

# Foreword: Choosing Among Systems of Auto Insurance for Personal Injury

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## I. BACKGROUND

In 1965 Jeffrey O'Connell and Robert Keeton published *Basic Protection for the Traffic Victim*. They were hardly the first to advocate what has become known as "no-fault" auto insurance. Yet their book played a critical role in launching a movement which, during the decade that followed, saw about half of the states adopt some sort of no-fault plan.

The auto no-fault movement of the 1960s and 1970s failed in two important respects, however. First, its political momentum was spent before the other half of the states fell in line. After ten years of feverish activity, there followed an equal period of legislative indifference to the issue. Second, most of the states adopted no-fault auto insurance schemes that are far from ideal in the view of no-fault's keenest boosters.<sup>1</sup> In all too many places, no-fault benefits are meager in amount, and worse, hardly any tort law has actually been displaced. As a consequence, the cost of auto insurance coverage pertaining to bodily injury is actually higher in several no-fault states than it would have been under the fault system—a result sharply at odds with what no-fault promoters promised. In addition, since no United States jurisdiction has fully replaced tort with no-fault, many observers believe that first party benefits actually promote litigation; that is, the availability of a no-fault award now enables claimants to resist an early and low settlement with their injurer's insurance company.

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1. See generally U.S. DEP'T OF TRANSPORTATION, COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES (1985).

At the same time, no-fault advocates consider the plan a very considerable success in the two states—New York and Michigan—which have gone furthest with the idea. In those states, auto accident victims are assured reasonably generous and promptly paid benefits to replace their economic losses without the need to prove or disprove fault. At the same time, both states use high “verbal” thresholds to screen from the tort system claims for pain and suffering by those who have not incurred serious injuries.<sup>2</sup> As a result, in both places the number of personal injury claims for auto accidents has been drastically reduced, more auto accident victims obtain recovery than under the old system, and auto insurance rates with respect to bodily injury are lower than they would have been under the fault system. In short, in New York and Michigan, no-fault has worked as its supporters promised, squeezing out of the system legal costs and noneconomic loss awards in nonserious injury cases and redirecting that money both to a wider group of victims and back into the pockets of motorists generally.

In the face of this experience, one might expect fans of no-fault to redouble their efforts to get existing no-fault states to switch to—and other states to adopt—plans patterned after New York and Michigan. (Michigan’s is more generous in its unlimited coverage of medical expenses, and Michigan’s, uniquely, covers property damage as well.) Some people have indeed adopted that strategy. As William George explains in his article that follows, California Assemblyman Patrick Johnston, chair of the Assembly Finance and Insurance Committee, with the support of Consumers Union, carried (unsuccessfully) a New York style bill during the 1989 legislative session.<sup>3</sup> So, too, Professor Joseph Little’s article in this issue calls for what he labels “more aggressive no-fault”—which is largely the New York plan.<sup>4</sup>

Professor O’Connell, however, is now promoting a different strategy—the idea of “choice,” which is explained below. His shift in approach can be explained in several ways. First, O’Connell is probably pessimistic about the political prospects of a new effort to achieve mandatory and expansive no-fault.<sup>5</sup> Second, he is clearly somewhat disheartened by the litigation-promoting propensity of the

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2. For example, Michigan requires “death, serious impairment of a body function, or permanent serious disfigurement.” *Id.* at 34.

3. See George, *Whither No-Fault in California: Is There Salvation After Proposition 103?*, 26 SAN DIEGO L. REV. 1065, 1077 (1989). As George explains, later in the session, Johnston scaled his proposal way back in hopes that its lower price tag for the motorist would attract greater political support. *Id.* at 1079.

4. Little, *Reducing Noneconomic Damages by Trick*, 26 SAN DIEGO L. REV. 1017, 1024 (1989).

5. George documents California’s history of political failure to adopt no-fault through both legislative and initiative processes. *George, supra* note 3, at 1067.

typical combined fault and no-fault systems adopted by most states. Finally, given the current wave of public unrest over auto insurance rates, he is understandably eager to offer an alternative that promises to achieve a sharp reduction in responsible people's auto insurance costs even beyond what New York has accomplished with its version of no-fault.

