer who is applying to State Farm or Allstate, those companies' underwriting standards might lead the companies to reject this person's application. Note, however, that the same result could easily ensue in a modern tort regime—when the applicant's record shows three collision claims filed during the previous year because of accidents that are not obviously due to the fault of the applicant.

Under market conditions,¹⁴⁶ then, private no-fault insurers can be expected to set premiums in ways that resemble tort liability premiums insofar as they take driver records and driver group characteristics into account. Insofar as these practices considerably reduce the extent to which no-fault threatens core tort values, market-oriented insurance for no-fault seems clearly desirable. Is it proper to assume, however, that no-fault plans will tolerate ordinary market practices? There might be several reasons for doubting this assumption.

One set of reasons mixes principle and politics. As a matter of principle, once the purchase of insurance becomes mandated by government, it can be argued that government is under a moral obligation to regulate insurance premiums so as to achieve distributional equity.¹⁴⁷ As a matter of politics, such arguments will in fact be advanced by appropriate interest groups whose members are experiencing the burden of higher

145. See Kinney interview, *supra* note 132; LaMonica interview, *supra* note 134; Hospital interview, *supra* note 135. Geico indicates that depending on the circumstances it might initiate a preliminary fraud investigation.

146. The market for auto insurance seems to be competitive. Nationwide, State Farm has the largest share, and it is only 18.8%. See *supra* note 133 and accompanying text. In California, recent competition has reduced State Farm's market share from 20% to less than 17%, and the market shares of Farmers and Allstate have declined as well. See Liz Pulliam, *Look Around*, L.A. TIMES, July 19, 1998, at D1. There are 81 companies selling auto insurance in New York, and approximately 62 in New Jersey. See Joseph B. Treaster, *Auto Insurance Is Now Cheaper in Many States*, N.Y. TIMES, Apr. 15, 1998, at C3.

Auto insurance is, however, substantially regulated; regimes of heavy regulation can dull an industry's competitive qualities.

147. Of course, this point also applies in a tort jurisdiction, once that jurisdiction renders mandatory the purchase of liability insurance.

insurance premiums. Moreover, the moral argument may even have a constitutional dimension. Once the purchase of insurance is required by state law, courts might perceive that this state mandate converts the insurance-premium practices adhered to by private insurance companies into state action that hence is subject to constitutional review. This possibility is illustrated by the *Shavers* litigation in Michigan in the late 1970s: In 1978, the Michigan Supreme Court seemingly ruled that the Michigan no-fault program was unconstitutional insofar as it provided inadequate assurances that insurance premiums would not become inequitable or “unfairly discriminatory.”¹⁴⁸

Moral principle, politics, and constitutional law apart, the social theory underlying no-fault might make it inappropriate for private insurance companies to write insurance and to engage in ordinary market practices. In New Zealand, for example, the reasoning of the Wodehouse Commission was that accidents generally (including highway accidents) are basically an inevitable result of the activities that modern society chooses to engage in and benefit from.¹⁴⁹ The Commission hence perceived that providing compensation for accidents is the responsibility of society rather than the responsibility of the accident victim.¹⁵⁰ Accepting the Commission’s evaluation, New Zealand in 1973 adopted a comprehensive program for compensating accident victims. The motor vehicle portion of this program is financed by an annual registration fee on motor vehicles and an excise duty on the sale of gasoline;¹⁵¹ and there is nothing in these fees or taxes that takes into account the motorist’s individual driving record or group characteristics.

Social theories of societal responsibility aside, leading arguments in favor of no-fault tend to adopt a certain view as to the causation of auto accidents. According to the Keeton-O’Connell study, auto accidents are primarily due to the incredible number of choices that every motorist needs to make during every minute he is on the road.¹⁵² “Driving is an extremely

148. *Shavers v. Kelley*, 267 N.W.2d 72, 77, 87-88 (Mich. 1978).

The court gave the legislature 18 months, however, in which to modify the program so as to respond to the constitutional problem. *See id.* at 78. The statute the legislature proceeded to adopt ended up somewhat satisfying the court. *See Shavers v. Attorney General*, 315 N.W.2d 130 (Mich. 1982). Moreover, this statute did not require departures from the kind of insurance practices that I have commended above.

149. *See supra* note 113.

150. ROYAL COMMISSION OF INQUIRY, *supra* note 113, at 19-22, 26.

151. *See* John Michael Miller, *Compensation for Motor Vehicle Injuries in New Zealand*, 39 LES CAHIERS DE DROIT 371, 388 (1998).

152. A 1971 Department of Transportation study ended up strongly supporting no-fault. According to that study, the relevant evidence fails to confirm the common view “that most accidents

complicated process [that] involves making constant, subtle judgments of speed, motion, and space, and with very little margin for error.”¹⁵³ The implication of all this is that auto accidents are a bit of random bad luck—innocent lapses that could easily happen to any driver on the road. Accordingly, in Keeton-O’Connell there is hardly any mention of instances of serious bad driving such as speeding¹⁵⁴ or driving while under the influence.¹⁵⁵ A theory that auto accidents are random—resulting from errors made by ordinary drivers that are essentially predictable and morally irrelevant—facilitates the adoption of legal rules that require equal premiums for all motorists.

For whatever reason or combination of reasons, it is not uncommon for auto no-fault plans to require that premiums be set in ways that depart from a basic market logic. In particular, in foreign jurisdictions with pure no-fault, market insurance is routinely rejected.¹⁵⁶ In Israel, private companies sell no-fault insurance, but they operate under a government mandate requiring equal premiums for all motorists, regardless of driving records or demographic characteristics.¹⁵⁷ In Quebec, no-fault insurance is sold exclusively by a government agency. The Quebec plan, in its original form, provided for flat-rate premiums for all motorists.¹⁵⁸ Interestingly, studies by Gaudry¹⁵⁹ and Devlin¹⁶⁰ that focused on the early years of the

are caused by improper and avoidable human error”; rather, the relevant causes are environmental and sociological. 1971 DOT REPORT, *supra* note 55, at 53-56.

153. BASIC PROTECTION, *supra* note 1, at 16. The study points out that motorists make 200 observations per mile, and 20 decisions per mile; on average, there is an error every 2 miles and a near-collision every 500 miles. *See id.*

154. There is one passing reference to speeding. *See id.* at 21.

155. The last part of the report provides Comments on individual sections of the proposed statute. One Comment confirms that the definition of compensable “accidental injury” includes injuries caused by the victim’s drunk driving; and the Comment supports this definition by noting that such injuries “are a major risk of motoring in our society.” *Id.* at 396. Yet in the basic text of the report there is essentially no mention of drunk driving.

156. For New Zealand, see Miller, *supra* note 151 and accompanying text.

157. *See* Englard, *supra* note 19, at 163. Premiums do vary to take vehicle engine size into account. *See infra* note 204.

158. *See* Trebilcock, *supra* note 45, at 29-30.

159. *See* Marc Gaudry, *Measuring the Effects of the No-Fault 1978 Quebec Automobile Insurance Act with the DRAG Model*, in CONTRIBUTION TO INSURANCE ECONOMICS 471 (Georges Dionne ed., 1991). A recent consultant’s report, which has been widely circulated, alleges that Gaudry’s subsequent research—consisting mainly of French-language government reports—has repudiated his own original findings. *See* Ned Glick, Statistical Evidence of Fatality Increases in Response to “No-Fault” Insurance? (Jan. 14 1997) (unpublished manuscript, on file with author).

However, this allegation is incorrect. “In Quebec, . . . the establishment of a . . . no-fault system of automobile insurance . . . without experience-rating was disastrous.” Marc Gaudry, Some Perspectives on the DRAG Approach and Family of National Road Safety Models 20 (1999) (unpublished manuscript, on file with author). “[The] position [advanced in my earlier studies] has not

Quebec program found that it resulted in a disturbing increase in accidents and fatalities. These studies (especially Gaudry's) attributed much of the increase to the way in which flat-rate premiums failed to discourage bad driving and failed to discourage motorists, such as teenagers, who might be prone to bad driving. Indeed, when no-fault was introduced, the premium charged to young male drivers decreased by about 80%.¹⁶¹ In 1992, the Quebec program was amended so as to allow premiums to take into limited account the actual driving record of the individual motorist.¹⁶² However, even in its current form the Quebec program does not permit premiums to take into account the age or other demographic circumstances of the insurance applicant.¹⁶³ Among American jurisdictions with hybrid no-fault, at least one follows the Quebec lead. Hawaii's no-fault plan prohibits as a "discriminatory practice" basing premiums "directly or indirectly" on factors such as "age, sex, [and] length of driving experience."¹⁶⁴

To recap, the ability of a modern tort regime to achieve its fairness or deterrence objectives depends on the way in which insurance companies classify motorists who drive badly, or who are likely to drive badly. Whether market conditions for insurance will be allowed to prevail in no-fault is an interesting and difficult question. Yet so long as they do prevail, the insurance practices that ensue in no-fault are to a surprising extent similar to the practices that are observable in ordinary tort. Accordingly, no-fault interferes with tort law's fairness and deterrence functions much less than is often assumed.

