

The Uninsured Motorist Puzzle

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ABSTRACT

The United States is thought to have a serious uninsured motorist problem, with the national average rate estimated at 17% and ranging up to nearly double that in some states. State governments are now attacking the issue with ever-stronger measures designed to bludgeon the uninsured into either buying auto insurance or getting off the road. Yet, it is by no means clear that this approach is effective, fair, or efficient. There are more promising solutions available - including a liberal approach to "no pay, no play" - that are readily understood once the nature of the problem is re-examined.

1. Is there an uninsured motorist problem?

1.1 Many motorists are driving around without liability insurance. Although highly accurate figures are unavailable, studies suggest that about one in six U.S. drivers is uninsured, with rates varying from about 5% in North Carolina to more than 25% in California and New Mexico. In some neighborhoods the uninsured rate rises above two out of three.

1.2 Forty-three states currently have compulsory liability insurance laws. It is illegal to drive in those jurisdictions without the statutory-minimum level of insurance to cover you if you carelessly injure someone with your vehicle. This means there is an enormous amount of law breaking occurring.

1.3 But these facts alone tell us little about what the underlying problem is.

1.4 For conservatives, identifying the problem has been easy. Millions of Americans are taking their cars out on to the road, knowing that they could well carelessly hurt someone, but with no feasible means of taking responsibility for the harm they might do in the context of a legal system that holds negligent drivers liable for the injuries they cause. Liability insurance could make them financially responsible drivers, and yet they don't buy it. For conservatives, this failure is a morally irresponsible act.

1.5 For liberals, however, the issue has been more complicated. On the one hand, liberals generally support the idea that accident victims should be compensated for their losses, and if people drive uninsured, then other drivers, pedestrians and passengers risk going uncompensated. That is bad. On the other hand, many of the uninsured are low income people, who may have pared down to the minimum the kind of car they have and the driving they do and they still can't afford liability insurance. For them, it is a tough choice between going without a car and driving uninsured.

1.6 In some countries, the poor can go without a car because a strong public transportation system is available. But in the U.S., to be without a car may well be to go without a job, and, in any event, it can be an enormous burden. Liberals are reluctant to say it is wrong to drive uninsured in such circumstances, perhaps turning the blame on other institutional forces, like the public transport system for its failures, or the economic system for its failure to provide enough good-paying jobs that would allow people to afford automobile insurance.

1.7 If the uninsured drove extra-carefully, so as to avoid being in accidents, then their failure to have insurance wouldn't really matter in the end. But, that is not the case. To the contrary, uninsured motorists are more likely to cause accidents than insured drivers.

1.8 Worse, studies show that the uninsured drivers are by no means all desperately poor. Non-compliance by the non-poor is also fairly widespread. Apparently, many people have simply concluded that liability insurance is something they'd just prefer not to spend their money on, and if they can get away without buying it, they will.

1.9 Furthermore, when the uninsured do injure others few suffer financial consequences. To be sure, some are able to, and do, compensate their victims directly from their own earnings and savings. But this is often implausible, especially if the victim's injury is at all serious. Besides, the uninsured may well simply resist paying once they realize that, as a practical matter, they are judgment proof. Few Americans have assets worth talking about that cannot be shielded in bankruptcy (if it were to come to that). Hence, victims soon realize that going after the uninsured with a lawsuit is likely to be fruitless. In theory, the victim might obtain a judgment against the wrongdoer and collect over time by attaching the wrongdoer's wages. But in practice, lawyers aren't much interested in bringing cases where the prospect of actually obtaining recovery is so uncertain; if nothing else, they like getting all of their fee at once. The upshot is that the uninsured are likely to walk away from the experience by, in effect, thumbing their noses at the civil justice system.

1.10 From a selfish and cynical perspective, the uninsured might tell themselves that since it is only the civil justice system that they are sneering at, that's not so bad. Other people seem to avoid paying up what the law technically requires. Why not them? At the least, advocates for the poor may understandably object to the regressive nature of the current legal system, which awards far more money to higher earners than to low earners when they suffer the same physical injury.

