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## No-Fault Drives Again: A Contemporary Primer

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# No-Fault Drives Again: A Contemporary Primer

MARK M. HAGER\*

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## I. INTRODUCTION

There are signs that the United States may be entering a second wave of "no-fault" reforms to traditional auto accident tort law. A first wave, with both academic and legislative initiatives, peaked in the 1960s and early 1970s and then subsided.<sup>1</sup> Today, twenty-six states plus the District of Columbia and Puerto Rico have some sort of auto no-fault system.<sup>2</sup> In recent years, three states—Georgia, Nevada, and Connecticut—have repealed no-fault,<sup>3</sup> no state has enacted no-fault in the past twenty years,<sup>4</sup> and California voters have rejected a no-fault ballot initiative.<sup>5</sup>

First-wave no-fault systems now have a record for study and evaluation. Meanwhile, the contemporary second wave is impelled by several converging factors: advocacy by no-fault proponents, a generalized interest in anti-liability "tort reform," and persisting concern over high auto insurance costs. No-fault bills and ballot initiatives have proliferated, prompting an occasion for debate and assessment. At the federal

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1. See Fred Holender, *Basic No-Fault Insurance Seeks to Speed Recovery*, BUS. FIRST OF BUFF., Oct. 6, 1997, at 28.

2. See *id.*

3. See Christopher Swope, *No-Fault: How It's Totaled Every Time*, SACRAMENTO BEE, Sept. 21, 1997, at F1.

4. See Richard D. Hailey, *Traveling Same Old Road*, USA TODAY, Oct. 3, 1997, at 12A.

5. See Swope, *supra* note 3.

level, Congressional activity on behalf of no-fault has recently taken the form of the proposed Auto Choice Reform Act of 1997.<sup>6</sup>

This Article will analyze moral and policy issues raised by the emerging debate. Throughout, I will focus on personal injury issues and will not touch on property damage issues. Some of the issues discussed have been the subject of disputed empirical studies, while others are subject to contentious value disputes. I will attempt to map out those considerations that are necessary for a careful evaluation.

In some respects, the new debate simply recapitulates issues and arguments from the first no-fault wave, but at the same time there are new complexities in the debate for two reasons. First, there has now been actual experience with no-fault schemes, and studies and evaluations have been made. Second, there are novel no-fault proposals, not just in response to criticisms of traditional tort, but also in response to criticisms of existing first-wave no-fault schemes.<sup>7</sup> Compared with the first-wave, the second-wave debate may be both more sophisticated and more confusing.

Tort law delivers compensation to accident victims from the pocket of the driver at fault, or from that driver's insurer. No-fault compensation schemes depart from this in two crucial respects. First, tort suits for auto accident injuries are curtailed. Second, compensation comes without proof of any party's fault from the victim's own first-party accident insurance coverage, which he is required to carry.<sup>8</sup> Essentially, no-fault narrows auto accident victims' rights to seek compensation from culprits, requiring victims to accept compensation instead from coverage they have been forced to buy. The principal argument for such an arrangement is that it benefits victims by delivering compensation more rationally, efficiently, and cost-effectively than the tort system does. The main arguments against no-fault are that it does not function more effectively than the tort system, and that no-fault carries disadvantages that outweigh its advantages. No-fault's disadvantages are chiefly two-

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6. See Auto Choice Reform Act of 1997, S. 625, 105th Cong.; Auto Choice Reform Act of 1997, H.R. 2021, 105th Cong. The Act would create a particular national no-fault system, but would observe federalism concerns by allowing individual states to opt out of the system under certain circumstances. See Auto Choice Reform Act of 1997, § 8. In order to focus here on the substantive merits of no-fault schemes, this Article foregoes commentary on federalism issues.

For background and perspectives on the Auto Choice Reform Act, see Kathy Kristof, *Armed Bill Would Alter Auto Insurance Landscape*, BUS. FIRST OF COLUMBUS, Oct. 3, 1997, at 19, available in 1997 WL 15122019; Betty Joyce Nash, *Auto Act Takes Its Cue From 'No-Fault' Plans*, RICHMOND TIMES-DISPATCH, Aug. 24, 1997, at E1, available in 1997 WL 7627148.

7. See Kristof, *supra* note 6, at \*3. See also Auto Choice Reform Act of 1997, S. 625, 105th Cong., § 2.

8. Under first-party insurance, an accident victim is indemnified for losses by an underwriter from whom he has bought coverage directly. This contrasts with third-party compensation in a tort system, where losses are typically indemnified by the underwriter of the injury-causing party.

fold: (1) loss of tort law's purported role in deterring unsafe driving; and (2) loss of tort law's purported corrective justice function in securing recompense for injury victims from culprits who inflict injury.

This Article will analyze four basic variations of auto accident compensation schemes: (1) tort; (2) "pure" no-fault, which bars substantially all tort actions, substituting first-party coverage for injuries; (3) "partial" no-fault, which also provides first-party coverage and bans tort suits for certain damages, but allows tort suits for other damages; and (4) recently-devised "choice" proposals that allow drivers to choose between first-party coverage and tort compensation.<sup>9</sup>

Clear and thorough analysis is difficult, however, because even these four systems do not exhaust the range of possible schemes. In particular, a variety of different partial no-fault and choice schemes have been or could be devised by combining and substituting basic elements. Moreover, both partial no-fault and choice schemes lie in the middle ground between pure tort and pure no-fault. Depending on specifics, a given plan in this middle ground may resemble pure tort or pure no-fault. With these caveats in mind, this Article attempts to organize the discussion with an appropriate amount of detail to grasp essential issues encapsulated in the contemporary debate.

These four contrasting schemes will focus around four main themes: (1) whether no-fault delivers compensation more efficiently than tort; (2) whether no-fault undermines tort's role in deterring unsafe driving; (3) whether no-fault wrongly abandons the "corrective justice" function served by tort; and (4) whether no-fault is especially beneficial or especially harmful to low-income motorists.

## II. BASIC INSURANCE CRITIQUES OF TORT

Advocacy for no-fault originates in criticism of the tort system as a costly, inefficient, and irrational means of delivering compensation to auto accident victims. It focuses on tort as a system of compensation, to the exclusion of other objectives associated with tort: deterrence and corrective justice. To the extent one views tort exclusively as a compensation system, no-fault is likely to appear superior. On the other hand, to whatever extent one credits or values tort's deterrent and corrective justice aspects, no-fault will appear less advantageous, or even detrimental.

Several compensation-oriented critiques of the tort system are dominant. First, tort litigation costs and attorneys' fees drain extravagant

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9. A fifth major type of scheme will not be analyzed specifically here: "add-on" schemes, whereby rights to bring tort suits are left unaltered, but no-fault first-party coverage is made available or mandatory, and tort recoveries may be passed through to reimburse no-fault insurers.

portions of insurance premium funds away from victim compensation.<sup>10</sup> Hence, by eliminating tort suits, expanded compensation and/or reduced premiums could be achieved.

Second, tort confines compensation to victims of negligent driving, thereby excluding many who are comparably injured and needy, but who receive nothing because they cannot prove that some other party was at fault. One study suggests that only thirty-seven percent of auto accident victims receive a tort recovery, while twenty-three percent receive no compensation at all.<sup>11</sup> The low level of recovery stems, in part, from the requirement of proving negligence to recover in tort. By eliminating fault as a prerequisite to recovery, no-fault delivers compensation more widely and less arbitrarily.

Third, tort systematically produces over-compensation of less-severely injured victims and under-compensation of poor or more seriously injured ones. Because litigation is risky and costly, defendants often settle small claims at inflated levels attractive to plaintiffs.<sup>12</sup> By contrast, plaintiffs with large claims and poor plaintiffs tend to avoid the prolonged litigation needed to secure full compensation, opting instead to settle early for less.<sup>13</sup>

Fourth, the tort litigation process delays delivery of compensation, compared with how long a straightforward first-party insurance system takes.<sup>14</sup>

Fifth, auto accident cases strain court systems by their sheer numbers.<sup>15</sup> Many cases may be too commonplace or trivial to warrant such resource drain.

Finally, the tort system creates incentives to create fraudulent claims and to overstate injuries. Fraud ranges from the staging of acci-

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10. See STEPHEN J. CARROLL, EFFECTS OF AN AUTO-CHOICE AUTOMOBILE INSURANCE PLAN ON COSTS AND PREMIUMS 2 (Rand Inst. for Civil Just. 1997) (no-fault insurance cuts costs, because the need to litigate negligence is eliminated); see also Linda Ross Meyer, *Just the Facts?*, 106 YALE L.J. 1269, 1277 (1997) (book review) (providing that the tort system is slow, undercompensates those who need fast cash, overcompensates those with minimal losses, because defendants settle for more to avoid litigation, and that system features high transaction costs).

11. See ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPAIRMENT 148-49 (1964).

12. See Meyer, *supra* note 10, at 1277.

13. See *id.* See also Jeffrey O'Connell et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 MD. L. REV. 160, 177 (1996); Clarence Morris & James C.N. Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, 914 (1962). But see Fleming Jamer, Jr. & Stuart C. Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 CONN. B.J. 70, 76 (1952) (larger claims take longer to settle).

14. See Mitch McConnell et al., *Auto Insurance: A Better Way*, WALL ST. J., Sept. 22, 1997, at A22.

15. See SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, STANDARDS FOR NO-FAULT MOTOR VEHICLE ACCIDENT BENEFITS ACT, S. REP. NO. 95-975 (2d Sess. 1978) [hereinafter STANDARDS FOR NO-FAULT].

dents to more genteel forms. Overstatement is inherently in the interest of particular claimants.<sup>16</sup>

There is little that tort defenders can say directly in response to these critiques. The premium drain point is undeniable. Tort entails litigation that is superfluous to a first-party compensation scheme, diverting premium dollars away from compensation. There is no response in defense of the tort system except to say that it is not solely a compensation system.

Tort defenders would also note that first-party compensation schemes will generate their own litigation costs and lawyer fees, while avoiding those of tort. Litigation issues under no-fault would include scope of policy coverage and other contractual ambiguities, cause of accident, and degree of damage. Premiums will be drained away from compensation in order to resolve such issues. One can only guess how these drains compare with current tort-system drains. I have found no study addressing the question. A reasonable guess is that the no-fault drain, though substantial, should be smaller than the tort drain. In a first-party insurance market, underwriters can compete to offer low premiums to customers by finding ways to minimize dispute-driven premium drain through contractual clarity and low-cost dispute resolution. Equivalent market forces to reduce dispute costs cannot so easily operate in a tort system between adversarial parties not covered by prior contracts.

Requiring proof of fault also excludes many victims from compensation. Again, the charge cannot be denied, but only answered by pointing out that a fault-based tort system is not the same animal as a loss-based compensation system. Another possible response is to propose a non-fault-based (strict liability) recovery rule for auto tort cases.<sup>17</sup> The merits and demerits of that suggestion, however, are beyond the scope of this analysis. Nevertheless, such a reform is not in the current political winds. Contemporary no-fault debate focuses on first-party insurance coverage, not third-party tort recovery.

