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No-Fault Automobile Insurance: Will the Poor Pay More Again?

Wilbur C. Leatherberry*

No-fault automobile insurance is a topic presently before Congress and many state legislatures. Some states have already enacted statutes providing for various forms of no-fault coverage. Throughout the no-fault debate the interests of the poorer members of society have been inadequately considered. In an attempt to test their ability to best serve the interests of the poor the author examines enacted no-fault statutes and proposed bills. He concludes that, for the most part, the enacted state provisions do little to improve the lot of the poor; however, the Uniform Motor Vehicle Accident Reparations Act and proposed Senate Bill 354 are the best legislative proposals to date.

"For the poor it [citizenship] consists in supporting and maintaining the rich in their power and their idleness. At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

I. INTRODUCTION

The recent past provides numerous examples of well-publicized major legislative proposals directed at the problems of the poor. President Johnson waged his war on poverty, 2 President

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Nixon proposed welfare reforms, and now President Ford is resis-
ting pressures for an extravagant national health insurance system.
Poor people and their advocates have focused much attention on
these and other legislative proposals in an effort to make certain
that the interests of the poor are represented and fully discussed.
However, there is another equally important legislative movement
where less attention has been paid to the interests of the poor.
No-fault automobile insurance in some form has been enacted in 23
states and Puerto Rico. In addition, a uniform law has been
drafted, federal legislation has been proposed, and many no-fault
bills are now pending in state legislatures, largely due to the threat
of federal intervention. Although the impact of a change to a no-
fault system on the poor has been discussed in some instances,
most legislators have failed to give it adequate consideration.

The cost of a no-fault plan must be the principal concern of
those who would represent the interests of the poor. Some plans
are too expensive in terms of absolute costs, meaning that all mo-
torists will pay too much for the benefits provided. Others are un-
acceptable because they are relatively more expensive for the poor
than for other motorists. Poor motorists should pay no more than
their fair share of the cost of a no-fault plan. Perhaps they should
pay less. Some benefits provided by no-fault plans may be unneces-
sary or even useless to the poor. An analysis of the method of
financing and the benefits provided is crucial to the proper evalua-
tion of any no-fault proposal.

Before considering these issues, an attempt must be made to
delineate the class of people with whom this article is concerned.
In addition, since the term “no-fault” encompasses a wide range of
insurance proposals, the various plans and their common features
must be described.

3. For an insider's view of the struggle over this legislation, see D. MOYNIHAN,
4. See, e.g., National Health Insurance Stalemated, 33 CONG. Q. 1091-93
(1975).
5. For a list of enacted statutes and major current proposals, see Appendix B.
6. UNIFORM MOTOR VEHICLE ACCIDENT REPARATIONS ACT (1972) [hereinafter cited as UMVARA]. Professor Henderson, one of the reporter-draftsmen of the
Act, has written a very useful article explaining the policy choices which were made
by the commissioners. Henderson, The Uniform Motor Vehicle Accident Repara-
7. A bill passed the United States Senate on May 1, 1974, but it died in the
8. For example, the congressional hearings on the proposed no-fault bill for
the District of Columbia produced several interesting comments about the effect of
such legislation on the poor. See Hearings on H.R. 5448 Before the Subcomm. on
Business, Commerce, and Taxation of the House Comm. on the District of Columbia,
93d Cong., 1st Sess. 9, 169, 257, 276 (1973) [hereinafter cited as D.C. Hearings].
A. Who Are the Poor?

Defining "the poor" is no easy task. Any attempt to formulate a definition necessitates recourse to arbitrary criteria but is nonetheless essential to the present analysis. The poverty line used by the federal government commends itself as a fixed definitional standard. Of greater assistance, however, is the enumeration of some of the prominent characteristics of the group denominated "the poor" without drawing bold lines to include or exclude people.

There can be little doubt that minority groups are disproportionately represented in the economically disadvantaged class. The aged also make up a very large segment of the group. In addition, millions of people, although employed, earn an income which is inadequate to support their families at a decent level. Indeed, the working poor may be the group most seriously affected by no-fault automobile insurance because many, if not most, must drive to and from work. The enactment of a no-fault insurance plan af-

9. The poverty line concept was developed in order to identify, in dollar terms, a minimum level of income adequacy for families of different types in keeping with American consumption patterns. Based on an analysis of the percent of income devoted to food expenditures, an estimate was developed of the minimum cost at which an American family, making average choices, can be provided with a diet meeting recommended nutritional goals. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CONSUMER INCOME: CHARACTERISTICS OF THE LOW INCOME POPULATION: 1973 at 165 (Series P-60, No. 98, 1975). In 1973 the poverty line was set at an annual income of $4,540 for a nonfarm family of four. About 23 million people or 11 percent of the population were below the line in 1973. In terms of households, some 4.8 million families and 4.7 million unrelated persons (those who live alone or with nonrelatives) were below the line. Id. at 1.

10. About 31 percent of blacks (compared with only 8 percent of whites) were below the poverty line in 1973. Blacks constituted 32 percent of the low-income population and only 9 percent of the nonpoor group. About 22 percent of those of Spanish origin were below the poverty line in 1973, representing about 10 percent of the low-income population. Id. at 2-3.

11. About 3.4 million people over age 65 were classified as poor in 1973. They represented about 15 percent of the low-income population. Id. at 3.

12. In about one-half of low-income families the family head worked at some time during 1973 and, of this group, 35 percent worked year round full time. Of the low-income family heads who did not work at all during 1973, three-fifths were women with family responsibilities or retired persons. Id. at 3.

13. Public transit lines generally converge on the central business district while many low-income ghetto residents work in the suburbs. In addition, public transportation from the ghetto to the suburbs is slow and indirect in most cities. See Meyer, Urban Transportation, in THE METROPOLITAN ENIGMA—INQUIRIES INTO THE NATURE AND DIMENSIONS OF AMERICA'S "URBAN CRISIS" 41, 66-69 (J. Wilson ed. 1968). Because public transit from the ghetto to the suburbs is inadequate, it may be necessary to preserve and improve the access of the poor to automobile transportation. As one writer suggests,
fects all potential victims of automobile accidents and all owners and potential owners of automobiles. It most seriously affects those who can least afford to buy or to be without insurance coverage. Because "poverty is not really a discrete condition," the class of people with whom this article is concerned cannot be precisely limited. Poor people have limited choices and those who are poorest are subject to the most severe limitations. However, the problems of poverty cannot be eliminated simply by moving people across the poverty line. Accordingly, the analysis of interests offered herein will be relevant to a very substantial number of people above the government poverty level.

This article will focus on the interests of the poor who do own or drive automobiles. The number of individuals who do not own or drive an automobile, or who live in a household which does not have one, is very small. The members of that class are likely to be the

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Among families that own cars, the lower the income level the greater the proportion of family income which is expended for gasoline. It appears "that 25 percent of all car owners in the lowest income decile spend more than 20 percent of their total income on gasoline charges." J. Holmes, The Relative Burden of Higher Gasoline Prices, February, 1975 (working paper from the Panel Study of Family Income Dynamics for the Office of Economic Opportunity; available from the Institute for Social Research of the University of Michigan). If automobile insurance becomes compulsory, poor people will be forced to spend a considerable portion of their income for the coverage. See notes 50-52 infra.


15. In 1971, 79.5 percent of all households owned at least one car. Of households with an annual income below $3,000, 40.6 percent had a car. For other income groups the percentages of car ownership were as follows: of households with incomes from $3,000 to $4,999, 68 percent; of households with incomes from $5,000 to $7,499, 84.2 percent; and of households with incomes from $7,500 to $9,999, 91.3 percent. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1973 No. 542, at 332.

16. A study done for the Office of Economic Opportunity indicates that half of the people in the two lowest real income deciles, compared with only one-sixth of the population as a whole, did not own a car. Nearly three-quarters of households headed by nonwhite females with children had no car. J. Benus, Transportation of the Poor 2-3, July, 1970 (working paper from the Panel Study of Family Income Dynamics for the Office of Economic Opportunity; available from the Institute for Social Research of the University of Michigan).

The poor who live in households without a car will not contribute to a no-fault plan but will sometimes be victims of accidents. When they are injured in accidents involving insured vehicles, the plans will provide them with the same no-fault benefits available to other victims. However, many plans fail to provide for these
B. **What is No-Fault Automobile Insurance?**

Pressure for reform of the automobile accident reparations system has led to numerous proposals.\(^{17}\) Most of the plans are now being lumped together under the heading "no-fault insurance," although they differ substantially. Hence, a politician's statement of support for no-fault automobile insurance is comparable to a statement that he likes classical music or French literature; the statement is so broad that it is almost meaningless.

Actually, "no-fault" is a misnomer when applied to any of the enacted plans or to those now under consideration. Today, no one seriously promotes a plan which would eliminate fault as a basis of recovery in all automobile accident cases.\(^{18}\) Even the most ardent proponents of the no-fault concept argue for only a partial abolition of tort liability based on fault. Their plans set a threshold, based upon the amount of medical expenses incurred or upon other factors, which determines initially whether a fault-based suit is permissible. Unless the threshold requirements are met, the accident victim will be limited to recovery of his pecuniary loss from his own insurer. He will not be permitted to recover general damages\(^{19}\) from the victims when they are injured by uninsured or hit-skip vehicles. *See* notes 219-22 *infra* and accompanying text.


18. Such a plan was proposed and introduced in state legislatures by the American Insurance Association whose members have been strong advocates of no-fault insurance. The plan was described by T. Lawrence Jones, president of the association, in testimony before the Senate Antitrust and Monopoly Subcommittee on December 15, 1969. That statement is reprinted in *Hearings on H.R. Con. Res. 24 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess., ser. 27, pt. 3, at 1116-33* (1971) [hereinafter cited as *1971 House Commerce Hearings*]. Its unsuccessful track record is documented in a table listing plans proposed in 1969, 1970, and 1971 and indicating the action taken in various state legislatures. Id. at 1137-38.

19. These damages encompass nonpecuniary losses such as pain and suffering: General damages are those which do not require a specific showing of monetary loss, but are such losses which can be inferred from the evidence of injury. These include, among other things, damages for pain and suffering, loss of use of body members or loss by amputation of a member (hand, arm, leg, eye, etc.), total or partial loss of vision, and the effect of facial or bodily scarring on the injured person's future enjoyment of life, as well as the value of the loss of ability to bear children. They include losses presumably incurred when there is a loss of opportunity which conceivably might have yielded financial reward were it not for the occurrence of the accident.

General damages are such as the law itself implies or presumes to have
other party, even if the accident was clearly the other party's fault. Those who argue for the partial abolition of tort liability include Professors Keeton and O'Connell,20 the American Insurance Association21 and its member companies,22 and the Uniform Law Commissioners who have promulgated the Uniform Motor Vehicle Accident Reparations Act.23 Those plans which provide for partial abolition of tort liability will be referred to herein as threshold plans.24

Bar groups25 and others, including Professors Blum and Kal-

accrued from the wrong complained of, for the reason that they are its immediate, direct, and proximate result. The distinguishing characteristic of general damages is the lack of corroboration—the lack of specific evidence—of a specific monetary loss.

W. ROKES, NO-FAULT INSURANCE 209 (1971). General damages are to be distinguished from special damages, which are “specific medical and hospital expenses, property damages, and dollar amount income losses which can be verified by reference to specific expenditures, evidenced by invoices, receipts, and other records.” Id.

