"PAY AT THE PUMP" AUTO INSURANCE

The California Vehicle Injury Plan (VIP) for Better Compensation, Fairer Funding, and Greater Safety

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CHAPTER 1

VIP IN A NUTSHELL

THE IDEA

The California Vehicle Injury Plan (VIP) replaces auto insurance for bodily injury with a new system providing better compensation, fairer funding, and greater safety.

VIP would pay generous compensation to virtually everyone who suffers personal injuries in a motor vehicle accident in the state, with the amount paid unrelated to who is at fault. VIP would fund those benefits through a series of new charges related to driving—including about 30 cents per gallon of gasoline, so that some people call VIP "Pay at the Pump." VIP would replace the current lawsuit system of tort liability for bodily injury.

Motorists would no longer buy private insurance that now costs hundreds, and in some cases thousands, of dollars a year. For most motorists, the net cost of driving would be less than it is today. VIP would cover truck, bus, recreational vehicle, and motorcycle accidents, as well as auto accidents. Private insurers would be the primary administrators of VIP claims. VIP is an idea I have been developing over the past few years,[1] simultaneously with Andrew Tobias, a Florida-based free-lance writer, who initially proposed the basic concept in his book *The Invisible Bankers* (1982) and who has focused his new book *Auto Insurance Alert!* (1993) on it.

THE BASICS

The critical issues for VIP are: what happens to the current auto insurance regime, what new benefits will be paid, how will they be funded, and how will VIP be administered. Each of these is next presented in a nutshell. Subsequent chapters elaborate the details.

Eliminate Auto Insurance For Bodily Injury

Under VIP, people would no longer purchase motor vehicle insurance covering bodily injury. Most importantly, there would be no need for *liability* insurance for bodily injury—ordinarily the single most expensive item in the auto insurance policy—because motor vehicle accident victims could no longer sue their negligent injurers for money damages. Since VIP would automatically provide motor vehicle accident victims with generous compensation, there would be no need for two other significant protections now typically purchased by vehicle owners[2]—*uninsured* motorist coverage for bodily injury and motor vehicle accident *medical payments* coverage.

VIP Benefits

VIP would fund a generous compensation package, paying the following benefits to motor vehicle accident victims on a no-fault basis:

1. Seventy percent of otherwise unreimbursed lost earnings up to twice the state's average weekly wage from full-time employment (up to approximately $1,000 a week or $50,000 a year at present earning levels). For those who have no recent earnings experience, but whose injuries are long term and serious, income loss benefits would be calculated in terms of lost earning power, a provision aimed at children, students, homemakers, and the temporarily unemployed.
2. Otherwise unreimbursed and reasonably incurred medical expenses (and rehabilitation costs, where needed).
3. After a short waiting period, 80 percent of other reasonably incurred home expenses for up to a year of up to a stated maximum daily amount.
4. Moderate amounts for pain and suffering for those who either remain unable to return to their normal activities six months after the accident or who suffer a permanent and serious impairment or disfigurement.

VIP Funding

VIP would have three sources of income.

1. The most important source, in terms of money raised, would be a charge on fuel consumption of 30 cents a gallon. This would be collected at the pump by gasoline retailers and remitted to VIP just as

these dealers now remit fuel taxes to the appropriate taxing authorities. For this reason, VIP should be understood to be a specific version of those plans generally called "Pay at the Pump" (or sometimes "Pay as You Drive").

2. Charges would be imposed on drivers based upon (a) their driving record and (b) their experience. Good drivers over age 19 would contribute at the rate of $20 a year, payable when they renew their driving licenses. Drivers with bad records, young drivers, and novice drivers would pay more, in some cases considerably more (as discussed below).

3. Two types of charges would be imposed on the ownership of a vehicle. On the annual registration of an auto, the owner would pay a sum based upon the model's safety record. Cars of average safety would cost $80 a year. In addition, a one-time safety fee of $250, payable to VIP, would be imposed on the purchase of a new car, against which various credits would be allowed if the car has certain safety features, such as air bags and anti-lock brakes. Both types of safety charges (the annual and one time) would be posted on a car's "sticker" when sold out of the showroom or off the lot.

VIP Administration

VIP would be run by a new state body that could be housed within the Department of Insurance or established as an independent institution like the University of California. For claims processing, however, VIP would rely primarily upon the expertise of the existing insurance industry. Although a number of strategies for utilizing private enterprises are possible, this seems most promising.

1. Qualified claims administering companies (and their agents and brokers) could sign up as many "good drivers" as they wish and would be paid so many dollars (as discussed below) for every such person on their rolls—a capitation payment. Given the number of good drivers it signed up, the company would have to take its market share of "bad drivers" and would be awarded a capitation amount for each of them too.

2. Out of the total capitation amounts it receives, the company would have to pay the full VIP benefit to any person on its rolls who is injured in a motor vehicle accident. It could keep any extra money for administration and profit. *Companies could use a portion of their capitation money to offer cash rebates to those who sign up with them.*

3. Motorists could sign up with any qualified claims administrator they wish, changing as often as once a year. Although existing auto insurers might well play key roles as claims administrators, other companies could also qualify for the job. They could include health insurers, homeowner insurers, and possibly other enterprises as well, such as banks or large employers. Provisions are also made for the administration of claims by nondrivers.

4. Every time a claim is filed, the claimant would complete a claim satisfaction form that would be returned to the company and to VIP. Each year, VIP would pay a claims administrator a bonus based upon two factors: (a) its claimant satisfaction rating and (b) the proportion of those people on its roles who choose to renew their affiliation for the next year.

CHAPTER 2

BETTER COMPENSATION, LESS LITIGATION

ELIMINATING MOST LAWSUITS

Under VIP, victims of motor vehicle accidents would, in general, no longer be permitted to sue other motorists for bodily injury. This is central to the proposal and eliminates the need under VIP for motorists to purchase auto insurance covering personal injury. (The place of lawsuits for compensation for property damage is addressed below.)

This does not mean eliminating tort claims for punitive damages that are not individually insurable in California given their punishment function.[3] Hence, a cause of action would remain available against another driver in those very exceptional cases in which that driver has intentionally harmed the victim or, as per current California law, has displayed a malicious disregard for the safety of others through despicable conduct.[4] Probably, driving under the influence of alcohol or drugs should not by itself meet that standard, a point perhaps best resolved in the law adopting VIP, rather than left to courts to decide by applying the current punitive damages law.[5]

A difficult question is whether or not tort remedies should remain concerning accidents caused by defective vehicles, negligently repaired or maintained vehicles, defectively designed or negligently maintained highways, and so on. This is bound to be controversial as a policy matter, and its resolution either way could importantly influence the political prospects of VIP.

It is worth emphasizing, on the policy side, that because vehicle safety is promoted through the funding features of VIP, this cuts against allowing lawsuits against manufacturers. Moreover, VIP would provide whistle-blower cash awards to individuals who bring to the attention of VIP vehicle dangers not already disclosed by the manufacturers themselves; VIP would utilize these disclosures in setting the annual safety charge for vehicles (discussed below).

In any event, assuming lawsuits for bodily injury are still allowed against third parties such as automakers, mechanics, and the like, tort recovery in those cases should probably be limited to losses not already covered by either VIP or other broad-based compensation sources, with the result that the main purpose of such lawsuits from a compensation viewpoint would be to permit the recovery of larger sums for pain and suffering.

PAYING NO-FAULT COMPENSATION

Benefits In General

The central social objective of VIP, in terms of compensation, is to provide prompt payments covering actual out-of-pocket losses incurred as a result of bodily injury sustained in motor vehicle accidents. Subsidiary objectives concerning benefit fairness, victim incentives, and ease of administration help shape the plan's compensation details.

To deal broadly with victim need arising from personal injury caused by a motor vehicle auto accident, VIP embraces the basic principle underlying "no-fault" auto insurance. That is, VIP benefits are generally payable regardless of fault. Thus, for example, victims of their own carelessness are treated the same as victims of the negligence of others.

Accepting the no-fault principle in general does not preclude denying benefits (or providing reduced benefits) to that relatively small proportion of motorists who incur injuries after they have been seriously and deliberately at fault—for example, those who intentionally injure themselves or who are themselves injured in the process of trying to use a vehicle to injure another. But it would probably be inappropriate to have differential treatment for, say, drunk drivers or those driving under the influence of illegal drugs or in knowingly stolen vehicles. Their punishment could come instead both in criminal penalties and in future VIP contribution requirements (discussed below).

Lost Earnings

To preclude the claimant from winding up financially better off than before the accident, the plan should in no event replace 100 percent of lost gross earnings, because those who suffer lost earnings also typically save work-related expenses that they would otherwise incur, including social security taxes. In addition, it would probably be wise to reduce

somewhat further the earnings replacement rate, as is the practice in workers' compensation, for example, to give the injured person a financial incentive to recover and return to work rather than to malinger.

For these reasons, setting the replacement rate in VIP at 70 percent of gross income seems reasonable. As a bench mark, private long-term disability insurance policies typically contain a 67 or 70 percent maximum. Assuming that the VIP benefit is not taxable for state and federal income tax purposes, in principle it might be preferable to cast the benefit percentage in terms of lost "take home" pay rather than gross earnings although this may be difficult to administer.

The earnings replacement benefit would be based upon weekly wages at the time of the accident, unless they quite atypically reflected the victim's recent past wages, in which case an average weekly rate would be determined by reference to earnings over some base period, say, the past year. Although the self-employed, those with unstable wages, those who work on commission, and those with otherwise unreported black market or gray market earnings would present some administrative difficulties to VIP, these problems are hardly new, and solutions could readily be adopted from other schemes.

But VIP would not replace people's earnings beyond twice the state average weekly wage. That ceiling takes in the full earnings of perhaps 85 to 90 percent of employees.[6] Those with earnings beyond the ceiling would be expected to insure those excess earnings privately, something that a substantial portion of higher earners already do through private disability insurance or employee benefit arrangements. (People in this situation almost always wish to protect their earning power from a wide range of risks and not just from the risk of loss from a motor vehicle accident, making broad disability protection much more sensible for them.)

The use of an earnings ceiling is in the tradition of other social insurance programs including Social Security and auto no-fault insurance, and it ought to ward off protestations that very high earners should be making larger contributions to the scheme. It might also be wise to impose a waiting period (in effect, a deductible) on earnings loss replacement in VIP (such as three days or a week).

Those who, at the time of their injuries, have no earnings would also require special treatment. As a general principle, under VIP these victims would receive no earnings replacement benefit for six-months following the accident, on the irrebuttable presumption that they would not have earned money during this period anyway; even where this assumption is

in error, this would ordinarily impose a relatively modest loss on people who, by and large, were already dependent upon others at the time of the accident.

This six-months rule serves to restrict the problem of nonearners to a relatively few claimants with long-term disabilities. Children, students, temporary homemakers, and temporarily unemployed people would be the main groups to qualify. VIP would establish rules of thumb, based upon experience with other programs, that might well, in any case, limit potentially lost earnings to the state average. Similar special arrangements might be made for those with long-term disabilities who can clearly show that their long-term earnings would have far exceeded their earnings at the time of the accident. These are all matters that the VIP board would be empowered to resolve through the rule-making process.

Medical Expenses

Probably the most desirable solution is for VIP to provide unlimited medical expense reimbursement, although, as with any similar program, only those expenses that are reasonably incurred and for reasonable amounts would be covered. Some people, however, might wish to establish a maximum, as exists in many health insurance policies today, such as $1 million. Experience with Michigan's auto no-fault plan shows that a relatively few gravely injured victims impose a relatively significant proportion of the plan's costs;[7] but, then, they are, in a sense, the most needy. Others might wish to impose deductibles (e.g., $250) or co-insurance provisions (e.g., 10 or 20 percent, up to $2,400) so as to give victims an incentive to shop carefully for their medical care. These are important questions to be resolved through the political process, to which there is no clearly preferable answer.

What we call medical expense would also include rehabilitation expenses when needed, as well as other special accommodation expenses (like wheelchairs, ramps, and the like) so as reasonably to permit the disabled to attain mobility. Indeed, in the most serious injury cases, these benefits would include the payment for personal attendant care (or institutional care) where reasonably necessary.

"Unreimbursed" Losses

It should be emphasized that VIP benefits would be "secondary" to other regular income and expense replacement schemes. That is, VIP would pay after health insurance, disability insurance, Social Security, workers' compensation, and the like; VIP would cover only those losses not already met by those other plans. The major reason for this feature is to keep the loss with the broadest-based schemes, which generally have the lowest claims administration costs, and thereby avoid the inefficiency of one insurance plan reimbursing another. Another social advantage will be to concentrate VIP benefits on the most seriously injured, since social insurance and broad employment-based insurance schemes currently better protect against short-term than long-term injuries. Restricting benefits to "unreimbursed" losses will also have the effect of lowering the costs of VIP, other things equal, or, looked at differently, permitting VIP to have more generous maximum benefits for the same cost, further helping the most seriously injured. Another consequence is to reduce the need for the VIP benefit as the state and nation improve our basic health insurance and social insurance systems.

VIP would not require claimants to look to all other sources first. For example, personal savings would not have to be used up since VIP is plainly not intended to be a means tested scheme. Some sources such as sick leave present difficult choices. As elsewhere, however, VIP could draw on the experience of other compensation programs in making its decision.

In any case, where practicable, VIP should probably not cover modest deductibles and copayment provisions contained in other universal schemes, such as workers' compensation, temporary disability insurance, and society-wide health insurance (if and when it is adopted). If people can generally be expected to bear some front-end medical costs, or a few days of wage loss when injured on the job, it is probably right that they also bear those small losses when occasioned by motor vehicle injuries (which is another argument in favor of imposing a waiting period for wage loss replacement within VIP itself). This would also help concentrate VIP on more serious injuries and prevent VIP from being bothered with too many claims for very small amounts. That concentration is also appealing on the ground that if society is, in effect, going to paternalize motorists by creating a mandatory compensation fund, then it is probably best to focus that fund on the more catastrophic

risks that people tend systematically to ignore and which are the most socially disruptive if left uncompensated.

Some people are bound to complain that by making VIP "secondary" to broad-based competition schemes, VIP is inappropriately shifting costs away from those who cause auto accidents. There are several responses to this. First, if people insist on internalizing additional costs to motoring and relieving other sources of this burden, then the VIP charges (detailed below) could simply be increased and specified lump sums could be paid over annually to those other sources by VIP. But before pressing for such a solution it is important to notice that VIP as proposed already will internalize substantial costs of motoring that the current system externalizes; these include, most importantly, those costs now shifted to other sources when motorists are uninsured, a problem that VIP solves. Hence, the net burden on health insurers, for example, is not likely to be larger under VIP than under the current system (and probably even less given the notorious inability of health insurers, in practice, to recoup from successful tort claimants the funds they have previously laid out.)