Yet care should be taken to avoid overstating this case. There are relevant differences between tort insurance and no-fault insurance, which have implications for fairness and deterrence. For one thing, even though insurers under either tort or no-fault would certainly take into account the especially high risk entailed by teenage drivers, those drivers' premiums

changed. [It is] fully compatible with [the more recent studies]." Electronic Mail Letter from Marc Gaudry to author (July 27, 1999) (on file with author) [hereinafter Gaudry e-mail].

It is clear that auto fatalities have declined significantly in Quebec over the years. See Glick, *supra*. But this decline may well be due to a variety of Quebec safety programs, including seat-belt requirements.

160. See Rose Anne Devlin, *Liability Versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec*, in CONTRIBUTIONS TO INSURANCE ECONOMICS 499 (Georges Dionne ed., 1992); Rose Anne Devlin, *Some Welfare Implications of No-Fault Automobile Insurance*, 10 INT'L REV. L. & ECON. 193 (1990) [hereinafter Devlin, *Some Welfare Implications*].

161. See Gaudry e-mail, *supra* note 159.

162. See JOOST, *supra* note 2, § 7:5.

163. See Gaudry e-mail, *supra* note 159.

164. HAW. REV. STAT. ANN. § 431:10C-207 (Michie 1994).

will be lower under no-fault than under tort, since the no-fault insurer takes into account the (low) income of its own (teenage) insured, while a tort insurer by contrast would take into account whatever the range of incomes is of those persons who might be victimized by the teenager's bad driving. The premium increase for teenage drivers under no-fault will hence be less than the premium increase under modern tort.¹⁶⁵

Note, however, two relevant points. The first is that perhaps only one-third of the economic costs of highway accidents take the form of income losses; the remaining two-thirds are health care expenses.¹⁶⁶ Hence the effect of the driver's income level on no-fault premiums is less than one might expect. A second point, to be developed in Part V below, is that lower insurance premiums for low income drivers might have the effect of reducing the number of drivers who are illegally uninsured;¹⁶⁷ and the current high rate of uninsured motorists in modern tort regimes itself serves to undermine tort law's fairness objectives. Hence while lower premiums produce one problem, they help to alleviate another problem.

A more general point concerns the extent of the insurer's compensation responsibilities under tort and pure no-fault: The tort system provides recovery for pain and suffering, while no-fault does not. Accordingly, while under both tort and no-fault the premiums of high-risk drivers increase, under no-fault the increase may be considerably less than it is in tort, since the insurer pays for the economic costs of bad driving, but not its non-economic costs. Of course, on the victims' side of the ledger, no-fault's denial of pain and suffering compensation to the victims of negligent driving is a denial that raises a fairness problem with no-fault, as indicated in the prior discussion of no-fault by choice.¹⁶⁸

In addition, from a deterrence perspective it can be argued that motorists may more frequently drive negligently when they know that a significant fraction of the costs of any accident will be defrayed by a

165. *But see* text accompanying *infra* note 126.

166. *See* HENSLER ET AL., *supra* note 47, at 105. My text uses "perhaps" advisedly. On the one hand, data studied by Stephen Carroll at Rand indicate that three-quarters of all economic losses in highway accident cases consist of health care expenses. *See* CARROLL ET AL., *supra* note 97, at 4. On the other hand, both the Hensler and Carroll studies have excluded fatal accidents. These are accidents that mainly generate income losses.

167. *See infra* notes 253-56 and accompanying text.

168. *See* Rosenfeld, *supra* note 41 and accompanying text. This is, indeed, a clear fairness negative for no-fault plans, though I do not spend more time on it here.

no-fault program.¹⁶⁹ Yet furnishing compensation to highway accident victims is of course the very outcome that no-fault programs seek: those programs rest in significant part on the precise social policy premise that all highway accident victims should receive compensation regardless of the accident cause.¹⁷⁰ Observe, moreover, that even in the absence of no-fault, most motorists who are potentially negligent are protected by important compensation sources, especially health insurance for medical expenses. Because, as noted in Part III, the added compensation furnished by no-fault is somewhat limited, the extent to which no-fault compensation might facilitate bad driving by potential victims is limited as well.

B. SAFER CARS

Return now, however, to insurance practices under tort and no-fault, and look at a possible safety advantage surrounding the latter. Consider safety features that might be included in the cars people buy, features that commonly protect car occupants—regular airbags, side airbags, “second generation” airbags, extra padding around windows, whiplash protection systems, computerized stability systems, or whatever.¹⁷¹ In a tort regime, the cost of liability insurance will ignore these design features, since they have no bearing on what injuries might be suffered by third parties on account of the negligence of the insured owner-driver.¹⁷² Yet under no-fault, so long as market conditions prevail, the price of insurance should decline whenever the consumer purchases a car that includes safety features that protect the car’s occupants.¹⁷³ These safety features, while essentially irrelevant to the exposure of the driver’s liability insurer in a tort regime, are highly relevant to the exposure of the driver’s no-fault insurer. It can be argued, then, that no-fault provides a valuable incentive for car

169. See Devlin, *Some Welfare Implications*, *supra* note 160, at 201-02. For a fuller statement, see Jennifer Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1106-15 (1993).

170. Accordingly, a no-fault supporter such as Stephen Sugarman rejects as essentially inappropriate the concern that compensating victims will encourage them to endanger themselves. See Sugarman, *supra* note 22, at 325.

171. See Jerry Morris, *Safety Features Top Consumer Lists*, BOSTON GLOBE, Nov. 1, 1998, at K1.

172. Unless, that is, the victim is the passenger in the driver’s vehicle.

173. Likewise, no-fault premiums should rise significantly insofar as the vehicle’s design features involve dangers to vehicle occupants. For example, the high center of gravity in sport utility vehicles considerably increases the prospect of a vehicle rollover. See Keith Bradsher, *Light Trucks Prone to Tip, Safety Tests Find*, N.Y. TIMES, July 15, 1999, at A17. On the very strong warning of “higher rollover risk” that federal regulators now require in SUVs, see Ricardo Alonso-Zaldivar, *Sport-Utility Vehicles to Get New Labels on Rollover Risk*, L.A. TIMES, Mar. 5, 1999, at A1.

owners to incorporate safety features into the cars they buy.¹⁷⁴ Moreover, predictions about insurance company practices are borne out by reality. State Farm, for example, offers a 20% discount in the price of no-fault insurance to motorists who have a driver airbag in their car, and a 30% discount to motorists with two airbags.¹⁷⁵ Allstate and Farmers each offer approximately a 10% discount on no-fault premiums for cars with anti-lock brakes;¹⁷⁶ State Farm does not currently offer such a discount, but only because it is not yet convinced of the actual safety efficacy of anti-lock brakes.¹⁷⁷

From this perspective, then, no-fault with first-party insurance has interesting safety advantages. There are, however, complicating considerations. First of all, even without no-fault, the motorist buying a car with occupant safety features receives a natural first-party benefit in terms of improved safety for the motorist and her family. The no-fault insurance discount, then, merely alters the form of the benefit the motorist receives, and not its substance. To this point, however, there are two quite different responses.¹⁷⁸ One response rests on the premise that motorists are only quasi-rational—and are thereby influenced by the prospect of an immediate insurance discount in a way they would not be influenced by an uncertain reduction in the long-run risk of injury. The other response rests on the opposite premise that the typical motorist is hyper-rational. Accordingly, the motorist recognizes that any injury she suffers may well be caused by the negligence of another motorist who in a tort regime will bear liability for that injury; the motorist hence appreciates that if she makes an out-of-pocket payment for a car safety device, the benefits of that purchase will significantly be transferred to negligent third parties. Having figured this out, the motorist is less likely to make the purchase. My own common sense assessment is that the quasi-rational premise describes reality in a

174. This argument was originally advanced in Guido Calabresi, *First Party, Third Party, and Product Liability Systems: Can Economic Analysis of Law Tell Us Anything About Them*, 69 IOWA L. REV. 833 (1984). See also JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 242 (1990).

In a tort regime, the motorist has a products liability claim against the manufacturer that omits a clearly desirable safety device. However, these are claims against non-motorists that are preserved by no-fault plans. No-fault thus provides an incentive for vehicle safety devices that supplements (rather than replaces) whatever incentives are given manufacturers by products liability.

175. See Kinney interview, *supra* note 132.

176. As for Allstate, see Telephone Interview with Christina Sanroman, Consumer Services Office, Allstate (Feb. 28, 2000).