1.11 Yet, being injured by an uninsured motorist is generally exasperating to the victim who is often completely innocent. But, isn't only the victims who object. Financial irresponsibility on the part of careless drivers generally riles up responsible motorists who have bothered to purchase insurance.

2. Conservative solutions

2.1 The conservative solution has generally been to try to force the uninsured either to pay up or to get off the road. Making the purchase of liability insurance a criminal offense began in Massachusetts in 1927 and by now most states have such a rule. (Nearly all of the remaining states have the somewhat weaker rule that if you are in an accident, then at that time you have must demonstrate your financial responsibility, usually by having insurance in force, in order to keep your driving license.)

2.2 Yet, as the ranks of the uninsured persist, and even grow, the political reaction has been to deploy ever stronger penalties, as well as ever more sophisticated enforcement mechanisms. If merely making it a criminal offense doesn't work, then impose a much larger fine. (California recently raised the penalty on first offenders to more than \$1,200.) Suspend people's driving licenses; suspend their car registrations; confiscate their license plates; impound their vehicles.

2.3 On the administrative side, the police are involved in several ways. In some places, when they stop people for routine traffic offenses, they demand proof of insurance. In some places, people are stopped at police roadblocks set up solely for the purpose of determining whether motorists are insured. The state agency that registers cars and licenses vehicles (of ten called "DMV") is brought into it; car

owners may be prevented from re-registering their cars until they provide proof that they have insurance. These enforcement mechanisms require the cooperation of the insurance companies, if nothing else by making them issue documents that motorists can show to the cops or the DMV.

2.4 There are limits to the effectiveness of these strategies. Some will simply drive without valid driving licenses and without registering their cars. That evasive behavior not only frustrates the compulsory insurance law but also costs the state the new revenue that would come from registrations. To help with their evasion, the uninsured may obtain forged registration stickers and forged evidence of insurance, or even fake license plates.

2.5 Some motorists will purchase insurance, only to cancel it immediately after obtaining proof of coverage and getting their cars re-registered. In response to that gambit, states may force insurers to notify the DMV if anyone cancels their insurance. The latest rage is using electronic data tapes to do the matching of which cars are currently insured with which are currently registered. But these tapes often contain many errors, and thus mistakenly catch the law-abiding in their net. This makes people mad and, undesirably, turns public opinion against the DMV. Besides, these tapes are useless against those who are both unregistered and uninsured.

2.6 Some may find it odd that conservatives, who often complain that government doesn't work, are so eager to have more government as the solution here. Yet, perhaps this isn't surprising when we think about the conservative attitude toward illegal drugs. When the "war on drugs" seems to be failing, their solution is to increase the army and send dealers to jail for ever longer terms.

2.7 Maybe it would be more effective to privatize this problem, something conservatives are fond of in other areas. Perhaps the private sector could better develop a "paid-up-insurance" sticker that was not easily forged and that you had to have on display on your windshield if you wanted to park your car in a public place.

In fact, some states are already moving in this direction. In Florida, for example, private bounty hunters are authorized to seize the license plates of certain of the uninsured.

3. Liberal solutions

3.1 Liberals might agree that it is fair to ask everyone to buy liability insurance if it cost a lot less. But now the costs seem amazingly high to many of the uninsured. In Los Angeles, for example, many people are looking at annual premiums ranging from \$1500-\$4000 a year for the minimum liability insurance alone.

3.2 The U.S. is a wealthy country, and our civil justice system awards very generous benefits. Liberals tend to applaud this. Liberal juries, who somehow seem to think they are just sticking it to insurance companies and not themselves, may award victims lavish sums. Liberal trial lawyers use their talents to ever increase the amount paid out to victims through the civil justice system.

3.3 If Americans restricted the generosity of our legal system, we would bring the price of auto insurance down. Suppose, for example, we limited pain and suffering awards -- say, by requiring a serious injury before you could collect for non-economic loss and by limiting the amount of pain and suffering damages you could recover in serious injury cases. This would make auto insurance much more affordable. Moreover, reducing the existing lure of generous and open-ended pain and suffering damages would also reduce various kinds of fraudulent claims that now plague our system, and that would bring insurance costs down further.