Second, what costs are to be "internalized" to what is something of a conundrum in any case. For example, VIP will pay for auto accident costs incurred by negligent pedestrians. Third, as a practical matter, making VIP secondary to other sources generates just about the same amount of money that is needed to pay the pain and suffering benefits that VIP will provide; but whereas the inclusion of those benefits may be politically very important to VIP, the additional costs shifted to other sources by making VIP secondary will be largely *de minimus* in the funding of those sources, say, national health care or Social Security. Moreover, from the selfish viewpoint of California, why not impose these costs on broader national funding bases instead of the state-level funding base for VIP.

Fourth, this proposal is by no means entirely inconsistent with prior practice. While it is true that worker's compensation is generally primary to other compensation sources, such as Social Security and health insurance, nevertheless, sometimes the broad-based schemes are primary. For example, private pension plans build on top of Social Security; and those with such plans are not denied Social Security benefits. Similarly, private long-term disability insurance pays on top of Social Security (and the benefits it pays are generally reduced based upon how much Social Security pays). Indeed, in recent years even the traditional tort law rule has been changed in several states, making other sources primary, on grounds of administrative efficiency and the desire to avoid duplicate

payments. Finally, as the closest analogy perhaps, auto no-fault plans too usually pay only for losses not already covered by Social Security and worker's compensation and include arrangements to permit motorists to make no-fault secondary to payments by health insurance.

Fifth and last, the major remaining justifications for making the auto compensation mechanism primary that could be invoked in favor of the traditional tort arrangements, aren't really apt for VIP: those motorists who carelessly harm others will be "punished" through VIP by having their annual driving license charge increased; and it is through those very charges that VIP seeks to provide "incentives to better driving."

Other Expenses

Many people injured in motor vehicle accidents must incur new home-based expenses, paying for work they previously performed themselves. For the first few days after an accident, it might be thought reasonable to expect family and friends to take care of these needs, which could include cooking, child care, and other chores. Soon, however, it seems appropriate to provide some modest benefits to permit the victim to pay for such services. On the other hand, over the longer run it might be thought appropriate that claimants pay for those costs out of their earnings replacement benefit.

Thus, for example, the VIP benefit for this purpose could be set at a maximum of $75 a day, after a one- or two-week waiting period, for up to six weeks, followed by a maximum benefit of $35 a day for up to one year following the accident. To help assure that the expenses incurred are reasonably necessary, VIP would include a co-insurance provision, reimbursing only 80 percent.

Pain and Suffering

Turning to the issue of the payment of VIP benefits for pain and suffering, some, no doubt, would oppose the payment of any such benefits, leaving it to motorists wanting that sort of protection to purchase private insurance coverage (and perhaps mandating that insurers offer such coverage). At the other extreme, many devotees of the tort system (to be eliminated by VIP) would bemoan the loss of full coverage for intangible losses. The VIP solution recommended here takes a middle position.

Benefits would be paid only to those who are seriously and permanently disabled. Probably the best strategy is to use a strong verbal threshold of the sort used in Michigan's auto no-fault plan, restricting awards, at the outside, to those with serious permanent impairments and disfigurements and those who remain unable to resume any sort of gainful activity for at least six months.[8] The general goal here is to limit the pain and suffering benefit group to fewer than 10 percent of motor vehicle accident victims with bodily injury.

These benefits would be paid based upon a scale or schedule that VIP would develop, with a maximum award that would not exceed, say, $100,000. This approach is modeled after a combination of the practices in workers' compensation, accidental dismemberment insurance, and New Zealand's 20 years of experience in this field—although it is worth noting that New Zealand's more conservative government has just eliminated this sort of benefit in the recent reform of its accident compensation scheme.[9]

Based upon data provided by Stephen Carroll of RAND's Institute for Civil Justice,[10] it may be estimated that if 10 percent of personal injury victims are entitled to pain and suffering payments under VIP and they receive an average payment of approximately $12,000 each, then pain and suffering awards in total would constitute somewhere in the order of 25 percent of the plan's benefits (as has tended to be the experience in New Zealand).[11]

Death Cases

Where individuals are killed in motor vehicle accidents, dependents of the sort who now qualify as plaintiffs in wrongful death lawsuits would be entitled to otherwise uncompensated income loss of a specified percentage. This should be set at a lower proportion of the decedent's earnings than the replacement percentage used in injury cases because the decedent's consumption needs would no longer be relevant; perhaps 50 percent of gross income would be appropriate so long as there are minor children, less if not (remembering that many widows and widowers remarry, and programs like Social Security typically terminate survivor benefits to spouses upon remarriage,[12] a provision that could also be considered for VIP). In addition, the payment of a lump sum would probably be appropriate in recognition of the death itself. Whether this should be the $100,000 maximum paid for the most serious personal injures (and which is similar to what is paid as the full lump sum death

benefit in workers' compensation in California[13]), or whether it should be a different sum, requires further consideration.

Periodic Payments

Earning losses and expenses would, in general, be reimbursed under VIP as they occur. For permanent injury cases, arrangements might be made for mutually agreed upon fixed annuities once an auto accident victim's condition has stabilized.

Property Damage

The core VIP idea does not concern property damage, and hence, as proposed, would have no impact on auto insurance coverages called "collision" and "comprehensive" (respectively, coverage for damage to, and theft of, a motor vehicle); nor would it necessarily effect auto liability insurance for property damage (coverage for negligently damaging another person's vehicle or other property). The final chapter discusses a supplementary proposal that would take compensation for auto damage out of the current litigation system and possibly include it in VIP.

CHAPTER 3

FAIRER FUNDING AND GREATER SAFETY

The goals of VIP on the funding side are to impose fairly the burden of paying for VIP benefits and to provide socially desirable incentives (and rewards) with respect to auto use and auto safety, relying on easy-and-cheap-to-administer and difficult-to-escape charges. Broadly speaking, the three VIP funding sources reflect the values contained in Proposition 103, passed by California voters in 1988, calling for auto insurance rates to be based upon the insured's driving record, the number of miles he or she drives annually, and the number of years of driving experience the insured has had.[14]

THE FUEL CHARGE

The fuel charge would impose costs on those who drive more and hence, other things being equal, are more likely to be in accidents. This would appeal to both fairness and cost internalizing norms. Generally speaking, the fuel charge relates the cost of VIP to miles driven, although not exactly. Yet a fuel consumption charge is actually considerably more desirable than would be an odometer-based charge.

In the first place, the unfortunate reality is that were an annual fee today imposed on drivers based upon their odometer reading, all too many Californians would probably tamper with their odometers, and significant cheating of this sort would be quite demoralizing to the scheme. Even if odometers could be made largely tamper proof, there are advantages in having motorists pay at the pump.

If, every time you fill up your tank, you contribute to the cost of compensating accident victims you put at risk by your driving, then you regularly face "marginal cost" pricing. That sort of pricing is designed to promote less driving and more efficient driving.

Adding 30 cents to the price of gasoline, as VIP would, confronts California drivers with a price increase of about 20 percent over current prices. When forced to pay more for gasoline, some people will modify their behavior by driving less; it has been estimated that, in the short run,

a 20 percent price increase would cause a 4 percent decline in gasoline consumption.[15]

This constant need to spend more on gas is likely to be psychologically more effective in changing behavior than if motorists were to pay a sum only once a year based on how far they drove that year (more frequent odometer-based payments are likely to be an administrative nightmare).

It is important to appreciate here that, even though the overall cost of accident compensation would be reduced for the typical motorist under VIP, that motorist would still be expected to drive less because he or she would face a substantial new cost increase *at the margin* (that is, when buying gas). This is because, today, by contrast, people typically commit to an annual auto insurance charge that is very little sensitive to how much they drive. Hence they don't really face, at the margin, the costs of auto accidents as they drive.

The result is that the typical driver would be expected to spend that money he or she saves from the adoption of VIP largely as he or she would spend any increase in income—and that would not be simply to focus the money on buying more gasoline. To be sure, some new motorists may be drawn onto the road by VIP's lower entry costs, but their new driving should be far less than the amount of driving saved as a result of the new fuel charge (and some of that potential new entry is meant to be discouraged by VIP charges on novices, described below).

By reducing the amount of driving people do, VIP should have what most would consider to be socially desirable impacts. More commuters would car pool or take public transportation. More people would walk or bike to shop or would plan their shopping and other outings more carefully. Streets and freeways would be less crowded, reducing travel time for those who continued to drive. As driving decreased, auto pollution would decrease generated, helping to clean up our dirty air. And with fewer people on the roads, there would be fewer accidents.

Over time, the 20 percent price rise should cause gasoline consumption to decline even further, perhaps by a total of up to 14 percent,[16] as people switch to more fuel efficient vehicles and are able to make more permanent changes in their lifestyles (like living closer to work) in the face of more expensive gasoline. By favoring cars with greater fuel efficiency, the fuel charge would probably be supported by the public at large on environmental grounds and because it would promote freedom from economic dependence on other nations. That is, as VIP leads to increased overall fuel efficiency of the California vehicle

fleet, this would slow the rate at which we use up nonrenewable petroleum supplies and reduce our dependence on imported oil. Notice that, by contrast, an odometer-based charge would do nothing to promote the use of more fuel-efficient vehicles.

Cars are much less likely to be in an accident for every mile driven on freeways than on ordinary streets. This may suggest that freeway drivers would pay too much by paying at the pump. But this concern is mitigated under VIP by the facts that freeway crashes tend to be more serious than those on ordinary streets and that drivers get much better gas mileage on the freeway (a feature ignored by odometer-based charges that treat all miles driven alike).

Although virtually all motor vehicles today depend upon fuel (gasoline, diesel, etc.) purchased at so-called service stations, this may not be the case in the future. For example, suppose electric cars are introduced in large numbers. It now seems likely, however, that their owners would have to recharge their cars at night in their garages with a separate electric line. On that assumption it would be simple to add a surcharge to that meter to cover an appropriate contribution of those owners to VIP. If the state wanted to promote the introduction of such vehicles, then, of course, a subsidized rate might be used for that power source.

In today's world, the fuel charge would be very difficult to avoid, especially in California where relatively few people live near enough to other jurisdictions in which gasoline might be sufficiently cheaper to make the trip worthwhile.[17] Of course, some gasoline might be bootlegged into California for sale in the black market without the fuel charge, but fortunately for these purposes, gasoline is bulky and hence not all that easy to hide in large quantities. In the same vein, gasoline retailers would have an increased incentive under VIP to try to cheat state authorities out of the money they collect, although this does not appear to be a large problem at present with the fuel taxes they collect. In short, VIP's fuel charge should be cheaply and effectively imposed on the full range of motorists, making it attractive on grounds of both fairness and efficiency.

DRIVER CHARGES

VIP's two types of driver charges have also been designed to maximize fairness and incentive considerations. As for the *driving-record* charges, three categories of drivers would be established. Those with the

best records would pay a modest surcharge when renewing their driving license every three years. This would be $60, or $20 per year. To fall in this category you would have to be a "good driver" under the provisions of Proposition 103; simply put, this means no more than one moving violation in the past three years.[18] In California today, this category includes about 80 percent of the drivers.[19]

Most drivers who do not qualify as "good drivers" would fall in the second category, paying $120 a year, and having to renew their license annually. This category would cover another 15-19 percent of drivers, depending upon how the boundary to the third category is defined. Assigned to the third category would be drivers with the worst records, fewer than 5 percent of motorists, who would have to pay VIP a much larger annual sum, such as $500 (or more). There are a number of ways to determine the size of this category or define entry. One possibility, which seems to single out about one percent of drivers, is to use DMV's point system, which terms you a dangerous driver if you accrue four points in the past year, six points in the past two years, or eight points in the past three years.[20]

The purpose of creating these three categories is both to punish bad driving, which is likely to cause claims on the system and, in turn, to provide an incentive not to fall into the higher cost categories.

Novice drivers would pay higher charges based upon their inexperience. The charge might be $500 for 16- and 17-year-olds and $250 for 18- and 19-year-olds and other new adult drivers (for two years). These charges are meant to capture the general riskiness of new drivers (and especially new young drivers) as generally reflected in existing higher insurance charges for such drivers. They are also designed to assure that driving isn't suddenly made so much less expensive for teenagers as to draw many more of them onto the roads.[21] Some might favor even larger charges for younger drivers so as to closer approximate the higher costs they currently face for auto insurance for bodily injury.[22] Whether the charges for newly licensed drivers over age 20 should be imposed on those who were previously licensed in other states is a delicate issue with no clearly correct answer.

Were it desired, further adjustments in the annual VIP charge could be made for additional driver characteristics—for example, for the driver's place of residence. This might be desirable on the ground that those living in counties with lower auto accident rates—for example, rural counties—deserve to pay less into VIP. For these purposes, VIP could take advantage of the state's existing eight automobile insurance rating

regions.[23] Adjusting for this factor in the annual driver charge on the basis of residence would be far more feasible than trying to charge different VIP rates at the pump in different counties (which would have the predictable effect of causing people to drive across county lines to purchase their gas).

On the other hand, many people feel that territorial-based charges are inappropriate because they don't treat people as individuals and have undesirable race and class effects. In that spirit, the Insurance Commissioner has assigned place-of-residence a much less prominent role under the provisions of Proposition 103 governing the classification criteria to be used in setting auto insurance premiums under the current regime.[24]

The same competing views could be brought to bear on the idea that VIP should surcharge males up to age 25 as auto insurers now commonly do. Indeed, a long list of controversial driver classifications could be drawn up on the basis of risk (as contrasted with individual past driving behavior); for example, some people might favor higher driver registration charges for motorcyclists who are especially at risk of serious injury from motor vehicle accidents. Perhaps the best solution to all of these issues is to empower the VIP board to undertake such motorist differentiation as it sees fit through the rule-making process. (As will be seen, the terms of the "rebate" scheme described below are also relevant to the resolution of this issue.)

The main point to emphasize here is that, like the fuel charge, both types of VIP driver charges would be relatively cheap and easy to administer and difficult to avoid. The Department of Motor Vehicles (DMV) already collects data concerning the motorist's age, years of driving experience, driving record, and so on,[25] and would simply tack the new VIP charges on top of the charges it already imposes when licenses are renewed. VIP would probably require bad drivers and young drivers to renew their licenses somewhat more frequently than today, especially those drivers with the worst driving records. This may have its advantages.

Of course, people would have increased financial incentives to drive unlicensed under VIP, and hence some new funds would need to be budgeted for increased enforcement. One of the advantages of VIP as compared with the present auto insurance scheme, however, is that even if people manage to escape one of the funding charges, they are unlikely to be able to avoid the others.

VEHICLE CHARGES

The third leg of the VIP funding stool concentrates on vehicles, and, as with the driver charges, there are two types—an annual charge and a new car charge. Both are designed to reward the purchase of safer vehicles—as an incentive to do so, and on the ground that owners of safer vehicles deserve to pay less because they and their passengers are likely to suffer both fewer and less damaging accidents.