In 1986, O'Connell and Robert Joost advanced an extremely creative proposal in an article titled "Giving Motorists a Choice Between Fault and No-Fault Insurance."<sup>6</sup> Simply put, motorists would be allowed to make an election that would free them from tort liability for auto accidents, on the condition that, in return, they give up their own right to sue in tort for auto accidents. In the O'Connell and Joost plan, those making the election would not buy auto liability insurance, but instead would purchase first party protection (*i.e.*, no-fault). If this choice were fairly priced, O'Connell and Joost believe that motorists would be able to buy very generous no-fault protection (broadly covering economic losses but not pain and suffering) for considerably less than they now pay for an equivalent amount of liability insurance.

In their proposal, O'Connell and Joost clearly stood behind the right of individuals to choose. They also argued that the ability of people to choose the tort option would help force the no-fault insurers to run a fair and efficient system. Yet it should be clear that they confidently believed that well-informed individuals facing the choice would overwhelmingly elect the no-fault option. Not only would it be cheaper, but, by O'Connell and Joost's lights, it would be better.

The genius of the idea from a political perspective is that the powerful opposition of the plaintiffs' bar to no-fault might be an end run in the quiet of the insurance agent's office. That is, if politicians who caved in to the trial lawyers' arguments against mandatory no-fault could give the choice instead to consumers, we might achieve a far-reaching no-fault plan through the accumulation of individual decisions made outside the state legislature.

In the reasonably short time since the "choice" idea has been launched, it has received considerable attention, both favorable and not, and versions of the plan have been introduced in several state legislatures. Now O'Connell and Joost are back in this Symposium, separately this time, responding to some critics, providing new data,

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6. O'Connell & Joost, *Giving Motorists A Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986).

filling in some details, and offering some possible modifications that might make the "choice" idea more attractive in some quarters.<sup>7</sup>

On the last point they are joined in this Symposium by Professor Craig Brown, a protégé and sometime co-author of O'Connell, who argues that we might possibly be politically wiser to put people to a choice *after* the accident rather than when they initially buy insurance.<sup>8</sup> Although I find Brown's proposal conceptually very different from the O'Connell and Joost plan, it might function in a reasonably similar way—with most people choosing no-fault, but this time after they are injured. Interestingly, Brown's scheme is broadly modeled after tort reform proposals that O'Connell has been promoting for some time in the nonauto area.<sup>9</sup>

The enthusiasm of O'Connell, Joost, and Brown for some kind of choice mechanism that might move the auto accident problem largely into a no-fault mode is met in this Symposium by strongly put objections from Professor Jack Carr<sup>10</sup> and Professor Joseph Little, who offer rather different (although partially overlapping) criticisms.

## II. A FEW KEY ISSUES

Both Little and Carr strongly protest, on moral grounds, the whole idea that people should be permitted to make a choice that frees them from liability for negligently injuring innocent victims. As Carr puts it, making a choice that functions to deprive others of their rights is not, as O'Connell and Joost originally argued by way of analogy, the same as choosing to drive a car with a manual instead of an automatic transmission. But this objection seems far too sweep-

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7. O'Connell, *No-Fault Auto Insurance: Back By Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993 (1989); Joost, *Choosing the Best Auto Insurance Choice System*, 26 SAN DIEGO L. REV. 1033 (1989).

8. Brown, *A Choice of Choice: Adding Postaccident Choice to the Menu of No-Fault Models*, 26 SAN DIEGO L. REV. 1095 (1989).

9. See, e.g., O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898 (1985).

In O'Connell's other proposals there is a risk that many of those with strong tort claims will not opt for the no-fault alternative, thereby threatening to make the plan more, rather than less, expensive than the system it replaces. Brown would deal with this problem by changing the damages rules for those who go the tort route. Most importantly, by imposing a substantial threshold on recovery for pain and suffering, the bulk of victims, even with strong tort claims, would not find it beneficial to pursue those claims. Brown, *supra* note 8, at 1097.