The phrase “pain and suffering” is sometimes used in a broad sense to include all sorts of nonpecuniary damages as is the phrase “intangible loss.” Blum & Kalven, Ceilings, Costs, and Compulsion in Auto Compensation Legislation, 1973 UTAH L. REV. 341, 347 n.12. “Noneconomic loss” is another frequently used synonymous phrase, but Blum and Kalven find it colorless. Id. “Noneconomic detriment” is the phrase chosen for use in the uniform act. UMVARA § 1(a)(9).

Professor Posner denies that such damages are “noneconomic.” He agrees that [S]uch losses, if they do not impair earning capacity, have no pecuniary dimension. But this is not because they are not true economic losses; it is because of the absence of markets in mutilation. A cannot buy B's ears and tongue to gratify his taste for mutilating people and therefore these things do not have prices. But they have opportunity costs: B would not part from them for nothing. The attempt to affix a money value to human suffering is disagreeable. But arguably it is even more disagreeable to increase that suffering by reducing the incentives to avoid inflicting it.

R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.11, at 82 (1972).

20. Their views and their plan are set out in detail in R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) [hereinafter cited as BASIC PROTECTION]. The Keeton-O'Connell Plan is said to have begun the contemporary momentum toward no-fault legislation. Blum & Kalven, supra note 19, at 341.

21. See note 18 supra.

22. Aetna Life & Casualty Co. is one such company. Its support of no-fault insurance in either the pure form proposed by the American Insurance Association or a threshold form was explained by the company's president, Frederick D. Watkins, in 1971 House Commerce Hearings, pt. 1, at 247-62.

23. See note 6 supra.

24. For a list of threshold plans which have been enacted or are now under serious consideration by legislators, see Appendix C.

25. The American Bar Association initially opposed threshold plans and even those add-on plans which compelled the purchase of the no-fault coverage. See SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS, AMERICAN BAR ASSOCIATION, REPORT in 1971 House Commerce Hearings, pt. 3, at 705-979. The ABA later supported compulsory add-on coverage but continues to oppose threshold plans. President Fellers Expresses the Association's Opposition to National No-Fault Standards and Urges Reform at State Levels, 61 A.B.A.J. 701 (1975);
ven,26 the National Association of Independent Insurers,27 and the American Mutual Insurance Alliance,28 have urged the retention of tort liability in all cases. While they generally recognize the need for some compensation for pecuniary loss to all victims regardless of fault, they support plans which would provide such benefits through expansion of the medical payments coverage now offered in most automobile insurance contracts and the addition of income-loss protection to that package. Their plans would not prevent any victim from bringing a fault-based suit for the recovery of general damages. Plans of this sort will be referred to herein as add-on plans.29

Legislative debate has centered on the degree to which guaranteed compensation for pecuniary loss should replace the tort liability—


A special committee of the American College of Trial Lawyers proposed a plan which provided for compulsory no-fault coverage while preserving tort liability in all cases—the basic add-on format. The plan was discussed by W. James Kronzer, Jr., of the Texas Trial Lawyers Association in testimony before the House Commerce Committee. 1971 House Commerce Hearings, pt. 2, at 577-78.

The Association of Trial Lawyers of America has supported add-on legislation of the sort enacted in Delaware and Maryland. Hearings on S. 354 Before the Senate Comm. on Commerce, 93d Cong., 1st Sess. 394 (1973) [hereinafter cited as 1973 Senate Commerce Hearings].

The Ohio State Bar Association introduced an add-on bill in the Ohio General Assembly. The bill is printed in 46 Ohio B.J. 455 (1973).


27. The position and plan of the National Association of Independent Insurers (NAII) are discussed by the president of the organization, Vestal Lemmon, in 1971 House Commerce Hearings, pt. 3, at 1078-1110. Interestingly, the NAII plan does not eliminate the right to recover pain-and-suffering damages in any case; however, it does limit the amount of pain-and-suffering damages recoverable in the less serious cases. In minor cases such damages would be no more than 50% of the first $500 of medical and hospital expenses and 100% of expenses over $500. Recovery would be unlimited in cases of “death, permanent total or partial disability, disfigurement or loss of limb, or other special circumstances shown to involve actual, substantial pain and suffering.” Id. at 1094.

28. Andre Maisonpierre, vice president of the Alliance, presents its views and its plan in 1971 House Commerce Hearings, pt. 2, at 605-62. Like the NAII plan, described in note 27 supra, the AMIA plan limits the amount of pain-and-suffering damages recoverable in minor cases but does not eliminate the right to such damages in any case. Id. at 612-13. The AMIA plan also limits contingent attorney's fees to 25% of the recovery. Id. at 613-14. The plan would use arbitration for resolving claims under $3,000. Id. at 612.

29. For a listing of states which have enacted add-on plans, see Appendix B.
ity approach of requiring a tortfeasor, or his insurer, to pay for all of his innocent victim's losses, including general damages. The shift is "from a redress perspective to an insurance perspective." Proponents of threshold plans seek to eliminate the great bulk of the cases from the fault system by setting high thresholds which are met only in very serious cases. Although defenders of the tort system argue for the right to tort damages in all cases, when pressed they have settled for lower thresholds which eliminate fewer cases from the tort system. Thus, enacted plans inevitably combine the compensation and the liability approaches in varying proportions.

Whether they are of the threshold or add-on variety, virtually all no-fault plans have a few common characteristics. First, they provide for benefits regardless of fault for medical expenses and income loss. Second, they deliver the no-fault benefits on a first-party basis. This means that a victim claims against his own insurer rather than the insurer of the other driver. Third, they compel or at least pressure owners of automobiles to buy insurance. Fourth, they utilize private insurance companies for coverage rather than any form of government insurance. Fifth, they provide for payment of benefits periodically as expenses and losses are incurred rather than in the form of a lump-sum settlement. Given the political realities of the situation, it is doubtful that any no-fault plan can be enacted which departs in any substantial degree from these standard features. Poor people and their representatives will often be faced with a choice among evils rather than a desirable feature with no political chance of passage. Government insurance is a good example; it might be best for the poor but it has little chance of enactment in the face of the powerful insurance lobby.

There is a common theme in statements made by nearly all participants in the no-fault debate. Each advocate contends that

31. For a discussion of the problem of designing a threshold, see notes 137-52 infra and accompanying text.
32. For example, members of the 110th Ohio General Assembly, Regular Session 1973-74, hotly debated the dollar threshold of proposed bills, none of which was ultimately enacted. The committee bill provided for a $1,000 medical expense threshold. A victim who incurred medical expenses in excess of that amount would have been permitted to bring a tort action. Am. Sub. H.B. 251, 110th Ohio General Assembly, Regular Sess. § 3938.08 (1973-74). As passed by the House on July 26, 1973, however, the bill set the threshold at $250. Committee action in the Senate pushed the threshold up to $1,500. Id. § 3938.11(A)(5). The bill died without action on the Senate floor.
33. For a discussion of government insurance, see notes 70-100 infra and accompanying text.
his plan will reduce or at least stabilize premiums while equitably allocating both costs and benefits. Not surprisingly, an opposition plan is always seen as one which would increase premiums and cause inequities.\textsuperscript{34}

II. FINANCING NO-FAULT BENEFITS: WHO PAYS AND HOW?

A. Prologue: Compulsory Insurance

Despite the interest in the increasing number of auto accident victims, compulsory insurance did not really begin to catch on until the recent wave of no-fault legislation. Previously, liability insurance was compulsory in only three states.\textsuperscript{35} One of the reasons for the slow growth of compulsory liability insurance is that the insurance industry has never supported compulsory coverage despite the obvious increase in sales which would result. The main industry objection has been the belief that compulsory insurance ultimately would lead to more stringent regulation or to government insurance.\textsuperscript{36} Insurers also believed that to stay solvent and earn a reasonable profit, they must remain free to select the risks they will insure, especially in the volatile area of tort liability insurance.\textsuperscript{37} Compulsory insurance, they thought, would necessarily result in governmental requirements forcing them to accept undesirable risks or in the creation of government insurance plans for high-risk driv-

\textsuperscript{34} Compare Keeton, The Case for No-Fault Insurance, 44 Miss. L.J. 1, 14 (1973), with Spangenberg, No-Fault Fact, Fiction, and Fallacy, 44 Miss. L.J. 15, 72 (1973).

\textsuperscript{35} “Massachusetts pioneered compulsory automobile tort liability insurance in the United States with legislation that became effective in 1927. Strangely, no other state enacted such legislation until New York did so in 1956 and North Carolina in 1957.” Basic Protection 76 (footnotes omitted).

\textsuperscript{36} Id. at 91-93. Despite four decades of compulsory liability insurance, Massachusetts never made the jump to government insurance. Id. at 92. For a discussion of the “perversity” of industry opposition to governmental compulsion to buy its product, see Blum & Kalven, Public Law Perspectives on a Private Law Problem—Auto Compensation Plans, 31 U. CHI. L. REV. 641, 716-18 (1964).

\textsuperscript{37} Careful selection of risks seems to be the industry’s way of dealing with the uncertainties of the tort system and with what it considers to be inadequate rates, artificially restricted by state insurance regulators. C. Kulp & J. Hall, Casualty Insurance 420-23 (4th ed. 1968). For further discussion of the rating problem, see note 76 infra and accompanying text.
The industry still shows little enthusiasm for compelling all car owners to insure.39

Craig Spangenberg, former president of the American Trial Lawyers Association, suggests that some insurers are now supporting compulsory no-fault insurance because "it will increase the cash flow and reserves of the insurance industry."

If no-fault insurance does indeed lower premiums as many advocates contend it will,40

38. This argument has little force at present because, even where liability insurance is not compulsory, it is viewed by the regulators as a necessity. Insurers have been compelled to offer uninsured motorists coverage as a way of providing compensation where the tortfeasor is not insured. See, e.g., OHIO REV. CODE ANN. § 3937.18 (Page 1971). In addition, insurers have been forced to participate in assigned-risk plans which distribute the undesirable risks among all insurers doing business in a state. The California assigned-risk plan was attacked on constitutional grounds. California State Auto. Ass'n Inter-Insurance Bureau v. Maloney, 341 U.S. 105 (1951). In upholding the plan, Justice Douglas, speaking for the Court, found that in the field of insurance, the police power of the states "is broad enough to take over the whole business, leaving no part for private enterprise." Id. at 110.

39. For several years the American Insurance Association has supported compulsory no-fault insurance and the total abolition of tort liability in auto accident cases. See note 18 supra.

The National Association of Independent Insurers avoided the issue of compulsion with a statement that the question whether a policyholder should be able to reject no-fault coverage "must ultimately be resolved by each legislature on a state-by-state basis." 1971 House Commerce Hearings, pt. 3, at 1190. The NAII did, however, express a preference for the inclusion of no-fault coverage in every policy. Id.

The American Mutual Insurance Alliance has said nothing about requiring all car owners to insure but does advocate that every policy issued include no-fault coverage. 1971 House Commerce Hearings, pt. 2, at 612.

While neither NAII nor AMIA endorsed the concept that all car owners be required to buy insurance, their comments were made in the context of a consideration of plans which preserve the right to bring a tort action in all cases. That fact may account for their reluctance to go beyond financial responsibility laws to compulsory insurance. For an explanation why undesirable risks are more undesirable in a liability insurance system than in a no-fault system, see note 187 infra and accompanying text.