Turning first to the *annual vehicle safety charges*, three categories of vehicles would be created. The first, or safest, category would include 15-20 percent of cars. Their owners would pay a charge of, say, $40 a year. The second band would contain 60-70 percent of cars, and their owners would pay $80 a year. The remaining 10-20 percent of cars—the most dangerous models—would be in the third band, and their owners would pay $120 a year (or possibly up to $300 annually for cars that are especially dangerous).

In determining into which band each type of car falls, VIP would probably rely on some combination of federal government crash-test data,[26] actual loss experience as measured by the Highway Loss Data Institute (HLDI), an affiliate of the Insurance Institute for Highway Safety,[27] vehicle specifications (perhaps "muscle" cars would cost more), information about car dangers provided to VIP by whistle-blowers (see below), and the like.

Although VIP could start with federal government crash test results, one shortcoming of the crash-test data is that they are based upon experiments and not real world situations.[28] Another is that they only attempt to measure the danger of a head-on collision for vehicles in the same weight class. Crash-test results are based upon crashing the car into a fixed barrier, which is equivalent to crashing it into an identical vehicle at the same speed. But, of course, a large proportion of real crashes occur through rollovers, through a single vehicle crashing into an object that at least partially gives way, and through the crash of two vehicles other than head on and/or of sharply differing weights.[29]

Other things being equal, lighter cars are more dangerous to their occupants in a crash than are heavier cars. Thus, from the selfish point of view, it makes good sense to appreciate that you are more at risk in a well-rated light car than in an equally well-rated heavy one. On the other hand, from the overall societal safety viewpoint, other things being equal, heavier cars are more dangerous to nonoccupants than are lighter ones. How do these two factors net out? Work by Leonard Evans shows

that (at least as of recently) the danger to others caused by vehicles being heavier is more than offset by safety gains to the driver and occupants of heavier vehicles, and that this holds true even taking into account the fact that drivers of heavier cars are more likely to be involved in crashes than are drivers of lighter cars.[30] From this perspective, it probably would not be fair to ask owners of heavier cars to pay as much as owners of lighter cars with the same crash-test rating.

Unlike crash tests, on-road experience tells us about the actual performance of vehicles. Currently, widely disseminated data of this sort is compiled and analyzed by HLDI.[31] Some of the safer cars according to federal crash tests show up as more dangerous in the HLDI data, and visa versa. But HLDI results too are problematic, because they are confounded by the fact that drivers of different types of cars may drive more (or less) carefully.

What is clear is that, given currently available data and competing methods of analysis, there is sure to be controversy over how to measure a car's safety, so that some politically acceptable compromise over the calculation of these charges will be required. At this point, it seems best simply to assume that the VIP board would classify cars through a rule-making process in which it uses the available data in a sensible manner.[32]

New car and commercial used-car sellers would have to post on the car's "sticker" the charge category in which the car falls. This would provide a "talking point" so as to make safety a more prominent part of auto sales. As long as insufficient data is available, a new model that is largely a continuation of a prior model would be placed in the same band as the prior year's model. If, as determined by VIP, the new model is really a new design for which there is no experience or data, the model would normally be placed in the middle category.

This portion of the funding mechanism would also be the place for imposing appropriate charges on nonauto highway motor vehicles, including trucks of all sorts, buses, motorcycles, and recreational vehicles. These charges could take into account not only the dangerousness of these vehicles to their occupants, but also, given their typically larger mass (motorcycles aside), their disproportional dangerousness, other things equal, to occupants of other vehicles they might run into. It remains to be determined what would be fair charges for these nonautos, which, it should be understood, constitute about 6 million of the more than 22 million registered motor vehicles in California today.[33] For purposes of this analysis, it is assumed that the *average* charge for

highway-operated vehicles other than automobiles will be the same as for the most dangerous class of automobiles—$120 per year.

As noted above, there would also be a *one-time charge* (also posted on the "sticker") on the purchase of a new vehicle. Although this would be nominally set at, say, $250, the hope would be that many purchasers would escape much or all of it because their vehicle contained safety features specified by VIP. For example, there might be a credit of $100 for air bags or automatic motorized seat belts, $50 for anti-lock brakes, and so on. These credits would be adjusted by VIP for technology changes, as new safety features come into the marketplace (side air bags, for example) and older features become more widespread. Indeed, through this charge and credit mechanism, the VIP board could engage in some technology-forcing strategies.

Finally, as earlier mentioned, a promising approach for VIP is to offer whistle-blower financial awards to individuals who bring vehicle dangers to the attention of the VIP board, which information could then be used by the board in constructing both sorts of vehicle safety charges. It might also be desirable to impose a duty on manufacturers to disclose design dangers to VIP, with the proviso that if such a danger is first reported by a private whistle-blower, then the manufacturer would be subject to a fine equal to at least twice the whistle-blower's reward.[34]

CHAPTER 4

PRIVATE ADMINISTRATION

ADMINISTRATIVE GOALS AND PROBLEMS

It seems wise to try to take advantage of the existing claims administration expertise of the insurance carriers. First, this would make it unnecessary for the VIP board to seek out and train a legion of new public employees. Second, practically speaking, this could have political advantages, perhaps blunting opposition to the plan from both insurers and those who object to public bureaucracies. Third, the specific way that VIP proposes to use private enterprise takes advantage of the loss projection expertise of the private sector and the benefits of consumer choice that flow from competing private sector providers.

From the social viewpoint, we would want claims administrators, whoever they are, to pay deserving claims and deny undeserving ones at virtually no cost. Obviously, not all of these goals can be simultaneously achieved. Certain tradeoffs are necessarily involved, and there could be some public controversy over what would be the optimum balance between tolerating errors and minimizing expenses incurred in avoiding errors.

In any event, even if we knew the social optimum, getting the claims processors actually to behave in the right way presents a classic principal/agent problem. To deal with the problem of agents wanting to maximize their own objectives instead of the social objective, VIP needs to try to hit upon the right set of payment and monitoring mechanisms that, taking into account their cost, best channel the actions of the claims processors in the right direction. This problem would exist even if VIP were to create its own bureaucracy to administer claims, although the discussion will proceed from here on the assumption that there will be private claims administration.

Suppose, for example, an insurer was hired to process all the VIP claims in a particular county and was paid a fixed fee for each claim handled (or a proportion of the award made). In that case the public

concern would be that the claims administrator would be too quick to pay undeserving awards. If, on the other hand, the claims administrator was given a lump sum out of which to pay benefits to all claimants in the county, keeping what is left for its profit, the public concern would be that the claims administrator would be too miserly, denying too many deserving claims.

There are mechanisms available to deal with both of these concerns. For example, when the worry is that the claims processors will be too generous, VIP might protect itself with retrospective random audits, subjecting the claims administrator to penalties for improper overpayments (a strategy that has been employed, for example, in monitoring the food stamp and AFDC programs).[35] Alternatively, when the risk runs the other way, so too the audit could be aimed at finding underpayments. Other controls on underpayments might include (a) permitting lawsuits for bad faith refusals to pay deserved benefits[36] and (b) consumer claims evaluation schemes of the sort actually proposed for VIP.

Even if claimant rights are sufficiently protected, an additional critical issue confronts any approach that would pay a lump sum over to claims administrators out of which benefits are to come: how large should the lump sum be? Assume VIP wants to pay an amount that allows the efficient claims administrator to pay deserving claims, cover reasonable expenses, and wind up with a reasonable profit. But turning that principle into a dollar figure is quite another matter. For one thing, at least at the outset, the insurance industry is likely to have a better idea about what reasonable numbers are than would the VIP board, and only experience actually administering VIP is likely to provide a great deal of confidence in anyone's numbers. For another thing, assuming that many private claims processors will divide up the responsibility to administer VIP, then either each has to be responsible for a reasonably similar pool of claimants, or else VIP has to figure out a process to ensure that the administrators wind up with different sums for handling different claimant pools.

For example, suppose VIP simply agreed to pay a claims administrator X dollars for every driver it signed up that year, on the understanding that out of the total sum received the administrator had to pay appropriate benefits to anyone among its group of drivers who happened to be injured in a motor vehicle accident during the year. The trouble with this approach is adverse selection—claims administrators would try to sign up low-risk drivers and to avoid high-risk drivers in

order to maximize their profits. This might be countered somewhat by allowing everyone to sign up with any participating administrator. Even so, each administrator would not likely wind up with a random sample of the entire population; and fearing that, insurers would be either reluctant to participate or tempted to engage in undesirable tactics designed to discourage high-risk people from signing up with them in the first place. In response to these problems, Andrew Tobias and I have come up with two somewhat different administrative solutions.

A PROMISING SOLUTION

Tobias has proposed that, through a sort of auction process, insurers would bid for randomly selected blocks of Californians (say, 5,000 or 25,000 at a time).[37] Winning low bidders would receive a per capita payment for each customer, based on their bid. With that sum the insurer would have to pay the claims to which its customers are entitled under the plan (as well as cover their own costs of administration and profits).

This clever idea is intended to solve two problems at once. First, through the competitive bidding process, the market would determine how large the capitation payment should be—and the risk of the adequacy (or inadequacy) of that sum would have been shifted from the public to the expertise of the private sector. Second, by bundling customers together at random, the adverse selection problem would be avoided.

A person would simply be informed who his or her assigned claims administrator is through, for example, an 800 number printed at the bottom of his or her driving license.

Having thus minimized the cost to VIP, Tobias then addresses the problem that the claims processors with winning bids would have an incentive to be too miserly to claimants. Here Tobias proposes another clever idea—a consumer satisfaction reporting scheme.

Tobias recommends a claims handling evaluation form that all claimants would be asked to complete after their experience with the system. These evaluation forms would go to the body governing the plan and relative rankings of administrators would be compiled. Those rankings would then be used to control the amount of business an insurer could bid for in the next year, thereby giving a claims administrator an incentive to provide good service after all. It is also imaginable that sufficiently poor evaluations could cause firms to be dropped altogether from participation, financially penalized, etc.

To entice claimant participation in the evaluation process, accident victims might have to be given a reward for completing and turning in their evaluation forms. I once heard Tobias suggest (somewhat in jest) that the reward come in the form of a lottery ticket for a special annual (or monthly) lottery to be held exclusively for those claimants completing the evaluation form.[38] Not only would this encourage participation, but, as Tobias pointed out, it would, in a certain sense, recapitulate something of the current tort system missing from his proposed pay at the pump scheme—that is, certain auto accident victims now receive benefits from the legal system that bear many of the hallmarks of having won the lottery. In practice, probably some other incentive would be employed to entice claimant participation.

Although Tobias' administrative proposal is attractive in many respects, it also has certain drawbacks. First, the bidding scheme for random blocks of customers may be too cute and not actually work well in practice (an uncertainty, more than a necessary drawback). Second, even if the bidding system functioned smoothly, it deprives people of their traditional expectation to be able to select in advance who their claims administrator would be were they in an accident. People might especially want to be able to switch to another administrator after a bad experience and remain with their current administrator after a good experience. But that sort of consumer choice, and any additional prod to better service that might yield, would not be possible under the Tobias plan. Third, as a political matter, his scheme is sure to run into strong opposition from agents and brokers.[39]

CLAIMS ADMINISTRATION UNDER VIP

Given these concerns about Tobias' scheme, we might want to consider a somewhat different administrative arrangement for VIP. The primary consideration is to get people connected to claims administrators. Rather than being assigned at random, good drivers would be permitted to sign up with any participating claims administrator of their choice. Administrators would have to take their market share of bad drivers. If they fail to sign up enough bad drivers on their own, they could be assigned some in proportion to the good drivers covered. This strategy simultaneously promotes consumer choice, provides a continuing role for agents and brokers, and deals with the most serious aspect of the adverse selection problem (allocating bad drivers).

At the outset at least, many people would probably select their existing auto insurer as their claims administrator (assuming that insurer decided to participate in the plan); but, over time, many people might select, say, their health insurer were that insurer to agree to go into the VIP claims administration business. One administrative advantage the health insurer would have is that it would simultaneously be handling the claimant's medical benefits under both plans.

The next step is to determine the capitation payment made by VIP to the claims administrators to cover benefits, administration, and profit. Under VIP the capitation sums would not be determined through the competitive bid process suggested by Tobias. Instead, a different sort of market would be created to determine what is the "right" amount of money the claims administrators should get. There are two steps. First, a generous capitation amount would be set that should easily more than cover the claims administrator's obligations and expenses plus a reasonable profit; this amount would be paid for every driver on the administrator's rolls.

Second, claims administrators would be permitted to engage in price competition by offering cash rebates (out of the capitation amount) to those people who sign up with them. Some administrators might offer cash up front; others might promise end-of-year "dividends" of the sort that have traditionally been paid by mutual life and casualty insurers. The latter might be especially prominent in the first year or two of the scheme as claims administrators get a feel for what their real costs are likely to be. For this reason, the "rebate market" may function better than Tobias' bidding market.

With rebates allowed, it is likely that most drivers would sign up with someone. Nevertheless, if the burden is on individuals to take action, some licensed drivers will inevitably fail to sign up with any company. What should be done with them? One approach would be to assign them at random to participating administrators based on market share. Another is to lump them together and assign them to a single administrator employed for this purpose and paid on a different basis.

Perhaps the best idea, however, is to create a competing state-run claims administrator who would serve as the default administrator for good drivers. This assumes that drivers would be annually reminded by DMV that they could switch VIP administrators. (The renewal cycle might be tied to the calendar, thus creating a single statewide "open enrollment" period each year; or perhaps better, enrollment could be tied to the date at which people renew their driving licenses thereby spreading

the renewal business throughout the year.) The DMV notice would state that although the driver could sign up with private participating claims administrators, by failing to do so he or she would be assigned to the state-run administrator and would be entitled to a specific rebate.

Through this approach, the state competitor would serve as a check on the private market. If the private administrators failed to offer competitive rebates, they would lose business; if they incurred excessively high costs in generating clients or tried to inflate their profits, they would lose business. In the end, however, if experience with competitive state providers in workers' insurance is a guide, the private sector will in fact garner the lion's share of the market[40]—perhaps because government providers are inevitably inefficient in certain respects and perhaps because consumers highly value being able to choose. Like the private administrators, the public competitor would have to take its fair share of bad drivers too.

A critical question under the proposed VIP scheme is whether or not claims administrators could offer different rebate amounts to individual customers or classes of customers. A related question is whether they could refuse business or would have to take on all good drivers who wished to sign up with them (a requirement that would parallel Proposition 103's requirement that those in the auto insurance business must agree to sell to all good drivers[41]).

Although it complicates things, allowing differential rebates has certain advantages. For example, suppose an administrator concentrated its business in Los Angeles County but wanted some customers in rural Tulare County. Given the likely higher claims experience in Los Angeles County, unless that company could offer differential rebates, it might find it impossible to compete for the Tulare business with an administrator who worked only there. As another example, suppose low-income good drivers become more attractive than high-income drivers because of their lower lost earning claims. Should not an administrator wanting to serve both classes of claimants be able to offer differential rebates?