What is a little awkward about Brown's proposal, however, is that by claiming no-fault benefits on your own policy, you are thereby barred from suing your injurer. To many, it will seem quite wrong that by choosing to obtain benefits you have paid for, you forfeit your right to claim against another. In the O'Connell proposals, by contrast, the injurer provides the no-fault benefits that you take in lieu of your right to sue.

10. Carr, *Giving Motorists a Choice Between Fault and No-Fault Insurance: An Economic Critique*, 26 SAN DIEGO L. REV. 1087 (1989).

ing. Consider the example of two people who go on a white water rafting adventure and who mutually and voluntarily agree in advance that neither will be able to sue if either were accidentally to injure the other. Or imagine a group of friends making such a deal before engaging in some recreational activity together, such as playing touch football. Expanding these analogies, it does not seem morally wrong to me that, even though they do not personally know each other, all of those who would elect to be in the auto no-fault system would be mutually barred from suing each other, assuming it were well understood in advance that this is part of the deal.

The tougher problem arises when *X* elects to be free from lawsuits and then negligently injures *Y* who has made no such election. Viewed in isolation, this seems no more just than, as Carr analogizes, to allow a polluter unilaterally to elect to be exempt from the tort system. But the proposal of O'Connell and Joost contains an additional feature designed to counter this objection. Those who elect to stay in the tort system would be able to make a fault based claim for damages after all. At least as a general proposition, they would be entitled to the same recovery as they are today.

The "catch" is they would have to make that claim against their own insurer under their own insurance policy—pursuant to what O'Connell and Joost call "connector" or "inverse liability" insurance, which is essentially the same as the "uninsured and underinsured motorist" coverage that motorists typically carry along with their liability insurance. At first blush, it might seem highly unfair that victims who have chosen the fault system also have to pay for "inverse liability" insurance to cover the fault of those who elect the no-fault option. But, as O'Connell and Joost point out, those electing the fault system would gain one substantial benefit over the present system; they would no longer have to pay for liability insurance to cover cases where they negligently injure those who have made the no-fault election because the latter would have waived their right to sue. On this basis, if everything works out as O'Connell and Joost hope, the extra cost of the "inverse liability" insurance is balanced by the reduced cost of liability insurance; as a result, those choosing the fault system would wind up both paying what they should fairly pay and getting what they were entitled to get per tort law if they were injured.

Notice here that if more and more people elect the no-fault solution, those left in the fault system would find that more of their premium goes for "inverse liability" insurance and less and less for lia-

bility insurance. At the limit, the final person electing the fault option would pay nothing for his careless driving since there would be no one left to sue him; instead, his bodily insurance premium would go entirely to create a fund against which he could collect if anyone else negligently injures him.

The “fly” in this ointment, if there is one, arises from differences between the people who would elect fault and those who would elect no-fault. Both Carr and Professor George Priest, in an unpublished memorandum mentioned by a number of the authors here,<sup>11</sup> predict that, for reasons suggested in the next paragraphs, the no-fault election will be made disproportionately by careless drivers. This adverse selection might lead to several important negative consequences.

First, if less careful motorists initially opt disproportionately into the no-fault system, this group presumably would be in a relatively greater number of accidents and that, in turn, could make the no-fault option quite expensive as compared with the fault option. This, in turn, may discourage others from selecting it, particularly the careful, with a subsequent further exaggeration of the price differential between the fault and the no-fault groups. This problem might be reasonably well solved, however, through the way the no-fault insurance premiums are set (*e.g.*, by charging more to those involved in more accidents)—a matter to which O’Connell and Joost, in my judgment, pay too little attention.

Second, even with differential pricing among those opting for no-fault, if no further adjustment were made, the fault-selecting group as a whole might pay more than would be thought fair. Put simply, if they were more frequently injured by the more careless, no-fault-selecting drivers than they in turn injure such drivers, the “inverse liability” insurance purchased by those staying in the tort system would have to increase in price faster than their liability insurance could decline in price. This problem might be well solved, however, through a mandatory cost reallocation agreement among insurers, pursuant to which charges are made against the no-fault selecting group and credits given to the fault-selecting group. This could be accomplished, for example, through a “risk exchange” device of the sort that Joost here describes New Jersey as having recently adopted.<sup>12</sup>

Third, those selecting the no-fault option might cause more accidents *because* they have been freed from tort liability. This clearly undesirable consequence could be badly magnified if the no-fault plan were eagerly selected by those who have a tendency to be less

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11. G. Priest, *Allowing Drivers a Choice between No-Fault and Fault-Based Auto Insurance: An Analytical Critique* (Nov. 17, 1988) (unpublished manuscript).