At a meeting of nine of the "leading automobile insurers" held at the Camelback Inn in Scottsdale, Arizona on December 8 and 9, 1972, the companies agreed to support a no-fault threshold plan. The meeting was called by Nationwide and Allstate, and The Hartford, Kemper, State Farm, Liberty Mutual, Travelers, Insurance Company of North America, and Fireman's Fund participated. The so-called "Camelback Plan" was something of a departure from the more conservative plans which had previously been advocated by some of the companies and their trade associations. An exposition of the plan and the text of the proposed legislation appears in the Statement of Donald L. Schaffer, Vice President, Secretary, and General Counsel, Allstate Insurance Company, in 1973 Senate Commerce Hearings 157-71. The plan compels every motor vehicle owner to buy and maintain both no-fault coverage and liability coverage for above-the-threshold cases. It provides criminal sanctions for failure to insure. Id. at 167-68.

40. Spangenberg, supra note 34, at 24.

41. Senator Warren Magnuson, Chairman of the Senate Commerce Committee which reported favorably on S. 354, testified before the Senate Judiciary Commit-
compulsory insurance can compensate for lost revenue by adding new people to the premium-paying class. Many, possibly most, of these new insurance purchasers will be poor people who until now have elected to take their chances under the financial responsibility laws. The poor automobile owner has no assets to protect with liability insurance and can discern no reason to buy the coverage. In addition, coverage has been too expensive and even unavailable to many low-income consumers, particularly those who live in large cities.

...tee which also considered the bill. He reported on the Milliman and Robertson actuarial study which predicted reductions in total premiums paid in every state if S. 354 were to be enacted. S. 354 is, of course, a threshold bill. The same study predicted premium increases in all but two states if an add-on plan were to be enacted. *Hearings on S. 354 Before the Senate Comm. on the Judiciary, 93d Cong. 1st & 2d Sess. 140-45 (1973-74).* Thus, it appears that the NAII and AMIA may have an additional reason—protection of premium revenue—for supporting add-on rather than threshold-type bills. See note 36 supra. Ironically, Mr. Spangenberg also supports add-on legislation. Spangenberg, *supra* note 34, at 72-73.


42. Convincing a poor person that he should buy auto liability coverage was never easy. Two decisions of the United States Supreme Court have made it even more difficult. In *Bell v. Burson*, 402 U.S. 535 (1971), the Court held that if a state, pursuant to its financial responsibility law, wants to suspend a driver's license and vehicle registration after an accident but before judgment in a tort suit, it must grant a due process hearing. The hearing is "for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." *Id.* at 542. In *Perez v. Campbell*, 402 U.S. 637 (1971), the Court overruled recent precedent and held that a state could not continue a license suspension after a tort claim had been discharged in bankruptcy. The Court found that the Arizona statute had both the purpose and the effect of frustrating the federal bankruptcy law by providing judgment creditors with leverage to collect tort claims which had been discharged in bankruptcy.

43. A Department of Transportation study of insurance accessibility found that:

- Most assigned risks live in urban areas. In New York the proportion was 97.5 percent; in no State was it lower than 70 percent . . . . [P]roblems of extremely high prices are concentrated in large cities; similarly, availability problems appear to be mainly a problem of urban areas.

- Data indicate that a significant portion of insurance plan populations are made up of people in relatively low paying occupations. The semi-skilled, the unskilled, the agricultural worker, the hotel and restaurant worker, and the unemployed appear disproportionately represented. Together these groups accounted for 37 percent of the new assignments in the eight States surveyed. By comparison, higher income occupations, including professionals and semi-professionals, accounted for only 7.3 percent of plan populations . . . .
Before the wave of no-fault laws, states generally used one of two means to encourage the purchase of liability insurance. The method which operated in nearly all states was the financial responsibility law. In states with such laws, car owners are free to drive uninsured without penalty so long as they avoid accidents. Any uninsured driver involved in an accident for which he is potentially liable is subject to license suspension unless he posts a bond or settles the claim with his victim. The suspension continues until the nonliability of the uninsured driver is established or until his victim agrees to allow the suspension to be lifted because a settlement has been reached. Satisfaction of a judgment or full payment of a settlement results in the lifting of the suspension, as does discharge of the claim in bankruptcy.

The other means of encouraging people to insure was compulsory insurance. The three states which had compulsory insurance required every car owner to present evidence of liability insurance at the annual registration of the owner’s vehicle. Compulsory insurance can reduce the number of uninsured motorists but it cannot eliminate them completely.

Nearly all of the enacted or proposed threshold plans move away from financial responsibility laws, which have permitted large numbers of people to drive without insurance, toward a more effective means of compelling both liability and no-fault coverage. Some plans provide for compulsory insurance, requiring the presentation of evidence of insurance, both no-fault and liability, at the time of vehicle registration and providing criminal sanctions for driving without insurance. Many states have used criminal sanctions.

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Report to the Dept. of Transportation on Insurance Accessibility for the Hard-to-Place Driver 40, 42 (1970) [hereinafter cited as Insurance Accessibility].

44. E.g., Ohio Rev. Code Ann. §§ 4509.17, .21 (Page 1973). With respect to the constitutionally required hearing prior to license suspension, see note 42 supra.

45. Id. §§ 4509.22, .24.

46. Id. §§ 4509.23, .24(c).


50. See Appendix B.

or other penalties to compel coverage without resorting to the registration mechanism.\textsuperscript{53} Compulsion is less common in add-on plans, but some add-on states do compel both coverages.\textsuperscript{54}

There is a considerable difference between compelling liability coverage and compelling no-fault coverage. The constitutionality of compulsory liability coverage was established long ago.\textsuperscript{55} The benefit to society is clear, and the need for compulsion is obvious. On

\textsuperscript{52} E.g., CONN. GEN. STAT. ANN. § 38-327(d) (Supp. 1975); MICH. COMP. LAWS ANN. § 500.3102 (Supp. 1975-76); UTAH CODE ANN. § 31-41-13 (Repl. vol. 4A 1974).

\textsuperscript{53} Some states make an uninsured motorist liable as an insurer for no-fault benefits to victims who would have been covered if he had had insurance. \textit{E.g.}, COLO. REV. STAT. § 10-4-705(2) (1973); CONN. GEN. STAT. ANN. § 38-327(e) (Supp. 1975); FLA. STAT. ANN. § 627.733(4) (1972). Virtually all plans preserve an uninsured motorist's tort liability in below-threshold cases. \textit{E.g.}, FLA. STAT. ANN. § 627.733(4) (1972); MINN. STAT. ANN. § 65B.67(1) (Supp. 1975-76); UTAH CODE ANN. § 31-41-9(2) (Repl. vol. 4A 1974); UMVARA § 5(a)(1).

Nevada preserved the financial responsibility law as a means of compelling insurance coverage. \textit{NEV. REV. STAT.} §§ 698.190, 485.010-.420 (1973). Like most other states Nevada also bars recovery of no-fault benefits by an uninsured motorist and denies him the tort-liability exemption. \textit{NEV. REV. STAT.} §§ 698.390, 698.280.1(a) (1973). Colorado's plan is similar to Nevada's but it includes a provision making the uninsured motorist liable as an insurer for no-fault benefits to his victims. \textit{COLO. REV. STAT.} §§ 10-4-705, 10-4-707, 10-4-715, 42-7-301 to 42-7-304 (1973).

Some of the states which preserve the financial responsibility mechanism combine it with other, more coercive provisions. \textit{E.g.}, CONN. GEN. STAT. ANN. §§ 38-327(d), (e) (Supp. 1975) (financial responsibility and criminal sanctions); FLA. STAT. ANN. §§ 627.734, 735 (financial responsibility and revocation of license and registration for driving uninsured even without an accident); \textit{GA. CODE ANN.} §§ 92A-601 to -621 (1972); §§ 56-3412b, 56-9915.2 (Supp. 1974) (financial responsibility, proof of insurance to register vehicle, and criminal sanctions).

All plans which rely on sanctions imposed on uninsured motorists who are caught to deter others are likely to be unsuccessful in compelling coverage. The poor may be served better by plans which require evidence of insurance for registration of the vehicle. They would then be more likely to have no-fault coverage and to be exempt from tort liability in minor cases. In addition, they would be less likely to suffer from the harsh penalties most jurisdictions provide for driving while uninsured. Plans which deny no-fault benefits to poor victims who are uninsured are especially harsh. Victims who need compensation most are denied it because they have failed to contribute to the fund. The issue of compensation for loss can and should be separated from the issue of contribution to the insurance fund. The Uniform Act protects all victims including those who fail to insure. \textit{UMVARA} §§ 2(a), 18(d). To compel coverage, the Act relies on a criminal penalty and an optional provision requiring evidence of insurance at the time of vehicle registration. \textit{UMVARA} §§ 7(j), 37.

\textsuperscript{54} Of the add-on states, Delaware, Maryland, and South Carolina make both no-fault and liability insurance compulsory. \textit{DEL. CODE ANNOT.} tit. 21, § 2118(a)-(j), §§ 2901-72 (1975) (criminal sanctions and financial responsibility law); \textit{MD. ANN. CODE} art. 48A, § 539 and art. 66 1/2, §§ 7-101, 7-103 (Supp. 1974) (evidence of insurance required to register vehicle plus criminal sanctions); \textit{S.C. CODE ANN.} §§ 46-744, 46-710 (Supp. 1974) (affidavit that vehicle is insured required to register plus criminal sanctions). The other add-on states rely on the financial responsibility mechanism and some of them make no-fault coverage optional. \textit{See Appendix B.}

\textsuperscript{55} \textit{Ex parte} Poresky, 290 U.S. 30 (1933), upheld the Massachusetts law against
the other hand, there are those who doubt the constitutionality of compulsory no-fault legislation but their arguments appear weak.\footnote{56} the challenge of a Massachusetts citizen who said he could not afford insurance but wanted to drive.

56. Professors Woodruff, Fonseca, and Squillante intimate that compulsory no-fault coverage is unconstitutional. M. Woodruff, J. Fonseca, & A. Squillante, \textit{Automobile Insurance and No-Fault Law} §§ 11.74-.75 (1974). They deny the analogies to both workmen's compensation and to social security. With respect to workmen's compensation they assert that it was not employees who were forced to bear the cost of coverage, but first employers and ultimately consumers through the price of the product. \textit{Id.} § 11.75. Obviously the argument assumes that the employer can pass the cost on to consumers and that he will do so rather than force employees to absorb it in the form of lower pay. With respect to Social Security, they perceive a difference between that system which taxes the insured to pay for government insurance and a no-fault system which compels the insured to buy private insurance. \textit{Id.} Their specific constitutional objection to compulsory no-fault insurance is unclear. If it is based upon a contention that a no-fault plan is an unreasonable exercise of the police power, that argument seems to have been thoroughly repudiated in the series of cases dealing with statutory requirements that motorcyclists buy and wear helmets. Bishop, \textit{The Validity Under the Constitution of the United States of Basic Protection Insurance and Similar Proposals for the Reform of the System of Compensating Victims of Automobile Accidents}, in \textit{Department of Transportation, Automobile Insurance and Compensation Study, Constitutional Problems in Automobile Accident Compensation Reform} 35, 48 n.30 (1970). Objections based upon due process or equal protection are likewise without merit. \textit{Id.} at 44-55; Basic Protection 484-93; Cowen, \textit{Due Process, Equal Protection and "No-Fault" Allocation of the Costs of Automobile Accidents}, in \textit{Department of Transportation, Automobile Insurance and Compensation Study, Constitutional Problems in Automobile Accident Compensation Reform} 1 (1970).