The same point applies for those with large as compared with small collateral benefits, those who engage in more as compared with less dangerous motoring activities (such as motorcyclists and taxi drivers) and so on. Moreover, differential rebates would encourage administrators voluntarily to have as clients every good driver who wishes to sign up with them. All of this is to say that many large groups of "good drivers" that could be assembled by claims administrators would probably not be a random sample of all good drivers in the state, and that the remaining

adverse selection problem flowing from this fact might be handled through differential rebates.

Cutting against differential rebates is the fact that drivers at greater risk will already have paid more through VIP's differential driver and vehicle charges. To be sure, since those charges are arguably intended primarily to reflect risk towards others, perhaps they are not incompatible with differential rebates that would be based upon risk to self. Moreover, if differential rebates were allowed and employed, then the VIP board could always choose to engage in less driver differentiation in setting driving license fees.

In between requiring uniform rebates to all good drivers and allowing a wide-open policy on differential rebates, VIP could restrict differential rebates to selected criteria. Finally, were uniform rebates combined with a requirement that claims administrators take all comers from the ranks of good drivers, then the process of drivers shopping for larger rebates may force each administrator to have a reasonably random share of the state's good drivers on its rolls after all. It is to be hoped that further light on this difficult issue of rebate differentials will be shed by comments from would-be claims administrators after they have had the opportunity to study the alternatives.

A final important issue concerns nondrivers. They, of course, are at risk in motor vehicle accidents as passengers, as pedestrians, and in other circumstances outside of vehicles (ranging from sitting in their gardens or at bus stops to riding bicycles). It is first important to appreciate that nondrivers are not expected to make any special contribution to VIP (beyond that which they may indirectly make as consumers of commercial transport systems, like buses and taxis). On the other hand they are entitled to VIP benefits when involved in motor vehicle accidents. This is the usual policy solution in auto no-fault schemes, and rests on the judgment that, on the whole, injuries suffered by nonmotorists should nonetheless be viewed as properly chargeable as costs of motoring.[42] (Were this position rejected, then it would be possible to give VIP an additional, suitable funding source.)

More than a third of Californians are not registered drivers, including, of course, millions of children under age 16. One solution is for VIP to contract out with a single claims administrator (or several regional claims administrators) to handle their claims. A different solution is to permit them also to sign up with claims administrators, although here a lower capitation fee would presumably be appropriate. Perhaps the best approach is to subdivide the class of nondrivers. Nondriver members of

households with drivers (primarily young children of drivers) could sign up with the claims administrator who signs up a driver in the household; typically this would mean that parents and children would be attached to the same claims administrator, and this would probably handle most of the adverse selection problem that might otherwise arise with respect to nondrivers. Moreover, if claims administrators essentially enrolled households, then the rebates they offered could be seen as household rebates. Those relatively few people living in households without drivers could then be handled by more centralized claims administrators (and would not qualify for a rebate since no member of their household was directly contributing to the scheme).

A final advantage of the capitation approach proposed for VIP lies in the way that it readily permits de-coupling the marginal cost pricing of driving (the revenue side) from the cost of benefits (the payment side). For example, VIP's three charges could be established so that, in the aggregate, they raise as much as is paid into the parts of the current scheme that VIP will replace; or the new charges could be set to generate 95 percent of the old revenue amount, or some variation.

VIP benefit amounts, on the other hand, need not exactly match available VIP revenues plus costs of administration. Rather, excess revenue could smoothly flow back out of the system to drivers in the form of rebates from claims administrators. Notice that, although drivers might think of the rebates as helping them pay for their annual driving license fee imposed by VIP, they would still face VIP's charge for each gallon of gasoline purchased with the consequent behavioral impacts already described.

Absent this de-coupling feature, there would probably be a greater political temptation to cut the gasoline charge as, say, a broadened national health insurance plan reduced the need for VIP benefits (thus undermining the attractiveness of VIP from the viewpoint of internalizing the social costs of motor vehicle accidents). Furthermore, because of the flexibility private claims administrators would have in changing rebate levels, the charge side of VIP ought to remain more stable than it would be if the VIP board had to keep benefit and revenues closely in balance. (Of course, Tobias' plan, in principle, could be adjusted to accommodate these points as well, by keeping program charges steady and annually turning over to the state general fund available revenues that are in excess of the sums paid out to claims administrators through the competitive bid process.)

VIP would use Tobias' claims evaluation scheme—but in a slightly different way. Instead of controlling future bidding rights, a firm's claims evaluation rating would influence its end-of-year bonus from VIP. Bonuses would also be based on obtaining renewal business, as further evidence of claimant satisfaction. In other words, VIP would withhold a share of a claims administrator's capitation award to be later released (all or in part) depending upon how well the firm scores on these two measures of consumer satisfaction. This bonus scheme, the right of consumers to switch claims administrators every year, plus the right to bring "bad faith" suits for punitive damages in extreme cases of despicable behavior by a claims administrator, should help assure that VIP claims administrators treat claimants fairly.

THE VIP BOARD

It remains to be decided whether VIP should be housed within the Department of Insurance (and, if so, whether the commissioner of insurance should be its nominal head) or whether VIP should be organized as a separate statewide public entity along the lines of the University of California or, say, those independent boards that have consumer protection responsibilities for matters such as medical quality.

Obviously, it is important that the VIP board be independent and act in ways that win it public confidence, especially because, as already indicated throughout, it is probably essential to give the board considerable policymaking latitude in certain areas where trying to spell things out in a statute would be impractical.

On the other hand, it is important to emphasize the limited role of the VIP board. VIP revenues would be privately collected by gasoline retailers and new car sellers and publicly collected by DMV—in conjunction with charges and taxes these actors already collect. Individual benefits would be paid out, not by the board, but by independent claims administrators. Moreover, the VIP enabling law should contain indexing provisions governing both revenues and benefits.

To be sure, some attention would have to be given to fraud control. On the benefit payout side, this would rest with the claims administrators, the costs of which would eventually be reflected in rebate levels. On the revenue side funds would be needed for modest additional policing of the private revenue collectors and to support DMV collection efforts from those who might otherwise seek to drive unlicensed or to drive an unlicensed vehicle (although fines for noncompliance could well finance

most of this effort). A good computerized data base would be critical to assure that only licensed drivers could obtain rebates from claims administrators and that they obtained only one.

The VIP board would, of course, engage in research, policy development, and rule-making, as well as approving and overseeing the claims administrators. Moreover, there is bound to be litigation over various aspects of the board's work, such as the safety class into which specific vehicles are put. Nevertheless, taking all of these roles into account, surely we are talking about less than one percent of VIP revenues for the board's administration (not including here, of course, the cost of individual claims administration).

OUT-OF-STATE DRIVING AND DRIVERS

There are several technically complicated and potentially politically contentious issues surrounding how VIP would deal with out-of-state driving and drivers, but, in the end, these matters should be of relatively small concern in judging the desirability of VIP.

Take first the question of Californians who drive their vehicles to other states. Leaving California's borders, they would need to have insurance coverage appropriate to the state in which they might happen to have an accident—assuming that VIP coverage would not apply to such accidents. In other words, they would need liability insurance and/or no-fault insurance depending upon the state in question. One solution is simply to require people to buy this coverage specifically for the trip in the way that many Americans have traditionally purchased special insurance coverage before driving their cars into Mexico. But this would admittedly be awkward, and many would probably forget. An alternative would be for people to purchase blanket out-of-state protection when they obtain other insurance, such as homeowner's insurance or property insurance on their car.

Better yet, however, would be to build this coverage right into VIP participation. In short, once you are a licensed California driver and driving a California car for which the VIP vehicle charge has been paid, VIP would automatically provide for you the sort of coverage that auto insurance policies now provide when people drive out of state—perhaps limiting the liability coverage to, say, $300,000 and leaving it up to those wanting greater protection to cover that risk with a so-called "umbrella" liability insurance policy (something that those with higher incomes and/or any substantial wealth often purchase anyway). With this solution,

it would probably make sense to impose the obligation to provide this coverage on the claims administrators participating in VIP (to be paid for out of their capitation payments)—a risk that some claims administrators would no doubt elect to reinsure elsewhere.

Perhaps this automatic coverage would only apply to those driving noncommercial vehicles, with commercial vehicles obligated to obtain special additional coverage. To answer this question requires obtaining additional information about commercial vehicle practices and their out-of-state risks. It might also be necessary to restrict automatic VIP provision of out-of-state coverage to those vehicles primarily driven in California (through representations made at the time of the vehicle's registration) so as to prevent those people in nearby states from pretending to be Californians and registering their vehicles in California at a lower cost. (Subjecting themselves to California income tax, as they would through such conduct, is probably enough of a deterrent.)

Coverage through VIP would, presumably, not be necessary for those Californians who go out of state and drive vehicles they don't own. Rental cars ordinarily come with liability insurance and/or no-fault insurance as appropriate, and those who drive other people's vehicles with their permission are routinely covered by the insurance on those vehicles.

The other side of the coin concerns people who visit California. These people would automatically be provided with VIP protection. First of all they would be contributing to the scheme by purchasing gasoline in the state. Second, if they rented cars they would be contributing indirectly because those cars would have been subject to the VIP vehicle charges. Rented cars might actually be slightly cheaper than today because the addition of the vehicle charge should cost the car rental companies less than they would save from the insurance coverage they would no longer need to provide. But of course the renter would have to pay more for gasoline.

To be sure, out-of-state motorists, whether they drive their own cars or rental cars, would not have contributed to VIP through the driving license fee; but on the other hand, they would not be entitled to a rebate. Indeed, nonresidents who drive their vehicles into the state gain VIP coverage without paying either the driving license charge or the vehicle charge. In a sense they might be thought to be getting protection too cheaply.[43] But, on the other hand, there may be some concern that VIP's higher gasoline charges would discourage desired tourism. In the end, given their relative financial insignificance, not too much should be made

of these "equity" issues. After all, nonresident good drivers who come to California for two weeks escape, on a *pro-rata* basis, around $5 in VIP license and vehicle charges and, if they drive, say, 1,000 miles, incur maybe $15 in VIP gasoline charges. Moreover, consistent with VIP's general policy, benefits would be paid to cover only those losses not already compensated by the out-of-state driver's own auto policy.

Out-of-state pedestrians would be covered without having made any contribution to the scheme, just as are nondriver California residents. It would probably be best to assign all out-of-state claimants to a single claims administrator selected for this purpose and paid in a different manner from the capitation scheme.

People who move to or from California during the year also present some administrative issues, but these would not be difficult to solve through *pro-rata* arrangements where appropriate. Some people will actually have become California residents but will pretend not to be by failing to obtain a California driving license and not registering their vehicle in California, thus avoiding VIP contributions they should have made. This should be a relatively small problem, however, and perhaps the most difficult policy issue concerning these cheaters is to what extent, if they are injured in vehicle accidents, they should have their access to VIP benefits restricted (in ways not applicable to true out-of-state residents).

CHAPTER 5

FINANCIAL ESTIMATES

FACTUAL ASSUMPTIONS

According to figures provided by various state agencies, there are currently (as of 1991) in California:

• over 20 million licensed drivers (of whom about 838,000 are between ages 16 and 19);[44]

• around 22 million registered on-highway automobiles, trucks, motorcycles, and recreational vehicles, including nearly two million new vehicles each year[45] (registered "trailers" are disregarded here, a matter warranting further consideration);

• about 15 billion gallons of fuel sold each year for on-highway use;[46]

• about $7.5 billion dollars paid annually in private and commercial auto insurance for bodily injury, medical payments, and uninsured motorist coverage for bodily injury.[47]

REVENUE PROJECTIONS

The charges discussed so far have been selected with the goal of raising approximately $7.5 billion dollars a year (in current dollars) for VIP. This initial figure is used because it represents the amount of motor vehicle insurance that need no longer be purchased as a result of the adoption of VIP. In other words, as a conservative strategy, the idea is that the VIP board would be authorized to collect the same total sum that Californians now pay for insurance for liability for bodily injury, uninsured motorist bodily injury, and medical payments. The justifying principle here is to attach to motoring the same aggregate cost as attaches to it under the existing scheme, albeit shifting considerably the burden on whom that cost falls (if nothing else the typical motorist's financial burden should drop because those who now drive uninsured will be contributing to the new scheme, more on this below).

Table 1 displays the revenue projections from the three VIP charges drawing upon the factual estimates set out above. As is readily seen, of the total $7.5 billion, nearly 60 percent would be paid at the pump, somewhat less than 30 percent would come from vehicle safety fees, and in the range of 15 percent would come from driving license fees.

These proportions have been established because they "feel" right in terms of fairness and politics. It is clearly possible to produce the same $7.5 billion by combining the three funding sources in a different way. The important thing is to make sure that people realize that using up gasoline, driving more safely, and driving a safer car make some difference. Under the proposed charges, owning a car for five years that is in a safer class should be worth around $200 (apart from front-end savings), which is approximately the same savings that an average driver should gain in that period from a car getting five miles more to the gallon or by reducing one's driving by 20 percent, and about half the license fee savings enjoyed in that period by being a good driver.

It should be emphasized that certain reasonably conservative estimates have been used in constructing Table 1. For example, it is assumed that the 30 cent fuel surcharge will reduce fuel consumption by five percent; it is assumed that there will be only 19 million licensed drivers on the ground that a small number more will drive unregistered vehicles than do so today; and the revenues from charges imposed on teen and novice drivers is estimated on the low side because of uncertainty about their behavioral response. In fact, there is probably little to be gained at this point in trying to refine the figures a great deal further. Perhaps it is more helpful simply to note that approximately $150 million more (or less) will be generated annually from a one cent change in the fuel charge.

The figures presented here are, of course, only for one year. Over time, various forces, including the economic incentives of VIP, would alter the number of drivers, the number of vehicles, the number of miles driven and gallons of fuel consumed, and hence the revenues produced for VIP. At the same time, there would be changes in the number of motor vehicle accidents, in wages lost, and medical and other costs incurred, as well as changes in other benefit arrangements, and these together would change the benefit cost of VIP. In general, so long as VIP indexes its charges and benefits, assuming the initial program parameters are sensible, everything should turn out reasonably well. And given the flexibility of the rebate arrangement, if the program budget were to begin to get out of whack, claims administrator actions should

Table 1

Projected VIP Revenues (1991 data and dollars)

Fuel charge:	
$0.30 a gallon on 14.5 billion gallons	$4.350 billion
Driving license charge on 19 million drivers:	
$20 on 15 million drivers	.300 billion
$120 on 3.8 million drivers	.450 billion
$500 on 200,000 drivers	.100 billion
$250/$500 extra on 1 million teens/novices	.250 billion
	1.100 billion
Annual vehicle registration charge on about 16 million automobiles, 600,000 motorcycles, and 5 million trucks, recreational vehicles and other vehicles.	
$40 on 3 million autos	.120 billion
$80 on 10 million autos	.800 billion
$120 on 3 million autos	.360 billion
$120 average on 5.6 million other vehicles	.670 billion
	1.950 billion
New vehicle safety fees	
$60 average on 1.7 million new vehicles	.100 billion
Grand Total	**7.500 billion**

give the VIP board ample warning before revenues would be outstripped by costs (or would way too far exceed costs).