12. Joost, *supra* note 7, at 1045.

careful anyway and might thus be especially desirous of escaping tort sanctions. Whether no-fault would breed more careless conduct depends upon whether tort liability for bodily injury under the current regime actually deters negligent driving. While simple economic models show that tort law ought to channel conduct in a socially desirable way, the addition of real world variables (such as criminal penalties for bad driving, liability insurance, fear for one's own safety, and moral aversion to careless conduct) makes many people skeptical about the behavioral impact of tort law in the motoring arena. Alas, the empirical findings are mixed.<sup>13</sup>

Nonetheless, two recent Canadian studies find that the shift from fault to no-fault, holding other things constant, does indeed lead to more accidents.<sup>14</sup> These studies examine the Quebec experience, the only North American example of a jurisdiction completely substituting no-fault for fault in the auto accident area.<sup>15</sup>

A critical question about the Quebec experience is how much of the accident increase is a product of people driving worse because their tort liability has been removed, and how much of the accident increase is a result of more people driving. Consider this hypothetical scenario. In the nation of Econoland, it previously cost \$500 to fly from the city of Coase to the city of Posner, the locations of the country's only two airports. Suddenly, Dr. Calabresi invents a new metal alloy that reduces the cost of airplanes so much that the fare is reduced to \$250. As a result many more people fly than before and with this increased traffic comes more accidents—not, let us assume, because more planes in the air means more planes crashing into each other, but simply because more are downed by bad weather. Would people then condemn the reduction in the price of air travel because of the increase in accidents that comes along with it? I doubt it. With this scenario in mind, I note that Quebec's plan reduced auto insurance premiums significantly, especially for younger drivers, who, not surprisingly, substantially increased their driving. It is also noteworthy that Quebec charges all motorists the same premium; that is, there are no variations either for past individual driving conduct or for predictors of accident involvement such as age and where the car is driven. Obviously, all those electing the no-fault option in

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13. See S. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 21-23 (1989).

14. See, e.g., Trebilcock, *The Future of Tort Law: Mapping The Contours of the Debate*, 15 CAN. BUS. L.J. 471, 476 nn.8, 9 (1989).

15. See O'Connell & Tenser, *North America's Most Ambitious No-Fault Law: Quebec's Auto Insurance Act*, 24 SAN DIEGO L. REV. 917 (1987).

the O'Connell and Joost plan need not be charged the same premium. Experience in the United States with no-fault today suggests that, if the decision is left to market forces, insurers would differentiate among the insureds. Because of these confounding features of the Quebec experience, at this time I remain unpersuaded that we would see the significant decline in careful driving that Carr and others predict will occur under the O'Connell and Joost plan.

It is also by no means clear that the critics are correct in their prediction of who would actually elect the no-fault option. O'Connell and Joost, as I noted, anticipate a high take-up rate by all classes of drivers. Yet Little, for example, describes himself as a high earning person who would eagerly remain in the tort system. Since I assume that his law professor's salary and his potential health care costs are already well insured apart from any ability to recover in tort, I imagine that what he wants to do is protect his right to collect for pain and suffering if someone negligently injures him.<sup>16</sup> In thinking about whether Little's reaction might be typical or not, it has seemed to me that I would readily give up my existing right to pain and suffering damages—provided that sufficient value, by my lights, were provided in return. Whether that would happen turns on what the O'Connell and Joost no-fault benefit package would look like, how expensive it would be, and how optional it would be.

In my case, for example, even a reasonably attractive package of first party auto no-fault benefits (*e.g.*, the New York style which provides up to \$50,000) has only marginal appeal. This is because my other existing sources of compensation render such a no-fault package largely duplicative. (Its attraction for other members of my family is another matter—and another complication.) But, if I could simply opt out of all no-fault coverage, I could clearly save a considerable sum of money—presumably my entire current auto liability insurance premium for bodily injury. For that amount of savings, I would indeed forgo my right to sue for pain and suffering if negligently injured by another driver.