177. See Kinney interview, *supra* note 132.

178. Because Calabresi does not address this point, he does not indicate which response he favors. See Calabresi, *supra* note 174.

way in which the super-rational premise does not; but readers are free to make up their own minds.

A second complicating circumstance concerns an idea advanced by Sam Peltzman: If a motorist knows his car contains safety features that protect him, he may drive somewhat more dangerously, thereby not only reducing the safety advantage he would otherwise receive but also imposing additional injury risks on persons outside his car—pedestrians and other motorists.¹⁷⁹ The failure, at least so far, of anti-lock brakes to bring about beneficial safety results may stem in part from motorists' inexperience with these brakes.¹⁸⁰ However, that failure may also be due to the willingness of motorists, knowing of the protection afforded by anti-lock brakes, to drive in a somewhat more risky way.¹⁸¹ Even those scholars who are most vigorous in complaining about Peltzman's argument to its full extent (that offsetting driver behavior completely offsets the safety advantages of the car's new safety features) often acknowledge that Peltzman's reasoning contains a core of truth (that some offsetting behavior takes place).¹⁸² The pertinent question is the exact extent to which motorists drive more dangerously because of their knowledge of occupant protection features.

My own judgment is that this extent is rather limited. The rapid decline in the auto fatality rate between 1965 and now has been reported above.¹⁸³ Peltzman, writing in 1975, argued that the decline between 1965 and 1972 would have happened anyway for reasons unrelated to vehicle safety features.¹⁸⁴ Yet Peltzman's specific arguments seem incomplete and

179. See Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975).

180. Regular brakes may need to be pumped in an emergency. But pumping anti-lock brakes renders them ineffective.

181. This possibility is assessed in Charles M. Farmer, Adrian K. Lund, Rebecca E. Trempel & Elisa R. Braver, *Fatal Crashes of Passenger Vehicles Before and After Adopting Anti-Lock Braking Systems*, 29 ACCID. ANAL. & PREV. 745, 755 (1997). This article discusses a prior German study which found that taxicab drivers in cars equipped with antilock brakes drive more aggressively than cabbies whose vehicles lack those brakes. See *id.*

182. Mark Kelman concludes that Peltzman's article "does nothing whatsoever to alter a critical reader's prior perceptions of the effects of safety regulation. It is not only not definitive, it makes no empirical contribution at all." Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 245 (1988).

Yet Kelman concedes that "one would expect that the *direction* of the shift in behavior would be as Peltzman predicts . . ." *Id.* at 240. That is, motorists, knowing their cars have occupant safety devices, will drive somewhat less cautiously than they otherwise would. And this is a point that had been all but ignored in the discussion of federal auto safety policy prior to Peltzman.

183. See *supra* text accompanying note 114.

184. See Peltzman, *supra* note 179, at 717-18.

unsatisfying.¹⁸⁵ More fundamentally, one simply can't quarrel with success—especially success as dramatic as that confirmed by the declining fatality rate. Indeed, Peltzman's own analysis is limited to 1965-72. After 1972, the fatality rate continued to decline, and for twenty years the declines were even steeper than they had been during the seven previous years. There is inadequate reason to assume Peltzman would deny the value of auto safety features in bringing about this decline.¹⁸⁶ Indeed, the decline itself may well be to a considerable extent inexplicable unless one assumes that safer cars have played a considerable causal role.

Moreover, as Peltzman himself points out, one of the best tests of the offsetting driver behavior phenomenon is the percentage of auto fatalities incurred by pedestrians.¹⁸⁷ If motorists are driving more dangerously because of safety features in their cars, this should be confirmed by an increasing percentage of pedestrian deaths. But the data fail to provide this confirmation. In fact, the percentage of pedestrians among accident fatalities held about steady between 1970 and 1987—and has declined appreciably since 1987 (from 15.5 to 14.3), even though it is these years that have witnessed the inclusion in cars of automatic seat belts and airbags.¹⁸⁸

C. CAR WEIGHT

On balance, then, the incentives that no-fault gives drivers to incorporate safety features into their cars is an interesting advantage of no-fault with market insurance, though the advantage may be of somewhat uncertain magnitude. Turn next, however, to a related issue with respect to which market insurance poses a real problem. Consider the weight of the

185. See, for example, the criticisms in ROBERTSON, *supra* note 121, at 142-43; Kelman, *supra* note 182, at 238-45.

186. Peltzman might adopt the position that offsetting driver behavior has somewhat reduced—but has not eliminated—the safety effects of the new design features. If so, Peltzman and I would agree in principle, and at worst disagree about the relevant numbers.

187. See Peltzman, *supra* note 179, at 698-99, 717.

188. See NATIONAL SAFETY COUNCIL, *supra* note 50, at 106-07. The percentage was about 18% in 1970 and about 17% in 1986. The definition of pedestrians was narrowed as of 1987. Since 1987, as noted, the percentage has declined from 15.5% in 1987 to 14.3% in 1997.

Of course, a full interpretation of the percentage of pedestrian fatalities depends on all factors that might affect that percentage figure. For example, the more freeway driving there is the lower that percentage will be (since freeways do not expose pedestrians to injury). But since 1970—and especially since 1987—there has been relatively little freeway building in the United States. Both children and older Americans are more likely to be the pedestrian-victims of fatal accidents. The percentage of seniors among the American population has been increasingly significantly.

motor vehicle. The heavier the vehicle, the better it protects the vehicle's occupants.

In this respect, vehicle weight (or mass) is simply one example of a design feature that protects the safety of vehicle occupants. Indeed, in many ways heavier vehicles are undeniably good for the cause of highway safety. First of all, when vehicles crash into trees or other stationary objects, the heavier the vehicle the less severe the injuries suffered by the vehicle's occupants. Secondly, most engineering experts believe that when two heavier vehicles collide the injuries incurred by their occupants are less severe than the injuries suffered when two lighter cars collide.¹⁸⁹ The reason for this result, however, relates not to the weight of the vehicles as such but rather to their size (though size is of course highly correlated with weight).¹⁹⁰

To a considerable extent, therefore, heavier vehicles really do reduce risk. To a major additional extent, however, the heavier vehicle merely allocates or distributes risk. There are, indeed, "two *laws* for two-vehicle crashes: 1. The lighter the vehicle, the less risk posed on other road users. 2. The heavier the vehicle, the less risk faced by its occupants."¹⁹¹ In short, when a heavier vehicle collides with a lighter vehicle, the weight differential signifies that the more serious injuries are suffered by the occupants of the latter.¹⁹² Accordingly, in a no-fault plan with market insurance, the premiums for larger vehicles can be expected to go down significantly, while the premiums for lighter vehicles can be expected to increase significantly.

The social problem entailed by vehicle weight differentials has been extensively discussed in the last three years in the context of what are called "light trucks"—a term that includes pickup trucks, sport utility vehicles, and minivans.¹⁹³ Light trucks now comprise almost 50% of all

189. See, e.g., ROBERTSON, *supra* note 121, at 29; Leonard Evans, *Car Size and Safety: A Review Focused on Identifying Causative Factors*, in 1 PROCEEDINGS OF THE 14TH ENHANCED SAFETY OF VEHICLES CONFERENCE 721 (1995); Leonard Evans, *Small Cars, Big Cars: What Is the Safety Difference?*, 7 CHANCE 9 (1994) [hereinafter Evans, *Small Cars*].

190. In particular, the size that matters is the distance between the point of collision and the location of the occupant.

191. Evans, *Small Cars*, *supra* note 189, at 12-13.

192. The vehicle safety features discussed in Part IV.B can bring about risks to third parties if, but only if, they encourage the vehicle's driver to drive less carefully. Heavier vehicles impose risks on third parties quite without regard to any changes in driver behavior.

193. There have been long articles, for example, in the *New York Times*. See Keith Bradsher, *Collision Odds Turn Lopsided as Sales of Big Vehicles Boom*, N.Y. TIMES, Mar. 19, 1997, at A1 [hereinafter *Collision Odds*]; Keith Bradsher, *A Deadly Highway Mismatch Ignored*, N.Y. TIMES, Sept. 24, 1997, at A1 [hereinafter *Deadly Mismatch*].

passenger vehicles sold in the United States.¹⁹⁴ When a light truck collides with an ordinary car in circumstances that result in a fatality, 80% of the time the fatality is borne by the occupant of the automobile.¹⁹⁵ If one assumes that the rate of injuries and of serious injuries is in line with the rate of fatalities, then under pure no-fault 80% of the expense of injury when light trucks and cars collide would be allocated to the no-fault premiums paid by the owners of the cars.