Charges of over- and under-compensation in tort actions are difficult to deny. It has been estimated that for out-of-pocket losses under \$500, victims on average receive four and a half times their loss from the tort system, while victims with over \$25,000 in out-of-pocket losses receive, on average, only around a third of their losses.<sup>18</sup> This feature

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16. See JOINT ECONOMIC COMMITTEE, 105TH CONG., THE BENEFITS AND SAVINGS OF AUTO-CHOICE 4 (Apr. 1997); U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION PRESS RELEASE 3 (May 24, 1995) (on file with author).

17. See REPORT BY COMM. TO STUDY COMPENSATION OF AUTO ACCIDENTS, COLUMBIA UNIV. COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 132-44 (1932).

18. See STANDARDS FOR NO-FAULT, *supra* note 15.

emerges from tort's adversarial and fault-based aspects. If loss-based indemnity is the only object, these compensation "errors" can be curtailed.

The charge of delay is equally undeniable. Delivery of compensation is undoubtedly quicker if it does not turn on proving fault in litigation. The strain on courts point is true, as well. If fewer cases get litigated, court burdens lighten. Of course, this is no more true of auto cases than of medical malpractice, product liability, toxic tort, or business tort cases. These other types of cases, though less numerous than auto cases, tax courts in a different way by virtue of their complexity. In varying degrees, they could also be swept from the dockets by enacting no-fault compensation schemes.

Similarly, the fraud and overstatement charge is also true, though whether it is truer of auto than of other tort cases is unproved. Curtailing tort suits might diminish some such abuse, but it will by no means, eliminate abuse, since temptations to commit fraud and to overstate injuries also characterize straightforward insurance schemes. Successful reduction of incentives toward abuse may depend on whether a given no-fault scheme succeeds in reducing access to the pain and suffering damages offered under tort law. Availability of such damages may fan the flames of temptation toward fraud and overstatement.

### III. NO-FAULT, TORT, AND DETERRRENCE

Critics of no-fault contend that curtailing tort suits will cause traffic injuries to rise because dangerous driving will not be checked by the fear of lawsuits.<sup>19</sup> Defenders of no-fault essentially make two responses to this criticism—one weak, the other stronger.

The first response is that no-fault schemes can provide meaningful deterrence against unsafe driving through an experience-rated premium device.<sup>20</sup> Because unsafe motorists would be charged higher premiums, drivers would feel a direct financial interest in driving safely.<sup>21</sup> This argument is dubious. At best, it holds true only if drivers can be classified with meaningful precision so that premium charges can be accu-

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19. See Frank A. Sloan, *Tort Liability Versus Other Approaches for Deterring Careless Driving*, 14 INT'L REV. L. & ECON. 53, 68 (1994) (finding that tort liability deters careless driving); see also Jennifer H. Arlen, *Compensation Systems and Efficient Deterrence*, 52 MD. L. REV. 1093, 1111-15 (1993) (finding that no-fault cuts administrative costs and rationalizes compensation, but it decreases motorist incentives to reduce risk, and thus, increases overall accident costs).

20. See Arlen, *supra* note 19, at 1108-10 (proper deterrence requires experience-rated premiums so injurers bear costs of risks they create); see also Sean Mooney, *Risk Classification Helps Cut Your Losses*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BEN. MGMT., Sept. 29, 1997, at 65.

21. See Arlen, *supra* note 19, at 1108-10.

rately gauged to reflect driver safety. The only conceivably affordable mechanism for this is to set premiums based on the number and severity of moving violations and accidents. But, the incidence of tickets and accidents is far too multi-causal and random to correlate substantially with driver dangerousness.

Premium-setting based on the number and severity of accidents might be rational from the standpoint of underwriter profitability because it predicts average likelihood of payout. For that reason, such premium-setting makes as much sense under no-fault as it does under tort. But, such premium-setting has little power, in itself, to induce safe driving because, within a broad range of driving habits, a driver's number or severity of accidents is poorly correlated with how dangerously he drives. It correlates more strongly with general accident rates in the areas where he drives.

Underwriters cannot easily implement true safety rating in a profitable manner. They maximize profit by correlating the premiums charged to any insured with the likelihood of making payouts to that insured. The elaborate information gathering needed to implement meaningful safety rating would probably cost far more than any benefit provided in improving the correlation between premiums charged and driver safety.

Sophisticated data would have to be developed on relationships between driving records and the likelihood of causing accidents. Information on moving violations would have to be analyzed along with accident and claim records. Huge uncertainties would stem from undetected traffic violations, unreported accidents, and vagaries in criminal adjudications.<sup>22</sup> No strong evidence indicates that underwriters systematically link premiums to driver dangerousness.<sup>23</sup> Even weaker is evidence that motorists change their driving habits in response to premium rates.

Though safety-rating is not a strong response to the lost-deterrence critique of no-fault, a stronger response exists—that the tort system does not substantially deter unsafe driving in the first place.<sup>24</sup> If the deterrent effect of tort liability is weak, little is lost in moving to no-fault. Some studies suggest that tort plays a substantial role in deterring auto negligence. Other studies indicate that tort's deterrent effect is weak. Analysis of the debate on this point is set out below.

If tort has little effect in reducing accident rates, it is not difficult to

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22. See JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* 131 (1989).

23. But see Richard W. Grayston, *Deterrence in Automobile Liability Insurance—The Empirical Evidence*, 40 *INS. COUNSEL J.* 117, 126-27 (1973) (noting that underwriters successfully focus high premiums on bad drivers).

24. See Howard Latin, *No-Fault: To Be or Not To Be? When Drivers Sue Drivers: Exposing the Myths Underlying Automobile Litigation*, *N.J. LAW.* 24, Jan. 1995, at 30.



grasp why: driving may not be the kind of activity upon which liability can exert strong incentive effects. Tort liability's financial incentives operate most powerfully on activities pursued with financial gain in mind. Motoring is generally not such an activity. Key incentives for safe driving include concern for safety of self, loved ones, and strangers; desire to prove competence and mastery; desire to avoid the hassle of accidents; and fear of losing driving privileges. Fear of tort liability probably ranks well behind all these other safe-driving incentives, especially because motorists generally carry liability insurance to shield themselves from having to pay tort judgments. If so, moving to a no-fault system will leave adequately powerful safety incentives in place.

Not only is the effect of tort liability on driving habits weak, but the relationship between driving habits and accidents is also attenuated. Most auto carelessness has a low correlation with injury. Common unsafe practices—excess speed, momentary lapses of attention, cheating on traffic signals, failures to anticipate—rarely produce accidents.<sup>25</sup> If they did, they would not be so common. Nearly all drivers commit such sins regularly, though not grievously, and rarely cause accidents. No given motorist can greatly reduce his or her odds of an accident by reducing such careless habits, though many accidents in general are caused by them.<sup>26</sup> This is because accidents are often caused by the interplay of conditions with actions and decisions taken by several drivers. Given this general low correlation between safety zeal and accident avoidance, no safety incentives of any kind are likely to have a meaningful impact on the majority of drivers—except perhaps drastic sanctions for unsafe practices.<sup>27</sup>

A different analysis may, at first glance, seem warranted for egregiously reckless drivers. Their habits seem especially prone to deterrence, because they lie so far from the norm and could be altered easily without great hardship or superhuman vigilance. But, this apparent susceptibility to deterrence is probably illusory. Young males and the inebriated, the two chief classes of deviantly bad drivers, are not likely to respond to tort liability with safer driving, because their dangerous behavior stems from impaired judgment from the start.<sup>28</sup> Thus, it seems unlikely that tort law substantially constrains the level of drunk driving or young male recklessness. For these drivers, under either no-fault or

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25. *See id.* at 29 (stating that “unlucky” circumstances, not bad driving, cause most accidents, and that the common forms of negligence include tailgating, speeding, inattention, and fatigue).

26. *See id.*

27. *See id.* at 29-30.

28. *See id.* at 30 (opining that tort liability cannot make eighteen-year-olds more mature, suppress hormonal impulses, or reverse the deterioration of elderly reflexes). The most prominent class for automobile accidents is males under the age of twenty-five. *See id.*

tort, meaningful deterrence can arise only if they risk forfeiture of driving privileges or other harsh sanctions, even if they have not yet caused an accident.

One odd feature of this debate is the self-contradictory posture each side may sometimes stake out. Defenders of tort who criticize no-fault on lost-deterrence grounds contend that motorists respond to possible tort liability with safer driving, but do not respond similarly to possible premium hikes under no-fault. That makes no more sense than denying that tort promotes safe driving while at the same time insisting that premium hikes under no-fault do. It makes equal sense to expect that either fear of suits or fear of premiums will promote safe driving. In fact, for motorists with liability insurance, fear of suits is pretty much the same thing as fear of premium hikes, because tort judgments themselves will be paid by underwriters. It would take solid empirical evidence to prove that such minor financial stakes have a major impact on highway safety, under either tort or no-fault.<sup>29</sup>

There is one likely respect in which experience rating may affect safety—by inducing some high-risk motorists to drive less in order to keep their premiums down. Though it may fail to affect individual driving habits, experience rating may improve the ratio of low-risk to high-risk drivers on the road. This effect could operate under either tort or no-fault and is, therefore, not a safety advantage for preferring either system over the other.

Most discussion of injury prevention under no-fault focuses on whether no-fault undermines deterrence by weakening incentives to drive safely. An argument can be made, however, that no-fault actually promotes injury prevention because, in a first-party coverage system, underwriters will offer low premiums to motorists driving collision-safe cars. They do this, of course, because safe cars reduce payout risks. Underwriters can, therefore, compete by cutting costs to attract customers who drive safe cars. This safety incentive is missing under tort where the damage pay-out goes to a third-party victim, not to the underwriter's own customer.<sup>30</sup>

It is likely that safety premiums would indeed emerge on discrete safety items, like air bags and anti-lock brakes, but unlikely that they would reach more subtle design elements. Crashworthiness can be sharply affected by even such minor design changes as occur year-to-

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29. See Paul Zador & Adrian Lund, *Re-Analyses of the Effects of No-Fault Auto Insurance on Fatal Crashes*, 53 J. RISK & INS. 226, 228-29 (1994).

30. See *Auto Choice Reform Act of 1997: Hearing Before the U.S. Senate Commerce Comm.*, 105th Cong. (July 17, 1997) (testimony of Andrew Tobias), available in 1997 WL 11235933, at \*3 [hereinafter *Senate Hearing*]; JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 242 (1990).

year within continuing models.<sup>31</sup> Gathering meaningful safety data on such items is painstaking at best and nearly impossible for new models.<sup>32</sup>

Though safe-car discounts could theoretically produce injury reductions, I have seen no study showing they do so in fact. There are reasons to suspect they might not. Discounts would bring injury reductions only if they strongly affect the number of motorists choosing air bags, anti-lock breaks, crash-proof construction, and the like. The actual effect may be small, however, because personal safety, not insurance cost, is arguably the major motive for choosing protective features. In addition, safety-indifferent motorists will not be tempted by premium discounts which fail to offset the added costs of these optional safety features. In short, safe-car discounts—nice as they are for those who get them—may not have much impact on safe-car choices. Safety-minded motorists will choose safety features even without discounts and safety-indifferent ones will reject them, discounts or no.