Notice, however, that if I am permitted to make the choice of simply giving up my right to sue in return for gaining immunity from suit, I am thereby able to shift what are now generally viewed as auto accident costs onto my health and disability insurance carriers. From the self-interested perspective, since those carriers provide group insurance that I obtain through my employment, I am unlikely to incur offsetting increases in what I now have to pay for such

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16. Joost suggests the possibility of offering an optional first party benefit that would pay for pain and suffering. Joost, *supra* note 7, at 1038. It is unclear, however, whether people like Little are interested in compensation for pain and suffering *per se* or only when they have been wronged.



insurance.<sup>17</sup> From the social perspective, however, some might object to that sort of cost shifting.

If, in order to keep auto accident costs (or at least some of them) contained within the auto insurance world, I am forced to purchase, say, \$100,000 of no-fault insurance with no deductible, at roughly the price of my present liability insurance, then it is possible that even I, like Little, might prefer to stay with the present system. A different package, at the same cost, would be much more attractive to me, however—for example, a much higher maximum no-fault benefit (say, \$2,000,000) combined with a substantial deductible (say, \$25,000) that my other compensation sources would readily cover. At least then I would be gaining catastrophic injury protection that I might not now have. Of course, the choice presented to me might not be set at a cost roughly equal to my current cost. Suppose, for example, I could buy \$100,000 of no-fault insurance at less than half the cost of my current liability insurance—something O'Connell's data suggest I might well be able to do. Then, too, the no-fault option would be quite appealing to me—at least as much for its cost reduction attributes as for its benefits.

Other people are in radically different situations, and hence their reactions to alternate options may differ significantly from mine. Most importantly, many people do not have the other sources of compensation that I have. Hence they are likely to find a New York style package of no-fault benefits more attractive than I do. At the same time, if such people were permitted to opt out of the fault system (*i.e.*, for immunity) and then to purchase no first party protection, the results of their choices might be socially unacceptable. Such people could achieve substantially lower insurance costs *ex ante*, but at the price of no protection if they are involved in an auto crash. Although O'Connell and Joost wave the banner of "choice," this does not appear to be a form of choice they are willing to allow people to make. In other words, before you surrender the right to sue another, you had better have some protection for yourself. This sort of paternalism, I note, is reflected today in the frequent judicial in-

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17. Of course, if many people were to make this sort of choice, those health and disability insurers may have to increase their premiums across the board. On the other hand, these increases in the aggregate are likely to be far less than the aggregate of auto liability insurance premiums that are saved. This is because of the much lower transaction costs associated with first party insurance as compared with liability insurance combined with first party insurer subrogation (whereby, as under the present system, my health insurer seeks reimbursement from me for the health care costs it covered once I obtain compensation for those expenses from my injurer's liability insurer).

validation of pre-accident express agreements not to sue—such as where tenants or patients waive their right to file negligence actions against their landlords or hospitals as a condition of service.<sup>18</sup>

O'Connell, Joost, and Little all give considerable attention to the poor. We know that in many jurisdictions today a significant portion of the poor are scofflaws when it comes to mandatory auto liability insurance. To Joost, the main point is that the poor who do buy liability insurance now really get nothing for it because they would be judgment proof without it. But by opting for no-fault they would finally be gaining something—their own protection—for their money; protection that is often especially needed by them because too many of their poor neighbors do not carry liability insurance. For Little, the poor are foolish to buy auto insurance today because of their practical freedom from personal liability. Hence, for them, the choice plan portends the possibility of a substantial increase in their driving costs—assuming that the purchase of first party protection is mandatory and effectively enforced. Responding to this concern, O'Connell now appears to be willing to structure the choice proposal so that those who are otherwise judgment proof (*i.e.*, the poor) could sensibly contemplate purchasing only \$15,000 of first party benefits; others, however, would be unwise, given the new wrinkles O'Connell proposes, to buy less than \$100,000 of first party benefits.