A compulsory threshold plan enacted in Massachusetts was upheld by the state's high court. Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971). The court rejected an argument that the tort action in the below-threshold case had the status of a vested property right. 271 N.E.2d at 599-600. It also found no impairment of what the plaintiff called a “right to personal security and bodily integrity” which is implicit in the Bill of Rights. 271 N.E.2d at 600. Finally, the court overruled objections based upon due process and equal protection.

Other compulsory threshold plans were upheld in New Hampshire and Florida. Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973); Lasky v. State Farm Ins. Co., 296 So.2d 9 (Fla. 1974). The Florida court did rule invalid two features of the plan, both of which were held to be severable. The fracture of a weight-bearing bone as a minimum requirement for the right to bring a tort suit was held violative of equal protection. \textit{Id.} at 20-21. The abolition of the car owner's right of action in tort for property damage to his car in minor cases was held to violate the Florida constitutional provision that “courts shall be open to every person for redress of any injury.” Kluger v. White, 281 So.2d 1, 3 (Fla. 1973). The court was concerned about the abolition of the tort right without the creation of an alternative right. \textit{Id.} at 4.

The only case in which an entire threshold plan has been ruled unconstitutional is Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972). The use of state funds to enforce the law was enjoined. The threshold section was held to violate a state constitutional provision against special legislation. It barred tort actions in minor cases by victims who were given no right to collect no-fault benefits. \textit{Id.} at 485-86, 283 N.E.2d at 478. No-fault coverage was not compulsory under the Illinois statute which may explain the absence of an attempt to make benefits available to noncontributing victims—those who had not purchased coverage. Compulsion can be help-
The wisdom of compulsory no-fault coverage is also disputed. Professors Blum and Kalven assert “the traditional presumption against sumptuary legislation.” Why indeed should the government force anyone to insure himself against pecuniary loss? If no-fault insurance is so important, it would seem that people would buy it voluntarily.

There are two basic reasons for compelling no-fault coverage. The first is a paternalistic rationale that some people will not see the value of the protection and will not buy the coverage. The poor who need the protection most are likely to be prominent in this group. Unless there is some degree of compulsion, no-fault will not protect all victims and will fail to protect those who need it most, the poor. The second reason is one of equity. A system ful in minimizing equal protection problems by requiring every car owner to contribute to the insurance fund, thereby minimizing the size of the class of noncontributing victims. The most obvious noncontributing victim is a pedestrian, not covered by automobile insurance, who is struck by an uninsured motorist. If all vehicles were insured as a result of compulsory insurance, this victim could collect from the policy covering the vehicle. No plan is likely to eliminate the uninsured motorist completely; however, the Uniform Act does seem to eliminate the uninsured victim, UMVARA § 2(a). Victims with no other source of no-fault reparations collect from the assigned-claims plan. Id. § 18. Even a car owner who has violated the law by failing to insure himself is given access to the minimum level of no-fault benefits if he is injured. Id. § 18(d).

57. Blum & Kalven, supra note 36, at 678.
58. Viewed cynically, “no-fault is so good for people they should be compelled to buy it, regardless of their particular needs or desires.” Spangenberg, supra note 34, at 24.
59. See D.C. Hearings 169, 276; P. Gillespie & M. Klipper, No-Fault 144 (1972). In 1972, personal health care expenditures for persons under 65 amounted to $52,113,000,000. Of that amount, $32,593,000,000 was paid by private health insurance, government, voluntary agencies, and in-plant facilities. The remainder, $19,520,000,000 was paid by individuals from their own resources. Health Insurance Institute, Source Book of Health Insurance Data 51 (15th ed. 1973-74). Thus, nearly 40 percent of personal health care expenditures were not covered by any of the usual varieties of health insurance. Obviously, some of the medical expenses for auto accident injuries which are included in these uncovered expenses would have been reimbursed by the liability insurance of culpable drivers. See note 102 infra. In addition, some of the expenses would have been paid by medical payments coverage, which is a no-fault coverage included in many automobile insurance policies. Neither medical payments coverage nor no-fault coverage in the states which had it in 1972 seems to be included in the covered-expense figure. However, there remains a substantial total of medical expenses which are uncompensated. Drivers who were negligent or contributorily negligent would not recover unless they had some form of health insurance or no-fault coverage. It seems quite probable that the poor are disproportionately represented among those who have no health insurance or automobile medical payments coverage. The poor who are on welfare and some others who are medically needy would be covered by Medicaid. Social Security Amendments of 1972, 42 U.S.C.A. § 1396(a) (1974). The working poor would not have access to governmental health care and would be less likely than better paid
could be devised whereby even those who fail to insure collect no-fault benefits.\textsuperscript{60} These victims could be subsidized either by those who did insure or by the government.\textsuperscript{61} In private insurance it is considered unfair to allow victims to collect benefits unless they have contributed to the insurance fund. A basic principle of private insurance is that each policyholder should pay a premium based only upon the cost of his coverage.\textsuperscript{62} Government subsidy is also objectionable to no-fault proponents for other reasons.\textsuperscript{63} Fortunately, the near identity of the motorist class and the victim class makes it possible to require nearly all victims to contribute by simply collecting insurance premiums from automobile owners.\textsuperscript{64}

Thus, compulsory no-fault coverage can be seen as a device to force the poor to insure themselves against pecuniary loss. Compulsory liability insurance is no more acceptable to the poor in a no-fault system than it is in a fault system. In fact, because all victims have protection for pecuniary loss, compulsory liability coverage is less justifiable. A poor motorist might ask why he should be compelled to buy liability coverage when he has no assets to protect. Even the best threshold plans do not fully compensate pecuniary loss for the most seriously injured victims. Those victims are left to collect their excess pecuniary loss and their pain and suffering damages through the traditional liability system.\textsuperscript{65} Only the innocent victims who can prove fault by the other party will collect. Compulsory liability insurance will do no more than assure that a solvent source of reparations will exist if liability can be established. Many of these victims could be protected without compelling the poor to buy liability coverage. For example, car owners might vol-

\textsuperscript{60} See, e.g., UMVARA § 18(d).

\textsuperscript{61} No-fault plans which do cover noncontributing victims collect the necessary funds from those who do buy insurance. \textit{E.g.}, UMVARA § 19(a). The more efficient the system of compulsion, the fewer the number of noncontributing victims.

\textsuperscript{62} See note 74 \textit{infra}.

\textsuperscript{63} See notes 82-86 \textit{infra} and accompanying text.

\textsuperscript{64} Blum & Kalven, \textit{supra} note 30, at 362; see note 15 \textit{supra}.

\textsuperscript{65} See, e.g., UMVARA § 5(a)(6).
untarily purchase supplementary no-fault coverage to cover excess pecuniary loss.\textsuperscript{66} Of course, poor victims are least likely to purchase such supplemental coverage;\textsuperscript{67} although, depending upon the benefits provided by the compulsory plan, they are likely to need additional coverage.

Unless both no-fault and liability coverages are compulsory, the full protection of victims envisioned by no-fault planners will not exist. Pecuniary loss protection is most important for the poor. Their representatives may well desire to support compulsory no-fault coverage, since poor constituents need the protection most and are least likely to buy it voluntarily. Poor people will not need or want liability coverage, however. Although such coverage should be less expensive and more available to them if a threshold plan is enacted,\textsuperscript{68} many poor people could rationally choose to do without it.\textsuperscript{69} Their representatives should oppose any compulsion beyond the financial responsibility laws with respect to liability coverage.

B. Government Insurance.

One way to reduce the cost of no-fault coverage would be to have the state or federal government provide it. This would maximize the pool of insureds, thus taking full advantage of the law of large numbers.\textsuperscript{70} The plan would not need to earn a profit, and the resources of government would assure its solvency. To date, only Puerto Rico has enacted a government insurance plan for auto accident victims.\textsuperscript{71}

A government has two basic options with respect to financing a compensation plan for accident victims. The first is to use general

\footnotesize{\textsuperscript{66} Under the Uniform Act insurers may be required to offer such protection. \textit{Id.} § 16(a).}

\footnotesize{\textsuperscript{67} \textit{P. Gillespie \& M. Klipper, No-Fault} 144 (1972); see notes 206-10 infra and accompanying text.}

\footnotesize{\textsuperscript{68} With the elimination of the small claims which now consume most of the money paid out by liability insurers, liability insurance should be much less expensive for everybody. According to the Department of Transportation study, claimants whose economic losses were between $1 and $1,000 suffered 33 percent of total losses, but received 44 percent of the dollars paid out by the liability system. \textit{DEPARTMENT OF TRANSPORTATION, AUTO MOBILE INSURANCE AND COMPENSATION STUDY, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES} 35 (1971). The poor will be attractive no-fault risks and should have an easier time locating insurers who will sell them the no-fault and liability package than they have had finding liability coverage alone. See notes 177-204 infra and accompanying text.}

\footnotesize{\textsuperscript{69} See note 42 supra and accompanying text.}

\footnotesize{\textsuperscript{70} For an explanation of the "law of large numbers," see \textit{R. Mehr \& E. Cammack, Principles of Insurance} 33-34 (5th ed. 1972).}

\footnotesize{\textsuperscript{71} \textit{P.R. Laws Ann.} tit. 9, §§ 2051-65 (Supp. 1974-75).}
tax revenues to assist victims. With the arrival of the millennium, a governmental plan which would guarantee medical care and a decent income to all citizens might be in operation. The nature of the misfortune would be irrelevant. Victims of accidents would be cared for along with victims of illness or poverty. Since such a system would not involve either the payment of premiums by beneficiaries or the application of actuarial principles, it would amount to a welfare plan rather than an insurance plan. It would have as a major objective the redistribution of income. It has been suggested that such a welfare system could coexist with the tort-liability system to provide for guaranteed compensation to auto accident victims without sacrificing the virtues of the liability system. Indeed, Professors Blum and Kalven have proposed a “stopgap plan” which would provide that no-fault benefits be available through government insurance financed from general tax revenues and that the tort-liability system would be fully preserved.

A second and politically more realistic option is social insurance. Whenever the private insurance system is not working well, social insurance becomes a possibility. Private insurance, because of its antipathy to rate discrimination, charges some people far more than others based on differences in risk. Equity among policyholders, meaning that each should pay a premium appropriate to the risk he represents, is an objective of both the insurance industry and insurance regulators.

72. See D. Bickelhaup & J. Magee, General Insurance 197-98 (8th ed. 1970); R. Mehr & E. Cammack, Principles of Insurance 98 (5th ed. 1972). Blum and Kalven argue that any compensation plan which provides benefits to some victims by reducing the benefits to others, as the threshold plans do, is in effect a welfare scheme for the redistribution of income from some of the more fortunate victims to the less fortunate. Blum & Kalven, supra note 36, at 676, 721.

73. Blum & Kalven, A Stopgap Plan for Compensating Auto Accident Victims, 547 Ins. J. 661, 668 (1968). The plan is a “stopgap” to serve until fundamental questions are decided, especially the question whether there is “any reason why the state should not pay for similar compensation to victims of other kinds of accidents?” Id. at 670. If no-fault benefits are to be provided to accident victims, Blum and Kalven argue that a welfare plan covering all sorts of accidents, illnesses, and other misfortunes is the most rational mechanism. Blum & Kalven, supra note 36, at 722-23.