#### IV. CORRECTIVE JUSTICE: NOW YOU SEE IT, NOW YOU DON'T

In addition to deterrence, another key value attributed to tort law is corrective justice: the fairness of exacting victim recompense from the culpable party.<sup>33</sup> With no-fault, corrective justice falls by the wayside, and as a result, could be judged a serious loss, though not everyone agrees. Concern over corrective justice strikes some as trivial and precious compared with tangible goals like compensation and deterrence. However, why worry about corrective justice if no-fault can deliver compensation more rationally than tort without sacrificing deterrence?

Moreover, no-fault proponents doubt whether auto tort law truly represents corrective justice. The notion of corrective justice starts with an image of injustice inflicted by the defendant upon the plaintiff. Because the defendant is "guilty" and the plaintiff "innocent," and because the defendant operated at the plaintiff's expense, he or she owes the plaintiff. Liability "corrects" the injustice.

It is not clear that this model makes sense for typical auto accidents. As suggested above, low-level auto negligence is ubiquitous. The vast majority of accidents involve the large group of drivers with low accident frequency.<sup>34</sup> Most motorists make driving mistakes fre-

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31. See MASHAW & HARFST, *supra* note 30, at 242-43.

32. See *id.*

33. See Meyer, *supra* note 10, at 1288-96 (discussing corrective justice); see also Laura R. Rose, *A Choice Scam: Consider All the Alternatives to National No-Fault Insurance*, CHARLESTON GAZETTE & DAILY MAIL (W. Va.), July 28, 1997, at P5A.

34. See U.S. DEP'T OF TRANSP., DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 98-99, 189-90 (1970).

quently, once every two miles according to one study.<sup>35</sup> Though negligence is ubiquitous, the incidence of actual harm is highly random, resembling "acts of God" in the selection of victims. Moreover, the risks imposed are highly reciprocal. Typically, the victim is about as "bad" a driver as the culprit. These aspects becloud the picture of auto tort liability as a form of corrective justice. If there is little corrective justice in auto tort law to start with, little is lost in moving to no-fault.

The corrective justice picture is also beclouded by insurance. Underwriters, not negligent drivers, usually pay tort damages. All drivers finance those payments through their premiums. Hence, payment ultimately comes from the pockets of the driving public, including victims. The notion that payment goes to innocent victims from negligent culprits is misguided. The negligent motorist becomes merely the moral scapegoat in an insurance delivery system.

Nevertheless, anxiety over lost corrective justice cannot simply be dismissed. Those who dismiss corrective justice concerns may hold a simplistic conception of them. The link between liability and corrective justice may be important, even if it is hazy and imperfect. Auto tort liability is not the only area where negligence law's link to corrective justice is hazy. In medical malpractice, for example, liability seldom turns on the notion that the doctor has done an "injustice" to the injured patient or is, so to speak, a "bad" doctor. Good doctors make mistakes just as the best athletes do.

But when such a mistake harms another, there may be injustice in failure to take responsibility for the mistake, even if "injustice" seems too strong a word for the defendant's actions toward the plaintiff. Hence, malpractice law may perform a corrective justice function, albeit a weaker one than pronouncing upon good and evil. The analogy between auto tort and medical malpractice can be pushed even further. Consumers ultimately absorb the cost of medical malpractice damages, because doctors will raise fees in order to pay insurance premiums. As in auto tort, where the driving public collectively makes payments to negligently injured members, the collective consumers of health care wind up paying malpractice victims. Hence, the corrective justice function of tort seems essentially symbolic for both auto tort law and medical malpractice. Both systems identify mistakes and attribute responsibility to culpable parties, though the victim's compensation comes not from the culprit but from elsewhere.

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35. See *id.* at 171-88; LESLIE GEORGE NORMAN, ROAD TRAFFIC ACCIDENTS—EPIDEMIOLOGY, CONTROL AND PREVENTION 51 (World Health Org. 1962) (estimating that the average driver makes mistakes every two miles, causing near-collision every 500 miles, collision every 61,000 miles, personal injury every 430,000 miles, and a fatality every sixteen million miles).

If corrective justice becomes purely symbolic, its value lies only in ritual assessments of responsibility. Such assessments delineate and fortify a sense of moral order by identifying how and by whom damage has been done. This may be meaningful to victims and other concerned parties, though it serves no instrumental function. An American Bar Association report notes that "the tort system provides an important psychological outlet for seriously injured victims who would be dissatisfied with 'no-fault' benefits and desirous of an impartial hearing of their substantive case."<sup>36</sup> To devalue tort law on the grounds that its corrective justice role is inconsequential or vestigial may ignore subtle but important concerns and experiences.

Still, it might be argued that corrective justice is especially overrated when it comes to auto tort law. A driver's negligence—as opposed to bad luck—seems less "responsible" for a given accident injury than a doctor's negligence is for medical mishaps. If so, the blame game may be misplaced or downright harmful. On the other hand, tort suits do allow fact-finders to weigh doubts about assigning responsibility. Such deliberations can be performed on a flexible case-by-case basis. But where no-fault prevails, all regularized inquest into responsibility for accidents is banished.

Is the symbolic corrective justice of auto negligence law worth all its lawyer fees and litigation costs? Such funds could be channeled into broader and/or deeper compensation, or be saved through premium reduction. Do all victims of harmful negligence have a "right" to corrective justice? In states that have adopted no-fault, some polls show majority support for a return to tort.<sup>37</sup> Such polls may reveal frustration with continuing high premiums under no-fault. But they may also reveal a moral sense that corrective justice for negligence is valuable, even if the negligence in question is as pervasive as auto carelessness is, implicating everyone, and even if corrective justice is costly.

## V. TYPES OF EXISTING NO-FAULT SCHEMES

Although no state has ever enacted a pure no-fault system, three states—Michigan, New York, and Florida—have adopted schemes which eliminate substantial proportions of auto tort suits. Though they are technically "partial" no-fault, these schemes approximate "pure" no-fault. Michigan's scheme comes closest to pure no-fault.<sup>38</sup> It bars suits

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36. SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984) [hereinafter TOWARDS A JURISPRUDENCE OF INJURY].

37. See *id.* at 11-15 to 11-17.

38. See MICH. COMP. LAWS ANN. § 500.3135 (West 1997).

for economic damages, except those intentionally inflicted under a narrow definition of intention.<sup>39</sup> It bars pain and suffering suits except for harm that is exceedingly serious or intentionally-inflicted.<sup>40</sup>

Partial and pure no-fault schemes can be compared with each other and with traditional tort systems still operating in many states. All three systems—partial no-fault, pure no-fault, and tort—can further be compared with new “choice” proposals that allow motorists to choose between a pre-existing tort or partial no-fault scheme on the one hand, and an alternative scheme closer to pure no-fault, on the other hand.<sup>41</sup>

Partial no-fault schemes provide first-party compensation for economic loss, up to the limits of coverage purchased, without proof of fault.<sup>42</sup> A few also compensate for noneconomic damages (e.g., pain and suffering), but most do not. Some, but not all, eliminate the right to sue for economic damages to the extent such damages are covered by no-fault benefits. Schemes that do not eliminate such suits usually let first-party insurers who make pay-outs to victims claim subrogation rights over tort judgments awarded to those same victims. This prevents double recovery by victims and discourages them from bringing tort suits, because damages from suits have to be paid to insurers as reimbursement for benefits paid.

Partial schemes ban pain and suffering claims for minor injuries, but allow them for major ones. All allow suits for death and egregious injury. They differ in how minor an injury can be and still be major enough for lawsuit eligibility.

Two different systems or types of thresholds exist for separating major from minor injuries. One is a “verbal” threshold, which descriptively defines injuries eligible for law suits—for example, broken bones, “permanent serious disfigurement,” or “significant and permanent loss of an important bodily function.”<sup>43</sup> The other type of threshold is “monetary,” a minimum dollar amount of medical damages.<sup>44</sup> Hence, depending on the type of threshold and on whether economic damages are entirely excluded from tort, there can be several major types of par-

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39. *See id.*

40. *See id.*

41. *See* Auto Choice Reform Act of 1977, S. 625, 105th Cong.

42. Five types of benefits are typically available: (1) lost income or earning capacity; (2) value of victim's lost services to family; (3) medical and rehabilitative expenses; (4) lost earnings a decedent would have provided to survivors; and (5) funeral costs. *See* ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 132 (2d ed. 1996).

43. Jeffrey O'Connell et al., *Consumer Choice in the Auto Insurance Market*, 52 MD. L. REV. 1016, 1018 (1993) (quoting STEPHEN J. CARROLL ET AL., NO FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTO ACCIDENTS 6 n.14 (RAND Inst. for Civ. Justice 1991)). *See also* Swope, *supra* note 3.

44. *See* Swope, *supra* note 3.

tial no-fault schemes. Partial no-fault schemes that most fully eliminate the tort option for economic damages and place a high threshold for suits for non-economic damages approximate pure no-fault. Currently, Michigan, New York, and Florida have no-fault systems of this type.<sup>45</sup>

## VI. EVALUATION OVERVIEW

The most significant no-fault experiences to date have been with "partial" schemes which continue to allow tort suits for certain damages. There is now enough experience with such schemes to allow meaningful, though tentative, assessment. To compare no-fault meaningfully with traditional tort, one would ideally assess each major type with respect to at least four major factors: (1) rationality and efficiency in delivering compensation; (2) success in deterrence; (3) fidelity to values of corrective justice; and (4) effect on low-income motorists. No study has attempted such a thorough evaluation, but less comprehensive evaluations have been offered, based unavoidably on incomplete information and debatable value judgments.

Attempts to evaluate no-fault have focused on compensation and deterrence. With respect to compensation, the controversy centers less upon the observed effects of no-fault than upon how they should be evaluated from the standpoint of wise public policy. With respect to deterrence, by contrast, the empirical controversy is thick, focusing on whether no-fault leads to increased highway danger. With respect to corrective justice, controversy over no-fault remains purely normative, focusing on the value and tangibility of corrective justice as delivered by auto tort litigation and how corrective justice should be weighed against compensation goals which may be better served by abandoning it.

## VII. NO-FAULT AS A COMPENSATION SYSTEM

In general, studies have found existing no-fault schemes superior to tort for rational and efficient delivery of compensation.<sup>46</sup> This is unsurprising, since the chief inspiration for no-fault is the deficiency of tort as a compensation system. It would be strange if no-fault, designed specifically to meet compensation goals alone, failed to excel in meeting those

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45. See Robert Schwaneberg, *Jersey's Top Car Rates Are No Accident*, STAR LEDGER (Newark, N.J.), Oct. 5, 1997, at 1; see also Swope, *supra* note 3; *Senate Hearing*, *supra* note 30.

Hawaii's legislature recently passed a bill to enact such a scheme, but it fell to the governor's veto. See Susanne Sclafane, *1997 A Bust for State Auto Insurance Reforms, but Pluses Emerge*, NAT'L UNDERWRITER PROP. & CASUALTY-RISK & BENEFIT MGMT., Aug. 11, 1997, at 3, available in 1997 WL 9332086.