In my view, given the fault system, it is irresponsible for people to drive without having liability insurance, a point that O'Connell endorses. Surely, a great number (although plainly not all) of those now driving without liability insurance could actually afford what is legally required if they were willing to drive older or less fancy automobiles. Hence, I do not consider it socially disadvantageous for a reform to impose new costs on people who are acting irresponsibly. (That general governmental assistance to the poor is currently inadequate is, of course, a problem, but, I believe, a separate one.)

The American practice of not seriously enforcing financial responsibility laws in the auto insurance area and only requiring puny amounts of coverage in the first place (typically \$15,000 or \$20,000 per person and \$30,000 or \$40,000 per accident) is also responsible for many pressures on substantive tort doctrine that some find distorting. It leads to the search for a deep pocket plausibly connected to an auto accident because the driver who is clearly at fault cannot fully compensate the victim. This search has prompted efforts to hold others legally responsible for accidents caused by careless drivers—including those who serve alcohol to drivers, those who design

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18. See, *e.g.*, *Henrioulle v. Marin Ventures, Inc.*, 20 Cal. 3d 512, 573 P.2d 465, 143 Cal. Rptr. 247 (1978); *Tunkl v. Regents of the Univ. of Cal.*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

and mark highways, those who loan their cars to drivers (or leave their keys in them for the taking), those who repair cars, and those who manufacture them. Of course, there would be considerable pressure on many of these other defendants anyway today—both through partial indemnity suits and in cases where the victim is a driver who is related to the deep pocket defendant (rather than, as in my paradigm, a third party who has been hit by an inadequately insured driver). Nevertheless, the pressures on tort doctrine would be different, with the result that the shape of current doctrine could well be different.

Furthermore, I believe that the typical American financial responsibility law has the required coverage backwards. To the extent they work at all, these laws only assure that the slightly or modestly injured victim is protected. This means that someone seriously injured by a private individual in an auto accident will, much of the time, be grossly undercompensated by auto liability insurance. I would find it far better to require people, for the same cost, to buy liability insurance with a higher ceiling and a substantial deductible; that is, I would prefer to see the less injured victim stuck with a judgment proof defendant (within the zone of the deductible) if, in return, the more seriously injured victim were more fully compensated. By contrast, it has been my experience in Western Europe that no such choice is necessary. When one purchases liability insurance, one is protected to the full extent of one's liability.

Of course, requiring all motorists in America to buy unlimited liability insurance (and seriously enforcing the requirement) would mean a substantial increase in auto insurance costs for most people at a time when policy analysts and politicians are desperately looking for something that will reduce those costs. In my judgment, the main reason auto liability insurance costs for bodily injury are so high in the United States is that we are so liberal in the award of pain and suffering damages, for both small and large injury cases. For the seriously injured auto victim, the bitter irony in America, as compared with other countries, is that while there is some chance you will be extremely generously compensated by the driver who negligently harms you, there is a greater chance you will hardly be compensated at all because your injurer has purchased only the minimum liability insurance required by law.

### III. A DIFFERENT IDEA

If a main goal today, as several of the authors in this Symposium emphasize, is to reduce auto insurance costs, how about a plan that eliminates auto liability insurance premiums entirely? Consider this proposal.

Motorists could no longer be sued in tort—thus obviating the need for liability insurance.<sup>19</sup> As a corollary, of course, nor could they, as victims, sue other motorists. So far, it would be as though everyone made the initial election that O'Connell and Joost favor. But that election would not require the mandatory purchase of any auto no-fault insurance.

What about compensating victims, then? And what about internalizing auto accident costs to motoring? And what about, to the extent one can, deterring careless drivers (or at least penalizing them)?

I propose that the state assure the universal availability of first party (no-fault) benefits for auto accident victims, but that these benefits not be funded through no-fault auto insurance. Instead, there would be three new funding sources, and for the present it is probably sensible to assume that each would contribute one-third of the plan's revenues.