3.4 Although a few states have made some changes along these lines, the traditional rules are strongly defended by the very liberals who complain that auto insurance is too expensive for poor people.

3.5 Some liberals think we could make automobile liability insurance much cheaper simply by ordering the insurers to sharply reduce their prices. That was the theory behind California's Proposition 103 adopted by the voters in 1988. These critics operate on the belief that auto insurers are a cartel and collude to overcharge consumers. Most economists, as well as the insurance companies of course, reject this as fantasy. My judgment is that, although automobile insurers make reasonable rates of return, it is implausible to expect large reductions in auto premiums unless insurers' costs are also brought down. After all, there are many companies selling automobile insurance in most states, some of whom regularly advertise to consumers on the basis of price. Perhaps a few small companies get away with price gouging (through a combination of their marketing methods and consumer ignorance), but it is hard to see how the major companies could do this.

3.6 We might decide to help out the poor by providing them with so-called "lifeline" auto insurance rates. This would be analogous to lifeline phone, gas and electric rates that are now widely offered to the poor, and these lifeline auto rates would be similarly subsidized. But, of course, somebody has to provide that subsidy, and chances are it would be the already-insured. That prospect seems to make this approach politically unlikely.

3.7 Besides, even if much cheaper liability insurance were available, although this would seem to take away much of the liberal objection to the compulsory insurance laws, it remains quite unclear whether the poor would willingly buy insurance in significantly larger numbers. If you are poor and truly judgment proof, you will have to have a strong sense of moral responsibility before you voluntarily spend even \$300 year that might otherwise go toward putting food on the table.

4. "No pay, no play"-- liberal and conservative approaches

4.1 "No pay, no play" is a new idea for dealing with the uninsured motorist: if you don't have the insurance you are meant to have (i.e., "no pay"), then, if you are injured in an accident, your rights to sue are restricted (i.e., "no play"). "No pay, no play" has primarily been pushed as a matter of fairness, with the norm of reciprocity its central tenant. The basic idea is that the group that goes out onto the highways without paying into the liability insurance system ought not to be able to draw benefits from the system in the same way that those who comply with the law are able to.

4.2 Some hope that "no pay, no play" will entice more people to buy insurance. This is probably a faint hope. An even fainter hope is that some uninsured people would stop driving in the face of this added risk.

4.3 A few states have already embraced "no pay, no play." Pursuant to an initiative passed by California voters in 1996 (Proposition 213), the uninsured are unable to sue for damages for pain and suffering. The Michigan variant only imposes that penalty on the uninsured who are also primarily at fault in causing the accident. The Louisiana alternative imposes on uninsured victims the obligation to bear the first \$10,000 of their bodily injury losses and the first \$10,000 of their property damages.

4.4 "No pay, no play" has its conservative and liberal versions. Under the conservative approach, this reform is just another penalty. Not only are you subject to the existing penalties of the compulsory insurance law, but in addition your rights to sue are restricted.

4.5 The liberal version of "no pay, no play" is identified with Virginia Law Professor Jeffrey O'Connell, one of the architects of auto "no-fault" insurance. This version substitutes "no pay, no play" for compulsory insurance. You have a choice. You may buy liability insurance, and then if you are injured you may exercise all of your conventional legal rights. Or you may elect not to insure, and in return you can't sue others for pain and suffering. (O'Connell believes that, where the fault system is in

place, it would be too harsh to deny the uninsured their legal right to sue for wage losses, medical expenses and the like. Others might see this differently.)

4.6 As compared with the current system, the liberal approach to "no pay, no play" reduces the number of criminals in the state by a huge number. It allows the uninsured to stop feeling that they are always at risk of getting a ticket, followed by a fine, suspension of the right to drive, or even jail time. Yet, so far, each of the states that has acted has followed the conservative approach.

5. Rethinking the problem - "no pay, no play" and uninsured motorist insurance

5.1 The uninsured motorist problem looks much more like a problem of the redistribution of income once "uninsured motorist insurance" is taken into account.

5.2 It turns out that in states where traditional tort law applies, if you don't like the fact that you might be negligently injured by an uninsured motorist and thereby have no legal remedy, you can buy your own insurance ("uninsured motorist insurance") to protect against that very risk. Indeed many states require you to buy it, and several others make it cumbersome for you not to do so.