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

goals compared with tort, where compensation goals are compromised by additional and partially competing goals like deterrence and corrective justice. On the other hand, there are several ambiguities in evaluating whether no-fault indeed exceeds tort in compensation rationality and efficiency.

Before exploring those ambiguities, it is worthwhile to itemize the different ways in which no-fault seems to successfully serve rationality and efficiency in compensation.

*No-Fault Pays a Higher Proportion of Premium Income to Claimants Than Do Tort Systems.* For each premium dollar, no-fault states deliver 50.2 cents in victim benefits, while tort states deliver only 43.2 cents.<sup>47</sup> Again, this is no surprise, because a goal of no-fault is to reduce the drain of premium dollars into lawyer fees and other litigation costs. Because most existing no-fault schemes are partial, the figures above understate the potential premium savings of no-fault. Under pure no-fault, the savings on fees and costs would almost certainly be higher and a larger gap would open between no-fault and tort states in the delivery of premium dollars to victims.

*No-Fault Delivers Auto Insurance Compensation to More Accident Victims Than Does Tort.* Compared with tort, many more victims receive auto insurance compensation under no-fault. Estimates for the increase range between roughly 25% and roughly 100%.<sup>48</sup> This is expected, since a basic purpose of no-fault is to widen the delivery of compensation by removing proof of some adverse party's fault as a prerequisite to compensation.

*No-Fault Reduces Over- and Under-Compensation.* Under no-fault, compensation delivered matches economic damages—mainly medical expenses and lost income—more closely than under tort.<sup>49</sup> This unsurprising result stems from two chief factors. First, no-fault plans focus on compensating economic losses and on curtailing compensation for pain and suffering. Second, no-fault delivers compensation with far less delay and strategic maneuvering between adverse litigants.

*No-Fault Delivers Compensation More Quickly Than Does Tort.* One year after filing notice of their claim, no-fault claimants have received, on average, over 95% of all they will ever receive, while most

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47. *See id.* at 83.

48. *See* AIS RISK CONSULTANTS, AUTOMOBILE INSURANCE COSTS IN THE UNITED STATES 26, 27 (May 1, 1997); *see also* COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 46, at 73 (estimating that almost twice as many accident victims are compensated under no-fault as under tort).

49. STEPHEN J. CARROLL ET AL., NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTO ACCIDENTS (RAND Inst. for Civ. Justice 1991).



tort claimants have received less than 52%.<sup>50</sup> This comes as no surprise, because no-fault avoids the delays of tort litigation by handling compensation as a simple insurance claim matter.

*No-Fault Cuts the Number of Lawsuits.* Since barring suits is at the heart of no-fault, this could scarcely fail to be true. Reduction in suits depends, of course, on the degree of "purity" in no-fault plans. Abolition of no-fault restores higher lawsuit volume.<sup>51</sup>

*Conclusions.* No-fault successfully achieves some goals it is designed to achieve. From this, one could conclude that no-fault exceeds tort in compensation rationality and efficiency. But before drawing that conclusion, several ambiguities need to be cleared up.

Existing no-fault has not brought reduced premiums, despite claims by advocates that it should. If anything, premiums appear to be higher in no-fault states than in traditional tort states,<sup>52</sup> despite savings on lawyer fees and litigation costs. There are two main reasons. First, no-fault compensates more people. Second, thresholds against tort suits have not been high enough to prevent the continued frequent filing of suits.<sup>53</sup> Premiums in partial no-fault states reflect not only victim compensation, but also the costs and lawyer fees associated with persistent tort litigation.<sup>54</sup> Premiums could be reduced by moving toward pure no-fault.<sup>55</sup> This means reduced litigation costs and lawyers' fees.<sup>56</sup> Of course, it also means curtailed corrective justice. Though experience with partial no-fault suggests a slight average hike in premiums compared with tort states, this could be viewed as a good bargain, because premiums under no-fault are paying for compensation to far more victims. But what

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50. See COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 46, at 79; ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW § 3.22 (2d ed. 1992).

51. See Schwaneberg, *supra* note 45.

52. See COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 46, at 67-72; see also Hailey, *supra* note 4 (noting that when Connecticut repealed no-fault, rates dropped 9.7%). Hailey notes that eight of the ten highest-premium states are no-fault. See *id.* This point may prove less than it seems. Though Hailey suggests that states have high premiums because they have no-fault, they might have high premiums even without it. High rates may explain why states adopt no-fault in the first place.

53. See J. David Cummins & Sharon Tennyson, *Controlling Automobile Insurance Costs*, 6 J. ECON. PERSP. 95, 110-11 (1992); STEPHEN CARROLL ET AL., THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES (RAND Inst. For Civ. Justice 1995).

54. One perspective on partial no-fault is that its existence and flaws can be blamed on trial lawyers who resisted enactments of pure no-fault. In the words of one no-fault proponent: "The trial lawyers have basically shot no-fault in the foot and now they complain that it limps." Swope, *supra* note 3 (quoting law professor Jeffrey O'Connell).

55. W. PAGE KEETON & ROBERT E. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 804-05 (2d ed. 1977).

56. The few pain and suffering suits exceeding the severe injury threshold in New York contribute disproportionately to premium costs in that state. See O'Connell et al., *supra* note 13, at 167-68.

seems like a bargain may trouble consumers concerned only with keeping their own premiums down. They may not care that hiked premiums under no-fault provide them guaranteed compensation for auto accident injury. Given a choice, many might waive guaranteed compensation in return for lower premiums. If so, no-fault undermines rationality and efficiency by delivering more compensation than people truly value. The tort fault system is, therefore, arguably better.

Consumer-choice arguments of this sort are a staple in law-and-economics analysis of liability and insurance issues. Because such arguments imagine a world where efficiency and rationality lie exclusively in individualized consumer choice, they ultimately yield proposals to banish all liability law and compulsory insurance, replacing both with a system of optional first-party insurance, purchased in whatever amounts motorists choose. That way, consumers do not pay for indemnification they would not freely buy. Though there are many reasons to view such arguments skeptically, they cannot be dismissed out of hand. Choice and willingness to pay are undeniably pertinent to economic conceptions of rationality and efficiency. It might be rational to reject no-fault due to an unwillingness to pay for expanded coverage, even though the existing tort system, with mutually offsetting third-party coverage among motorists due to mandatory insurance requirements, in effect, also requires motorists to pay for coverage they might not willingly purchase.

On the other hand, moving from partial to pure no-fault might curtail opposition to expanded forced coverage by reducing its cost. Tort, pure no-fault, and partial no-fault can be viewed as alternative regimes of forced coverage, with variations and trade-offs as to premium levels and types and scope of coverage. Evaluation from the standpoint of consumer free choice is elusive. The simplest analysis would be that consumer free choice is offended least by the system that costs least in forced premiums. Pure no-fault, which shrinks lawsuit costs and compensation for pain and suffering most radically, may feature the lowest premiums, and hence, the greatest consumer free choice from that standpoint. But this analysis is tentative. It may be simple to think that consumer choice is most favored by the system that charges the least. The charges imposed by the different systems pay for different packages of benefits. Attempting to rank the systems on how well they serve consumer choice makes no more sense than ranking apples against oranges.

Two potential fronts for premium reduction under partial no-fault are: (1) better curtailment of tort suits for economic damages, and (2) stringent thresholds against tort suits for pain and suffering damages. In partial no-fault states that currently allow tort suits for economic damages, lawsuit curtailment can, of course, be achieved by switching to a

system that bars them. States that bar economic damage suits do so only when such damages do not exceed first-party coverage levels. Where such levels are low, the number and cost of tort suits are high, because it is easy for damages to exceed them. Hence, overall premium reduction would be served by mandating *high* first-party coverage minimums so as to preclude more of the tort suits that drive premiums upward.<sup>57</sup> Michigan goes the next step by banning all auto tort suits for economic damages, except for harm intentionally caused under a narrow definition, while providing unlimited medical and rehabilitation benefits to injury victims, along with substantial wage loss protection.<sup>58</sup> Premiums in Michigan are low as a result.<sup>59</sup>

Thresholds have proved weak in preempting tort suits under partial no-fault. Monetary thresholds have proved especially ineffective. They have been far too low to succeed in blocking tort suits.<sup>60</sup> Plaintiffs, lawyers, and medical providers combine to produce damages claims high enough to exceed threshold amounts. Consequently, cases of fraud may rise.<sup>61</sup> When Massachusetts raised its threshold from \$500 to \$2,000 in 1988, average medical visits rocketed from thirteen to thirty per claim.<sup>62</sup> In Hawaii, which had a high \$7,000 threshold in 1990,<sup>63</sup> the median number of chiropractor visits among those tort claimants who saw a chiropractor was fifty-eight per injury.<sup>64</sup> Monetary thresholds also fall behind inflation.<sup>65</sup>

Verbal thresholds requiring serious injury in order to proceed in tort have had greater success in preempting tort suits. Some verbal thresholds are too lax on their face to preempt enough tort suits to generate real savings. New Jersey's weak threshold, for example, speaks of fractures and disfigurement.<sup>66</sup> Michigan's, by contrast, is stringent enough

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57. See *Senate Hearing*, *supra* note 30.

58. See *id.*; MICH. COMP. LAWS ANN. § 500.3135 (West 1997).

59. See *id.*

60. In 1991, monetary thresholds varied from Connecticut's low at \$400 to Hawaii's high at \$7,600. See CARROLL ET AL., *supra* note 49, at 6 n.15, 29 n.1.

61. See *Senate Hearing*, *supra* note 30; see also AUTO CHOICE REFORM ACT, SUMMARY (1997) (on file with author); see also Sarah S. Marter & Herbert I. Weisberg, *Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Liability Claims*, 10 J. INS. REG. 462, 488 tbl. 12 (1992); LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 32-33 (Manhattan Inst. 1994); Efrain Hernandez, Jr., *Ring in Somerville Indicted for Filing False Auto Claims*, BOSTON GLOBE, July 3, 1992, at 58; James H. Andrews, *No-Fault Insurance Faulted as Some States Move to Drop It*, CHRISTIAN SCI. MONITOR, May 26, 1994, at 3.

62. See Marter & Weisberg, *supra* note 61.

63. See INSURANCE RESEARCH COUNCIL, AUTOMOBILE INJURY CLAIMS IN HAWAII 29 (1991).

64. See *id.* at 26 Hol. 38.

65. See ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 13-14 (1989) (now known as the Insurance Research Council).

66. See Schwaneberg, *supra* note 45.

to preempt the bulk of tort suits. It speaks of "death, serious impairment of body function, [and] permanent serious disfigurement."<sup>67</sup> Michigan limits litigation costs further by treating "permanent serious disfigurement" and "serious impairment of body function" as issues of law for courts to decide where there is no factual dispute over the actual nature of the injuries.<sup>68</sup> New Jersey's high premiums compared with Michigan's stem partly from these differences.<sup>69</sup>

Even strong verbal thresholds may succumb to "slippage," whereby tort suits of less and less magnitude are allowed by courts to escape preemption. This process cannot be forestalled unless thresholds are stiff and strictly enforced. New York's threshold, for example, is fairly stringent, but may, nevertheless, succumb to slippage.<sup>70</sup> If thresholds are truly stringent, the difference between partial and pure no-fault narrows. At that point, any special virtues of partial over pure no-fault lose relevance, and any preference for partial over pure becomes weak.