One funding source would be an increase in the gasoline tax.<sup>20</sup> This, generally speaking, would impose costs on those who drive more, and hence, other things being equal, are more likely to be in accidents. This effect would appeal to both fairness and cost internalizing norms. This mechanism would also favor cars with greater fuel efficiency, something that would probably be supported by the public at large on environmental grounds and on grounds it would promote freedom from economic dependence on other nations. To be sure, the more fuel efficient cars tend to be lighter, and lighter cars in turn tend to cause more damage to their occupants when they are in accidents. Yet there seems to be no strong public support for a policy that would favor cost relief for drivers of heavier cars, if for no other reason than that their cars, while perhaps safer to occupants, seem also to cause more harm to others.

The second funding source would be annual driver's license fees. These fees would not only be considerably higher on average than today, but also they could be adjusted based upon various factors

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19. I put aside the problem of intentional torts committed with automobiles, as well as the question of whether special treatment should be reserved for alcohol and drug impaired drivers.

20. For another proposal to fund no-fault benefits with gasoline taxes, see, e.g., A. TOBIAS, *INVISIBLE BANKERS: EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED TO KNOW* (1982); Tobias, *Fill 'Er Up With No-Fault, Please*, *TIME*, Feb. 27, 1989, at 52.

about the driver that are thought relevant and fair. For example, the annual fee could be set sharply higher for younger drivers (or for the broader class of newer drivers). Adjustments could also be made for the driver's place of residence, such as for those living in counties with high accident rates. Additionally, surcharges could be imposed based upon certain past driving conduct—such as having so many traffic citations of a certain sort, or such as having been involved in so many auto accidents of a certain sort. Of course, in the details of these adjustments there are difficult issues and the promise of considerable controversy. But I leave those details for another time. The main point is that this part of the funding mechanism can be used, to the extent politically agreeable, to promote deterrence and fair cost-sharing goals at the individual level—or at least to give symbolic recognition to those goals.

The final funding source would be a tax on new car sales. At the outset this tax should probably be set on a per car basis. But after a reasonable phase in period, the tax could be adjusted depending upon the accident involvement history of that model (or, perhaps, the several models sold by the manufacturer through separate dealers).

The idea of imposing a tax on car makers that varies based upon a model's accident involvement record was first suggested to me by Professor Howard Latin.<sup>21</sup> This strategy, simply put, is primarily meant to give manufacturers financial rewards for making safer cars and secondarily to internalize costs differentially among buyers when the autos they purchase have different accident experience rates. Although these differential charges might only serve symbolic functions, their chances of influencing manufacturer and consumer conduct could be increased if price stickers posted on new cars were required to disclose the auto accident tax assigned to the particular model. (Of course, the car itself only partly contributes to its involvement in an accident; yet, under my proposal, car taxes only contribute one-third of the revenues to the plan.)

One important advantage of this three part funding method is that it would be difficult for people to evade. Driving license fees would probably be more effectively enforced than are financial responsibility laws today. Gasoline taxes would be very difficult to escape, as would the tax on new car sales (except, of course, by infrequently entering the new car market).

These three types of revenues would be collected by a state agency

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21. See generally Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CALIF. L. REV. 677 (1985).

with which auto accident victims would file benefit claims on a no-fault basis. The structure of the benefits would, of course, determine the level of funding required. For now, I propose the following. For those auto accident victims suffering disabilities lasting less than six months and who have no permanent and significant impairment or disfigurement, the agency would pay for reasonably incurred, and otherwise uncompensated, expenses for medical care, rehabilitation, and the like, plus eighty-five percent of otherwise uncompensated income losses up to twice the state average weekly wage.

For those whose injuries are more serious (an estimated ten percent of all bodily injury cases), additional benefits would include compensation for lost earning power to those not now in the paid work force, and perhaps even the payment of moderate sums for pain and suffering along the lines now provided in New Zealand pursuant to its general accident compensation scheme.<sup>22</sup>

It is important to appreciate that, since the benefits payable to auto victims under my proposal would only supplement other compensation sources, the more employee benefit and social insurance plans grow, the less the motoring related no-fault benefits would be claimed and so, other things being equal, less money would be needed from the three revenue sources. Moreover, since employee benefit and social insurance plans tend to be more effective in covering medical expenses and income losses associated with short term disabilities, my proposed method of benefit coordination would tend to concentrate auto related benefits on the most seriously injured.<sup>23</sup> Indeed, it is arguable that the auto related benefits under my proposal should, in any event, be restricted to the seriously injured on the ground that if society is, in effect, going to paternalize motorists by creating a mandatory compensation fund, it should concentrate that fund on the more catastrophic risks which people tend systematically to ignore and which are the most socially disruptive if left uncompensated.