5.3 Therefore, to the extent that responsible motorists who buy liability insurance also buy uninsured motorist coverage, their real complaint comes down to the cost of insurance. It is not that they are left in the lurch when they are injured. Rather it is that they are paying for additional insurance that they think uninsured wrongdoers should pay for.

5.4 "No pay, no play" responds to this concern in a cunning way. Under "no pay, no play," those who buy insurance should see their liability insurance premiums lowered. That is, because the uninsured as a group won't be able to sue them for pain and suffering, the cost of that insurance will be less.

5.5 If this reduction in liability insurance costs roughly offsets the uninsured motorist premiums that the insured pay, maybe it all balances out reasonably well. Encouragingly from this perspective, RAND Corporation estimates for California suggest that "no pay, no play" ought to reduce liability insurance premiums by about 10% on average (overall premiums by an average of about 5%). It turns out that uninsured motorist insurance in California also now typically costs in the neighborhood of 10-15% of the cost of liability insurance. So we are talking about offsetting sums that are in the ballpark of each other.

5.6 This means that the liberal version of "no pay, no play" may indeed give conservatives more or less what they are ultimately complaining about.

5.7 Why, then, have California, Michigan and Louisiana enacted the conservative, not the liberal, version of "no pay, no play"? This is especially puzzling because some conservatives have long concluded that the game of requiring liability insurance just isn't worth the candle. They acknowledge that enforcement is costly and not fully effective. The liberal version of "no pay, no play" avoids those costs and abandons that failure.

5.8 Some might assume that the insurance industry stands in the way of the repeal of compulsory insurance laws. Although one might think that insurers would relish a law mandating that they get more business, this is not the case. They are not eager to have customers who don't want to be their customers. Moreover, they realize that the uninsured tend to be more dangerous drivers, and they believe that compulsory insurance laws wind up being combined with additional provisions that both require them to take all applicants and hold down the premiums they can charge the formerly

uninsured. Hence, most companies find it in their selfish interest to take the high ground that the public should have a choice whether or not to buy their product. In effect, they have for some time been content to have the insured motorists just suffer the uninsured motorist insurance premiums and be done with. The liberal form of "no pay, no play" now brings the added advantage of reducing that excess financial burden on the insured while providing a moral sop to those who are generally angry at the uninsured.

5.9 Nor do the "trial lawyers" seem to stand in the way of rolling back the compulsory insurance laws. They, of course, want there to be as much insurance coverage as possible. So, if compulsory insurance laws really made a large impact on the amount of insurance in force, they would probably support them. But as the penalties for non-compliance rise, they face pressure from liberal friends of the poor who find those penalties both ineffective and draconian. Hence, repeal of compulsory insurance probably would not be a big loss for the trial lawyers, assuming it didn't lead to a sharp increase in the uninsured. Of course, the trial lawyers strongly oppose "no pay, no play" in any form. But if it is going to be adopted in one form or another, they don't appear to be strong supporters of the conservative version.

5.10 The big problem, it seems, is the general motoring public. As noted already, the public is angry at uninsured motorists and is eager to penalize them. No sufficiently prominent political leader has come forward to lead a coalition from all sides in support of the liberal version of "no pay, no play" as a reasonable compromise. Without that, the point of least resistance currently appears to be the adoption of the conservative version.

5.11 Of course, friends of the poor would prefer, if given the choice, the simple elimination of compulsory insurance laws to their replacement with "no pay, no play." But, even with the trial lawyers' support, given the voting public's attitude about this issue, merely repealing compulsory insurance while keeping the uninsured's right to sue intact is an unlikely solution. Faced with a choice between the liberal version of "no pay, no play" and an ever-tougher compulsory insurance scheme, friends of the poor might well prefer the former.

5.12 The foregoing analysis suggests to me that, if people better understood the uninsured motorist problem, the liberal version of "no pay, no play" might well command widespread support as an improvement on the tough compulsory insurance programs now in vogue.