### VIII. NO-FAULT AND DETERRENCE

With respect to deterrence, the crucial question is whether no-fault is inferior to tort. Conclusions on lost deterrence—increased accidents due to decreased care in driving—are mixed. The issue has been hotly contested in a series of studies reaching various results. At this point, no firm conclusion can be drawn on whether no-fault produces higher accident rates, and if so, why or how much. What follows is a brief review of several of the significant studies and issues.

In one early study, Elizabeth M. Landes looked at auto fatality rates for the 1967-76 period, running a regression analysis designed to isolate

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67. MICH. COMP. LAWS ANN. § 500.3135(1) (West 1997). Florida and New York are the two other states with stringent verbal thresholds. See FLA. STAT. ANN. § 627.737(2) (West 1984); N.Y. INS. LAW § 5102(d) (McKinney 1985).

Florida's threshold is slightly weaker than Michigan's, because its categories for allowing suits are broader. See FLA. STAT. ANN. § 627.737(2) (allowing suits for "permanent injury" and "significant and permanent scarring"). New York, in turn, is slightly less rigorous than Florida using terms such as "fracture," "significant disfigurement," and "injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days immediately following the occurrence." N.Y. INS. LAW § 5102(d). Compare with Michigan's standard of "permanent serious disfigurement," MICH. COMP. LAWS ANN. § 500.3135(1), and Florida's standard of "significant and permanent disfigurement." FLA. STAT. ANN. § 627.737(2).

68. MICH. COMP. LAWS ANN. § 500.3135(2)(a).

69. See Schwaneberg, *supra* note 45; see also Swope, *supra* note 3 (looser thresholds generally increase litigation and premiums); Senate Hearing, *supra* note 30 (same).

70. See N.Y. INS. LAW § 5102(d); see also INSURANCE RESEARCH COUNCIL, INC., TRENDS IN AUTO INJURY CLAIMS (2d ed. 1995).

the impact of no-fault.<sup>71</sup> She concluded that at a \$1,500 lawsuit threshold, fatal accidents would rise 10% over what would happen under tort.<sup>72</sup>

Landes' study was hotly criticized by O'Connell and Levmore.<sup>73</sup> They chide failure to control for such variables as weather, police enforcement, road quality, driver training, urban-rural differences, and medical care. It was also criticized for focusing on fatalities, not injuries generally, and its implicit assumption that motorists will ignore their own safety, increasing their recklessness due to no-fault's protection against tort suits.<sup>74</sup> All of these criticisms seem well-taken except for the focus-on-fatalities point. The critics puzzlingly suggest that a fatalities hike proves nothing about any difference between tort and no-fault, because tort recovery for fatalities remains available anyway under all state no-fault plans. But if no-fault's reduced exposure to tort liability makes drivers more reckless, an increase in fatalities is very much what one could expect, even if fatalities remain subject to tort suits under no-fault. Of course, this is not to say that Landes has indeed proved that curtailing tort will in fact cause increased recklessness.

Zador and Lund castigate Landes not for her choice of variables, but for her statistical analysis. Using more adequate statistical methods and a more comprehensive data set, they find no link between no-fault and increased highway fatalities.<sup>75</sup> Kochanowski and Young find likewise. A U.S. Department of Transportation study comparing no-fault with tort states, found no statistically significant difference in highway fatalities or injuries.<sup>76</sup>

Sloan, on the other hand, estimates that a no-fault system that bars 25% of potential suits hikes fatalities 18% over what would happen under tort.<sup>77</sup> That figure seems implausibly high on its face, and Sloan warns about possible limitations in the data. Nevertheless, he contends that tort exerts a powerful safety effect, though not upon young drivers.<sup>78</sup>

Medoff and Magaddino find that loss ratios in no-fault states are

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71. See Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effects of No-Fault Accidents*, 25 J.L. & ECON. 49, 62 (1982).

72. See *id.*

73. See generally Jeffrey O'Connell & Saul Levmore, *A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault?*, 48 MO. L. REV. 649 (1983).

74. See *id.* at 650-51.

75. See Zador & Lund, *supra* note 29, at 234-35; see also P.S. Kochanowski & Madelyn K. Young, *Deterrent Aspects of No-Fault Automobile Insurance: Some Empirical Findings*, 52 J. RISK & INS. 269, 286-87 (1985).

76. See COMPENSATING AUTO ACCIDENT VICTIMS, *supra* note 46, at 159-66.

77. See Sloan, *supra* note 19, at 66.

78. See *id.* at 66-69.

higher than in tort states by 3.9 to 7.4 percent, depending upon degrees of purity in different no-fault plans.<sup>79</sup> A loss ratio is essentially the proportion of premium dollars paid out on claims.<sup>80</sup> From higher loss ratios, the authors deduce that no-fault states have higher accident rates.<sup>81</sup> There are serious problems with this deduction, however, because higher loss ratios could stem from factors other than increased accidents. The authors offer data negating possibilities that average claim size goes up under no-fault or that no-fault states had higher average accident rates prior to enactment of no-fault.<sup>82</sup> But there are two other hypotheses they fail to rule out.

One is that no-fault will show higher loss ratios if it brings lower average premiums. Since loss ratios are inversely proportional to premiums, premium reductions yield loss ratio increases if loss levels remain constant. The authors point out that premiums were indeed lower under no-fault than under tort during the period they studied. Though the magnitude of premium reductions reasonably matches that of the increased loss ratios under no-fault, the authors fail to consider a causal relationship.<sup>83</sup>

They also fail to consider that the number of paid claims may rise under no-fault not because accidents increase, but because claims are paid on a higher proportion of them. Under no-fault, victims get paid by filing first-party claims, not by filing lawsuits where fault must be pled and ultimately proved before the adversary's underwriter will pay anything. If the ratio of paid claims to accidents will be higher with no-fault than with tort, loss ratios will increase correspondingly. That is exactly the pattern observed.<sup>84</sup>

Studies abroad match the equivocal pattern of U.S. studies. Two Canadian studies, one by Gaudry and one by Devlin, observe that reported highway injuries and fatalities rose sharply after Quebec enacted no-fault in 1978.<sup>85</sup> But particular features of the Quebec reform must be inspected before drawing conclusions. For one thing, Quebec's

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79. See generally Marshall H. Medoff & Joseph P. Magaddino, *An Empirical Analysis of No-Fault Insurance*, 6 EVALUATION REV. 373 (1982).

80. See *id.* at 390 n.8.

81. See *id.* at 378-88.

82. See *id.* at 383-84.

83. See *id.* at 382, 386.

84. See *id.* at 382.

85. See Marc Gaudry, *Measuring the Effects of the No-Fault 1978 Quebec Automobile Insurance Act With the Drag Model*, in CONTRIBUTIONS OF INSURANCE ECONOMICS 471 (1991); Rose Anne Devlin, *Liability Versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec*, in CONTRIBUTIONS TO INSURANCE ECONOMICS 499, 513-14 (1992) [hereinafter Devlin, *Liability Versus No-Fault*]. See also Rose Anne Devlin, *Some Welfare Implications of No-Fault Automobile Insurance*, 10 INT'L REV. L. ECON. 193, 202 (1990) [hereinafter Devlin, *Welfare Implications*].

reform installed a public first-party compensation fund charging the same premium to all motorists. Premiums are neither experience-rated for individual drivers nor adjusted for high-risk group factors, such as young male status.<sup>86</sup> This reduces premiums sharply for high-risk drivers, young males for example, drawing many who found driving previously unaffordable onto the highways or else converting low-mileage high-risk drivers to higher mileage.

Highway danger rises, to be sure, but due to increased motoring by high-risk drivers, not by decreasing individual care levels.<sup>87</sup> This may turn entirely on flat premium schedules, not on no-fault as such. And even if it is true that lack of experience rating brings increased individual carelessness, this proves nothing about no-fault as such, because no-fault can be combined with experience rating. Existing and proposed U.S. no-fault plans leave underwriting to private firms and forswear flat premium schedules. This stifles at least one dimension of increased highway danger.

If no-fault successfully brings average premiums down compared with tort, that itself may bring about an increase in miles driven and a consequent rise in accidents. This could also be part of the story in Quebec.<sup>88</sup> Again, this does not mean that individual care levels have declined. It would be strange to view increased accident rates as a disadvantage of no-fault if the reason is entirely that no-fault, by bringing down the insurance cost of driving, encourages people to drive more. Driving more at less cost should count as an advantage of no-fault, not a disadvantage, even if it means more injuries, unless some optimum injury level or tradeoff with miles driven can somehow be specified. Auto injuries can be reduced to zero if no one drives at all, but that hardly counts as optimal.

Despite such problems, Devlin insists that Quebec's fatality hike under no-fault must stem from reduced care in driving.<sup>89</sup> But this insistence has no discernible scientific foundation and seems to rest entirely on the implausible conjecture that people take more risks with their *own* bodily safety if they are guaranteed injury compensation regardless of their own fault levels.

Devlin's study is further flawed by failure to investigate whether increased accident levels might be due to higher auto volume and traffic density in the years after enactment of no-fault. She concedes that iso-

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86. See Gaudry, *supra* note 85, at 481-83.

87. Cf. Michael J. Trebilcock, *Incentive Issues in the Design of 'No-Fault' Compensation Systems*, 39 U. TORONTO L.J. 19, 29-30 (1989) (finding individual care levels decrease); Devlin, *Liability Versus No-Fault*, *supra* note 85, at nn.12, 19; Gaudry, *supra* note 85.

88. See Devlin, *Liability Versus No-Fault*, *supra* note 85, at n.12.

89. See *id.* at 513-14.

lating the level of care as explanation for accident levels requires controlling for miles driven and perhaps for vehicular volume.<sup>90</sup> Unreliable data on miles driven prevent her from controlling for that factor. She acknowledges this and purports to deploy analytic techniques to minimize the problem,<sup>91</sup> but she is less than convincing in this regard.

She could use vehicular volume, where the data are far more reliable, to help isolate the level of care variable. Her responses to this do not inspire confidence. First, she notes that number of vehicles may be a poor proxy for miles driven, because it does not indicate how many miles vehicles get driven.<sup>92</sup> This is true, but is of questionable relevance. Even with an arbitrarily-assigned figure for miles per vehicle (to reduce, at least partly, the effect of uncertain underlying data on miles driven) or no assumption at all (treating increased vehicular volume as an independent, stand-alone possible cause of accident increases), controlling for vehicular volume is better than not doing so.

Devlin seems to acknowledge this when she reports that she did control for vehicular volume in the earliest version of her study. Though she claims that doing so yields results consistent with the causal connection she draws between no-fault and increased fatality, she provides no details.<sup>93</sup> Credence is under some strain by this point.