While recent publicity has attended to light trucks, the basic problem is in fact pervasive. Consider, for example, the weight differential—and hence the inquiry differential—between compact cars, ordinary-sized cars, and full-sized cars. Data compiled annually by the Highway Loss Data Institute compares the injury rates for various car models; the data for four-door sedans (1996-98) models is presented below.¹⁹⁶

194. See Robyn Meredith, *Car and Truck Sales in 1999 at U.S. Record*, N.Y. TIMES, Jan. 6, 2000, at C1. Note, however, that minivans—which are lighter than pickups and sport utility vehicles—perform in ways that resemble full-sized cars more than other light trucks.

195. See *Crash Compatibility*, INS. INST. FOR HIGHWAY SAFETY STATUS REP., Feb. 14, 1998, at 1, 10.

Much of this result is due to the differential in vehicle weight. But in part, the result is brought about by specific design features in sport utility vehicles. These vehicles have stiff body frames, which can operate as a battering ram in a two vehicle collision. See Keith Bradsher, *Sport Vehicles Can Be Built to Be Safer, Insurers Say*, N.Y. TIMES, July 8, 1999, at A12. However, while that stiff frame imposes greater risks on occupants of other vehicles, it evidently provides more protection in crashes to the occupants of the SUVs. Federal regulators are currently gearing up to consider these specific SUV design features. See *id.* Also, products liability design defect claims could conceivably be filed against SUV manufacturers, though this has not happened so far. For recent developments on SUV design, see Keith Bradsher, *Automakers Modifying S.U.V.'s to Reduce Risk to Other Drivers*, N.Y. TIMES, Mar. 21, 2000, at A1.

196. See HIGHWAY LOSS DATA INST., *INJURY, COLLISION, & THEFT LOSSES (1999)*. My text provides information for most of the models in this document.

A document with the same title was published in January 1999, for 1995-97 models. The Ford Aspire, a “mini” car, was withdrawn from the market at the end of the 1997 model year. The data in the text include the Aspire’s injury rate, as reported in the January 1999 document. This inclusion makes it possible for my text to provide a comparison of the full range of Ford cars.

Four Door Cars	Injury
All Very Large	59
Mercury Grand Marquis	55
Ford Crown Victoria	65
All Large	73
Buick LeSabre	52
Buick Regal	54
Oldsmobile Intrigue	58
Chrysler Concorde	68
Pontiac Grand Prix	70
Chevrolet Lumina	74
Dodge Intrepid	85
Ford Taurus	88
All Midsize	105
Buick Century	62
Infiniti I30	75
Cadillac Catera	76
Volvo S70	77
Lexus ES 300	80
Toyota Avalon	80
Buick Skylark	94
Toyota Camry	95
Pontiac Grand Am	106
Dodge Stratus	107
Nissan Maxima	109
Honda Accord	109
Ford Contour	112
Plymouth Breeze	116
Oldsmobile Achieva	117
Pontiac Sunfire	125
Nissan Altima	138
Mazda 626	139
All Small	135
Audi A4	65
Saturn SL	99

Acura Integra	108
Honda Civic	121
Ford Escort	139
Toyota Corolla	141
Plymouth Neon	144
Mazda Protege	149
Nissan Sentra	170
Mitsubishi Mirage	221
All Mini	170
Volkswagen Golf	112
Geo Metro	172
Ford Aspire	188
Hyundai Accent	236

Note that the injury rate for a “very large” Ford Crown Victoria (4,010 pounds) is 65; for a “large” Ford Taurus (3,515 pounds), 88; for a “mid-sized” Ford Contour (2,895 pounds), 112; for a “small” Ford Escort (2,585 pounds), 139; for a “mini” Ford Aspire (2,140 pounds), 188.¹⁹⁷

The implications of all of this for no-fault with first-party market insurance are obvious. Under pure no-fault, one can expect that the

197. The weight data for 1997 models can be found in CONSUMER REPORTS, 1997 CARS: FACTS AND FIGURES 62, 64-65 (1997).

premium paid by the owner of the Escort will be about three-fifths higher than the premium charged to the Taurus owner, while the premium paid by the owner of the Ford Aspire will be almost three times the premium assigned to the Ford Crown Victoria.¹⁹⁸

The interesting point is that the particular injury risk involved when a heavier vehicle and a lighter vehicle collide is “caused” neither by the heavier nor smaller vehicle. Rather—in a valuable illustration of bilateral Coasian causation¹⁹⁹—the risk is caused precisely by the activities in combination. Indeed, the language of “compatibility” that is used to refer to the safety problem²⁰⁰ highlights the feature of concurrent causation. Yet a major feature of no-fault backed up with market insurance is that it can assign the lion’s share of the injury costs created by the combination of heavier and lighter vehicles to the owners of the latter.

This result seems deeply problematic for several reasons. First of all, there is a real fairness problem when owners of lighter vehicles are asked to pay for almost all the extra risk caused by the combination of lighter and heavier vehicles on the road. As one leading advocate of no-fault told me while discussing (typically heavy) commercial vehicles, no-fault “gives in effect—to be candid—a windfall to commercial vehicles.”²⁰¹ Moreover, since lighter, smaller vehicles are generally less expensive and hence more likely to be owned by lower-income families, the fairness problem likewise points to a problem of distributive justice: No-fault first-party insurance can disadvantage lower-income families who purchase smaller cars. Moreover, the pattern of insurance premiums gives potential car purchasers an incentive to buy heavier vehicles. Yet heavier vehicles may entail social disadvantages²⁰²—insofar as they consume more fuel, produce more pollution, hog the road, and impair traffic flow.²⁰³

198. Honda has recently introduced its Insight model, which weighs 1,887 pounds and gets 70 miles per gallon. See *Honda Hybrid*, L.A. TIMES, Jan. 9, 2000, at S19. It can travel from New York to Detroit on a single tank of gasoline. Imagine what its premiums would be under pure no-fault.

199. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

200. See *Crash Compatibility*, *supra* note 195.

201. Perceiving this windfall, commercial vehicle owners can be expected to lobby in favor of no-fault. For a Joint Economic Committee study that highlights the benefits that no-fault provides to businesses generally, see JOINT ECON. COMM., 105TH CONG., AUTO CHOICE: RELIEF FOR BUSINESSES & CONSUMERS (1998).

202. On fuel and pollution, see Blair Golson, *SUVs Taking Toll in Pollution, Fuel Costs, Research Group Says*, L.A. TIMES, June 17, 1999, at A4. On hogging the road, see Keith Bradsher, *Some Worry Sport Utilities are Too Much for New York*, N.Y. TIMES, July 2, 1999, at A1 (describing, among other things, the safety hazards of sport utility vehicles driving on the curve of a two-lane road). On traffic flow, see Keith Bradsher, *No Wonder S.U.V.'s Are Called Light Trucks*, N.Y. TIMES, Jan. 16, 2000, § 4, at 4.

Admittedly, much of the discussion above has been based on rather general reasoning as to what happens to vehicle premiums under no-fault. One needs to know the extent to which real world practices conform to abstract reasoning. What is the record, then, of actual insurance company practices under no-fault? As far as pure no-fault is concerned, there is not much of a record. In Quebec, for example, the no-fault insurance policies sold by the government are constant for all passenger vehicles.²⁰⁴

With respect to American no-fault plans, as will be discussed below, they commonly exclude motorcycles from their operation.²⁰⁵ This exclusion clearly rests on lawmakers' premise that without the exclusion, no-fault insurers would in fact charge motorcycle owners extremely high premiums. In upholding the New York exclusion as constitutional, the Court of Appeals reasoned that in its absence the no-fault premiums for

Extra fuel consumption is a "social" rather than a merely private disadvantage insofar as for various reasons there is a national interest in fuel conservation. For a sense of this social issue, see the statement of one Sierra Club official: Sport utility vehicles are "heavily polluting, gas-guzzling vehicles that can only bring a smile to Saddam Hussein's face." Donald W. Nauss, *Ford About to Unveil 4 Tons of Controversy*, L.A. TIMES, Mar. 11, 1999, at A1.

203. Both the Dewees team and Judge Posner have claimed that no-fault plans (as an alternative to tort) are inefficient for safety purposes insofar as they fail to encourage drivers to buy lighter cars. See DEWEES ET AL., *supra* note 34, at 56; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 205-06 (4th ed. 1992). However, in light of the fact that highway collisions are somewhat less harmful if vehicles are (uniformly) heavy, the claim of an efficiency interest in lighter vehicles seems odd. Furthermore, the claim does not adequately attend to the reciprocal nature of the vehicle weight problem. Assume that A has a car of average weight, and L buys a light subcompact; A and L are then involved in a collision, caused by the negligence of either A or L, or both. The light weight of L's vehicle reduces the injury that A suffers, and to that extent is socially desirable. But that light weight also renders more severe the injuries that L incurs. Moreover, the costs of these injuries are not necessarily borne by L; in a tort system, the costs may be shifted to A, in whole or in part.

For whatever reason, in the latest edition of his treatise Judge Posner deletes the passage concerning lighter cars. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 223-24 (5th ed. 1998) [hereinafter POSNER (5th ed.)]. See also *infra* note 213.