5.13 Still, if O'Connell's "no pay, no play" plan is enacted and two uninsured motorists are in an accident and both are injured, neither would be compensated. This result, of course, is the same today without "no pay, no play." How should we feel about that outcome? Is this poetic justice? Is it a serious problem of under-compensation of needy victims? Or is the main concern that these victims will impose these costs on the public through other compensation schemes, like health insurance? This example suggests that we should canvas other approaches to the uninsured motorist problem beyond "no pay, no play."

6. Other solutions

6.1 Consider first, comprehensive automobile no-fault insurance. Although no American state has adopted this solution, it has been in effect in Quebec for more than 20 years and has recently been enacted in two other Canadian provinces. Under comprehensive no-fault, people are told to buy their own insurance to cover their own injuries. If you hurt me in an accident, it doesn't matter whether you are insured or whether you were at fault. I can't sue you anyway. I claim from my own insurance company.

6.2 Hence, under comprehensive no-fault, it is not morally irresponsible to fail to carry insurance that would compensate your victim. In that regime, if you are an uninsured motorist, it's your own problem. In other words, "no pay, no play" is inherent in comprehensive auto no-fault for those who fail to purchase it.

6.3 Moreover, no-fault insurance can be much cheaper than existing liability insurance, assuming it pays little or no benefits for pain and suffering. Hence, many more people could afford insurance, thereby closing the compensation gap. Although the American experience is that many people don't buy no-fault insurance either, one reason is that no state has adopted truly comprehensive no-fault, and hence the minimum required policy is a package of both no-fault and liability insurance, and that makes the insurance much more expensive. In Quebec, by contrast, where no-fault is comprehensive and insurance is cheap, there does not seem to be a serious uninsured motorist problem.

6.4 Yet, if nothing else, the political power of the plaintiffs' personal injury bar currently prevents adoption of comprehensive auto no-fault in the U.S.

6.5 A different scheme that would "solve" the uninsured motorist problem usually goes by the name "pay at the pump." Simply put, in the version that Andrew Tobias and I have been proposing, a comprehensive no-fault plan would be funded by gasoline surcharges. Others have proposed "pay at the pump" to fund the current liability system (more on this below). Either way, since everyone who drives buys gas, then everyone will pay in to the system and everyone will be covered.

6.6 But for now at least, even putting aside the trial lawyers' opposition to the no-fault version of "pay at the pump," the "highway lobby" stands firmly in the way of an approach that would substantially boost gasoline prices and hence reduce the amount of driving people do.

6.7 An even more wide-ranging solution to the problem of compensating auto accident victims would be a national health insurance scheme and a better social security safety net for wage loss. But at a time when welfare is being cut and Social

Security is under fire, and when President Clinton failed miserably in his effort to have a national health scheme enacted, the current prospects for these reforms are also slight.

7. Further rethinking -- the uninsured and the under-insured

7.1 The focus so far has been on the uninsured motorist, but this ignores a related problem -- the under-insured motorist. In the U.S. even when liability insurance is compulsory, little is required -- typically from \$10,000 to \$25,000 per victim. The upshot is that most drivers buy \$50,000 or less.

7.2 This means that, despite the theoretical availability of very generous damage awards, the great majority of people who are seriously injured in auto accidents go vastly under-compensated. Most of the time, the at-fault driver is either uninsured or under-insured; \$50,000 is gone in a flash if the injury is serious.

7.3 Perhaps we have imposed compulsory insurance at the wrong end. For most victims, \$10,000 of economic loss is bad but not devastating, especially because most will have other insurance sources to cover at least part of that loss. But that is what most of our insurance system is aimed at. By contrast, the catastrophic injury can wipe out nearly anyone, but nowhere do we insist on coverage of that for which insurance is really needed. Perhaps we'd be wiser to require motorists to insure, not for small injuries, but for losses of more than \$50,000 (perhaps up to \$1 million).

7.4. You might think that the problem of under-insurance can be handled by people buying under-insured motorist coverage, which many people do buy (indeed many policies simultaneously cover both the uninsured and under-insured). But the reality is

the most people buy uninsured and under-insured motorist insurance at too low levels -- again typically \$50,000 or less.