Devlin does not even consider increased traffic density as a possible cause of increased accident rates. Density in some areas may rise faster than the general increase in vehicular volume, and increased density may produce exponential or discontinuous jumps in accident rates. Moreover, it would make sense that flat premiums could produce disproportionately increased road use in urban areas where market-set rates are normally higher than in rural areas. Hence, road use can be expected to rise in precisely those areas where density is already highest. The resulting accident increase has nothing to do with individual care levels or with no-fault, and everything to do with flat premiums and their effect on road use.

In a New Zealand study, Brown finds that enactment of no-fault there produced no adverse safety effect.<sup>94</sup> Accident, injury, and fatality rates actually declined after the onset of no-fault, due to stiffened laws and enforcement on motorcycle helmets, seat-belts, and drunk driving.<sup>95</sup> These factors make it difficult to isolate no-fault's effect on driving hab-

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90. See *id.* at 510-11, 517 n.18.

91. See *id.* at 510-11.

92. See *id.* at 517 n.18.

93. See *id.*

94. See Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CAL. L. REV. 976 (1985).

95. See *id.* at 994-1001.



its. Absence of multi-variable statistical analysis weakens the value of Brown's study.<sup>96</sup> Nevertheless, the figures on convictions for alcohol-unrelated recklessness and speeding do tell a story. They do not rise with the enactment of no-fault.<sup>97</sup>

McEwin's study of no-fault in Australia and New Zealand finds fatality hikes of 16% per driver.<sup>98</sup> Like Quebec, however, Australian and New Zealand no-fault utilizes flat premium structures that may draw high-risk drivers onto the road more heavily.<sup>99</sup> Hasty conclusions about the United States should not be drawn from such systems.

#### IX. NO-FAULT AND CORRECTIVE JUSTICE

Corrective justice inherently defies empirical measurement or study. Hence, any corrective justice comparison between tort and no-fault schemes is ineffable. If pure no-fault abandons all corrective justice (because tort suits are thrown out entirely), comparing it with tort quickly reduces to two questions: (1) how valuable is corrective justice; and (2) how much does auto tort litigation embody it?

Comparisons grow even more ineffable when tort is compared with partial no-fault, which retains vestiges of corrective justice, and when partial no-fault is compared with pure no-fault. The comparisons become ones between varying types and degrees of corrective justice. How close to or far from the tort law "norm" for corrective justice do the various partial no-fault schemes lie? How much does it matter? How should any sacrifices in corrective justice be weighed against gains in compensation rationality and efficiency? Can meaningful corrective justice be reconciled with substantial gains in compensation rationality and efficiency?

#### X. "CHOICE" NO-FAULT: THE SIMPLE VERSION

Current assessments of no-fault are further complicated by proposals for so-called "choice" no-fault plans. Under the simplest choice scheme, each motorist would opt either for a type of no-fault coverage or for retention of whatever tort lawsuit rights, full or partial, exist prior to enactment of the choice scheme. First-party no-fault recovery, called PIP (personal injury protection) or PPI (personal protection insurance), is for economic damages up to the coverage limit, with tort suits for economic damages allowed only when they exceed the limit. Suits for

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96. See Trebilcock, *supra* note 87, at 29.

97. See Brown, *supra* note 94, at 1000-01.

98. See R. IAN McEWIN, NO-FAULT AND ROAD ACCIDENTS: SOME AUSTRALASIAN EVIDENCE, PROCEEDINGS OF THE INTERNATIONAL INSURANCE SOCIETY 185-93 (1987).

99. See Trebilcock, *supra* note 87, at 29.

pain and suffering are barred. Motorists opting for PIP receive first-party coverage for economic losses, but not for pain and suffering, and waive all tort suits for pain and suffering. They also receive immunity from suits for pain and suffering damages. In effect, they waive their right to seek compensation for pain and suffering they may experience in return for immunity from pain and suffering they may inflict.

The appeal of choice is to offer motorists the option of no-fault's projected low premiums and ensure compensation without forcing it on anyone who prefers tort's corrective justice and higher possible recoveries. A choice system purportedly offers the compensation advantages of no-fault to those who choose the no-fault option. Like other systems discussed above, choice plans present issues of compensation rationality and efficiency, effectiveness in deterrence, and fidelity to values of corrective justice. Empirical evaluation is hampered, because actual experience with choice is even more limited than that with pure no-fault.

Choice proponents predict substantial premium reductions for motorists who select no-fault.<sup>100</sup> Since this is the proposal's main purpose, this prediction is unsurprising. By removing pain and suffering, lawyer fees, and litigation costs from the compensation system for no-fault insureds, the scheme is able to offer them reduced premiums. Participants get reduced premiums, guaranteed compensation without proof of fault, and immunity from suits for pain and suffering in exchange for waiving access to pain and suffering damages. Though this assertedly achieves superior rationality and efficiency in compensation, pain and suffering damages must be sacrificed in order to obtain no-fault's advantages. This upends no-fault's claim to economic superiority. In technical economic terms: there is no free lunch.

For those who choose the no-fault option under a simple choice plan, results compare to what one could expect from a pure no-fault plan that bars compensation for pain and suffering. Meanwhile, those opting for tort under a simple choice plan can expect premiums to remain basically as they were under the pre-existing tort or partial no-fault systems, because accident risks and litigation expenses would not change much. Minor changes might occur, because for accidents between defendants under PIP and plaintiffs under tort, pain and suffering indemnity would come from first-party coverage, known as tort maintenance coverage, not from adversary lawsuits as under tort or partial no-fault. This difference could affect average premiums paid by tort-system motorists.

New Jersey and Pennsylvania have recently enacted simple choice systems. They basically allow motorists to choose between partial no-

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100. See sources cited *supra* note 61.

fault coverage and the traditional tort system.<sup>101</sup> New Jersey's recently re-elected governor, Christin Todd Whitman, now advocates a more complex plan, offering four choices: nearly-pure no-fault; partial no-fault with verbal thresholds; no-fault with first-party pain and suffering coverage; and traditional tort.<sup>102</sup> Astonishingly enough, auto insurance rates were a leading issue in the gubernatorial campaign.

#### XI. THE CONGRESSIONAL CHOICE INITIATIVE: "NEO-PARTIAL" NO-FAULT

In the Auto Choice Reform Act of 1997, Congress considered a plan different in one crucial respect from the simple choice plan described above. Under the Congressional choice plan, all motorists, whether covered under PIP or under tort maintenance, could sue for pain and suffering where the injuring driver was under the influence of drugs or alcohol or engaged in intentional misconduct.<sup>103</sup> This exception to no-fault preemption of pain and suffering suits separates the Congressional plan from the simple choice scheme. Essentially, the Congressional plan substitutes a severity-of-misconduct threshold to pain and suffering suits for the severity-of-injury thresholds found in partial no-fault schemes. Hence, the Congressional plan could be called "neo-partial" no-fault.

A plan recently rejected by Louisiana lawmakers featured two alternate partial no-fault thresholds to pain and suffering suits—a traditional verbal severe-injury threshold and a neo-partial severe-misconduct threshold. In theory, neo-partial no-fault could exist with or without choice. Because previous versions of choice no-fault have not featured this severe-misconduct loophole, their PIP coverage is closer to pure no-fault.<sup>104</sup>

A threshold to pain and suffering suits based on severe misconduct rather than severe injury preserves the most morally compelling core of corrective justice—pain and suffering compensation from wanton wrongdoers—while stripping away lawsuit opportunities based on severe damage alone. It is not clear, however, how successful this misconduct-based threshold system can be in preempting suits and bringing rates down, since so many serious accidents are caused by drunk drivers.

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101. See Thomas Martello, *Sabrin's Auto Insurance Plan Copies Republican Senator's Bill*, ASSOCIATED PRESS POL. SERV., Oct. 4, 1997 (discussing New Jersey's Choice System); Stephen Carroll, *Effects of a Choice Automobile Insurance Plan on Costs and Premiums: Testimony Presented to the Senate Commerce, Science and Transportation Committee*, 105th Cong. (July 17, 1997) (on file with author); Sclafane, *supra* note 45.

102. See Sclafane, *supra* note 45.

103. See Auto Choice Reform Act of 1997, S. 625, 105th Cong. § 6(d).

104. See generally Swope, *supra* note 3.

Projections of major premium cuts under the Congressional plan do not consider how many suits will escape no-fault preemption due to drunk defendants. Unless studies make such estimates reasonably, any savings projections made are fanciful. Savings are in fact overestimated in the most widely-cited study of the Congressional plan, because the number and costs of drunk-driving suits have not been factored.<sup>105</sup> This is clear, because the study projects the same premium cuts for the Congressional choice plan as for a choice plan without the drunk-driver pain and suffering threshold.<sup>106</sup>

Information on drunk driving and accidents yields a rough measure of savings overstatement in the study. One careful estimate is that alcohol causes roughly a quarter of all highway fatalities.<sup>107</sup> If total highway injuries correspond with fatalities, one fourth can be chalked up to drinking. Alcohol's share of auto tort suits may well be much higher than its share of auto injuries, because many injuries involve no negligence and give rise to no lawsuit. One study found that only 37% of auto accident victims who suffer economic loss receive a tort settlement.<sup>108</sup> This suggests that for a high proportion of injuries, no suit is filed. Furthermore, alcohol-caused crashes may yield suits in higher proportion than crashes caused by alcohol-unrelated negligence, because culpability for drinking may be especially clear and provable. Judgments and settlements might be higher, as well. At any rate, there is no question that an estimate omitting the cost of drunk driving suits overstates savings by a considerable magnitude.

The Congressional plan dreams of major premium cuts while retaining the crucial moral core of corrective justice. But that circle will not square, precisely because drunk driving suits are key both to corrective justice and to high costs and premiums. In terms of corrective justice, a misconduct-based threshold is superior to an injury-based one. But preserving this heart of corrective justice requires losing a substantial slice of potential cost cuts.

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105. ALLAN F. ABRAHAMSE & STEPHEN J. CARROLL, THE EFFECTS OF A CHOICE AUTOMOBILE PLAN UNDER CONSIDERATION BY THE JOINT ECONOMIC COMMITTEE OF THE UNITED STATES CONGRESS n.3 (RAND Inst. for Civ. Justice, Apr. 1997).

106. Compare *id.* (projecting savings from plan with misconduct threshold included), with ALLAN F. ABRAHAMSE & STEPHEN J. CARROLL, THE EFFECTS OF A CHOICE AUTO INSURANCE PLAN ON INSURANCE COSTS (RAND Inst. for Civ. Justice 1995) (projecting savings from plan without misconduct threshold included).

107. See H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING: SOCIAL POLICY FOR SAVING LIVES 37 (1992).

108. See CONARD ET AL., *supra* note 11, at 149.

## XII. CHOICE PLANS: MECHANICS, DYNAMICS, RESULTS, AND VALUES

Under choice, PIP motorists waive their right to bring many tort actions for auto negligence. In exchange, they receive partial immunity from economic damage suits for their own negligence and complete or neo-partial immunity from pain and suffering suits. It is this immunity, combined with reduced premiums and assured partial compensation, that induces motorists to waive their rights to bring suit.