It might be politically more attractive in some quarters to reduce the revenues generated by VIP, thus in turn reducing the need for the "rebate" system. The main appeal would be that lower required VIP charges would make it evident to most motorists that they would be even better off financially as compared with the present scheme (without having to count on rebates from VIP). I find the drawbacks more than offsetting, however. First, I don't want to raise fears in the insurance industry (or to give ammunition to opponents in that industry) that VIP just won't generate a large enough capitation amount to cover the required benefits. Nor do I want to provide grounds for the trial lawyers to complain that I have made the plan so cheap that I must be unfairly putting the squeeze on victims. Additionally, I don't want that VIP charges to be so low as to lose their attractiveness to environmental and energy efficiency groups who like VIP's promise to reduce auto and gasoline use. Finally, although I am reasonably confident about the reliability of the number provided here, because of the uncertainty surrounding any new program, I think it is only prudent to make certain that it is sufficiently well funded at the outset, for fear that otherwise new public expectations about cost levels would be quickly generated, putting the plan in a bind if it turned out that more money were needed to fund the promised benefits. The beauty of the VIP system is that, through the rebate mechanism, extra revenues initially produced through excessive caution should flow right back out to motorists. On the other hand, if, in the course of debate on VIP, it becomes clear that the proposed charges are in fact far more than needed, then, of course, it might well be wise to reduce them at least somewhat right from the beginning.[48]

COST ESTIMATES

According to figures published and privately provided by Stephen Carroll of RAND's Institute for Civil Justice, shifting from the current system to VIP should result in a claims cost savings of approximately 30 percent. That is, the sum of VIP benefits paid plus VIP claims administration costs should be about 30 percent less than the sum of compensation and claims administration costs for bodily injury today.

This figure is reached in the following way. Carroll's data show that by paying for all out-of-pocket economic losses (e.g., with health insurance primary to VIP), VIP could compensate all motor vehicle

accident victims and cover the cost of administering those claims for only 52.1 percent of the cost of the current system (a savings of nearly half). Savings come from sharply reduced costs of claims administration, nonpayment of pain and suffering damages, and nonduplication of other sources of compensation. Carroll's model shows that those savings together far exceed new costs incurred from covering accident victims who for one reason or another fail to recover under the current system.

To Carroll's data are added an increase in compensation costs for the pain and suffering benefits to be provided by VIP (on the assumption that those benefits will be set so as to comprise approximately 25 percent of benefit costs) plus an increase in claims administration expense occasioned by the availability of those pain and suffering benefits. From these additions the estimated 30 percent reduction in benefit plus claims administration cost is reached.

Carroll's data are conservative in certain respects. For example, they do not incorporate the VIP wage replacement ceiling. On the other hand, they are based on a complex simulation model that probably fails to replicate in several ways what VIP would actually cost in practice. But the main point is the VIP should be significantly cheaper than what it will replace.

It is important to remember that the current system incurs additional costs not included in Carroll's figures (e.g., marketing and other administrative costs plus profits). Making the conservative assumption here that there are no savings on those items, and given the share of premium dollars now allocated to compensation plus claims administration (estimated at about 85 percent), the financial savings described above should translate into an overall savings to the system (with respect to bodily injury) of about 25 percent. (Tobias might hope for even greater savings under his plan by sacrificing consumer choice and hence cutting out marketing costs completely.)

The bottom line for VIP is that the costs of the scheme should be easily met from its projected revenues, with the difference expected to be returned to the driving public through rebates.

NET COMPENSATION TO VICTIMS

It should be appreciated that a reduction in benefit plus claims administration costs of 30 percent under VIP does not mean a reduction of that same magnitude for the typical victim. This is because of the substantial projected reduction in claims administration costs under VIP,

savings in transactions costs currently born directly by both insurers and claimants. Most of these administrative costs now go to lawyers. Put differently, a much higher share of system costs would actually reach victims under VIP. Based upon Carroll's data it appears reasonable to assume that the average victim's take home benefit would exceed 90 percent of current levels.[49]

It should be further emphasized that, in any event, the VIP benefit is much more focused on actual victim need—covering nearly all motor vehicle accident victims, primarily funding actual out-of-pocket losses, and providing compensation for pain and suffering only to those few worst injured victims.

FINANCIAL BURDEN ON THE TYPICAL DRIVER

If the aggregate collections from VIP are the same as the amount saved from the present system, then motorists as a whole will pay in as much as they do now. But as already noted, this does not mean that individuals will pay the same as they do today.

For one thing it is probably fair to assume that the pool of contributing motorists will be increased from, say, 75-80 percent of motorists who are insured today to at least 95 percent under VIP. That broadening of the base of contributors, other things equal, ought to bring about an immediate reduction on the order of 20 percent to the typical motorist who now buys insurance.

Note that is 20 percent of the cost of bodily injury coverage, not all auto insurance—which also includes property damage, primarily to vehicles (from collision, theft, and so on). Since bodily injury coverages account for roughly half of the cost of auto insurance,[50] we are talking about an average cost reduction in insurance costs overall of 10, not 20, percent.

But, of course, in very critical respects averages mean little here. Individual motorists pay highly varying amounts into the current system (depending on what coverages they elect, where they live, their driving record, and so on), and would, of course, pay quite different amounts into VIP as well—depending upon how much gasoline they used, the car they owned, and their driving record and experience. Moreover, the net cost to drivers of VIP would depend upon the size of the rebate they obtained under the plan, a sum that, although it remains somewhat uncertain at present, ought to leave the typical motorist with a total reduction in cost.

Perhaps it would be most helpful here to provide some examples. Let us start with the "typical driver" whose VIP contributions would look like this: $20 a year as a good driver, $80 a year for a car of average safety, plus $195 a year for 650 gallons of fuel at 30 cents a gallon. The 650 gallons at 20 miles per gallon amounts to 13,000 miles a year, a reasonably generous estimate for the average motorist.[51] (Notice that at 25 miles per gallon, it takes only 520 gallons to go 13,000 miles a year, which translates into a savings of about $40.)

This total contribution of $295 a year is certainly less than the typical driver now pays throughout California for even the minimum liability and uninsured motorist insurance, to say nothing of those people who responsibly carry higher coverage and who live in higher cost counties. And when the prospect of a rebate is added, VIP should be financially attractive indeed to the typical motorist.

Notice that VIP would, in effect, treat households with two drivers and two vehicles the same as two single households with one vehicle each. That is, the two driver/two vehicle household would incur two vehicle safety charges, two driver license charges, and fuel charges as each vehicle is driven. A driver with two cars might be better off under VIP in the sense that whereas both cars have to be separately insured today, because the driver could only drive one at a time, the VIP fuel charge would be no greater than if the driver had only one car (although that owner would, of course, face two vehicle safety charges under VIP). A household with two drivers and only one vehicle would under VIP have to incur two driver charges, but, for good drivers, those charges are very modest; and, whereas that household would only need to insure the one vehicle today, once more, remember that those two drivers can only be driving one vehicle at a time and so in that household under VIP only one car would incur fuel charges at any one time.

When a teenager in a household starts to drive, that household today incurs a sharp increase in insurance costs (even assuming no additional vehicle is purchased for the teenager). So too under VIP, there would be the additional cost not only of more expensive gasoline whenever the teenager actually drives, but also the significant additional driving license fee of, say, $500 for 16 and 17 year olds (assuming they have not been in accidents, in which case their driving license fees would increase even further).

Drivers today who use their cars very little typically obtain only tiny reductions in insurance costs. Perhaps larger savings would be obtained under VIP. For example, if you drive only 5,000 miles a year at 20 miles

to the gallon, you use only 250 gallons a year (in contrast to our "typical" driver who uses 650 gallons) for an annual savings of $120 at 30 cents a gallon.

For private passenger motorists, of probable considerable political importance are the comparative figures for different regions in the state because current spending averages are collected and publicized on a regional basis.[52] Yet, in the end, little may be said definitively on this topic. In the first place, as mentioned already, existing regional differences will probably decline significantly once changes mandated by Proposition 103 are finally put into effect. Second, regional rebate differentials might be offered by claims administrators—if such differentials are permitted. And last, as noted above, VIP could deal with this matter directly by varying the annual driving license fee based upon the driver's place of residence.

VIP AND THE POOR

Considering first those motorists who currently purchase auto insurance, VIP promises many poor people sharply lower costs than they face under existing arrangements. A poor person with a good driving record could commute 24 miles a day even in an older, reasonably-safe, "gas guzzler" (getting only 12 miles to the gallon) and would still have to pay only about $250 annually to VIP from all sources ($20 driving license fee, $80 safety charge, and $150 fuel charges).

By comparison, in Los Angeles today, for example, because of "redlining" and other reasons, many poor people are forced into the state's assigned risk plan regardless of their past driving records and face annual liability-insurance premiums in the range of $1,000 for the minimum required protection.[53] Even poor motorists living in less urban counties, buying in the standard insurance market and eligible for good driver discounts, are now likely to pay at least $300 a year for minimum liability and uninsured-motorist protection.[54]

Moreover, poor people will be gaining more useful protection under VIP. Today, if they are truly judgment proof, buying liability insurance amounts to morally proper, but financially wasteful, behavior. By contrast, VIP will cover medical expenses and earnings losses that the working poor might not otherwise have insured. (Admittedly the very poor may already have access to public medical care and little or no earnings to protect.)

Poor people who do not insure today will face increased costs (and will gain new benefits). Although a disproportionate share of California's uninsured motorists is poor, it is by no means clear that their scofflaw behavior is approved. California advocates for the poor have been searching for ways to provide them with affordable auto insurance that they could be expected to buy. VIP meets that standard.

If, in the end, the poor were thought too burdened by VIP, surely their plight should not block its adoption altogether. If necessary they could be provided with increased cash transfer payments or, if politically expedient, with transportation vouchers good for the purchase of public transportation, or gasoline, or both.

VIP AND LONG DISTANCE COMMERCIAL MOTORISTS

Businesses that make heavy use of the roads, such as travelling salespeople, taxi drivers, and truckers, may object to VIP on purely self-interested financial grounds. Although these parties would also get reduced insurance costs as a trade-off for higher fuel charges, the net effect to them may be an increase. Preliminary reactions from lobbyists to proposed VIP charges suggest that perhaps taxi drivers would actually be better off under VIP, truckers worse off.

What to do about these prospects presents difficult questions of policy and politics. On the one hand, perhaps it would be a socially good thing if more transactions were done by phone or fax and traffic congestion caused by trucks were somewhat reduced by a shift to increased use of rail. Some road users may argue it isn't fair to "subsidize" competing means of communication and transport. But road users are themselves "subsidized" through public construction of roads. A big problem is deciding whether, given all the market imperfections that now exist, increasing the cost on at least some heavy road users would move our economy closer to or further away from an efficient allocation of resources. Probably, we just won't be able to figure that out.

There is also the narrower question of whether heavy trucks are paying their fair share of accident costs today, even though their owners are, of course, held liable when negligence against them is proved. Because heavy trucks, on average, will do more damage than is done to them, it may well be that, for various reasons, the existing scheme fails to force them to internalize the externalities they may fairly be thought to create. Again, it will be difficult to resolve this issue definitively. The

upshot is that heavy road users are in the relatively attractive political position (from their viewpoint) of arguing against upsetting the financial status quo.

Of course, VIP could make internal adjustments to deal with the complaints of commercial users of large quantities of gasoline—such as through tax rebates, the lower taxation of diesel fuel, and so on. Or a different strategy would be to reduce the proportion of VIP revenue coming from fuel charges and shift those funds onto license and vehicle charges. For example, roughly speaking, the proceeds from $8 a year in driving license fees are equivalent to what is obtained from a one cent charge on gasoline. But providing trucker rebates or shifting the share of the total VIP burden among the three revenue sources is a delicate matter. For one thing, because commercial consumption of gasoline is counted on, in the figures presented so far, to contribute a not insignificant share of the overall revenue to VIP, that revenue may not be blithely dismissed as unimportant. At the same time, shifting from the fuel charge to the license fee sacrifices environmental and energy efficiency benefits gained from marginal cost pricing.

Perhaps any further resolution of this issue should await the provision of hard data from trucking and other interests so that realistic estimates may be made about what cost increases, if any, they genuinely would face, and whether anything should be done about that. Driving 100,000 miles a year (400 miles a day for 250 days a year) at only six miles to the gallon means 16,000 gallons of fuel annually. Even this would amount to income-tax-deductible VIP fuel charges of only $4,800, which while not trivial, must be a relatively small share of the cost of running a commercial vehicle so intensively, especially when reduced auto insurance costs are further taken into account.

THE CAPITATION AMOUNT

Taking 30 million as a convenient measure of California's current population and dividing that into $7.5 billion in VIP revenues amounts to $250 per person. This provides a rough starting point for projecting the magnitude of the average capitation amount. As noted above, assuming it was agreed that it would be unwise to allow rebates to nondrivers, then it might be necessary to provide differing capitation amounts for drivers and nondrivers since the latter are at risk only as passengers and pedestrians. (Alternatively, as suggested above, nondrivers might be allocated to claims administrators based upon the latter's share

of the market of drivers, or nondrivers might all be assigned to a special claims administrator who would be compensated in a different way.)

CHAPTER 6

TEN THINGS WRONG WITH THE CURRENT SYSTEM AND HOW VIP ADDRESSES THEM

1. AUTO INSURANCE PREMIUMS ARE TOO HIGH

Californians understandably complain about auto insurance premiums today, because they are among the highest in the country.[55] Some people think that fully and effectively enforcing the terms of Proposition 103 will solve the problem.[56] Many experts doubt that. This is because Proposition 103 really did nothing to reduce the underlying cost structure faced by the insurers who administer tort liability law. Moreover, the auto insurance industry appears to be quite competitive; there are hundreds of sellers, and the top handful of firms do not have a commanding share of the market among them.[57] Hence, the assertion that high prices are the result of illegal collusion is not very persuasive. Perhaps Proposition 103 will permanently shift some costs away from those motorists complaining the loudest and who voted most heavily for it—those living in Los Angeles and Orange Counties.[58] But those savings are likely to be born by residents of other counties who object to the level of premiums they are now paying. For many observers, reforms beyond Proposition 103 are required.

VIP is highly promising on this score. As already explained, VIP should reduce the typical motorist's "insurance" costs related to bodily injury by 20 percent plus whatever rebate he or she obtains. The popularity of the VIP proposal with the public is likely to depend on just what numbers people come up with when they do the math for themselves and compare it with what they are now paying. It seems clear that, among those who now purchase insurance, most drivers would be able to anticipate a reduction even without taking the rebate into account.