7.5. Most American no-fault laws have this same deficiency. They only cover the small injuries, thereby providing little protection for the seriously injured. Quebec, by contrast, covers all medical expenses and life-long wage losses, albeit limited to a monthly maximum equal to approximately twice the average wage.

8. A modest proposal

8.1 In view of the under-insured motorist problem just discussed, I want to offer a new proposal for consideration. It assumes that, at least for now, fault-based tort law will be the underlying regime. It draws on a combination of "no pay, no play," "pay at the pump," and threshold-based recovery for pain and suffering damages (of the sort imposed by auto no-fault laws in Michigan and New York).

8.2 The proposal contains three key elements.

8.2.1 Through "pay at the pump" provide all motorists with liability insurance covering economic loss in case they negligently injure someone seriously (up to, say, \$500,000 or \$1 million).

8.2.2 Impose a threshold in tort law for the recovery of pain and suffering damages, by requiring serious injury, and thereby denying pain and suffering recovery in most cases.

8.2.3 Give motorists O'Connell's liberal "no pay no play" option.

8.3 Under this proposal liability insurance for bodily injury would cover two kinds of losses: (a) the victim's economic loss for non-serious injuries (i.e., before the "pay at the pump" part of the coverage comes into play); and (b) the victim's pain and suffering when the injury is serious (i.e., above the tort threshold).

8.4 People who buy liability insurance could sue and be sued for the same damages for which they provide insurance. Under the "no pay, no play" feature, people who do not buy liability insurance could not sue for (b) - their pain and suffering in serious injury cases, but they could sue for (a) - their economic losses in non-serious injury cases. Everyone could sue for economic losses in serious injury cases, and that insurance coverage would be funded via "pay at the pump."

8.5 Insured motorists could also by uninsured motorist insurance to cover both (a) - their economic losses in non-serious injury cases - and (b) - their pain and suffering in serious injury cases. In practice, many may forego (a) coverage because they have other sources of compensation that would reasonably adequately cover those losses in any event.

8.6 Trial lawyers who handle the routine auto injury cases would strongly oppose the elimination of pain and suffering awards in non-serious injury cases. But the trial bar could be divided because those lawyers who handle the serious injury cases would welcome the big increase in insurance coverage (both through "pay at the pump" for

economic losses and though individually-purchased liability insurance for pain and suffering).

8.7. Insurers ought to like both the "no pay, no play" feature (combined with the elimination of compulsory insurance) and the elimination of everyone's right to sue for pain and suffering in non-serious injury cases. If they could administer the "pay at the pump" part of the scheme and were assured reasonable funds to do so, they ought to be content with that as well. Overall, the package should be attractive to them.

8.8 What about consumers? I believe that informed consumers who buy liability insurance would be willing to give up their right to pain and suffering awards in non-serious injury cases because of what they get in return: assured coverage of economic loss when they are negligently injured in a serious way plus a greater likelihood that the party injuring them will have insurance that covers pain and suffering in serious injury cases.

8.9 Of course, insurance-buying consumers will care about the impact of this plan on their insurance rates. But I believe that the combination of what they would pay at the pump plus what they would pay for bodily injury insurance under this plan ought to cost no more than (and perhaps less than) what they pay for bodily injury insurance now.

8.10 Advocates for the poor will have to accept the modestly higher gasoline prices brought about through the pay at the pump feature. Yet, in return, their constituents will escape from the burdens of today's compulsory insurance penalties. Moreover, those who don't buy insurance will still be able to sue for economic loss if they are negligently injured, including cases in which that injury is serious (a substantial improvement over the current regime).

8.11 The highway lobby will still oppose the "pay at the pump" feature, but since it will fund but a portion of the plan, this lobby might be defeated if consumers and insurers lined up behind it.

8.12 This proposal is not my most preferred solution to the auto insurance situation, because it keeps the fault system intact. But, on that assumption, I believe that informed motorists would broadly conclude that they are better off ex ante. Ex post, although a lot of recovery would be foregone that is now won for pain and suffering in non-serious injury cases, I believe that victims as a group would agree that off-setting gains in the serious injury cases are greater. My hope is to see both this proposal and the liberal version of "no pay, no play" more widely discussed.