204. See Gaudry e-mail, *supra* note 159.

In Israel, no-fault insurance is sold by private companies, but under premiums established by government regulation. For passenger vehicles, the premiums ignore vehicle weight as such, yet are scaled according to engine size, which may correlate with weight. See Electronic Mail Letter from Israel Gilead to author (Aug. 23, 1999) (on file with author). The New Zealand plan is financed by a combination of car registration fees and gasoline taxes. See *supra* note 151 and accompanying text. Insofar as heavier cars consume more gas, in New Zealand they pay more for no-fault coverage. In all likelihood, however, this is an unintended consequence of the method of financing that New Zealand utilizes.

Several years ago, a no-fault plan was proposed for California that would have relied primarily on a 30-cent per gallon gas tax. See STEPHEN D. SUGARMAN, "PAY AT THE PUMP" AUTO INSURANCE (1993). Since heavy vehicles consume more gallons of gas, they would have contributed a larger share of tax revenues.

205. See *infra* note 217 and accompanying text. This exclusion is ignored in DEWEES ET AL., *supra* note 34, at 60.

motorcycles would be “prohibitively high.”²⁰⁶ As for commercial vehicles, their owners commonly buy auto insurance as part of a much larger comprehensive liability policy. In jurisdictions whose no-fault plans include commercial vehicles,²⁰⁷ the no-fault premium included in this general policy almost certainly takes into account the extent to which no-fault limits the insurer’s payouts.

Apart from this, however, American no-fault insurers—so far, at least—have responded to vehicle weight in limited ways. Farmers has lowered its no-fault premiums in Pennsylvania for sport utility vehicles and pickups; and Progressive, also a large insurer, has reduced premiums for such vehicles in no-fault jurisdictions nationwide.²⁰⁸ At least until now, however, no-fault insurers have not raised premiums for compact cars.²⁰⁹ It is proper to assume, however, that it is primarily the low stakes involved in most hybrid American no-fault programs that has until now discouraged more sophisticated insurance pricing. Allstate, for example, told me that the compact car issue is one that “needs to be looked at,” and that if more American jurisdictions adopted ambitious Michigan-like no-fault plans—let alone pure no-fault—the incentive on insurers to raise premiums for compact cars would probably become irresistible.²¹⁰ That is, American no-fault plans have until now not encountered the possible problem of vehicle weight and insurance premiums only because those plans have remained timid and localized. Were no-fault to become bolder and more uniform throughout the nation, that problem would certainly manifest itself in a dramatic way.

The problem of vehicle compatibility and insurance premiums has been described above as a problem peculiar to no-fault plans. However, recognizing the problem in the context of no-fault conduces to the perception that the reverse image of the problem can arise in a modern tort regime over time. In such a regime, there will be collisions between heavier vehicles and lighter vehicles. Whenever the driver of the heavier is negligent, the driver (and the driver’s liability insurer) are liable for the injuries suffered by the occupants of the lighter vehicles. Whenever the

206. *Montgomery v. Daniels*, 340 N.E.2d 444, 457 (N.Y. 1975) (discussing evidence presented to legislature).

207. *See infra* note 216 and accompanying text.

208. *See Big Insurers*, *supra* note 133.

209. As for State Farm and Geico, see Kinney interview, *supra* note 132; Hospital interview, *supra* note 135.

210. *See LaMonica* interview, *supra* note 134. For a similar expression of views, see Telephone Interview with Joe Olsen, then-Insurance Commissioner of Michigan (Mar. 15, 1997) [hereinafter Olsen interview].

driver of the lighter vehicles is negligent, the driver (and the driver's liability insurer) are liable for the losses suffered by the occupants of the heavier vehicles. But in such negligent accidents, the injuries incurred by occupants of smaller vehicles are likely to be much greater than the injuries suffered by the occupants of heavier vehicles. Granted, the negligence of the motorist is a precondition for entry into the liability system. Yet once that system is entered, the level of liability for negligent driving borne by motorists in heavier vehicles will considerably exceed the level of liability for negligent driving borne by motorists in lighter vehicles. It would be rational, then, for companies writing insurance for heavier vehicles to charge higher premiums than they would charge for lighter vehicles.

When I first began gathering information for this research project in early 1997, such premium differentials were not in fact observable, and the puzzle was to explain their apparent absence. In the intervening time, however, a limited number of liability insurance companies have begun taking vehicle weight into account. Farmers and Progressive, as of late 1997, were charging higher liability premiums to pickup trucks and sport utility vehicles.²¹¹ Allstate, in turn, was offering a 10% reduction in liability premiums to owners of subcompact cars, yet was not distinguishing in liability premiums between ordinary cars and light trucks.²¹² Also, commercial vehicles acquiring insurance as part of a comprehensive liability policy certainly pay a premium that incorporates their extra liability exposure. One can refer, then, to a developing trend in the tort system to apportion liability premiums in accordance with vehicle weight, with heavier vehicles paying more. Admittedly, in a tort system a motorist can avoid liability altogether by avoiding driving negligently; yet given compulsory liability insurance, this motorist, in buying an insurance policy, is required to bear the financial burden of the average driver's liability.

If, then, no-fault insurance can be criticized for its arbitrariness in assigning to lighter vehicles the costs entailed by the incompatibility of lighter and heavier vehicles, liability insurance in the developing tort regime can be criticized for being similarly arbitrary in increasingly assigning these costs to heavier vehicles.²¹³ To be sure, it can be argued

211. See *Big Insurers*, *supra* note 133.

212. See *id.* The Farmers practice was limited to Pennsylvania. See *id.*

213. My own analysis assumes that for various reasons, tort law itself is unable to address the specific problem of vehicle weight. That is, no motorist will be found negligent for driving a heavy car, nor will a motorist be found contributorily negligent for riding in a lighter car. Similarly, a car will not be deemed defectively designed merely because it is heavy (and therefore increases the danger to third parties) or merely because it is light (and thereby increases the danger to the occupant). See SHAVELL,

that this arbitrariness is justifiable, in light of the extent to which it disproportionately favors poorer families (who tend to buy smaller cars), and imposes heavier financial burdens on cars that bring about larger social costs (in terms of pollution and energy consumption). Though this argument may be interesting, I find it unpersuasive. Surely there are more even-handed ways for dealing with problems of unequal wealth distribution. (After all, many low income families drive older full-sized clunkers, acquired used.) Moreover, public policy can develop strategies that more directly respond to problems of pollution and energy conservation.

Accordingly, then, the developing tort trend can be deemed unsatisfactory in how it apportions insurance costs between vehicles of different weights. However, this finding does not disturb the observation that the apportionment attributable to no-fault first-party insurance is even more unsatisfactory. This presents a vexing problem for no-fault plans. Even so, the problem has quite frequently been ignored. For example, it is not mentioned at all in the original Keeton-O'Connell study, and it has been considered only briefly and occasionally in the subsequent academic commentary.²¹⁴ Also, the problem has frequently been neglected by no-fault policymakers. Indeed, it has received almost no attention in the current Congressional debate.²¹⁵

As for existing American hybrid no-fault plans, in extreme situations they have sometimes taken the vehicle weight problem into account by excluding certain vehicles from the operation of the no-fault program. For example, a limited number of state programs have excluded commercial vehicles.²¹⁶ Moreover, seemingly all American no-fault programs exclude

supra note 111 (indicating that a party's choice of activities is ordinarily beyond the scope of tort review).

214. See *supra* note 203.

215. The one exception is a several-page "Issue Brief" prepared by the American Academy of Actuaries (dated Summer 1998), which spends three paragraphs describing (but not evaluating) the "cost shifting" that can occur in the move from tort to no-fault.

216. See 1985 DOT REPORT, *supra* note 24, at 118; D.S. Greer, *No-Fault Compensation for Personal Injuries Arising from Road Accidents: Developments in the United States*, 21 *ANGLO-AM. L. REV.* 221, 237 (1992). However, the rationale for excluding commercial vehicles often is that their occupants (typically, the employees of the vehicle owners) are already covered by workers' compensation programs, which provide a compensation guarantee.

The exclusion of commercial vehicles from the Florida program was affirmed in *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974). An Illinois no-fault statute excluded commercial vehicles—and for that reason was found invalid by the Illinois Supreme Court as a matter of state equal protection. See *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972). The Illinois court reached this surprising result by comparing the situation of a pedestrian hit by an ordinary car (who under the statute had a no-fault claim against the car driver) and the pedestrian hit by a commercial vehicle (who did not have such a

motorcycles,²¹⁷ for when motorcycles and cars collide it is the motorcyclist who typically suffers serious injury. Obviously, however, the strategy of exclusion is feasible only at the extremes: The more vehicles one excludes from the operation of no-fault, the less there remains of the no-fault program itself. Neither light trucks nor compact cars could be “excluded” from a no-fault program without essentially gutting the program altogether.