74. 1 National Association of Insurance Commissioners, Monitoring Competition: A Means of Regulating the Property and Liability Insurance Business 93 (1974) [hereinafter cited as Monitoring Competition]; Kimball, The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law, 45 Minn. L. Rev. 471, 495-98 (1961). The antipathy to rate discrimination is based primarily on ethical beliefs which may or may not be generally shared. Discrimination may be necessary to achieve the goal of socialization of risk. Williams, Price Discrimination in Property and Liability Insurance, in Insurance, Government, and Social Policy 209, 240 (S. Kimball & H. Denenberg eds. 1969); see notes 160-65 infra and accompanying text.
If it is desirable for society to have everyone insured, private insurance may not be the most feasible alternative because people in the higher risk categories will find insurance unavailable or too expensive. In a competitive market, insurers attempt to narrow rate classifications in order to attract the best risks. A company can compete for the best risks by grouping them with other good risks. The rate for a class is based upon the average expected losses for the class. By separating out the better-than-average risks, the company can offer a lower premium to the new, narrower class. The better-than-average risks in other companies' broader risk classes will be tempted by the lower premium to change companies. As the process continues, the poorer risks are left with the companies which have not yet narrowed rate classes and their premiums increase. In order to improve their loss ratios and remain profitable, the remaining broad-class companies are forced to use narrower classes to compete for the profitable customers, the low risks. Insurance becomes more expensive and less available for the high-risk classes. The limiting factors in the process are the degree of variability among the risks and the cost of differentiation among them. This phenomenon has occurred in auto liability insurance. The need to insure everybody brings about pressure for socialization of the risk—that is, "provision of insurance for everyone at a price that is reasonable in terms of what the people in question can afford to pay . . . and not in terms of the burdens imposed on society by their driving of cars." The easiest way to socialize the risk is for government to compel and provide insurance coverage for the people who need it. Government can make the decision to subordinate equity among policyholders to the objective of universal coverage. The good risks subsidize the bad and everyone pays the same premium. Society benefits because everyone is insured and the good risks, although they pay more than the cost of their coverage, may still pay less than they would pay in a private insurance system because the government need not earn a profit and does not pay taxes. Social insurance is able to maximize loss-spreading—that is, spread the burden of losses over the largest

75. G. Calabresi, The Costs of Accidents 60-64 (Student ed. 1970). This tendency toward increasingly narrow risk classification may be inhibited by the switch to no-fault due to the improved accuracy in predicting losses which no-fault will bring. See note 187 infra and accompanying text.

76. MONITORING COMPETITION 95-96; Kimbell, supra note 74, at 513-14.

possible class of premium payers. Of course, it is possible for the government to set premiums the way private insurers do by adjusting them to the risk, but that would detract from the goal of socialization of risk.

Ironically, Keeton and O'Connell, who are most vocal in opposing the continued use of fault as a criterion for auto reparations, are also opposed to government insurance. Although they believe that keeping the cost of insurance higher for the high-risk drivers will do little to deter negligent driving, they argue that the full cost of accidents should be imposed upon the activity which produces them, the activity of motoring. One reason they offer is that it is fairer for those who benefit from the activity to pay its cost. A more sophisticated argument is that putting the full cost of accidents on the activity of motoring should produce more rational resource allocation. Professor James explains the thesis this way:

A system of liability which promotes proper allocation of resources will not only limit the costs incurred by an activity (including accident losses) to those for which we are willing to pay; it may also in present context have collateral advantages. It will tend to assure compensation for traffic victims and it will bring about a wide distribution of the costs of accidents . . . . [I]f these ends were sought by themselves, the most effective way to attain them might well be some broad form of social insurance for all disabling accidents; or, perhaps, for disability from any source, the cost of which would be distributed over society as a whole by general taxation. . . . If the accident costs of motoring are externalized in this way—that is, divorced from the activities which generated them—then the activity in question will receive a hidden subsidy which will invite

79. According to Calabresi:
Such an attempt would immediately suggest that the objective was primary accident cost deterrence rather than loss spreading. Indeed, the very fact that some would bear a greater loss burden than others and would do so in relation to factors other than the desired income redistribution would mean that [sic] full or optimal spreading was not the sole motivating force. Such a way of handling social insurance would involve not only some concentration of accident losses, but greater tertiary or administrative costs as well, for people would have to be placed in appropriate risk categories for taxation purposes.

Id. at 46-47. Differentiating among risks imposes costs on the system and detracts from the effort to make insurance affordable to all.
80. BASIC PROTECTION 266-68.
81. Id. at 247-49.
82. Id. at 257-59.
83. Id. at 25-60.
us to vote for more accidents than we should be willing to pay for if we realized their cost.84

Professor Calabresi argues that keeping the cost of accidents on the activity which causes them will result in what he terms "general deterrence."85 Permitting the economic forces of the market to operate naturally will "decrease accident costs either by reducing the cost-causing activity by making it more expensive, or by inducing the introduction of safety devices to the extent that they cost less than paying for the damages which they prevent."86 Thus, keeping the full cost of accidents on motoring should encourage development of safer cars and should provide an incentive to reduce the accident-causing activity, driving. In short, although the cost of insurance may have little influence on how a person drives, it may have a substantial effect on whether and how much he drives.

As discussed previously, the theory of general deterrence requires that the full cost of accidents be borne by the activity of motoring. This will affect the general level of insurance premiums. The theory of deterrence also supports setting premiums according to risk classifications. Failure to adjust premiums to risks would result in what Calabresi refers to as "externalization due to insufficient subcategorization." Just as total costs from motoring could be externalized to the taxpaying public by social insurance, a portion of costs attributable to a class of motorists could be externalized to motorists generally. This would have the effect of subsidizing the higher risk drivers by overcharging the lower risk drivers. If general deterrence is to work well, the higher risks must be subjected to greater economic pressure.87 Although skeptical about the value of post-accident fault determinations as a way of penalizing bad driving, no-fault proponents do support the adjustment of premiums based upon accident involvement.88 Thus, even in a no-fault system peo-

87. G. Calabresi, THE COSTS OF ACCIDENTS 145 (Student ed. 1970). It is also said to be fairer to charge groups which cause a disproportionate share of accidents or which are better situated to reduce accidents more than is charged to consumers generally. NEW YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT 67-68 (1970).
88. See BASIC PROTECTION 252-56. Keeton and O'Connell support involvement rating rather than the more expensive merit rating which depends on case-by-case fault determinations. Id. at 269 n.28. For a discussion of the effect of the changeover to a no-fault system on rating risks, see notes 183-96 infra and accompanying text.
ple who are high-risk drivers because of age, type of car, accident involvement, or other actuarial factors would pay higher-than-average premiums. This can be a real burden on some drivers who have never had an accident or a traffic violation. For example, young drivers are now classified as higher-than-average risks.89

Who are the marginal drivers, persons who might be forced off the road by the higher cost of insurance? The adolescent whose age and lack of driving experience put him in a high-risk group may find it more difficult to convince his parents to permit him to drive.90 Parents may be faced with Hobson's choice—paying the extra cost for insurance or providing chauffeur service. Society will suffer little if this driver and some others are forced off the road.91 A car, particularly a second car, may be an affordable luxury for middle and upper class families. General deterrence may lead to some reduction in the number of cars owned by this group at little social cost. However, for poor families a car may be a necessity if the breadwinner is to get to work. Public transportation from the central cities to the jobs for ghetto residents is unlikely to be as good as public transportation from the suburbs to the central business district.92

Unfortunately, the principle of general deterrence may have serious adverse effects on the poor. Of all the marginal drivers the poor are in the most difficult position. They are least able to absorb the differential in insurance premiums which makes the deterrence theory work. Many poor people therefore drive without insurance coverage.93 A disproportionate number of poor people seem to be

89. An unmarried male who is an owner or principal operator and who drives 10 or more miles to work is charged from 2.65 times the basic premium at age 21 to 1.40 times the basic premium at age 29. Insurance Services Office, Private Passenger Automobile Manual 7 (1974). A married male, by contrast, would pay from 1.65 times the basic premium at age 21 to 1.35 times the basic premium at age 24. Id. at 6. In addition, the married male gets out of the higher risk category when he becomes 25, but the single male must wait until his 30th birthday. Id. at 6-7. Youthful drivers may be treated differently as insurers gain experience with no-fault rating. See notes 183-85 infra and accompanying text.

90. An unmarried male age 17 or less who drives only for pleasure, not for work or business, who has not had driver training and is not eligible for good-student credit will add 2.75 times the basic premium to the family liability premium. Id. at 7. An unmarried female, similarly situated, would add 1.75 times the basic premium to the cost of the family liability insurance. Id. at 6.

91. General deterrence may even be helpful in encouraging people who now drive to and from work to shift to public transportation by raising the cost of driving in relation to the cost of public transit. See D. Netzer, Economics and Urban Problems 203-04 (2d ed. 1974).

92. Id. at 217.

93. The Department of Transportation has estimated that about 20 percent of the nation's drivers were uninsured in 1967, with the percentage varying from about
in higher-than-average risk categories. This is true of assigned risks and seems likely to be true of the uninsured population as well.\footnote{94} If they are to be pressured or compelled to pay insurance premiums, poor motorists will need a plan which does not charge the full cost attributable to motoring generally or to them in particular.

The poor have more to gain and less to lose than others if some accident costs are externalized from the activity of motoring. Poor motorists should happily trade the speculative, unmeasurable benefit of general—deterrence accident—cost reduction for the obvious benefit of lower insurance premiums. The cost of a plan providing for general deterrence would include all of the costs of accidents as well as the administrative costs associated with classification of risks. However, there is a chance that the reduction in total accident costs because of the deterrence provided would more than offset the added burdens caused by the elimination of externalization and the classification of risks. If this occurred, a deterrence plan could operate for a lower total of premiums than a social insurance plan involving externalization of costs. All drivers would be better off because of the overall reduction in accident costs, but the high-risk

\footnote{10 percent in the compulsory insurance states to about 33 1/3 percent in some states. Insurance Accessibility 28. At hearings on no-fault legislation for the District of Columbia, the District government estimated that about 30 percent of the District's 270,000 cars were uninsured in 1971. D.C. Hearings 24. Because the District is a totally urban jurisdiction, the magnitude of the uninsured-motorist problem in the city of Washington is clear. Most estimates are by state. The seriousness of the problem in urban areas, where the poor and the high-risk drivers tend to be concentrated, is likely to be understated. Cf. Insurance Accessibility 40.}

\footnote{94. See note 43 supra. Professor Prosser states that

[T]he uninsured are, as a group, those who are least responsible financially, and so unlikely to be able to pay a judgment . . . . It is also undoubtedly true that uninsured drivers on the highway are those who tend on the whole to be driving unsafe vehicles, to be the most slipshod, law-violating and reckless, and to cause a disproportionately large percentage of the accidents. It is, in short, those who are unable to pay for the harm they do, who do most of the harm.


In testimony on no-fault legislation proposed for the District of Columbia, Charlie Short, State-National Director of the Metropolitan Washington Association of Independent Insurance Agents, expressed similar views. He stated that uninsured motorists "have traffic violations and a lot of teenagers in high performance cars, in undesirable neighborhoods" and that they are "the higher risk sector of the population insurancewise." D.C. Hearings 103.

Of course, a concentration of poor people and high-risk drivers in the uninsured category is to be expected as a natural consequence of the operation of the general deterrence element in the liability insurance system.