VIP also takes nearly all the mystery out of insurance charges, makes clear to people that all those who are similarly situated will be paying the same sum into VIP, and permits people to determine quickly just how

much their obligation is. A good driver who goes 12,000 miles a year and is contemplating purchasing a new small car that gets 25 miles to the gallon and has a good safety rating could quickly figure out that the annual VIP costs of operating this car would be under $200 ($20 driving license fee, plus $40 vehicle safety fee, plus $144 in gasoline charges for 480 gallons at 30 cents a gallon). A 16-year-old thinking about buying a used clunker and driving it 6,000 miles in the upcoming year at 10 miles to the gallon ought to be able to appreciate that his or her VIP charges would be up to $900 ($500-600 driving license fee, plus $120 vehicle safety fee, plus $180 in gasoline charges for 600 gallons). And so on. With a phone call or two (or based upon computerized printouts that would presumably be available from the Department of Insurance), these hypothetical drivers could also quickly determine what amount of rebates differing qualified claims administrators were offering them.

VIP charges will remain relatively high for certain people—primarily new drivers and bad drivers, but also those who drive a great deal in comparatively unsafe cars. But the general public considers those higher charges very appropriate.

2. THERE ARE TOO MANY UNINSURED MOTORISTS

California has one of the nation's highest, if not the highest, rate of uninsured motorists, estimated to be at least 20 percent, and perhaps even 25 percent or more, of drivers.[59] These drivers not only are failing in their moral duty under the current regime to take responsibility for personal injuries they might cause, but also they are imposing higher costs on responsible drivers who must pay increasing sums for uninsured motorist insurance.

Why do we currently tolerate such scofflaw behavior? Because California tort liability law is so generous and Californians are so claims conscious, insurance costs are high. But because they are so high, the state's political leaders have been unwilling to get serious about requiring all motorists to carry insurance—for fear that this would put too many low-income people off the road who are seen as needing a car to get to work.

Japanese society seems less concerned about forcing the poor to ride public transportation. In Japan, required, unlimited-liability, auto insurance is strictly enforced.[60] In nearby Canada $250,000 in liability insurance is generally required and is routinely purchased by motorists without outcry from friends of the poor.[61] But, of course, in both Japan

and Canada the reach and generosity of tort law are much less, people are not so quick to sue, and, in turn, liability insurance is much more affordable.

The uninsured motorist problem is basically solved under VIP. Nearly everyone who drives will have to contribute to VIP. Indeed, the front-end cost savings to the typical driver just described are based on the assumption that under VIP almost all of those who are currently driving uninsured will be paying. Not only would this save money for people who are now acting responsibly, but it will certainly be considered fairer by most people.

3. TOO MANY SERIOUSLY INJURED VICTIMS ARE VASTLY UNDER COMPENSATED

California tort law might serve you well today if you happen to be hit by a city bus, a company vehicle, or a car driven by somebody who is rich. After all, California courts now acknowledge the dignity of the individual by awarding pain and suffering damages that are far in excess of what other nations do and of what VIP would award. And, in principle, under California tort law you are entitled to full replacement of lost earnings and recovery for all of the expenses you incur.

But, in practice, most of the time your legal rights aren't worth very much. Even those Californians who carry liability insurance all too often carry too little to begin adequately to compensate the seriously injured. About half of those who have insurance have no more than $50,000.[62] When added to the uninsured motorists, the upshot is that the great majority of seriously injured traffic victims (perhaps as many as three quarters of them) cannot recover adequately from the driver who carelessly harmed them. It is no wonder that California plaintiffs' lawyers have been so inventive in trying to find ways to sue highway designers and maintainers, auto manufacturers, those who serve drinks to drivers, and so on. Nevertheless, in the end, most seriously injured auto accident victims are vastly under compensated by the current system.[63]

VIP would change this much for the better. Virtually all people seriously injured in motor vehicle accidents would be well compensated for their out-of-pocket losses—lost earnings, medical expenses, and the like. This includes, of course, those people who obtain nothing through tort law today because their own fault is the cause of their harm, or because they are injured by a judgment proof or under-insured driver, a hit-and-run driver, or by a driver whose fault they cannot prove. Only

those who are hurt in the course of intentionally harmful or despicably dangerous driving would be excluded from the system.

4. TOO MUCH OF THE PREMIUM DOLLAR GOES TO CLAIMS ADMINISTRATION (PRIMARILY LAWYERS)

Of every dollar paid in for liability insurance for personal injury, only about half winds up in the pockets of victims.[64] The rest is ground up in administration. This includes marketing costs (including commissions), taxes, and profits. But most important are claims processing costs on both sides, and, overall, the lion's share of those go to lawyers. In workers' compensation, by contrast, about 21 cents on the dollar goes to administration; in health insurance it is only about 10 cents; Social Security disability spends only 8 cents on the dollar for administration.[65]

VIP would substantially improve on this record. Most claimants would certainly not need lawyers and would receive prompt, no-hassle payments covering their actual losses. In the rare cases where lawyers would be used to help with a claim filed with a VIP claims administrator, that attorney is very likely to charge a fee in the range of 10 percent of the sum eventually awarded, rather than the 25-33 percent fee typically charged by lawyers to process auto accident claims today. And with fewer claimants using lawyers on one side, fewer lawyers would be needed on the other. As a consequence, much more of the money paid into the system would be paid out again as benefits or as rebates.

5. TOO MUCH OF THE PREMIUM DOLLAR GOES FOR PAIN AND SUFFERING AWARDS

Of the money that winds up in the pockets of auto accident victims today, it is often estimated that as much as half, on average, is compensation for pain and suffering.[66] Many find this bizarre. One offensive feature is that people with modest injuries (or no injuries at all) are able to extract some payment just for the nuisance value of their lawsuit—to get the claim off the insurer's books and to avoid the cost of formal litigation in court. The pain these claimants suffered, if any, is typically long over before any money is received.

At the other extreme are very gravely injured people. Almost no one would want to change places with them even for the lavish sums that the tort system now awards to some of them. Nevertheless, it is fair to ask whether it really is socially sensible to turn some seriously disabled

individuals into millionaires (especially when so many other disabled people are treated so shabbily by our society).

This would all be changed by VIP. Those who do not suffer serious injuries would receive no payment for pain and suffering. Even though those with small injuries may now extract a fair amount of money from the present system, in the end, they wind up turning over much or all of their compensation for pain and suffering to pay their lawyer.

With respect to the seriously injured, pain and suffering awards would not be concentrated as today in large amounts on those few badly injured people who, in effect, now win the lottery. Instead, modest sums for pain and suffering will be paid to all of the most seriously injured victims.

6. TOO MUCH OF THE PREMIUM DOLLAR IS LOST TO FRAUD

California's auto insurance and liability system is rife with fraud. Some people stage accidents, or file claims for accidents that never happened. Others drive around and intentionally cause accidents with strangers in order to be able to file claims. Many, once they are in an accident, incur wildly excessive and unneeded medical bills—typically with the connivance of a doctor and a lawyer. Yet others feign continued injury, when they really have recovered, or they malinger in other ways.[67]

Just how much of the premium dollar is lost to fraud is unknown, but some have estimated that it is as high as 20 percent.[68] One reason that fraud is so attractive is that along with recovery for actual losses comes payment for pain and suffering; indeed, traditionally, the higher medical bills you incur, the more your lawyer can get for you in pain and suffering payments.

VIP will make a large dent in the fraud problem. Because there will be so much less in it for lawyers and for small injury victims in terms of pain and suffering awards, the incentives to stage accidents or deliberately cause them will be sharply reduced. Moreover, claimants will be much less interested in trying to run up needless medical bills when there is no longer the promise of much higher pain and suffering awards on the other side.

Of course there will be some evading of the VIP funding sources, but that won't be easy. As explained above, in California, driving out of state to find cheaper gasoline is not a very promising avoidance strategy for most motorists; and because gasoline is bulky, black market gasoline

would be very difficult to hide and sell in large quantities. To be sure, some people won't register their cars, but this is fairly easily detected. The same goes for those who try to drive without being licensed. Avoiding the license fee may allow someone to escape only a portion of VIP funding. While there will be some malingering under VIP, this will be partially curbed by having VIP replace less than 100 percent of lost wages, making malingering under VIP certainly less productive than it is while awaiting trial or the settlement of a legal claim today. There will also be some fake claims and exaggerated claims under VIP, just as there are under any benefit program, but there is no reason to believe their proportion will increase as compared with the present tort system, or that claims administrators won't be able to ferret out most of them.

7. TOO MUCH OF THE PREMIUM DOLLAR GOES TO DUPLICATE OTHER SOURCES OF COMPENSATION

For motor vehicle injury cases in California, victims are now entitled to recover from the other person's auto insurer sums they have already recovered from their health insurer, their workers' compensation insurer, social security, sick leave, disability insurance, and the like. Often, in theory, claimants are supposed to reimburse the source that initially covered the lost wages or medical expenses. Frequently, this just doesn't happen. When it doesn't the victim gets the windfall of double recovery for which everyone who buys auto insurance pays; when it does happen, there is the wasteful process of incurring all those auto insurance claims administration expenses to transfer money from one insurer to another. A significant percentage of auto premium dollars now goes for this sort of duplicate payment.[69]

VIP deals directly with this problem. Victims just won't obtain benefit from VIP claims administrators for losses also covered by basic forms of social insurance and employee benefits. Administrative costs of shuffling this money around will be saved, and VIP benefits will be largely reserved for the cases of the greatest actual need.

8. THE PAYMENT OF TOO MANY BODILY INJURY CLAIMS IS DELAYED TOO LONG

Today, people who suffer personal injuries and file lawsuits against other motorists frequently wait over a year before their claims are

settled.[70] Often they receive no money in the meantime. Insurers are not eager to pay up early when they can use the money in the meantime to earn interest; even plaintiff attorneys are sometimes not eager to settle early for fear that the victim's condition may take a turn for the worse.

On the other hand, fear of delay causes many victims to compromise their claims for less than they are really worth—unless they can get their attorneys to advance them living expenses (a practice that is not infrequent even though it is generally seen as inconsistent with the lawyer's canon of ethics).[71]

VIP would not have long delays: because fault would not be an issue, claims would be more easily resolved; partial payments would be routinely provided soon after an injury occurs, even before its long-term financial consequences have been determined; and VIP's offer of bonuses to claims administrators based upon client satisfaction ratings would also encourage prompt payment.

9. TOO MANY VICTIMS FIND THE CLAIMS PROCESS UNSATISFYING

In the current system, adjustors and attorneys for the opposing party's insurance company sometimes treat victims in ways the victims find appalling. At the same time, claimants' own attorneys often, to the client's dismay, keep them in the dark about what is happening to their case. Finally, in the end, hardly any plaintiff actually gets his or her day in court. Nearly all auto cases are settled (or dropped)—through settlement processes in which the client usually plays a relatively small, and often unsatisfying, role.[72]

Claimants should find the VIP process far more gratifying. Most importantly, it will not be an adversarial process in which each side is typically seeking to cast blame on the other. Rather, victims will be pursuing their benefits from the claims administrators they selected in advance. To be sure, some people have bad experiences with their own insurers today, for example with claims on homeowner's insurance. But, even this potential dissatisfaction should be at least partially weeded out of VIP because of the new approaches to consumer satisfaction incorporated into the VIP scheme.

10. SAFER DRIVING OF SAFER VEHICLES IS INSUFFICIENTLY ENCOURAGED

Currently, some auto insurers raise your rates when you have been in an accident; some don't; some raise your rates after the second accident, not the first; some traditionally have refused to renew coverage of those who have claims paid out on their policies. In principle, these and other insurer practices might have some impact on how carefully people drive and on who drives. Whether experience rating in auto liability insurance premiums actually yields better driving is a hotly contested empirical question.[73]

VIP takes the cautious path by assuming there is some behavioral response to financial penalties and tries to create similar and clearer incentives by charging higher driving license fees to those with worse driving records. Even if these differential charges have no significant impact on conduct, they would probably be thought fair by most people anyway. If experience rating of auto insurance does have desirable effects on the accident rate, then VIP, by reaching more motorists than the current plan, is likely to be even more effective.

Whatever their impact on actual driving, it is reasonably clear that auto insurance premiums in California now do little to encourage people to buy safer cars. For example, suppose you buy air bags. The likely result is that if you are in a serious crash you will suffer a smaller (or no) injury as compared with driving a car without air bags. But your insurance rates for bodily injury currently depend almost entirely on the amount of harm you are likely to do to the other party, something that your air bags will do little to reduce.

VIP sharply changes that. The vehicle charge imposed when a new car is purchased and the annual charge based on the model's safety record are far more likely than the current system to give people a direct financial reason for buying cars that are more crashworthy. Thus, under VIP effective safety measures such as air bags will vividly translate into a lower safety charge. Moreover, beyond the financial incentives, putting the information on the "sticker" should help make safety more of a "talking point" in car sales.

Notice too that the lower fuel charges that owners of lighter more fuel efficient cars obtain under VIP would probably be somewhat offset by the advantages heavier, safer cars would, on average, likely attract under the vehicle charge portion of the plan.

CHAPTER 7

ALTERNATIVES AND POLITICS

A SUPPLEMENTARY PLAN FOR PROPERTY DAMAGE INSURANCE

As so far presented, VIP would deal only with bodily injury. But auto insurance—indeed about half of the typical auto insurance premium—also concerns property damage. What, if anything, should VIP do about that portion of the insurance policy?

Most property damage from auto accidents concerns damage to vehicles, but not exclusively. After all, cars run into other things, like buildings and fences, causing damage to them as well. Property damage is now insured on both a third-party and a first-party basis; that is, the typical motorist purchases liability insurance covering damage to other people's property he or she might cause and "collision" insurance to protect his or her own car on a no-fault basis (that is, regardless of how it was damaged). Claims based on your own collision coverage are ordinarily not made, however, when the other driver is at fault and is insured. In addition, most motorists purchase first party, no-fault insurance covering vehicle losses not caused by "collision"; this coverage is traditionally called "comprehensive" and most importantly covers theft.

There are three main policy alternatives here. First, VIP could simply ignore damage to property and leave the existing legal system in place. This would require responsible motorists to purchase liability insurance for property damage; in addition, most would continue to carry comprehensive and collision.

A second possibility is to cover property damage under VIP just as bodily injury is covered. Lawsuits would no longer be permitted. Private insurance would not be purchased for property damage—neither liability, nor collision, nor comprehensive. When a vehicle is damaged (or stolen), its owner would apply to his or her own claims administrator and obtain compensation on a no-fault basis. When other property is damaged in a motor vehicle accident, its owner would either claim from his or her

designated claims administrator. Perhaps better, he could claim from a single centralized claims administrator, like that which would administer claims of nondrivers who are injured in auto accidents and have no preselected claims administrator of their own. This system would presumably be funded by an additional vehicle charge that is related, at a minimum, to the value of the vehicle (and perhaps as well to the model, for example, its cost to repair, resistance to damage, frequency of theft, and so on).