The New York no-fault program, and likewise the Uniform Motor Vehicle Accident Reparations Act (UMVARA),²¹⁸ approved in 1972, do not take the tack of excluding commercial vehicles from the basic operation of no-fault. Nevertheless, each incorporates special provisions to respond to the specific problem of very heavy vehicles. For vehicles above 6,500 pounds in weight, the New York statute modifies the tort immunity that no-fault ordinarily confers. If such a vehicle collides with a car, the victims each recover from their own no-fault insurers. The insurers then have potential subrogation claims against each other based on the rules of tort liability as they would ordinarily apply to the vehicle drivers.²¹⁹ Somewhat similar provisions exist in other states.²²⁰ Such provisions are obviously aimed essentially at regular-sized trucks. However, it is noteworthy that the new Ford Excursion SUV weighs in at 8,600 pounds.²²¹ As for UMVARA (which has not been adopted in any state), one of its Comments reports that when trucks and cars collide in a tort regime, about 90% of the total liability payments fall on trucks. The Comment then notes that no-fault would “almost exactly reverse the distribution between truckers and car owners of the burden of accidents.”²²² The Comment goes on to reason that such a reversal would be “unfair by any standard of

claim). For some reason, the court did not consider the more basic situation of injuries to the car drivers themselves (or their passengers).

217. See 1985 DOT REPORT, *supra* note 24, at 119.

To exclude motorcycles from the definition of “motor vehicle” in a no-fault plan means that the motorcyclist is treated as a pedestrian. If the motorcyclist is injured in an accident not involving a covered motor vehicle, no-fault does not apply at all. But if the motorcyclist is injured in a collision with a car, the rider (like the pedestrian) has a no-fault claim against the car owner. In fact, most car-motorcycle collisions involve apparent negligence by the car driver in not observing the near by motorcycle.

While Hawaii currently excludes motorcycles from no-fault, see HAW. REV. STAT. ANN. § 431:10C-103 (Michie 1994), at an earlier time Hawaii included motorcycles but prohibited no-fault insurers from regarding motorcyclists as a separate “class” for purposes of calculating no-fault premiums. See 1985 DOT REPORT, *supra* note 24, at 119.

218. See National Conference of Comm’rs on Uniform State Laws, Uniform Motor Vehicle Accident Reparations Act (1972) [hereinafter UMVARA].

219. See N.Y. INS. LAW § 5105(a) (McKinney 1999-2000).

220. See Greer, *supra* note 216, at 263.

221. See Nauss, *supra* note 202.

222. UMVARA, *supra* note 218, § 38 Comment.

judgment.”²²³ To respond to this unfairness, section 38 of the Act endorses and mandates “a principle of reallocation among insurers.”²²⁴ Yet the Act is essentially unable to figure out how such a principle should be given effect. Instead, it urges the state’s insurance commissioner to “develop an equitable arrangement, improving it from time to time as experience with the new system grows.”²²⁵ Until the state commissioner is able to develop this, section 39 of the Act provides for a “reallocation of benefits” under a “case-by-case” claims process that takes into account *not* negligence, but rather the basic fact of vehicle weight. Reallocation is in proportion to the weight category into which a particular vehicle falls.²²⁶ All vehicles under 4,000 pounds are, however, to be placed in the same weight class.²²⁷ Given this 4,000-pound figure and its actual applications at the time UMVARA was adopted in 1972, it is clear enough that UMVARA was intended to apply only to collisions between cars and conventional trucks; and the UMVARA Comments support this understanding.

Though New York and UMVARA should be commended for acknowledging and addressing the vehicle weight problem, the solutions they come up with are not attractive. First of all, each accepts the allocation of costs as between lighter cars and heavier trucks as the baseline of fairness; yet, as suggested above, this distribution is itself arbitrary, insofar as it assigns mainly to trucks a cost that is due to the combination of cars and trucks. Secondly, having selected a criterion for the ultimate distribution of costs, both New York and UMVARA achieve that distribution by way of a case-by-case claims procedure. In this regard, New York is much worse than UMVARA, for its individual case procedure would require litigating the issue of fault. The UMVARA Comment is on proper ground in rejecting as “excessively expensive” any “fault-based, case-by-case reallocation procedure.”²²⁸ Yet the UMVARA weight-based reallocation procedure would itself be administratively quite cumbersome. UMVARA obviously recognizes this, supporting that procedure only as an interim measure. Indeed, in light of the administrative costs, if the New York and the interim UMVARA arrangements are acceptable at all, they are acceptable only if confined to regular-sized trucks. To apply either

223. *Id.*

224. *Id.*

225. *Id.*

226. *See id.* § 39 Comment.

227. *See id.* § 39.

228. *Id.* § 38 Comment.

arrangement across the board would excessively undermine the basic no-fault goal of sharply reducing claims-processing costs.²²⁹

In their own 1973 article on no-fault, Blum and Kalven briefly discuss the vehicle weight problem.²³⁰ Noting that the 90-10 distribution of insurance premiums between trucks and cars under tort would be essentially reversed under no-fault, their article recognized that the problem itself is due to the “reciprocal” combination of trucks and cars on the road.²³¹ Relying, then, on the criterion of fairness, they recommended that all vehicles, regardless of weight, be charged “the same premium rate.”²³²

As a matter of fairness, the idea that the factor of vehicle weight be neutralized in determining the allocation of cost burdens under no-fault has substantial appeal. Moreover, while Blum and Kalven fail to consider the issue of appropriate incentives, it is hard to see what incentive disadvantages there are in their proposal (or what the incentive advantages might be in any policy alternative).²³³ Of course, Blum and Kalven disagree with UMVARA not only in terms of the ultimate distribution of costs but also in terms of the method for bringing about this distribution. For UMVARA, the method is a blizzard of claims among insurance companies after victims’ original no-fault claims have been settled. For Blum and Kalven, the method instead concerns the original fixing of no-fault premiums. This method is preferable insofar as it avoids all the costs involved in reallocation claims.

Nevertheless, rendering the method operational would be significantly more burdensome than Blum and Kalven seem to realize. Because no-fault insurers on their own would not be inclined to neutralize for weight, implementing the Blum-Kalven proposal would require a considerable scheme of regulation. Moreover, that scheme would not be easy to work out. It would not be sufficient merely to prohibit no-fault insurers from taking vehicle weight explicitly into account. Even in a pure no-fault regime, insurance companies probably would not do this. Instead, insurers would directly consider the claims experiences occasioned by various models of vehicles. To be sure, these claims experiences would be due in

229. It should be noted, though, that a limited number of no-fault programs create general subrogation-like rights between no-fault insurers, with liability ultimately assigned in accordance with negligence standards. Such statutes are properly criticized, for unjustifiably restoring negligence litigation, in Robert E. Keeton, *Compensation Systems and Utah’s No-Fault Statute*, 1973 UTAH L. REV. 383, 392-93 (1973).

230. See *Ceilings*, *supra* note 69, at 365.

231. See *id.*

232. *Id.*

233. See *supra* notes 203, 213 and accompanying text.

considerable part to the factor of vehicle weight. However, identifying and correcting for the actual influence of the weight factor would not be an easy regulatory task. Furthermore, insofar as the regulation would require insurers to charge various motorists less than (or more than) a no-fault “market price,” the regulation would likely operate unequally on different insurance companies. This would give those insurers incentives to strategize in ways that might produce socially disadvantageous results.

An adequate regulatory scheme would hence involve considerable problems. Nevertheless, over time a variety of regulatory requirements have been imposed on auto insurers, with results that certainly have not been ideal yet which generally have not proved to be unacceptable. While I make no effort here to work out the elements of the regulatory plan that would neutralize the weight factor in no-fault insurance premiums, my assumption is that the project of devising such a plan would prove feasible. Accordingly, while vehicle weight differentials identify a real problem that pure no-fault programs must address, the problem is one that probably can be solved, though burdens will certainly be borne in implementing the solution.

It is time now to consider a final line of analysis relating to no-fault: the relationship of no-fault to the phenomenon of uninsured (and non-solvent) motorists. This consideration is provided in Part V.