The fact that poor people are overrepresented in the high-risk category should not be taken as evidence that the poor are, as a group or individually, incompetent or careless drivers. The classification of risks depends more on factors like age, sex, marital status, and place of residence than on merit factors such as previous accidents and traffic violations. See notes 171-74 infra and accompanying text.
drivers would be paying relatively higher premiums and might not be able to afford to drive. The low-risk drivers who benefit most could compensate them for giving up driving. This would be unlikely to happen unless the government compelled it. Furthermore, the premium cost saved by low-risk drivers is not likely to be enough to cover both the compensation required by the high-risk drivers and by the administrative cost of shifting the funds from low- to high-risk drivers. What is more important, even a very effective deterrence plan is likely to concentrate the burden on the poor because of the congruence between low-income and high-risk classifications.95 Given their present share of the nation's income the poor cannot accept any program which compels them to pay any more than necessary for needed insurance benefits. General deterrence would be acceptable if income distribution were satisfactory, but it is not.96

As discussed previously, government insurance would externalize accident costs. A plan which would charge all motorists premiums based upon the risk each represented would provide the most deterrence of any government plan. The burden would be on the activity of motoring but it would be lighter than that which would be imposed by compulsory private insurance. The higher risk drivers would have more incentive to stop driving, and there would be a substantial chance that some poor people could not afford to drive. A welfare plan financed by general tax revenues would involve the most extreme externalization of costs. The burden would be borne by the general tax paying population, minimizing the burden on the poor, especially if the tax were a progressive income tax.97

The goals of general deterrence and income redistribution might be sought in a compromise plan. Such a plan could impose the full cost of motoring on the activity, charge higher premiums for the higher risk drivers, but provide a governmental subsidy for poor motorists.98 In other words, general deterrence would be applied to nonpoor motorists but all or part of the costs imposed on the system by the poor would be externalized. It may seem unfair to treat drivers differently on the basis of income; however, disparate treatment based on income has been accepted in other contexts. Two

95. G. CALABRESI, THE COSTS OF ACCIDENTS 63 (Student ed. 1970); see note 94 supra.
96. Calabresi concedes that "any system of handling accident costs which tends to aggravate bad distributions of income is likely to be unacceptable, even if it is very effective from a resource allocation point of view." G. CALABRESI, THE COSTS OF ACCIDENTS 80 (Student ed. 1970).
97. Blum & Kalven, supra note 36, at 721.
obvious examples are the federally funded legal services program and the medicaid program which provide free legal and medical services to the poor. Such a scheme may also amount to mere tinkering with income distribution in an inefficient and limited way when what is really needed is reform of the tax structure.\textsuperscript{99}

In addition to objections based on concepts of fairness or proper resource allocation, Keeton and O'Connell have a practical reason for proposing a private rather than government insurance plan. They respect the power of the insurance lobby:

[I]nsurers have always vigorously protested even changing the basis of liability for the insurance they write. Can one imagine the vigor with which they would oppose having not only their familiar and preferred form of coverage abolished but also their function as well? Keep in mind what powerful lobbyists insurers are. . . . [T]he controversy over Medicare is instructive. If the insurance industry can battle so effectively, along with others, to preserve such an unpromising bit of accident insurance as insuring the aged against sickness—so likely to be unprofitable that they have developed relatively little of this kind of insurance business—the vigor with which they would oppose any attempt to abolish the whole automobile casualty line is stunning to ponder.\textsuperscript{100}

Although it would probably be best for the poor and possibly best for society generally, government insurance for auto accidents is not to be—at least not for a long time.

However, this discussion of government insurance brings up two important principles. First, the poor, more than any other group, must oppose accident reparations plans which fail to minimize total costs. Second, they must support plans which shift from the poor part of the cost they impose. Both of these objectives are best achieved through government insurance, although both may be attained to a limited extent in other plans. Representatives of the poor must identify the features of plans which affect total costs or the portion of them to be borne by the poor. They will find more political support for general cost reduction than for shifting costs from the poor. Their power is likely to be negative rather than affirmative; defeating or modifying a bad plan will be easier than enacting a good one.

\textsuperscript{99} Id. at 80.

\textsuperscript{100} BASIC PROTECTION 233 (footnotes omitted). Although it may amount to overreaction, the industry opposition to any plan which looks remotely like government insurance cannot be denied. See Blum & Kalven, \textit{supra} note 36, at 716-18.
C. Abolishing Tort Liability

1. Living With the Present Tort Liability System

The basic issue to be confronted by representatives of the poor with respect to no-fault plans is the extent to which tort liability should be eliminated. In pondering that issue they must consider how the tort-liability system presently affects the poor. We have seen that substantial numbers of poor people in states which have not enacted no-fault plans drive without insurance. They subject themselves to the risk of license suspension and tort claims which may drive them into bankruptcy in the event of an accident. Those who do buy liability insurance pay rates reflecting the potential loss to the person with whom they collide and the subjective factors which may influence a jury when determining liability. Those who live in urban areas must pay high rates and often find insurance virtually unavailable to them. Most assigned risks live in urban areas and a very substantial number of them are poor. As consumers of liability insurance coverage the poor have not fared well.

Another issue to be considered is the value of liability insurance to poor people who are victims of automobile accidents. Given the fact that uninsured motorists tend to be concentrated in cities, especially ghetto areas, poor people stand a better chance than most victims of being injured by an uninsured motorist. For example, in the District of Columbia, an all central-city jurisdiction with a heavy concentration of poor people, it is estimated that 30 percent of the drivers are uninsured. Also, the poor have been notably less successful than the affluent in recovering their losses through the tort liability system.

Data gathered by the Department of Transportation make it clear that the negligence based insurance system distributes assets better to those who have the greatest edu-

101. See notes 93-94 supra and accompanying text.
102. Ohio's financial responsibility law is typical of the laws of states which have not yet enacted no-fault plans. It provides that the registrar must suspend the driver's license and the vehicle registration of any driver involved in an accident who is potentially liable to any third party, who is uninsured, and who fails to deposit security with the registrar to cover the potential claim. OHIO REV. CODE ANN. §§ 4509.11, .12, .13, 17, .19 (Page 1973). Although bankruptcy does result in the lifting of a license suspension, it is a very unpleasant experience and has a lasting effect on a person's credit rating. See note 39 supra.
103. See notes 177-80 infra and accompanying text.
104. See notes 166-67 infra and accompanying text.
105. See note 43 supra.
106. See note 93 supra.
cation and who make enough money to support themselves during the time-consuming claim settlement process. Apparently these auto victims can afford to retain the best legal counsel, make better appearances in court (at least in the minds of the claim settlers) and have the resources, determination, and sophistication to fight the system. Because of their limited resources, poor victims suffer most from the delays of the liability system and from the principle that only the innocent injured by the faulty may recover. "[O]nly 45 percent of all those killed or seriously injured in auto accidents benefited in any way under the tort liability system." Only about one third of the recovery for these serious losses comes from tort claims. Most compensation comes from wage-replacement plans and no-fault coverages paid for by the victim such as medical insurance (including auto medical payments coverage) and life insurance. Most important, in these serious cases only "about half of total personal and family economic loss was recovered" from any source. Collateral sources of reparations from automobile in-


The DOT study found that the average time between accident and settlement was 16 months with the length of time varying directly with the size of the loss. It further indicated that in serious or fatal cases, "30% of families with incomes under $5,000 retained counsel, compared to 42% of families with incomes over $10,000. The ratio of reparations to loss was 0.38 for low income families and 0.61 for high income families". DEPARTMENT OF TRANSPORTATION, AUTOMOBILE INSURANCE AND COMPENSATION STUDY, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENTS 3 (1970).

A black legislator, State Senator Coleman Young of Michigan, testified at the hearings on no-fault insurance for the District of Columbia that

Under the present system low income persons receive proportionately less for their economic losses than higher income persons. It is low income families who suffer the most because of the intolerable delays inherent in the tort system. It is the poor person whose injury is worth less in "pain and suffering" than a higher income person.

D.C. Hearings 169. A black attorney, Wilfred R. Mundle, testifying on behalf of the Washington Bar Association at the same hearings agreed that blacks had not fared well in the tort system but contended that the situation was improving "with the jury complexion changing in the District." Id. at 256-57. Mr. Mundle, on behalf of the Association, argued eloquently for the retention of tort liability, including availability of pain-and-suffering damages in all cases. Although purporting to represent the poor black population of the district, the Association position with respect to abolition of tort seems more closely related to the self-interest of the attorneys who handle personal injury cases.


109. Professor Kalven points out that

[T]he common law did not intend to compensate all victims; whether for good or for ill, as a matter of principle, it did not compensate all victims of auto accidents. I stress this obvious point simply because in so many discussions it is announced with an air of discovery that the current system does not
juries, such as health insurance, wage continuation plans, and the like, are less likely to be available to the poor victim.\textsuperscript{10}

In short, the poor suffer more than any other group from the deficiencies of the present liability system.\textsuperscript{11} If a plan is proposed which attempts to eliminate some of the deficiencies in the liability system, it would seem that the poor would have little reason to oppose a change in the status quo. They should, however, oppose some expensive add-on plans which leave the liability system largely intact and in addition require no-fault coverage.\textsuperscript{12} Like all interest groups the poor must press for that sort of legislation which best meets their needs.

2. Minimizing Total System Costs

The major reason for abolishing tort liability in some instances is to reduce total system costs. If all victims, including those who are at fault and victims of single-car accidents, are to be compensated, either costs must be reduced or premiums increased. Threshold plans eliminate the less serious cases from the tort system and thus save the money now being paid out in the form of overpayments of small claims. Small claims are being overpaid in the sense that those victims recover several times their actual pecuniary losses while claimants in more serious cases recover considerably less than their pecuniary losses.\textsuperscript{13}

The most obvious way to reduce costs is to reduce benefits payable to each victim and to spread the available funds over more victims.