I believe the package of benefits I have outlined would cost consid-

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22. New Zealand currently awards up to \$27,000 for permanent impairment or significant pain as a result of an accident. For a discussion of this part of the New Zealand scheme in operation and recommendations for reform, see LAW COMMISSION, PERSONAL INJURY: PREVENTION AND RECOVERY, REPORT NO. 4 (1988) (New Zealand).

23. Making the auto accident benefit plan "secondary" to other sources of compensation admittedly gives up on the broad goal of using carefully calculated accident cost internalization in support of the efficient allocation of resources at the activity level. But since, for example, import quotas on Japanese cars already artificially increase auto prices and thus currently distort the motoring market, there is little reason to believe that shifting some auto accident costs to health and disability insurance would make things worse. As for the potential "act" level influences of the three part funding plan (on the manner of driving and the design of new cars), there would still be considerable room for differential charging even after some auto accident costs are shifted to other sources of compensation.

erably less than is now collected in the aggregate for auto liability insurance for bodily injury. To be sure, many more victims would be covered than now are covered in fault-only states. And I concede that there might well be some inefficiency arising from monopolistic public administration of my proposal. But, on the other hand, there would be enormous cost savings.

These economies would include saved commissions for brokers and agents, sharply reduced advertising and other marketing costs now incurred by insurers, and the end of insurer profits.<sup>24</sup> The lion's share of claims administration expenses would also be eliminated—most importantly from the near eradication of legal fees on both sides. Double recovery would cease as well (and the administrative costs of subrogation would be saved where there is subrogation by health insurers and other collateral sources today). Finally, the payment of money for pain and suffering would decline considerably—both in the smaller injury cases where it would be abolished, and in the larger injury cases where it would be reduced, perhaps primarily by the elimination of the occasional million dollar plus jackpot award. In fact, although some seriously injured auto victims would, of course, get far less money than they do today from the tort system, many others would actually secure larger recoveries because they would not be up against an uninsured or underinsured defendant.

Under my proposal, insurers might still perform claims processing functions under contract with the state agency in the same way that private insurers now process Medicare claims for the federal government. Indeed, to promote effective competition in claims processing that serves the needs of both claimants and the state, certain arrangements could be worked out that would allow people to choose in advance which insurer would process their claim in the event of a subsequent injury.

If we as a society were offered this proposal, I think a well-informed public would prefer it to the current system, to New York or to Michigan no-fault plans (where the seriously injured still have to sue for full economic loss recovery and where costly insurance marketing still exists), or to the O'Connell and Joost plan. But achieving the legislative adoption of such a proposal promises to be rather diffi-

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24. If my proposal were combined with the adoption of a no-fault approach to automobile property damage (something Michigan has already done), then it would make sense for people to obtain their remaining auto related insurance as part of their homeowner's (or renter's) insurance instead of through a separate auto policy as they do today.

cult in the face of the political might of the trial lawyers who want to keep the tort system, the auto insurers who want to hold on to the bodily injury insurance business (at least if it can be stabilized), and politicians who are reluctant to raise taxes.

Perhaps, in the end, the O'Connell and Joost choice plan could turn out to be the best route to the adoption of my proposal. If it works as they predict, eliminating most lawsuits between motorists, that would leave the trial lawyers with little investment in maintaining the status quo. Moreover, if nearly all people switch to no-fault, the need for competing private insurers to market the product is sharply reduced. Besides, at that point the route to yet further cuts in auto insurance costs could be seen to lie most promisingly in a shift to my plan. Of course, motorists as a class would still pay for their benefits—albeit through new mechanisms—but the net annual cost reduction for the average driver could be enough to garner the support of our elected leaders.

Whether my proposal would be feasible and popular remains to be determined. But it at least demonstrates the point that even if an individual choice mechanism is superior to the way we presently treat auto accident compensation, there may be a still superior collective choice alternative.