V. UNINSURED MOTORISTS: TORT AND NO-FAULT

At the time of the Keeton-O’Connell study in 1965, only three states—Massachusetts, New York and North Carolina—compelled the purchase of liability insurance.²³⁴ At that time, the rate of uninsured motorists was somewhere in the vicinity of 15 or 20%.²³⁵ Thirty-three years later, liability insurance is now legally compulsory in at least forty American jurisdictions (and is conditionally compulsory in the remaining jurisdictions, which have financial responsibility laws).²³⁶ Yet the best estimate is that the rate of uninsurance is about 17%.²³⁷ That is, despite the move towards compulsory insurance, and despite other public

234. See BASIC PROTECTION, *supra* note 1, at 76.

235. See 1971 DOT REPORT, *supra* note 55, at 28. See also BASIC PROTECTION, *supra* note 1, at 76 (15%).

236. See JOOST, *supra* note 2, § 1:8 (1997 Supp.).

237. See Sean Mooney, Facts and Figures of Uninsured Drivers (1997) (unpublished manuscript, on file with author). At the time, Mooney was Senior Vice President of the Insurance Information Institute.

policy efforts, the uninsurance rate has remained “stubbornly high.”²³⁸ In California, it is now estimated that 22.5% of all motor vehicles are uninsured, including 19% of all cars and 30% of all commercial vehicles.²³⁹ Moreover, the uninsurance rate in certain zip codes (mainly, in South Central Los Angeles) reaches 80%.²⁴⁰ In January 1997, a new California law went into effect that calls for first-time fines of \$1,350 or more.²⁴¹ Not surprisingly, this statute is meeting resistance from judges concerned not only with its harshness but also with its counter-productivity. It seems bizarre to impose heavy fines on persons who are violating the law in large part because they don’t have the money to comply. “Judges are slashing the fines to \$100 or are suspending them to give drivers a chance to buy the required insurance and then canceling the penalty when they do so. . . .”²⁴² These suspension/cancellation orders convert a fully compulsory insurance program into what amounts to a financial responsibility program. While proof of insurance is now required in registering one’s car in California, a number of motorists are responding by declining to register their cars, or by canceling insurance as soon as their cars have been reregistered.²⁴³

In a tort regime, what are the implications of motorists’ lack of insurance? If uninsured motorists are also judgment proof, then the absence of liability insurance clearly signifies that tort law fundamentally fails in its goal of providing corrective justice:²⁴⁴ The negligent motorist

238. Telephone Interview with Robert Hartwig, Economist, Insurance Information Institute (Oct. 29, 1998).

239. See ROBERT O. BERNSTEIN, CALIFORNIA UNINSURED VEHICLES AS OF JUNE 1, 1997, at 32 (1999) (report issued by the California Department of Insurance). The Department’s previous estimate for all motor vehicles in California had been 30%. The new lower estimate is due partly to a change in methodology. But it appears that in the last few years the actual number of uninsured vehicles in California has gone down. This is partly because of reductions in premiums—and likewise to increases in average incomes statewide; it is also due to the more rigorous enforcement of compulsory insurance. See *id.* at 34.

240. See *id.* at 37.

241. See CAL. VEH. CODE § 16029(a) (West 1999). The statute itself calls for a \$500 fine; but various court costs raise the effective fine to \$1,350. See Kenneth Reich, *Trying to Turn the Corner on Uninsured-Driver Woes*, L.A. TIMES, Sept. 16, 1999, at B5. In October, the California Legislature approved a pilot program making low-cost liability insurance policies available to low income motorists in Los Angeles and San Francisco Counties. See Carl Ingram & Mark Gladstone, *Davis Signs Bill Providing Auto Insurance for Poor*, L.A. TIMES, Oct. 11, 1999, at A3.

242. Kenneth Reich, *Implementation of State’s Auto Insurance Law Varies*, L.A. TIMES, Apr. 13, 1997, at A3.

243. See Stephen Green, *DMV Fails to Learn of the Uninsured*, DAILY BREEZE (Torrance, Cal.), Aug. 31, 1997, at A1.

244. A recent study by the California Department of Insurance considers the circumstances of uninsured motorists. See LYN HUNSTAD, CHARACTERISTICS OF UNINSURED MOTORIST (1999). This study finds (not surprisingly) that “the uninsured had a higher likelihood of . . . having an income of

neither provides compensation to the victim directly, nor arranges for any insurance policy that can afford this compensation.

With respect to deterrence, the situation is somewhat more complex. If uninsured motorists are really judgment proof, then liability is not a threat, and the prospect of liability does not serve as a meaningful deterrent. (In fact, it is widely believed that uninsured motorists have a *higher* accident rate than motorists driving with insurance.²⁴⁵) If uninsured motorists have some reachable assets, their lack of insurance might prompt them to drive with special care, so as to avoid having these assets depleted by a tort judgment. Even so, insofar as their asset base is less than their liability potential, the care they exercise in the course of driving might well be inadequate. By contrast, if the insurance mandate were fairly enforced, those low income motorists who do purchase insurance would be somewhat deterred from bad driving by the prospect of a moderate premium increase should an insurer learn of an instance of bad driving (on account of either an accident or a citation).²⁴⁶ Furthermore, the mandated insurance premium would induce low income persons to at least compare the average cost of liability (reflected in the insurance premium) with the benefits they receive from driving. In making this comparison, some persons would decide to abstain from driving.

To recap, insofar as motorists without insurance are of low income, tort law's compensatory justice objective is undermined, and its deterrence objective needs to be reconsidered.²⁴⁷ Accordingly, in considering a possible shift from traditional tort to pure no-fault, very much depends on how that shift would handle the rate of uninsurance. The Keeton-O'Connell study proposed that no-fault insurance be compulsory and that the mandate be enforced by virtue of making proof of insurance a

less than \$20,000 [and] being Hispanic or Black." *Id.* at 3. But the study also finds that many owners of uninsured cars also own a car that *is* insured; those owners identify their limited use of the car as a principal reason for the lack of insurance. *See id.* This California finding suggests that the actual uninsured motorist problem may not be quite as severe as the rate of uninsured vehicles would otherwise suggest.

245. This is stated as a fact in STEPHEN D. SUGARMAN, *THE UNINSURED MOTORIST PUZZLE* 5 (1998) (pamphlet published by the Auto Accident Compensation Project). *See also* Mooney, *supra* note 237, at 7.

246. Compare this to a rationale often offered on behalf of employer vicarious liability: Potentially negligent employees, because of their low wealth, might not be fearful of being sued in tort, yet are quite fearful of avoiding sanctions their employers might impose should the employers themselves be sued. *See* POSNER (5th ed. 1998), *supra* note 203, at 204-05.

247. Making liability insurance compulsory (as American states have done) can be understood as an effort to protect corrective justice rights; to assure at least a certain measure of deterrence; and likewise to further a social policy in favor of victim compensation. *See* Schwartz, *supra* note 12.

prerequisite for car registration.²⁴⁸ The expectation seems to have been that compulsory insurance, with this method of enforcement, would be very effective in bringing about compliance.²⁴⁹ Reality, however, has not strongly supported this expectation. It is not even evident that hybrid no-fault has significantly reduced the rate of uninsurance. For example, in a strong hybrid no-fault state such as Michigan, the uninsured rate has been estimated at 16%,²⁵⁰ which is only slightly below the 17% national average.

Still, there are reasons to hope that a pure no-fault plan would appreciably reduce the uninsurance rate. Consider, first of all, the current level of premiums. In California, a nineteen-year-old male with a good driving record living in South Central Los Angeles can still be charged \$3,000 for a basic liability insurance policy.²⁵¹ According to one much cited yet still “unpublished” study from Arizona, a low income family might need to spend 30% of its disposable income in order to purchase liability insurance.²⁵² Even if the Los Angeles experience is distinguished as exceptional and even if the Arizona number is treated as a mere anecdote, one can still appreciate that the outlays for liability insurance can be quite substantial. Moreover, such an outlay does not serve the usual insurance function of protecting the wealth of the household—because, by hypothesis, the household has little wealth to protect. Instead, the outlay merely protects the interests of abstract third parties. In these circumstances, the household’s decision not to purchase insurance is generally quite easy to understand.

Contrast this to the situation in a pure no-fault regime. Insurance now protects the insured and her own family, not some hypothetical third party. To this extent, the purchase of insurance becomes far more sensible and attractive. Also, insofar as the household’s problem with insurance concerns its high price, under pure no-fault the savings on administrative costs (and also on pain and suffering liability) can be expected to bring down the cost of insurance in a quite significant way. The lower cost of

248. See BASIC PROTECTION, *supra* note 1, at 286.

249. In a recent conversation, Judge Keeton has advised me that he had assumed that the rate of uninsurance in no-fault would be “very low,” though certainly not zero.