Although there is much positive that could be said about this second alternative, a middle ground between the two is proposed here. Under VIP, lawsuits for damage to vehicles would be eliminated, so there would be no need to carry liability insurance for causing this sort of harm. (Intentional damage, whether by theft or deliberate collision would, of course, subject the wrongdoer to the risk of not only a lawsuit for punitive damages, but also criminal prosecution.) People who want to insure their vehicles against the risk of damage would do so on a no-fault basis, as they do today, by purchasing collision and/or comprehensive. Many would probably buy this coverage from auto insurers; but many others probably would no longer have a separate insurance policy for this item of property. Rather, they would simply list their vehicle as a specially scheduled item on their homeowner's (or renter's) insurance policy, in the way that many people now specially schedule and cover jewelry, furs, musical instruments, and the like. (Many people already buy their homeowner's insurance from the same insurer that provides their auto insurance. In their case, it is only necessary for the lawyers and accountants to rearrange things a bit.)

This, then, leaves the matter of damage to property other than vehicles, and for that it is proposed that the current legal system remain in place. Because motorists could be sued for negligently harming other property, that in turn would mean that people would have to be able to obtain liability insurance to cover losses of this sort they might impose. But again, instead of having to purchase a special auto-related policy, it seems highly likely that homeowner's insurance would just add this small additional liability risk to the liability risks now covered in the standard portion of the homeowner's policy that provides liability protection for other negligent conduct, such as that which causes others to slip and fall in or around your home. Those without homeowner's or renter's insurance would presumably have this liability insurance coverage tacked onto the policy they buy when they insure their vehicles on a no-fault

basis; and some, no doubt, would, as today, wind up without coverage altogether.

The main reason for keeping property damage out of the mandatory VIP scheme is that it is socially less important to be sure that property is insured than serious bodily injury is insured. That, in turn, means there is more reason to permit people to self-insure (i.e., not insure) their cars if that is their choice. Those people who finance the purchase of new cars will almost always be required to purchase collision and comprehensive for those cars by the lender. But those with older cars owned outright may, given their income and taste, much prefer to run the risk of loss themselves. Or some might want a $1,000 deductible, or $250, whereas others want only $100; or some may want comprehensive without collision while others want both. Making the coverage optional, of course, readily allows for these variations.

Eliminating lawsuits for damage to cars, however, should save everyone transactions costs. It should also stimulate people to use resources more sensibly in the repair of vehicles. Surely many motorists would agree that, under today's system, when their car has been hit by another and the insurance of that other motorist is available, an extravagant sum is put into fixing the car that cannot really be justified and would never be spent were it the owner's own money. Of course, this extravagance often also accompanies claims on one's own collision policy after the deductible has been reached. But perhaps if a fully no-fault scheme for damage to vehicles is adopted, we will see more collision and comprehensive policies containing co-insurance features that would prompt more realistic decisions about spending on repairs.

In the end, if it were preferred on policy or political grounds, either of the other two main alternatives earlier set out for covering property damage could be adopted and would be compatible with VIP. That is why this issue is treated as only supplemental to the central VIP concept.

USING PAY AT THE PUMP TO FUND THE TORT SYSTEM

Some have proposed combining pay at the pump with the existing tort law system.[74] As a technical matter, fuel charges (even driver and vehicle charges as well) could be employed to provide all motorists with minimum liability insurance for bodily injury. For example, every registered vehicle owner might be allowed to designate an approved insurance carrier to whom a capitation amount would be paid, in return for which liability insurance would be provided. Alternatively, such sum

would be applied towards whatever it costs that driver to obtain minimum liability insurance protection.

Such an approach admittedly would go at least some way towards solving the uninsured motorist problem, and it would have some of the same incentive effects anticipated for VIP in terms of changing the total number of miles driven and shifting motorists towards more fuel efficient vehicles. But, clearly, by failing to substitute no-fault for tort, little headway would be made with respect to most of the other problems of the current system earlier discussed. Hence, with "Pay at the Pump," as with other catch phrase labels for new policy ideas, everything is in the details.

COMPARING VIP AND NO-FAULT GENERALLY

Assuming, then, that it is agreed to embrace no-fault, the next question is why VIP is better than a strong auto no-fault scheme, such as that in place in Michigan, or an even stronger no-fault plan that would fully substitute for the lawsuit system. In other words, since we already know how to design and operate conventional no-fault plans, why invent VIP's new funding and administrative arrangements?

Moreover, VIP is sure to attract objections to the idea of a government-run scheme, even with private administration, on the ground that having a public body determine the details of the plan's funding is a recipe for trouble. Critics will point to potential administrative inefficiencies in implementing the program and the prospects that the political system would prevent the VIP board (over time) from differentiating among drivers and vehicles in the ways promised. These concerns should not be trivialized, even though several VIP features are designed to minimize the risk that they would eventuate.

But, as has already been made clear, there is one fundamental advantage of VIP that arguably swamps these objections: nearly all drivers would contribute and would be covered. By contrast, even in mandatory no-fault insurance states, a significant share of motorists nonetheless wind up outside the scheme and uninsured—nearly 17 percent in RAND's no-fault simulation model for California.[75]

VIP has a tactical advantage as well. Because its core idea is to eliminate the need to purchase liability insurance, this minimizes the chance that, if VIP is adopted, it will contain only halfway-house no-fault features—a fate that has bedeviled auto no-fault in all U.S. jurisdictions, including Michigan, which has the most progressive plan on the books.[76]

To be sure, retaining a significant measure of tort law whenever no-fault is adopted is not an inevitable outcome, as is demonstrated by the only North American system of pure no-fault, that enacted by Quebec.[77] (It is noteworthy that Quebec did away with both private administration and, at least at the outset, driver-differentiated charges.)

Nonetheless, the fact remains that in the U.S. no-fault has never been close to adoption in pure form, and in fact the entire no-fault movement has been pretty much stymied for nearly 20 years. In short, as a practical matter, by casting the reform in an entirely new way there is a chance that "Pay at the Pump" could catch on as an idea and succeed where no-fault as we have known it has failed.

THE POLITICS OF VIP

This brings us more generally to the matter of the likely politics of VIP. VIP could well run into the opposition of the insurance and oil industries, trial lawyers, the "highway lobby" (concrete manufacturers, road builders, owners of motels, fast food outlets, and gasoline stations), independent insurance agents and brokers, and truckers and travelling sales people. However, several VIP features, as has already been pointed out, should at least reduce the potential opposition of some of these groups. For example, private administration of VIP through the capitation system in which individuals select their own claims administrator just might, in the end, be as attractive as the existing system to insurers and independent brokers and agents. Moreover, for the highway and oil lobbies, VIP could turn out to be a more attractive alternative than other proposals now in the air, which also seek to impose new fuel charges but do not plan to use the proceeds for motoring-related activities as does VIP. And heavy gasoline users could possibly be placated with various adjustments, previously discussed, in the VIP revenue-raising details.

Whether automakers back or oppose the plan may turn on whether the introduction of VIP, and especially the charge on new cars, were seen as a proper *quid pro quo* for the elimination of auto manufacturer product liability for manufacturing, design, and warning defects. Even if not, the relegation of tort damages in car defect litigation to the role of supplemental coverage might by itself suffice to win support from auto manufacturers. In fact, the automakers could well be divided over VIP depending upon their internal appraisal of how well their products would

do in a market where consumers are likely to care more about safety and fuel efficiency than they do today.

Because of the plan's projected behavioral consequences, it should win the support of environmentalists, public transport supporters, those responsible for (and concerned about) improved air quality, and fans of energy efficiency and independence. Most importantly, it should have the support of both consumer and traffic safety groups and of individual motorists (at least those who can see how VIP would save them money). Whether VIP could gain the support of consumer leader Ralph Nader is another question. Nader has long opposed auto no-fault plans, although some consumer advocates who back no-fault find this opposition curious.[78] One encouraging sign is that the National Insurance Consumers' Organization, which is connected to Nader, has recently endorsed the basic pay at the pump/no-fault idea.[79]

Of course, there is probably no way to avoid the opposition of trial lawyers who depend upon auto liability cases for an important share of their business, as well as their colleagues who fear that the adoption of VIP risks the scaling back of tort law in other areas. On the other hand, it is conceivable that other segments of the bar would favor VIP. Anyway, not to discount the political clout of the trial lawyers in the legislature, the fact is that with the public at large it is by no means clear that strong lawyer opposition is a negative today.

In this respect VIP might well, in the end, go to the public by way of some sort of voter referendum (perhaps put on the ballot by the voters through the initiative process, perhaps put to the voters by the legislature). Indeed, some have suggested that VIP may only be adopted in California through a popular vote because the state constitution requires gasoline taxes to be used for highways and mass transit.[80]

If the experience of Proposition 103 is a guide, it would appear that a proposal has a real chance of passage if it is seen by the public as both a criticism of the current auto insurance system and a promising source of personal financial saving. Of course, public disappointment that the Proposition 103-promised rebates have not yet generally been paid may make the voters skeptical about whether any new auto insurance reform will yield the savings it promises.[81]

In any case, with the slogan pay at the pump having suddenly caught the national spotlight,[82] it may well be true that a plan like VIP is at present the only serious auto insurance reform plan going. Ordinary auto no-fault just doesn't seem able to regain its' lost momentum. Elective no-fault is a very clever idea[83] proposed by Professor Jeffrey O'Connell,

who was initially responsible for getting no-fault off the ground; but it, too, appears politically unpromising at present, having been very badly defeated recently by Arizona voters.

Were VIP adopted, the transition to it from the current plan would no doubt be tricky and require careful planning. But we are plainly not writing on a clean slate here. Surely, the Quebec and New Zealand experiences moving from tort law to a compensation system for auto accidents would provide useful guides.

CONCLUSION

In the short period of time during which pay at the pump has been in the public eye, several misinformed objections have already been made to it. My hope in providing this detailed account of what VIP would, or at least could, look like is to allow those erroneous or trivial complaints to be cast aside, so that the idea may be debated genuinely on the merits. This account is also intended to help advocates and policy analysts in other jurisdictions make a careful appraisal of the promise VIP may hold for them, as well as to influence the specific details of the pay at the pump plan being debated in California now.

ENDNOTES

1. Stephen D. Sugarman, *Nader's Failures?*, 80 CAL. L. REV. 289 (1992); Stephen D. Sugarman, *The Case for Pay-at-the-Pump Car Insurance*, SACRAMENTO BEE, June 9, 1991, Forum, at 1; Stephen D. Sugarman, *How To Slash Car Insurance Costs*, SACRAMENTO BEE, April 1, 1990, Forum, at 1; Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683, 711-13 (1990) [hereinafter *Proposition 103*]; Stephen D. Sugarman, *Foreword: Choosing Among Systems of Auto Insurance for Personal Injury*, 26 SAN DIEGO L. REV. 977, 988-92 (1989) [hereinafter *Foreword*].

2. Uninsured motorist protection provides benefits (up to the policy limit) equivalent to what the victim would have obtained from a motorist who negligently injured the victim had the injured been sufficiently insured. It is purchased to counter the maddening problem that so many motorists drive without carrying liability insurance (and would be unable to satisfy a judgment against them out of their own wealth). Medical payments coverage provides no-fault benefits to motorists (and often their passengers as well) for injuries suffered in motor vehicle accidents and usually has a low benefit ceiling; now that most people have health insurance it is not at all clear why more than a majority of motorists purchase medical payments coverage, but they do.

3. CAL. INS. CODE § 533 (West 1972).

4. CAL. CIV. CODE § 3294 (West Supp. 1993).

5. *See* the California Supreme Court's opinion in Taylor v. Superior Court, 598 P.2d 854 (Cal. 1979), under an earlier version of the law governing the availability of punitive damages, finding that drinking while knowing that you will later drive drunk may suffice to support the award of punitive damages. Taylor's result might well not apply under the current statute.

6. In 1990, the average weekly wage was $501. CALIFORNIA EMPLOYMENT DEVELOPMENT DEPARTMENT, AVERAGE ANNUAL PAY REPORT: CALENDAR YEAR 1990 9 (1991).

7. *See e.g.*, INSURANCE RESEARCH COUNCIL, CATASTROPHIC AUTO INJURIES: SURVEY OF AUTO INJURY CLAIMS WITH UNLIMITED NO-FAULT MEDICAL BENEFITS IN MICHIGAN, NEW JERSEY AND PENNSYLVANIA (1992).

8. MICH. COMP. LAWS § 500.3135 (1) (West 1991); *see also* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 176-78 (1989).

9. Accident Rehabilitation and Compensation Insurance Act 1992 (ARCIA); *see* Richard S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand's Accident Compensation Scheme*, 52 MD. L. REV. ___ (forthcoming 1993).

10. STEPHEN J. CARROLL, ET AL., RAND CORP. INSTITUTE FOR CIVIL JUSTICE, NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS, NO. R-4019-ICJ, 176 (1991). *See infra* note 49.

11. *See* LAW COMMISSION (NEW ZEALAND) REPORT NO. 4, PERSONAL INJURY: PREVENTION AND RECOVERY 20 (1988).

12. 42 U.S.C.A. § 402(e) (West 1991) (remarriage does not terminate benefits if the remarrying widow(er) remarries after reaching age 60).

13. California workers' compensation death benefit ranges from not more than $95,000 in the case of one or more partial dependents to $115,000 in the case of two or more total dependents. CAL. LAB. CODE § 4702 (West 1989 & Supp. 1993).

14. CAL. INS. CODE § 1861.02 (a)(1)-(3) (West Supp. 1993).

15. Mohamed M. El-Gasseir, State of California Energy Resources Conservation and Development Commission, *The Potential Benefits and Workability of Pay-as-You-Drive Automobile Insurance* (No. 89-CR-90) (June 8, 1990) at 16.

16. *Id.*

17. Interestingly enough, eight months after California adopted a significantly higher tax on cigarettes in November 1988, Nevada elected to match the tax rather than to try to take advantage of its proximity to Californians living at or visiting Lake Tahoe. Perhaps this would happen with VIP as well.

18. CAL. INS. CODE § 1861.025 (West Supp. 1993).

19. Sugarman, *Proposition 103, supra* note 1, at 703.

20. CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, TRAFFIC CONVICTION AND ACCIDENT-RECORD FACTS 2 (1990).

21. *See generally*, MARTIN FRIEDLAND ET AL., REGULATING TRAFFIC SAFETY 88-93 (1990).

22. *See e.g.*, Anne C. Roark, *High Costs Force Teen-age Drivers to Stay Off the Road*, L.A. TIMES, Sept. 8, 1992, at A1.

23. These eight regions were created by the Department of Insurance Statistical Analysis Bureau to simplify comparison of insurance rates within and between regions. Telephone Interview with Ben Gentile, Senior Insurance Rate Analyst *California Dep't. of Insurance* (Apr. 13, 1993).