Motorists who refuse this bargain retain rights to sue, but remain subject to being sued under whatever tort or partial no-fault system already exists in their state, and recover nothing for their injuries without proving the adverse party's negligence. In accidents between two PIP motorists, each receives first-party compensation. In accidents between two tort system motorists, suits or settlements proceed as in the pre-existing tort system, be it traditional or partial no-fault. However, there is potential awkwardness in a choice plan when accidents occur between motorists under no-fault and motorists under tort. Allowing suit by the tort-system motorist would contradict the no-fault motorist's immunity; hence, the right to sue must yield. Over time, this risk of having suits thwarted by immunity may induce motorists who actually prefer tort to choose no-fault instead. Otherwise, they could wind up paying high tort-system premiums while losing effective exercise of the right to sue they supposedly retain. Pressure on each motorist to choose no-fault would increase as more and more others do. The "choice" aspect would become illusory and the system would converge on no-fault for everyone.<sup>109</sup>

This awkwardness is supposedly resolved by giving tort plaintiffs who face immunized no-fault defendants an equivalent of tort recovery. Such plaintiffs secure their tort-damage equivalent through first-party claims against their own insurers in what is called "tort maintenance coverage," with recovery up to the coverage amount conditioned on proving negligence by the immunized defendant, even though the immunized defendant will not make the actual payment.<sup>110</sup> Thus, the no-fault defendant retains his tort immunity, but the plaintiff secures the equivalent of a tort recovery. The system is much like existing uninsured motorist coverage, whereby a claimant receives first-party cover-

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109. Some indication of the likelihood of this scenario may be observed in New Jersey where, under the current plan allowing choice between tort and partial no-fault, 88% percent of motorists opt for partial no-fault. See Martello, *supra* note 101. It is impossible to say whether these motorists are simply attracted to lower rates and guaranteed recoveries under partial no-fault or whether they perceive the tort option as valueless, because so many other motorists have immunity.

110. See Auto Choice Reform Act of 1997, S. 625, 105th Cong. §§ 4(20)-(21), 5(c), 6.

age in lieu of tort compensation if a particular defendant lacks funds or insurance to pay a judgment.<sup>111</sup> Tort claims against PIP insureds would remain available for economic damages exceeding one's tort maintenance coverage limit.

A system of litigating third-party negligence against first-party underwriters under tort maintenance coverage might not last long. Underwriters could cut litigation costs by offering no-fault recovery to tort maintenance customers at rates more attractive than those for fault-based coverage. This will occur if savings from avoiding negligence litigation exceed the costs of increased numbers of payouts. Moreover, it is predictable that underwriters will standardize damage payment levels, including those for pain and suffering, according to pre-set schedules, rather than "litigating" them before in-house "juries."

With these developments, it is likely that competitive forces will then drive fault-based first-party coverage from the market, leaving a tort maintenance system where motorists instead choose first-party no-fault coverage at various levels for various rates. This could, in theory, include a first-party market for pain and suffering coverage. But it is likely that this market, in turn, will fail and that motorists will overwhelmingly abandon pain and suffering coverage in pursuit of low premiums. In other words, they will not buy tort maintenance coverage, but will opt for PIP instead. A combination of market choices and market breakdown will produce a regime of near pure no-fault for almost everyone. Lawmakers considering voting for a so-called "choice" plan should understand that voting for it may, in effect, mean voting for uniform no-fault in the end.

When all is said and done, the resulting system will be akin to near-pure no-fault for everyone, with pain and suffering compensation squeezed out of the system, except under the Congressional plan, which retains tort cases for egregious driving misconduct. The Congressional plan might yield a decent system—no-fault first-party coverage for economic losses, and corrective justice for pain and suffering, but only in the most morally compelling situations. But the "choice" aspect will have turned out to be a mirage. Under the Congressional plan, incentive to choose PIP over tort maintenance coverage would be especially sharp, because PIP motorists would retain the right to sue for pain and suffering in cases of egregious driver misconduct. Under such a system, PIP seems the best of possible worlds. It may not, however, be a world of drastically reduced premiums, because costly pain and suffering suits will remain commonplace.

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111. *See id.* § 6(c).

Proponents of choice might argue that if motorists choose to waive pain and suffering coverage, it means they did not value it enough in the first place to pay for it willingly. They are better off without it, and better off without a system (tort) that makes them pay (with extra premiums) for a good they do not truly value (the chance for pain and suffering compensation). This argument ignores the possibility that market failure might thwart delivery of a good people truly value at prices reflecting how much they value it.

There is strong reason to suspect that market failure would plague first-party insurance for pain and suffering. Consumers would face prohibitive information costs in estimating their chances of suffering pains of various magnitudes. In other words, they would have no realistic way of finding out how much pain and suffering coverage they should buy and at what prices. A rational and functioning market for reasonable amounts at reasonable prices would not emerge and consumers would go uninsured instead, even though they might, in fact, deem compensation for pain and suffering to be valuable.<sup>112</sup>

If all this is true, a tort system that provides regular pain and suffering benefits might be superior from a consumer-welfare standpoint to a no-fault system that constricts them. On the other hand, under the Congressional plan, pain and suffering damages may remain adequately available under the drunk-driving loophole. As noted, motorists with this loophole available may strongly tend to opt for PIP coverage. If so, that plan may achieve a defensible balance of widespread easy compensation for economic losses, corrective justice, and an adequate level of pain and suffering damages. What such a plan may not achieve is sharply cutting premiums. In fact, premium hikes would not be surprising.

Evaluating deterrence under choice plans is equally ambiguous. If tort serves deterrence, choice plans undermine it to whatever degree motorists opt out of tort into no-fault. In theory, the degree of lost deterrence in the switch from tort or partial no-fault to choice could be measured by careful analysis of accident rates. Because choice schemes have not yet been widely adopted, no such study can yet be made. It is doubtful that such studies would prove a connection between deterrence and tort more convincing than studies so far have managed to do.

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112. On the possibility of market failure in first-party insurance for pain and suffering coverage, see Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785 (1995); see also Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 770-79 (1993) (discussing similar market failures in the products liability context); Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1, 61-64 (1990) (same).

Corrective justice comparisons are again ineffable. Corrective justice can be "quantified" by the proportion of auto accidents in which some third-party settlement or judgment takes place. Under simple choice, the overall "quantum" of corrective justice is more than under pure no-fault if many motorists retain lawsuit rights, but less than under traditional tort, because many will waive such rights. How much more and less is a matter of how many motorists retain their lawsuit option. The more motorists choose to retain lawsuit rights, the more the system retains tort's purported corrective justice dimension. As noted above, waiver of tort rights is likely to be high if underwriters begin offering tort maintenance coverage as a form of optional no-fault indemnity for pain and suffering. The Congressional plan, with its severe misconduct tort threshold, would nevertheless retain a substantial measure of corrective justice, arguably in precisely those cases where it is most proper and meaningful.

When tort and no-fault motorists collide under choice plans, corrective justice takes a back seat. Claimants secure full tort-like compensation, but it comes from underwriters, not from negligent motorists. Determining culprit negligence may turn out to be more costly for underwriters than covering claimant losses on a no-fault basis. If so, negligence determinations may grow rare, supplanted by no-fault indemnity offerings. Even if determining culprit negligence remains a prerequisite to payment, this dim echo of corrective justice would lose moral significance, because negligent culprits would not be party to proceedings and the compensation would not be linked to them even by insurance.

A corrective justice comparison between choice and existing partial no-fault schemes is similarly ambiguous. Under choice, motorists remaining with tort retain some, but not all, of tort's corrective justice. They lose corrective justice whenever the defendant is someone who has waived tort in favor of no-fault's lawsuit immunity. For motorists choosing no-fault, all vestige of corrective justice is abandoned; therefore, the overall "quantum" of corrective justice is determined by the number of motorists opting for no-fault. By contrast, partial no-fault places all motorists in the same corrective justice boat. That boat is one of diminished corrective justice compared with tort, with the degree of diminishment turning on how completely a given no-fault scheme preempts tort.

If simple choice is introduced into a partial no-fault scheme, the quantum of corrective justice can be expected to drop, perhaps drastically, as motorists waive tort rights. This is less the case with the Congressional neo-partial no-fault choice plan. It may or may not curtail the



number of tort suits in states with pre-existing partial no-fault, depending on what option motorists favor and on whether a severe misconduct threshold preempts more or fewer suits than existing severe injury thresholds. Those factors aside, the Congressional plan compares favorably with traditional partial no-fault on one crucial corrective justice consideration. It concentrates suits upon those guilty of the greatest misbehavior.

### XIII. LOW-INCOME MOTORISTS

Because high premiums are a major factor in prompting advocacy for no-fault, it is especially relevant to consider the place of low-income drivers under tort and no-fault. Benefits or detriments to low-income drivers may warrant special emphasis in policy evaluation. Tort has been criticized as particularly harmful and inequitable to low-income motorists.

First, high premiums are especially unaffordable for low-income motorists, who sometimes spend staggering proportions of their total incomes on auto insurance.<sup>113</sup> This expense may be inescapable for those who drive to work.

Second, due to urban residence, low-income motorists may pay average premiums higher in absolute terms, not just in proportion to income.<sup>114</sup>

Third, low-income drivers on average receive less in tort compensation than high-income drivers, because their lost income component is lower, and possibly also because their medical care is furnished by lower-cost providers.<sup>115</sup> Their premiums are not reduced in proportion to this compensation deficit, because an insured's income is a weak predictor of the third-party payout risk he imposes on an underwriter. Low-income motorists are as likely as wealthy ones to cause damage an insurer might need to indemnify.<sup>116</sup> Because they receive less compensation than the rich from the tort/insurance system but pay nearly as much, low-income motorists subsidize compensation for wealthier

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113. See Jeffrey O'Connell, *Allowing Motorists a Choice to Be Legally Uninsured by Surrendering Tort Claims for Noneconomic Loss (With Some Further Thoughts on Choices Between PIP and Tort Coverage)*, 1 CONN. INS. L.J. 33, 41 (1995). O'Connell indicates poor families may need to spend up to 30% of income on auto insurance and frequently postpone food and shelter payments as a result. See *id.* (citing Robert Lee Maril, *The Impact of Mandatory Auto Insurance Upon Low Income Residents of Maricopa County, Arizona* 8-9 (1993) (unpublished manuscript on file with *Connecticut Insurance Law Journal*)).

114. See *id.* at 41.

115. See *id.* at 41-42.

116. See *id.* at 41.

motorists. In effect, they pay for insurance to cover their well-to-do neighbors.