250. See Olsen interview, *supra* note 210.

251. See *Auto Insurance: New Law Highlights the Price Issue*, L.A. TIMES, Jan. 7, 1997, at B6.

252. See Robert Lee Maril, *The Impact of Mandatory Auto Insurance Upon Low-Income Residents of Maricopa County, Arizona* (1993) (unpublished manuscript, on file with author), discussed, for example, in Jeffrey O’Connell, *Allowing Motorists a Choice to Be Legally Uninsured by Surrendering Tort Claims for Noneconomic Loss (With Some Further Thoughts on Choices Between PIP and Tort Coverage)*, 1 CONN. INS. L.J. 33, 41 (1995).

insurance should, first of all, encourage a higher level of purchase. Quite encouragingly, the California Department of Insurance has recently found that lowering the price of auto insurance by \$22 reduces the rate of uninsured vehicles by 1%—from 20% (for example) to 19%.²⁵³ A second point is that under no-fault there should be an especially large decline in the insurance premiums charged to low income households.²⁵⁴ This is due to the fact that, under no-fault, such a household is insuring only its own (low) income, and not the (average) income that is insured by liability policies in a modern tort regime. Tort regimes, it can be noted, are in one sense distinctly regressive.²⁵⁵ All motorists are required to purchase insurance premiums that reflect the range of incomes of potential victims. However, low income motorists who purchase liability insurance that reflects average incomes draw out of the insurance pool (when they are injured by negligent motoring) proceeds that reflect only their low income.

Pure no-fault, then, would significantly reduce the price of auto insurance and would especially reduce its price for low income families.²⁵⁶ Moreover, pure no-fault would render the family's purchase of insurance more attractive by rendering family members the beneficiaries of insurance payouts. Hence the move to pure no-fault has the clear potential to reduce the level of uninsurance—an important plus.

Still, even with pure no-fault one can expect a significant uninsurance rate. In a no-fault jurisdiction, lawmakers and judges may find it difficult to muster the energy to enforce with significant penalties the obligation imposed on a motorist to purchase insurance that primarily protects the motorist's own interests. Moreover, state insurance commissioners seek to satisfy their constituents by holding down the cost of compulsory insurance. If in no-fault jurisdictions insurance commissioners share the

253. See BERNSTEIN, *supra* note 239, at iv.

254. To be sure, wage losses are about one-third of the economic losses of auto accidents. See *supra* note 166. Given this, and given the low cap in most hybrid no-fault programs, currently it is generally not sensible for insurance companies to take the income levels of insureds into account in fixing their no-fault premiums.

255. See Hager, *supra* note 45, at 824-25.

256. However, there is one offsetting consideration. Many insurance companies currently engage in "territorial rating," which typically increases liability insurance premiums in low income neighborhoods. But territorial rating provokes public controversies, given the way in which it tends to assume that an individual motorist drives badly just because of the neighborhood in which he lives. As a result, in several states (including California) territorial rating has been significantly restricted by regulation. Yet if a jurisdiction adopts pure no-fault, it would be hard to complain about experience rating. The rate of injuries incurred by persons living within a particular geographical area would be a straightforward statistical fact.

general view that uninsured motorists have a higher accident rate,²⁵⁷ they will believe that enforcing the insurance mandate will raise average insurance premiums. This belief may dissuade them from making an enforcement effort.²⁵⁸

Under pure no-fault, then, the rate of uninsurance may well be significant. Even so, from a certain justice perspective, no-fault may be more attractive than tort. Under a modern tort regime, the motorist who violates the law's mandate by declining to buy insurance imposes the burden of this violation on the innocent victim who is injured by the motorist's negligent driving and then is deprived of a tort recovery.²⁵⁹ By contrast, under no-fault a family's failure to purchase mandated insurance imposes its eventual detriments primarily on the family members themselves, as they are unable to secure compensation in the event of an accident. No-fault, then, does a better job than tort in bringing into an appropriate correspondence the benefits and burdens of statutory violations. The strength of this point should not be overstated, given the way in which low income helps explain why families violate the law by not purchasing insurance. But neither should its strength be denied. After all, the current system, by tolerating low income families who decline to buy insurance, in

257. See *supra* note 245 and accompanying text.

258. Michigan's Insurance Commissioner described his own position to me in basically these terms. See Olsen interview, *supra* note 210.

259. In this sense, the tort system is progressive—but in an apparently objectionable way: Low income families which (illegally) fail to purchase liability insurance can recover in tort if they are injured by another driver's negligence, but as a practical matter are free of liability for their own negligence.

Recent measures have addressed this phenomenon. Under Proposition 213, approved by California voters in 1996, uninsured motorists are rendered ineligible for pain and suffering damages if they are injured by the negligence of another motorist. Proposition 213 has been upheld against various constitutional challenges in *Quackenbush v. Superior Ct.*, 70 Cal. Rptr. 2d 271 (Ct. App. 1997). Liability insurance costs are currently coming down in California, and the implementation of 213 is at least part of the reason for this. Because the proportion of uninsured motorists is much higher in low income neighborhoods, one can assume that premium reductions due to 213 are proportionately larger in those neighborhoods. The cost savings due to a similar measure in Texas are discussed in STEPHEN J. CARROLL & ALLAN F. ABRAHAMSE, *THE EFFECTS OF A NO-PAY/NO-PLAY PLAN ON THE COSTS OF AUTO INSURANCE IN TEXAS* (1998).

Proposition 213 embodies what some call a "conservative" version of "no-pay/no-play." A more "liberal" version of no-pay/no-play would make it quite lawful for motorists to decline to buy liability insurance—so long as they agree to waive all claims for pain and suffering. See SUGARMAN, *supra* note 245; O'Connell, *supra* note 252.

Even under "conservative" Proposition 213, the low income uninsured motorist can—as a plaintiff—take advantage of other motorists' liability for economic losses, even while enjoying—as a defendant—a de facto immunity from that liability. A full application of the "no-pay/no-play" idea would prevent any tort recovery by the motorist who is himself uninsured. No one, however, is currently recommending this.

a sense discriminates against those low income families who do scrape resources together in order to purchase liability insurance and thereby comply with the law.

VI. CONCLUSION

American no-fault plans assume a hybrid form, combining a significant measure of no-fault with an ongoing measure of tort. Properly evaluated, these American no-fault plans do not prompt enthusiasm. One general goal of no-fault is to afford automatic compensation to all highway accident victims. In light of the expanded coverage of the modern tort system and the increased availability of non-tort sources of compensation for victims' economic losses, this goal is not nearly as attractive now as it might have been when no-fault was originally proposed in 1965. Moreover, given its hybrid form, American no-fault fails to guarantee compensation to victims of the most serious injuries; and it is precisely these victims whose need for compensation is the most urgent. No-fault also seeks to reduce the administrative costs or overhead of the highway accident tort system. This is a highly worthy goal, given what that overhead entails in the aggregate. Still, the extent of those administrative costs should not be overstated—in percentage terms, the tort system for auto accidents has a lower overhead than any other sector of American tort law. Moreover, the American no-fault hybrid preserves the administrative costs of tort in many cases, and adds to overhead insofar as it needs to work out the accommodation of no-fault and tort within its hybrid program. In addition, hybrid no-fault—in this regard, resembling a tort system—is plagued by the problem of padded medical bills (which can be regarded as a form of overhead). In all, then, hybrid no-fault—while perhaps not a loser—cannot be deemed a winner. American no-fault, with all its hybrid half-heartedness, can be contrasted to pure no-fault, which is in operation in several foreign jurisdictions. Pure no-fault may well be a winner: It can be quite effective in compensating accident victims, and it can dramatically reduce the various types of overhead. One further advantage of no-fault (and especially pure no-fault) is that it produces better results in responding to the problem of uninsured motorists—a problem that is capable of defeating corrective justice, preventing the compensation of accident victims, and complicating the law's deterrence efforts. Pure no-fault not only lowers the price of auto insurance, but in other important ways renders the purchase of that insurance more attractive to low income families.

The standard argument against no-fault is that it undermines the corrective justice and deterrence goals of a tort system. However, given

the interchangeability (unique to auto cases) of negligent conduct that endangers third parties and conduct that imperils the actor, no-fault first-party insurance can be expected to take the prospect of bad driving into account in a way that considerably resembles how that prospect is handled by tort liability insurance. Given this surprising resemblance, the threat that no-fault poses to the basic tort objectives of corrective justice and deterrence is considerably less than it seems at first. This is the case, at least, if it is assumed that no-fault insurance is written by private companies under market conditions; the likely accuracy of this assumption has been explored.

In any event, while no-fault first-party insurance and tort liability insurance tend to converge in how they respond to faulty driving, the two forms of insurance distinctly diverge in how they respond to certain safety-related features in automobiles. As other scholars have noted, no-fault with market insurance has a safety advantage in the incentive it gives motorists to purchase cars with design features that protect vehicle occupants. While this advantage is not as substantial as these scholars have suggested, no-fault first-party insurance here produces attractive results. The issue that has received inadequate attention in comparing tort and no-fault insurance concerns how they proceed in entirely different directions in apportioning injury costs between heavier and lighter vehicles. Moreover, the direction that no-fault insurance itself is inclined to take seems socially unacceptable. To be sure, the resulting problem can evidently be dealt with by developing regulatory controls on no-fault insurance practices. But the difficulties involved in working out an appropriate plan of regulation should not be underestimated.