24. *See* PUBLIC ADVOCATES INC., BROKEN PROMISES: THE THIRTY-THIRD INSURANCE COMMISSIONER'S RECORD ON RED-LINING AND MINORITIES (1990), filed in August 1990 with the Commissioner; Gary Williams, *"The Wrong Side of the Tracks": Territorial Rating and the Setting of Automobile Liability Insurance Rates in California*, 19 HAST. CONST. L. Q. 845, 868-71 (1992). For the California Department of Insurance regulations on rate setting, *see* Private Passenger Automobile Rating Factors, CAL. CODE REGS. tit. 10, Ch. 5, subch. 4.7 (*readopted* by emergency order Nov. 19, 1992).

25. It is not contemplated that being in an accident alone, or filing a VIP claim alone, would have any impact on the amount a person's VIP driving license charge. But, of course, as today, law enforcement officials called to the scene of accidents would issue citations in appropriate circumstances.

26. *See, e.g.*, JACK GILLIS, THE CAR BOOK 18 (1990); Sugarman, *Nader's Failures, supra* note 1 at 300-01.

27. *See* HIGHWAY LOSS DATA INSTITUTE, INJURY AND COLLISION LOSS EXPERIENCE: CARS BY MAKE AND MODEL (Sept. 1989) (pamphlet).

28. *See* Sugarman, *Nader's Failures?, supra* note 1, at 300.

29. LEONARD EVANS, TRAFFIC SAFETY AND THE DRIVER (1991); *see also* Sugarman, *Nader's Failures?, supra* note 1 at 300-01.

30. Perhaps the latter occurs because high performance vehicles tend to be heavier and are driven more carelessly. *See* EVANS, *supra* note 29, at 291; Sugarman, *Nader's Failures?, supra* note 1, at 301.

31. *See* HIGHWAY LOSS DATA INSTITUTE, *supra* note 27; Sugarman, *Nader's Failures?, supra* note 1, at 301.

32. Perhaps the VIP board should also be given the authority to vary somewhat the proportion of cars falling in each of the three (or four) charge categories.

33. CALIFORNIA DEP'T OF MOTOR VEHICLES, TOTAL VEHICLES CURRENTLY REGISTERED AS OF MAY 31, 1991. With respect to off-road vehicles for which gasoline is purchased, probably some sort of credit system would be put in place as already exists for gasoline tax today. *See* FEDERAL HIGHWAY ADMINISTRATION, U.S. DEP'T. OF TRANSPORTATION, HIGHWAY STATISTICS 1989, at 4.

34. For further discussion of this idea, *see* SUGARMAN, *supra* note 8, at 153-65.

35. *See e.g.*, S. James Press and Judith M. Tanur, *The Confluence of Sociology, Statistics, and Public Policy in the Quality Control of the Food Stamps, AFDC, and Medicaid Family Assistance Programs*, 15 EVALUATION REV. 315 (1991). George H. Cox et. al, *The Effectiveness of Home Visitation in Reducing AFDC Errors*, 60 SOC. SERV. REV. 603 (1986).

36. *Cf.* Crisci v. Security Insurance Co., 66 Cal 2d 425 (1967) (insurance carrier may be liable for failure to settle within policy limits).

37. ANDREW TOBIAS, AUTO INSURANCE ALERT (1993).

38. He spoke at the Berkeley Conference: Auto Insurance Reform and Ways for Paying for the Cost of Driving (Apr. 12, 1991).

39. *See e.g.*, Rick Kushman, *Car Insurance By the Gallon?* SACRAMENTO BEE, Jan. 25, 1993, at A1; Roy Estrada, *Pay-at-Pump No-Fault Insurance Plan Criticized*, L.A. TIMES, Mar. 16, 1993 (Financial Section); *Pay-at-the-Pump Auto Bill Proposed in California*, NATIONAL UNDERWRITER, Mar. 22, 1993 at 5.

40. *See* Bruce Poyer, *The Waste in Workers' Comp*, THE RECORDER, Mar. 20, 1992, at 8 (noting that private insurance carriers cover about 57% of the market, the state fund covers about 23% of the market, and large companies self insure about 20% of the market).

41. CAL. INS. CODE § 1861.02 (b) West (Supp. 1993).

42. For classic attacks on no-fault's assertion that motorists should pay for the costs of pedestrians, *see* Walter J. Blum and Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341, 357-59 (1973); WALTER J. BLUM & HARRY KALVEN JR., PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM 57-65 (1965).

43. Moreover, at least in principle, their own auto insurance should cost less because California coverage would no longer be required—although, as a practical matter, that probably would not happen. When nonresidents have an accident in California, VIP might seek to extract a payment from these people's insurers who also do business in California, but that might prove too complicated and undesirable on other grounds as well.

44. Roark, *supra* note 22, at A1; *see also* CALIFORNIA DEP'T. OF MOTOR VEHICLES, DRIVER LICENSES OUTSTANDING BY COUNTY (Mar. 1991).

45. CALIFORNIA DEP'T. OF MOTOR VEHICLES, *supra* note 33.

46. FEDERAL HIGHWAY ADMINISTRATION, *supra* note 33.

47. Telephone Interview with Ben Gentile, Senior Insurance Rate Analyst, *California Dep't. of Insurance* (Apr. 13, 1993). This total does not include the expenditures of self-insurers.

48. The financial estimates for VIP draw directly from data provided by RAND and relevant California state departments. Comforting, however, are broadly comparable figures provided by NICO in its estimated cost of Tobias' pay-at-the-pump plan that draw, in part, on auto insurer cost estimates for a pure no-fault scheme for the state of New Jersey. NATIONAL INSURANCE CONSUMER ORGANIZATION, TOWARD EXCELLENCE IN AUTOMOBILE INSURANCE: PAYING PREMIUM AT THE PUMP 5-9 and App. D. (*reprinting* figures developed by the American Insurance Association) (1991).

49. The conclusions provided in the text are based on these assumptions. According to the Carroll study, the present system costs insurers $7295 per victim, $6230 in benefits and $1065 administration. Victims keep not $6230 but only $4718, given their expenses. According to the special run by Carroll of his model simulating VIP, VIP would cost claims administrators $3485 in hard benefits plus $315 in expenses, for a total of $3800; it is assumed here that victims would keep $3400. To that $3400 would be added $1000 that victims would keep in pain and suffering benefits (making pain and suffering equal to about 25% of the benefits paid) and pain and suffering administrative costs on both sides totalling $300 (just a rough estimate) making total cost to claims administrators $5100 ($3400 in hard benefits, $85 in plaintiff's transaction costs, $315 in defendant's transaction costs, $1000 in pain and suffering take home, and $300 in pain and suffering administration) under VIP. This is just about 70 percent of the $7295 cost to them under the current system. The net in the pocket to victims of $4400 ($3400 plus $1000) amounts to more than 90% of $4718, the net to victims noted above. The $85 cost to victims under VIP without pain and suffering is based on Carroll's estimate for pure no-fault; the

$300 cost (to both sides) to administer the pain and suffering benefit is meant to be a conservative estimate. *See*, CARROLL, *supra* note 10 at 182; Letter from Stephen J. Carroll, *Rand Corp. Institute for Civil Justice*, to Stephen D. Sugarman, Professor, *Boalt Hall School of Law*, (Dec. 14, 1992) (on file with author).

50. STATISTICAL ANALYSIS BUREAU, CALIFORNIA DEP'T. OF INSURANCE. $12 BILLION FOR PRIVATE PASSENGER AUTO INSURANCE (Pamphlet distributed at Feb. 3, 1993 Senate Insurance Committee hearing)

51. El-Gasseir, *supra* note 15.

52. *See* STATISTICAL ANALYSIS BUREAU, CALIFORNIA DEP'T. OF INSURANCE, AUTOMOBILE PREMIUM SURVEY: CALIFORNIA, 1993 (1993).

53. Sugarman, *Proposition 103*, *supra* note 1, at 695-97.

54. *See*, STATISTICAL ANALYSIS BUREAU, *supra*, note 52, at iv. For example, in Northern California (Region H), which has the lowest average premium of all eight regions, a 30-year old male or female with no violations, who drives 12,000 annual miles, could expect to pay an average of $416 per year for a policy with the following limits (in thousands): Bodily Injury (BI): 15/30; Property Damage (PD): 5; Medical Payments: 2; Uninsured Motorist BI 15/30; and Uninsured Motorist PD: 3.5. *Id.*

55. The National Association of Insurance Commissioners estimates that, in 1991, California ranked 7th in the nation in average expenditures and combined premiums on private passenger automobile insurance. Telephone Interview with Mary Crystal, Western Insurance Information Service (Apr. 14, 1993); *See also* Daniel Akst, *Paying at the Pump Makes Sense*, L.A. TIMES, Apr. 6, 1993, at D1.

56. *See, e.g.*, Harvey Rosenfield, *Brazen Defiance of the People's Law: Insurers Derails Auto Insurance Rollbacks*, L.A. TIMES, Aug. 31, 1989, (Metro) at 7; Sugarman, *Proposition 103*, *supra* note 1, at 684-85.

57. *See* STATISTICAL ANALYSIS BUREAU, *supra* note 52, at i. The largest five firms have 63% of the market, the top 14 have about 80%.

58. *See* Sugarman, *Proposition 103*, *supra* note 1, at 691.

59. *See, e.g.*, John Garamendi, *Perspective on Insurance*, L.A. TIMES, Oct. 1, 1991, (Metro) at B7; Memorandum from Art Torres, Chairman, *California Senate Committee on Insurance, Claims and Corporations*, to Members of the Committee 1 (Feb. 1, 1993) (on file with author).

60. Interview with Akio Morishima, Professor of Law, Nagoya University, in Honolulu, Hawaii (at the International Workshop, Beyond Compensation: Dealing with Accidents in the 21st Century) (March 22-24, 1992).

61. Interview with Lewis Klar, Professor of Law, University of Alberta, in Honolulu, Hawaii (at the International Workshop, Beyond Compensation: Dealing with Accidents in the 21st Century) (March 22-24, 1992).

62. Jeffrey O'Connell, *No-Fault Auto Insurance: Back by Popular (Market) Demand?* 26 SAN DIEGO L. REV. 993, 1000 n. 18 (1989).

63. This is regularly confirmed by studies of the system. *See, e.g.*, Carroll, *supra* note 10, at 4; O'Connell, *supra* note 62, at 993; U.S. DEP'T. OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 94 (1971).

64. *See* U.S. DEP'T. OF TRANSPORTATION, COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 82-85 (1985); SUGARMAN, *supra* note 8, ch. 4.

65. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521, 1560 (1987).

66. *Id.*

67. *See, e.g.*, Rene Lynch at Gebe Martinez, *35 Arrested in Auto Fraud Scheme*, L.A. TIMES, Jan. 14, 1993, at A26.

68. *See, e.g.*, CAL. INS. CODE § 1871(b) (West Supp. 1993) (declaring the legislature's finding that "fraudulent activities account for 5 to 20 percent of all auto insurance payments.").

69. *See generally* MARC A. FRANKLIN AND ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 642-53 (4th ed. 1987); SUGARMAN, *supra* note 8, at 40; Jeffrey O'Connell, *Alternatives to the Tort System for Personal Injury*, 23 SAN DIEGO L. REV. 17, 20 (1986); Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1183-84 (1992).

70. *See* ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 51 (1989); *see also* SUGARMAN, *supra* note 8, at 38.

71. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8e (1987); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR-5-103(B) (1983); *But see* West's Ann. Cal. 23 pt. 2, Rule 4-210(A) (1988) (allowing attorneys to pay "personal or business expenses of a prospective or existing client . . . to third persons from funds collected or to be collected as a result of the representation).

72. *See*, E. ALLAN LIND ET AL., RAND CORP. INSTITUTE FOR CIVIL JUSTICE, THE PERCEPTION OF JUSTICE 79-80 (1989) (finding that litigants had a higher satisfaction with trials and lower satisfaction with settlements); DEBORAH R. HENSLER, RAND CORP. INSTITUTE FOR CIVIL JUSTICE, RESOLVING MASS TOXIC TORTS, 15-16 (1989) (finding that the traditional tort approach, in practice, falls far short of the goals ascribed to it in both routine and mass tort cases).

73. *See generally*, FRIEDLAND ET AL., *supra* note 21, at 65-75.

74. This is El Gasseir's proposal and has received some cautious support from spokesmen for the trial lawyers, who make it clear that this is not the same as endorsing fuel charges to fund no-fault or VIP.

75. *See* CARROLL, *supra* note 10, at 24. RAND's findings indicate that nationally, the proportion of injured people who suffer some economic loss but receive no compensation at all is roughly the same under its hypothetical no-fault plan (13%) as under the traditional system that combines tort with medical payments and uninsured motorist coverage (12%). *Id.* The RAND no-fault

simulation for California projects that 17% of people suffering some loss would not be compensated at all. *Id.* at 195.

76. Even in New York, with a high verbal threshold before a tort suit may be brought and generous no-fault benefits, the redlining liability insurance motorists must buy still costs more than what they pay for no-fault. *See* O'Connell, *supra* note 62, at 997-98; U.S. DEP'T. OF TRANSPORTATION, *supra* note 64, at 70.

77. Automobile Insurance Act, QUE. REV. STAT. Ch. A-25 (1977), *as amended. See also* Rose Anne Devlin, *Some Welfare Implications of No-Fault Automobile Insurance*, 10 INT'L. REV. OF L. & ECON. 193 (1990).

78. Sugarman, *Nader's Failures?, supra* note 1, at 304-05.

79. NATIONAL INSURANCE CONSUMER ORGANIZATION, *supra* note 48.

80. CAL. CONST. art. XIX, § 1. *See* Akst, *supra* note 55, at D3. The Torres pay at the pump bill (S.B. 684) assumes the need for constitutional change. The constitutional question is not addressed here.

81. As of March 25, 1993, five large companies and four smaller ones had paid 2.3 million policy holders a total of $518 million in rebates and credited dividends. Mark Glover, *CSAA Agrees to Prop. 103 Rebates*, SACRAMENTO BEE, Mar. 25, 1993, at F1. In the wake of a February 26, 1993 Los Angeles Superior Court ruling striking down the Department of Insurance regulations that limited insurers to an across the board 10 percent maximum rate of return, large-scale rebates are likely to be further delayed. Insurance Commissioner Garamendi has vowed to appeal the ruling. *See* Thomas S. Mulligan, *Judge Rejects Garamendi's Regulations for Prop. 103*, L.A. TIMES, Feb. 27, 1993, at A1. The California Supreme Court has already agreed to hear two related appeals brought by several large insurance companies. *Court to Review Prop. 103*, SACRAMENTO BEE, Mar. 26, 1993, at G1.

82. Nexis alone lists 122 stories on pay at the pump from Jan. 25, 1993 to Apr. 10, 1993.

83. *See* Sugarman, *Foreword, supra* note 1, at 979.

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