Fourth, low-income motorists get lower average settlements for equivalent loss, probably due to inferior education, sophistication, and lawyering, combined with higher need for quick cash.<sup>117</sup>

It would be good, somehow, to offer low-income motorists relief from these burdens and inequities. Some observers contend that no-fault can accomplish this by reducing premiums overall and by calibrating low premiums to the low incomes that would yield reduced payouts in first-party coverage. Because partial no-fault does not deliver premium reductions and retains tort to a substantial degree, relief for low-income motorists is not found there. Pure no-fault and choice plans may be different. There is reason to hope they might deliver reduced premiums overall by eliminating noneconomic damages, lawyer fees, and litigation costs.<sup>118</sup> Arguably, they could also provide specially reduced premiums to the poor due to first-party risk-rating. Because low-income victims would file smaller claims than the rich, underwriters might offer them reduced premiums.<sup>119</sup>

The prospects for reduced premiums overall are brighter than those for income-sensitive premium reductions targeted to the poor. Income-sensitive premium reductions might be slow to emerge, because they would depend on underwriter aggressiveness in performing income-sensitive risk rating. Incentives would come from the prospect of expanded sales to low-income customers through reduced premiums made possible by income-sensitive risk rating. But any kind of risk rating is costly, due to the information gathering and actuarial analysis required. It takes place only where its costs are outweighed by revenues garnered through expanded or protected market shares. There is no guarantee that income-sensitive first-party risk rating would turn out to be profitable. If not profitable, it will not happen.

Moreover, first-party risk rating for low-income motorists may yield counter-intuitive results. Though low-income motorists file relatively smaller claims for equivalent injuries and recovery periods, they may be more likely to get into accidents in the first place, due to higher traffic density, road disrepair, and poor traffic regulation in low-income neighborhoods, and be prone to more severe injuries from driving cheaper, less safe cars. Such factors compromise incentives to offer

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117. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS, 241-42 (1970); U.S. DEP'T OF TRANSP., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 54, tbl. 3.25 (1970).

118. See AUTO CHOICE REFORM ACT, SUMMARY, *supra* note 61, and accompanying cites.

119. See O'Connell, *supra* note 13, at 177.

targeted low-income premiums, even in a first-party market. Moreover, average medical care is inferior and rehabilitation for work consequently less effective for low-income citizens. If so, medical and lost-income expenses rise, offsetting the advantages of less costly medical care and lower lost-income sums.

Choice proposals introduce one further critical issue. I suggest above that a choice system might quickly evolve into a uniform no-fault system, with pain and suffering damages wiped from the scene by failure in the first-party insurance market for them, leaving only PIP coverage for all. If that is not the case, however, what may emerge instead is a class system of access to pain and suffering damages.

Under choice, low-income motorists will be more likely to opt for low-premium no-fault coverage than high-income motorists who can better afford the high premiums associated with tort. Wealthy motorists would be more inclined than the poor to retain tort rights to pain and suffering damages. No-fault's guarantee of compensation without proof of fault means less to the wealthy whose medical expenses are probably covered by job-linked health insurance and whose lost income from physical injury averages less, because they do not live off manual labor. Though many high-income motorists will choose no-fault anyway and some low-income motorists will stay with tort, the predictable result is a class system in which average wealthy victims receive pain and suffering damages (for fault-based accidents), while average low-income victims do not.

The implications grow more troubling when one considers that pain and suffering (along with other non-economic damages) act as a compensation equalizer between poor and wealthy under tort. The poor may receive less for lost income and medical expenses, but they suffer the same pain as the rich for mangled limbs and gashed faces, and receive roughly equivalent pain and suffering damages.

In this light, the tort system seems to affirm equal human worth between rich and poor, better than a pure no-fault system that eliminates pain and suffering compensation or a choice system that eliminates it disproportionately for the poor. Hence, no-fault may subject the poor to an unintended but very real indignity. True, this indignity may seem weightless compared with the tangible benefit of providing the poor with more affordable insurance. But damaged dignity is a paramount feature of serious personal injury. Redressing and minimizing dignitarian damage are key purposes of delivering compensation and administering corrective justice. Thus, there is reason to pause before adopting compensation schemes that might themselves engender new forms of dignitarian insult.

Arguably, these egalitarian/dignitarian objections count less heavily against choice plans than against universal no-fault. Under choice, the dignitarian deprivation is chosen, not compulsory as under pure no-fault, and this may seem to take the sting from any indignity. But this may be too glib. The "voluntary" aspect of choice no-fault is obviously more suspect for the poor than for the wealthy who feel less financial constraint. Moreover, "voluntary" indignity may sometimes sting more, not less, because it suggests personal complicity.

Pure no-fault puts rich and poor in the same boat on lost access to pain and suffering damages. In that sense, it may actually be less offensive to dignitarian values than a choice plan. Moreover, the poor are insulted more overtly under choice than under pure no-fault. Pure no-fault widens compensation gaps between rich and poor insofar it bans pain and suffering damages with their equalizing effect. But this may insult the poor less tangibly than hearing tales of hefty awards to the rich under a choice plan where the poor have waived rights to pain and suffering damages.

The particular burden placed on the poor by high premiums under tort has prompted calls for a modified choice plan exclusively targeted at low-income motorists. Under such a plan, an option for pure no-fault would be extended only to low-income drivers, with all other drivers confined to the preexisting tort or partial no-fault system. A California proposal along these lines, debated in 1989, was never passed.<sup>120</sup> Though some poverty and consumer activists rallied for the plan, others—Ralph Nader among them—resisted.<sup>121</sup> Basic arguments for and against such proposals are like those just reviewed, but there is one unique consideration. This kind of targeted choice plan would sharpen the class dimensions of the system and the seriousness of any attendant indignities.

In considering the situation of low-income motorists, no-fault proposals need to be compared with proposals to reform treatments of uninsured motorists. Reform ideas focused on uninsured motorists would impact heavily on low-income drivers, who represent the bulk of the uninsured. Uninsured drivers pose the risk to other motorists of going uncompensated for injuries. They also seem to cause a disproportionate share of auto injuries,<sup>122</sup> some probably because their individual driving records have caused the steep premiums they seek to avoid, others sim-

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120. See NAT'L INS. CONSUMER ORG., PAY-AT-THE-PUMP: PRIVATE NO-FAULT AUTO INSURANCE (on file with *Connecticut Insurance Law Journal*); see also ANDREW TOBIAS, AUTO INSURANCE ALERT! 57-58 (1993).

121. See Kenneth Reich, *Nader Draws Criticism by Consumer for No-Fault View*, L.A. TIMES, May 29, 1989, at A3.

122. See O'Connell, *supra* note 113, at 33-34.

ply because they are poor and live in dense, high-accident sectors. Though going uninsured is illegal and not to be admired, it is especially tempting for the poor, who not only face unaffordably high rates, but also have fewer assets to protect from lawsuits than do those with more wealth. For low-income motorists, compulsory insurance is disproportionately high in cost and low in benefit.<sup>123</sup>

One reform approach is to deprive the uninsured of rights to sue for auto accident injuries. This approach, sometimes dubbed "no pay, no play," has recently been enacted in Louisiana, New Jersey, and California.<sup>124</sup> A version has also been included in the Congressional choice no-fault bill.<sup>125</sup> It can be justified as a way of sanctioning motorists who flaunt required-coverage laws. The problem with "no pay, no play," however, is that it strips from uninsured motorists injured by the fault of others a basic right to seek compensation. The constitutionality of this may be questioned, but as a form of economic regulation, it probably passes muster under rationality review, at least for federal constitutional purposes. The right to sue for personal injury is arguably not fundamental and disproportionate impact on the poor does not trigger heightened scrutiny if poverty is not a suspect classification. Moreover, the loss of rights to sue in tort may be deemed rough justice for the uninsured, who impose on others a risk of uncompensated injury.

Another problem may be that "no pay, no play" is excessively punitive toward those for whom insurance is least affordable. Especially for the seriously injured, loss of lawsuit rights may be unduly harsh as a sanction for non-compliance with compulsory coverage laws. A Louisiana proposal, packaged with a recently-rejected no-fault bill, seemed alert to these concerns. It stripped lawsuit rights away from compulsory coverage violators only for the first \$10,000 in damages.<sup>126</sup> Like any such approach, this one conferred a windfall on negligent drivers lucky enough to injure uninsured motorists. But the sanction on uninsured motorists was definite in amount and seemed roughly fair.

A recently-proposed modification of "no pay, no play" superficially seeks to accommodate the uninsured rather than punish them. Under this proposal, going uninsured would be legalized, but those who do so

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123. See *id.* at 35-37.

124. See Sclafane, *supra* note 45 (Louisiana and California); see also Robert Schwaneberg, *Uninsured, Drunk Drivers Barred from Suits: Measure Excludes Classes of Motorists from Pursuing Litigation*, STAR-LEDGER (Newark N.J.), July 7, 1997, at 017 (discussing New Jersey law).

125. See Auto Choice Reform Act of 1997, H.R. 2021, 105th Cong. § 6(c)(2).

126. See Sclafane, *supra* note 45; see Ted Griggs, *Judge Hears Arguments on Insurance Law Changes*, BATON ROUGE ADVOC., Oct. 10, 1997, at 1B; see also S. Carl Redman, *Insurance Revamp Is OK'd: Law Would Reduce Car Liability Premiums*, BATON ROUGE ADVOC., June 17, 1997, at 1A.

would waive their rights to sue for pain and suffering.<sup>127</sup> The sting of curtailed right to sue is symbolically numbed by recharacterizing it as the consequence of a legal choice rather than punishment for scofflaws. In effect, low-income motorists are allowed to avoid burdensome premiums in return for waiving certain compensation rights. If loss of compensation rights seems harsh, recall that for low-income motorists, current high premium levels are also harsh.

Such a proposal differs in two respects from the targeted choice plan for the poor discussed above. First, it allows participation by non-poor motorists who may elect to go uninsured. This feature could conceivably be deleted by a wealth ceiling on participation. Second, the choice it offers is not between two systems of premiums and compensation (first-party and tort), but rather to forego premiums in return for waiving compensation.

Both the traditional tort system and all reform systems discussed here, including those defended or even designed as ways to help the poor, entail some disadvantages for them. Such trade-offs for the poor can be avoided only through outright subsidies or mandatory preferential premiums for the poor without exacting any price for them. Short of this, concern for the poor confronts an array of imperfect reform options, along with a traditional tort system which is itself especially imperfect from the standpoint of the poor.

#### XIV. CONCLUSION

Agitation and debate over auto no-fault are likely to accelerate in coming years. Fueled mainly by high and rising premiums, the discussion will call attention to no-fault's apparent advantages as a compensation system. Cost and compensation advantages are greatest when no-fault is closest to pure. Among existing schemes, this is best approximated by partial no-fault schemes with stringent verbal thresholds against pain and suffering suits.

Though studies are mixed, it seems unlikely that no-fault seriously undermines road safety. It is also unlikely to augment it.

No-fault's cost and compensation advantages must be weighed against disadvantages in preempting corrective justice values that tort may vindicate. Neo-partial no-fault, its pain and suffering lawsuit threshold based on severe misconduct, may strike a reasonable compromise between attaining no-fault's compensation advantages in modest degree and preserving corrective justice where it matters most. Whether it can deliver substantial premium cuts is more doubtful.

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127. See O'Connell, *supra* note 113, at 37.

Choice plans, inspired by consumer sovereignty, may fail to serve it. They may instead yield no-fault for all, as underwriters and motorists respond to market incentives, pressures, and failures.

All existing and seriously discussed systems visit hardships and even inequities upon the poor. On other hand, insofar as they are uninsured, the poor deal hardships and even inequities upon others. Policy options should be weighed for their impacts on the poor with respect to both of these dimensions.