\textsuperscript{10} See note 59 supra.
\textsuperscript{11} For an eight-count indictment of the liability system, see P. Keeton \& R. Keeton, Cases and Materials on the Law of Torts 457-59 (1971).
\textsuperscript{12} The reasons why threshold plans will be less expensive and more desirable than add-on plans are discussed in notes 113-36 infra and accompanying text.
\textsuperscript{13} It has been estimated that as much as 34 percent of all bodily injury liability insurance payments were for the intangible losses of non-permanently injured claimants whose measurable economic losses to date of settlement were less than $5,000. If only claimants with $2,000 or less in economic loss were counted, the amount of their "overpayments" still constituted almost a third of all payments to all claimants. In addition to the substantial reduction in benefits paid to the less seriously injured victims there are substantial savings in administrative costs which result from the elimination of disputes over fault and over the amount of pain-and-suffering damages. Basic Protection 358-62; Department of Transportation, Automobile Insurance and Compensation Study, Motor Vehicle Crash Losses and Their Compensation in the United States 131-32 (1971).
This is essentially what happens when a threshold plan is adopted. In opting for a threshold plan, policymakers force a class of victims—those with less serious injuries—to bear certain of their own losses.\textsuperscript{114} Victims of the least serious accidents give up their right to nonpecuniary damages, generally referred to as pain and suffering, in order to compensate all victims regardless of fault for all or some of their pecuniary losses. The savings from the elimination of tort liability in minor cases could be used to provide a high level of no-fault benefits or they could be applied toward reducing premiums below today's levels. In reality, the savings will be divided between the two objectives. Legislators and the public seem strongly attracted to the idea of premium reductions, although higher no-fault benefit levels may be a wiser choice.\textsuperscript{115}

Although we might agree with Professor Posner that pain-and-suffering damages represent real economic losses,\textsuperscript{116} such damages seem to be a "quixotic luxury"\textsuperscript{117} in a system which does not approach full compensation of even pecuniary losses, especially in the serious cases.\textsuperscript{118} The tort system was designed not for compensation but for corrective justice. Pain-and-suffering damages are needed in a corrective justice system both to deter wrongdoing and to give the victim the comfortable feeling that justice is being done.\textsuperscript{119}

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114. Blum & Kalven, supra note 36, at 669. Keeton and O'Connell argue that given a limited reparations fund, it is more sensible "to use dollars to replace dollars lost rather than to serve as a substitute for something not truly replaceable in dollars." Basic Protection 362. They would permit people to buy insurance for this pain-and-suffering loss but would not make it part of the basic insurance package. The value of pain-and-suffering damages in minor cases would be left to be tested in the marketplace. Id. The Uniform Act permits insurers to offer optional no-fault coverage for pain and suffering which is called "noneconomic detriment," and provides that the insurance commissioner may require insurers to offer such optional coverage. UMVARA § 16(a).
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116. See note 19 supra.
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118. See note 108 supra and accompanying text.
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119. Blum & Kalven, supra note 117, at 268-70. It is important to remember that corrective justice and distributive justice are not mutually exclusive. In fact, [T]he corrective and distributive principles, precisely because of their different aims, can easily co-exist in the same area. In particular, the distributive principle does not require us to say that tort law should abdicate the field, or that the tortfeasor should be ignored. Nor, conversely, does the corrective principle entail that a victim must wait until the tortfeasor's liability is established (for assistance may be needed immediately, and this the social fund can provide). . . .
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If a poll were taken, the poor might well prefer the chance at the jackpot which the availability of pain-and-suffering damages means to the assured reparations for pecuniary loss which no-fault provides. However, if poor people are to be compelled to pay for either a compensatory or a corrective justice system, the former makes more sense. Corrective justice in minor cases is a luxury the poor cannot afford, the cake they would like when they have no bread. At this stage of the no-fault debate the poor are not free to choose a compensation plan, a corrective justice plan, or no plan at all. Instead, they will be forced to contribute to some sort of automobile-accident plan. In that context, the poor should favor a scheme which emphasizes compensation rather than corrective justice.

In addition to reducing and redistributing benefits, threshold plans offer substantial reductions in the administrative costs of the system. The elimination of fault as a criterion is expected to provide considerable savings in the cost of investigating and paying claims. Insurers will save because insureds may be expected to report their own claims more promptly; because reserves can be estimated more accurately for claims which do not involve intangible damages; because cases involving no threat of a fault-based suit will require less investigative effort and fewer professionals to handle claims; and because settlements will be simpler to negotiate in the minor cases. The likelihood of dealing directly with the policyholder rather than his attorney is expected to reduce the cost of settlement as well as reduce the amount of money paid out.

Stoljar, *Accidents, Costs and Legal Responsibility*, 36 Modern L. Rev. 233, 234 (1973). It is obvious, however, that if both objectives are to be served, the cost of the plan will be higher than if only one of them is sought. See notes 129-33 infra and accompanying text.


121. *See* notes 50-54 *supra* and accompanying text.


123. The Department of Transportation found that in cases involving death or serious injury about one-fourth of total tort recovery went not to victims but to their attorneys for fees and other legal costs. Interestingly, the percentage of total tort recovery representing legal costs was highest in cases involving economic loss between $5,000 and $9,999. In those cases, legal costs amounted to 30 percent of the recovery. *Department of Transportation, Automobile Insurance and Compensation Study, Economic Consequences of Automobile Accident Injuries* 48 (1970). Spokesmen for the bar argue that "the victim who has a lawyer receives more than he would without one, and the increased amount more than covers the lawyer's fee." Spangenberg, *No-Fault Fact, Fiction, and Fallacy*, 44 Miss. L.J. 15, 37 (1973). Even if true, the argument does no more than justify the lawyer's existence in the context of the fault system. It proves nothing about
for legal services rendered on a contingent fee basis by the tort bar. While there will still be disputes between insurers and victims over the right to no-fault benefits and the amount of loss, proponents of tort abolition expect such disputes to be fewer in number, simpler, and less costly to resolve than disputes involving fault and pain-and-suffering damages.

A serious problem might arise if insurers could simply delay or refuse payments to victims with valid no-fault claims. No-fault plans typically award interest and attorney's fees to a claimant who must sue an insurer to collect no-fault benefits. However, if only a letter or call from an attorney is necessary, the claimant may be stuck with the legal fee. In addition, the fees provided by statute

the desirability of retaining a system in which such a substantial proportion of the premium dollar goes for legal costs rather than the compensation of victims. It is estimated that claims administration costs, including legal fees, amount to about 13 percent of the premium dollar for defense expenses and 10 percent for claimants' expenses. P. Keeton & R. Keeton, Cases and Materials on the Law of Torts 514 (1971). Only 44 cents of the liability premium dollar actually goes to compensate victims. Id. No-fault plans are said to pay much higher percentages of the premium dollar in benefits. S. Rep. No. 92-891, 92d Cong., 2d Sess. 23 (1972). The difference in efficiency may result because some no-fault insurance, like health insurance, is written on a group basis, or because the plans cited are governmental and not private. Spangenberg, supra, at 28. It seems clear that the cost of efficiency of the system can be substantially improved by a change to a no-fault threshold plan but the efficiency is likely to be lower than governmental insurance or group health plans.

124. See Keeton, The Case for No-Fault, 44 Miss. L.J. 1, 9-10 (1973). Because the no-fault payment is to be made by one's own insurer rather than a third party's company, it may help to stimulate faster and more reasonable settlements by insurers. Department of Transportation, Automobile Insurance and Compensation Study, Crash Losses and Their Compensation in the United States 128 (1971). But see Spangenberg, supra note 123, at 37, where trial lawyer Craig Spangenberg argues that insurers are just as recalcitrant about paying first-party claims and that insureds are more reluctant to press a claim against their own company.

125. For example, the Massachusetts law provides for court costs and reasonable attorney's fees to be awarded to a claimant who successfully sues an insurer for no-fault benefits. No interest is specifically provided; however, the cases are to be advanced for trial to avoid long delay. Mass. Gen. Laws Ann. ch. 90, § 34M (Supp. 1975). The New York law provides for reasonable attorney's fees and 2 percent interest per month on unpaid claims. N.Y. Ins. Law § 675(1) (McKinney Supp. 1974-75). The bill passed by the United States Senate provides for interest on overdue claims at 18 percent per annum and requires the insurer to pay the claimant's reasonable attorney's fee. S. 354, 93d Cong., 2d Sess. §§ 106(a)(2), 107(a) (1974). The Uniform Act has similar provisions for interest and attorney's fees. UMVARA §§ 23(b), 24(a). By contrast, the Ohio bill provides for interest at 18 percent per annum on overdue payments but fails to provide for attorney's fees. Am. Sub. H.B. 251, 110th Ohio General Assembly, Regular Sess. lines 364-66, at 13 (1973-74).

126. This would be true in Massachusetts where the law provides for attorney's fees only in the event of a judgment. Mass. Gen. Laws Ann. ch. 90, § 34M (Supp. 1975). The New York law provides for fees if the claim is overdue and is paid after an attorney is retained. N.Y. Ins. Law § 675(1) (McKinney Supp. 1974-75). Both
may be inadequate to enable claimants to obtain representation. Even if the claimant is successful, the fee is discretionary with the court. Lawyers are not likely to find this double contingency attractive.\textsuperscript{127} Ironically, the poor may be in a better position than the nonpoor with respect to this problem. A person eligible for federally financed legal services could have access to free counsel, while others would have to find counsel willing to work for the potential fee provided by the plan's formula.\textsuperscript{128}

Add-on plans—those which do not abolish tort recovery—offer little or no prospect for reducing premiums below existing levels. It is possible that the cost of providing pecuniary loss benefits to victims at fault could be offset by the elimination of duplicate benefits and by a decline in the number of suits, if many victims who receive the no-fault recovery then choose not to proceed with the tort claim.\textsuperscript{129} However, by maintaining existing tort liability and adding no-fault coverage to the insurance package, these plans probably will increase the cost of the total insurance package. Of course, it is possible that the existing premium level can be maintained if the injury rate is declining or if insurance company profits can be reduced as one industry critic suggests.\textsuperscript{130} Add-on plans might stimulate higher costs with respect to liability claims because victims would be receiving compensation for basic pecuniary loss and could better afford to pursue a pain-and-suffering claim. "[T]he provision of first-party benefits in such legislation would serve to finance additional lawsuits, thereby adding to the burden on [an] overloaded court system."\textsuperscript{131} The problem of no-fault benefits "financing" litigation of the tort claim also would exist under threshold plans,
but only with respect to the serious cases in which tort recovery is permitted. Thus, no-fault benefits would improve the settlement leverage of the seriously injured victims.\footnote{132}

Add-on plans are a bad bargain for poor people because they provide the same no-fault benefit levels at a higher cost than threshold plans. Savings from the reduction in the number of tort claims and the elimination of double recovery of pecuniary loss exist in threshold plans as well as add-on plans. A very low threshold might eliminate only a few of the tort cases that would have been filed under an add-on plan. Higher thresholds would eliminate more cases, and any threshold would assure that some reduction in the number of tort cases would occur. If both liability insurance and the added no-fault benefits are in some sense compulsory, the poor will be forced to buy this bad bargain. Delaware, Maryland, and South Carolina have already enacted such plans.\footnote{133}

Because of the reduction in pain-and-suffering damages payable to the less seriously injured victims, threshold plans do offer the prospect of substantial cost savings. Part of this cost savings could reduce the existing overall premium level. Additional cost savings resulting from the elimination of disputes over fault and the amount of pain-and-suffering damages are also likely. The realization of these savings may depend on the way the threshold requirements are drafted as well as on the number of cases eliminated from the tort system. Threshold plan drafters would be well advised to use factual (as opposed to evaluative) criteria.\footnote{134} It is conceivable that

\footnote{131} first route, and will only sue in tort for the most serious losses. However, an adequate threshold for tort recovery will assure that optimism becomes a reality.

\footnote{132} Id.; Keeton, Compensation Systems and Utah's No-Fault Statute, 1973 Utah L. Rev. 383, 387.


\footnote{134} R. Keeton, Basic Text on Insurance Law § 1.6, at 24 (1971). Use of evaluative criteria allows for flexibility but “such flexibility has its costs as well as its benefits. There is less assurance of consistency and evenhandedness than when less elastic criteria are used. And administrative costs tend to rise with the degree of discretion committed to those responsible for applying the criterion to individual cases.” Id. at 24-25. General and imprecise criteria can “reduce predictability and thereby impede the settlement process.” Id. at 25 n.5. Thus, a threshold criterion allowing tort actions in cases involving death is likely to be relatively simple and inexpensive to administer. By contrast, the criterion “permanent serious disfigurement” and other such phrases are much less definite and may generate numerous and costly disputes. See Schwartz, No-Fault Insurance: Litigation of Threshold Questions Under the New York Statute—The Neglected Procedural Dimension, 41 Brooklyn L. Rev. 37, 44 (1974).

The statute proposed by Professors Keeton and O'Connell minimizes evaluative
disputes over whether threshold requirements have been met could partially replace disputes over fault and pain and suffering in the cases eliminated from the fault system. Evaluation issues with respect to threshold criteria could preserve the nuisance claim in the new system. "Without a significant exemption, many accident victims whose claims for economic loss had been fully compensated by basic reparation benefits and who had not suffered some very serious injury, would have an arguable case, with some settlement value, for recovery beyond their out-of-pocket losses." Enacting a dollar threshold which is high enough to minimize the number of cases that approach it and being as specific as possible when defining serious injury will help minimize the number and cost of such disputes.  

3. **Designing a Threshold Fair to the Poor**

There are at least two major issues to consider when establishing a threshold in a no-fault plan. The first is the basic question of how many cases should be removed from the tort system. All threshold plans will eliminate tort recovery in a substantial number of cases, but some are much more restrictive than others. Because they will fare better under a no-fault system than under a fault system, the poor should favor a high-threshold plan—one which eliminates all but the most serious cases.  

The second issue may be even more important to the poor. That is the problem of defining serious cases. Nearly all of the enacted threshold plans permit tort suits for pain-and-suffering damages when the victim has suffered specified injuries or has incurred issues by using the dollars of tort damages recoverable rather than any definition of serious injury. Their plan permits tort suits only if pain-and-suffering damages recoverable exceed $5000 or damages recoverable for economic loss exceed $10,000. Motor Vehicle Basic Protection Insurance Act § 4.2(a), in BASIC PROTECTION 323. No jurisdiction has adopted such criteria. Virtually all of the enacted threshold plans use evaluative criteria in combination with a dollars-of-medical-expense criterion. The drafters of the Uniform Act elected to use evaluative criteria ("significant permanent injury" and "serious permanent disfigurement") but to limit severely the number of cases in which disputes over these terms would occur by requiring that the first $5000 of damages for noneconomic loss be deducted from any tort recovery. UMVARA § 5(a)(7), Comment, at 29.  

135. *Id.*  
136. See notes 122-24 *supra* and accompanying text.  
137. *E.g.*, COLO. REV. STAT. ANN. § 10-4-714(a) (1973); MICH. COMP. LAWS ANN. § 500.3135(1) (Supp. 1975-76); N.Y. INS. LAW §§ 671.4(a), 673.1 (McKinney Supp. 1974-75). Even if death occurred, the Uniform Act would require deduction of the first $5,000 of pain-and-suffering damages awarded in a tort action. UMVARA § 5(a)(7).
medical expenses in excess of a specified monetary level.\textsuperscript{138} There is considerable variation among the enacted threshold statutes with respect to the specific injuries which give rise to tort suits for pain-and-suffering damages,\textsuperscript{139} however, the statutes are unanimous in allowing such suits in cases where death has occurred. The specified-injury criteria would seem to treat rich and poor alike. If it can be said that the victim has suffered one of the enumerated serious injuries, his economic status should make no difference. It is even possible that some poor people might have a greater chance to assert such a claim since they have access to federally funded legal services.\textsuperscript{140} Other victims would have to pay a retainer or find private counsel willing to assert the claim and wait for the fee.

The medical-expense threshold, on the other hand, offers the potential of favoring the affluent because of the "ethical standard of the medical profession to set fees according to the ability of the patient to pay."\textsuperscript{141} Thus, statutes which use a standard based on the fee charged might be adjudged unconstitutional because they discriminate against the poor.\textsuperscript{142} For this reason, most plans use a

\begin{itemize}
  \item \textsuperscript{138} The dollar threshold is indicated for each threshold plan listed in Appendix C.
  \item \textsuperscript{139} Dismemberment is an injury which gives the victim the right to sue in tort in some jurisdictions. \textit{E.g.}, FLA. STAT. ANN. § 627.737(2) (1972); N.Y. INS. LAW §§ 671.4(a), 673.1 (McKinney Supp. 1974-75); UTAH CODE ANN. § 31-41-9(b) (Repl. vol. 4A 1974); NEV. REV. STAT. § 698.280(a) (1973). Long-term disability, variously defined, is another common criterion. \textit{E.g.}, COLO. REV. STAT. ANN. § 10-4-714(e) (1973); MINN. STAT. ANN. § 65B.51.3(b)(2) (Supp. 1975-76); GA. CODE ANN. §§ 56-3402b(j), 56-3410b(a) (Supp. 1974); UTAH CODE ANN. § 31-41-9(c) (Repl. vol. 4A 1974); NEV. REV. STAT. § 698.280.1(h) (1973). Disfigurement, usually modified by adjectives like "serious" or "permanent" is used in many states. \textit{E.g.}, FLA. STAT. ANN. § 627.737(2) (1972); CONN. GEN. STAT. ANN. § 38-323(a)(4)(Supp. 1975); GA. CODE ANN. §§ 56-3402b(j), 56-3410b(a) (Supp. 1974); N.Y. INS. LAW §§ 671.4(a), 673.1 (McKinney Supp. 1974-75). Many states permit tort suits by victims who suffer fractures or certain kinds of fractures. \textit{E.g.}, FLA. STAT. ANN. § 627.737(2) (1972); CONN. GEN. STAT. ANN. § 38-323(a)(3) (Supp. 1975); GA. CODE ANN. §§ 56-3402b(j), 56-3410b(a) (Supp. 1974); N.Y. INS. LAW §§ 671.4(a), 673.1 (McKinney Supp. 1974-75). Some states abandon attempts at specificity and use broad general criteria like "serious permanent injury" or "serious impairment of body function." MICH. COMP. LAWS ANN. § 500.3135(1) (Supp. 1975-76); N.Y. INS. LAW §§ 671.4(a), 673.1 (McKinney Supp. 1974-75); MINN. STAT. ANN. § 65B.53.3(b)(2) (Supp. 1975-76); GA. CODE ANN. §§ 56-3402b(j), 56-3410b(a) (Supp. 1974); NEV. REV. STAT. § 698.280.1(h) (1973).
  \item \textsuperscript{140} See note 128 supra and accompanying text.
  \item \textsuperscript{141} Spangenberg, supra note 123, at 71.
  \item \textsuperscript{142} 1973 Senate Commerce Hearings 387, 762-63. In Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), the trial court had held that the Illinois no-fault statute was unconstitutional because the threshold based upon "reasonable medical expenses" resulted in "irrational discrimination against economically disadvantaged persons." \textit{Id.} at 488-89, 283 N.E.2d at 480. Because it ruled the statute unconstitutional on other grounds, the Illinois Supreme Court did not reach this economic
standard based upon the reasonable value of the services rendered rather than the fee charged. A reasonable value standard appears in many of the enacted threshold laws. For example, the New York statute uses the phrase "reasonable and customary charges." The Pennsylvania law speaks of the "reasonable value of reasonable and necessary medical and dental services." However, the New Jersey statute uses the standard of actual expenses incurred for medical services and appears to be especially vulnerable to an equal protection challenge. The reasonable value of the doctor's services may be difficult to ascertain, and because of administrative costs and bureaucratic inertia, the fee charged is likely to be presumptive evidence of value.

One way to avoid the potential inequities associated with a threshold derived from the medical expense incurred is to use a threshold based upon damages recoverable. Pecuniary damages, such as medical expense and income loss, could not be used as a standard because poor people would incur lower losses than the affluent. A standard based upon pain-and-suffering damages, however, could work in a nondiscriminatory way. The amount of such damages would be determined only after trial and the threshold amount could then be subtracted. For example, serious cases could be defined as those in which a judge or jury might award more than $5,000 for pain and suffering. The plaintiff would then actually be

discrimination argument. The equal protection argument is not an easy one to make. If poor people were a suspect class, the courts would require a compelling state interest to support the classification. However, poverty alone is not sufficient to make a class suspect. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-29 (1973). Nor is there any discernible substantive constitutional right infringed by no-fault legislation. That, too, would provide reason for special scrutiny. Cf. id. at 33-37. In the absence of a reason for special scrutiny, the statute must only "bear some rational relationship to legitimate state purposes." Id. at 40. For an equal protection analysis of the the burden imposed on the poor by the financial responsibility laws, see Note, Personal Rights as an Emerging Approach to Equal Protection: Automobile Financial Responsibility Laws and the Right to Drive, 24 CASE W. RES. L. REV. 163, 174-99 (1972). The author concludes that there is no basis for special scrutiny of such laws. Even if the compelling interest test were applicable, he feels the laws would survive an attack based upon equal protection.

In Grace the argument was based on a state constitutional prohibition against special legislation. That provision was the basis of the decision that the Illinois statute arbitrarily discriminated against some classes of victims. Grace v. Howlett, supra, at 487-88, 283 N.E.2d at 479. 143. N.Y. INS. LAW § 671.4(b) (McKinney Supp. 1974-75). 144. PA. STAT. ANN. tit. 40, § 1009.301(a)(5)(b) (Supp. 1975-76). 145. E.g., N.J. REV. STAT. § 39: 6A-8 (1973). See note 142 supra. 146. It will be impossible to examine the reasonableness of every charge. Broad guidelines setting maximums beyond which reasonableness will be questioned could be adopted, but considerable variation in fees will continue unless a fixed schedule of fees is promulgated.
awarded the pain-and-suffering damages in excess of that figure. If the finder of fact awarded less than $5,000, the plaintiff would collect nothing in the tort suit. This prospect obviously would discourage attorneys working on a contingent-fee basis from taking cases which they think are likely to result in damages below or only slightly above the threshold amount. Judges and juries might negate the effect of the threshold by simply adding the threshold amount to their awards. Nevertheless, the Keeton and O'Connell plan, UMVARA, and the Puerto Rican statute have adopted this approach.

If we assume that poor people recover pain-and-suffering damages to the same extent as those who are more affluent, a threshold using dollars of pain-and-suffering damages recoverable will work fairly. There are indications that damage claims of poor people, particularly members of racial minorities, have been discounted by fact finders. Whether such discrimination occurs today, or occurred in the past, a pain-and-suffering threshold may not be the best choice. Any dollar threshold could become ineffective because of inflation. Accordingly, if medical expense is used, the rising costs of medical care would force upward adjustment of the threshold if it is to continue to exclude the same percentage of cases from the tort system. A pain-and-suffering dollar threshold also would have to be adjusted for inflation in awards by judges and juries.

From the standpoint of fairness, then, perhaps the best choice of thresholds is one which uses the nature of the injury rather than any dollar figure to determine which cases remain in the tort system. Although the bill which passed the United States Senate used this approach, to date, only Michigan has enacted such a threshold.

4. Changing the basis for rating risks.

In the tort-liability system insurers must rate insureds according to their "loss-causing" potential. When setting the premium for liability coverage, the underwriter estimates the probability that the insured will be liable for an accident and multiplies that factor by an estimate of the average expected loss to the third-party vic-

147. D.C. Hearings 151.
148. P.R. LAWS ANN. tit. 9, § 2058(2) (Supp. 1974-75); Motor Vehicle Basic Protection Act § 4.2, in BASIC PROTECTION 323; UMVARA § 5(a)(7).
149. See note 107 supra and accompanying text.
150. Hawaii has a threshold which is designed to rise with inflation. HAWAII REV. STAT. § 294-10(b) (Supp. 1974).
152. MICH. COMP. LAWS ANN. § 500.3135(1) (Supp. 1975-76).
153. D.C. Hearings 150.
The amount of loss for which the insured will be legally liable is the important factor.

Defenders of the liability system assert that it is eminently fair in allocating the burden of accident costs. They concentrate on post-accident equities between drivers involved in accidents, and assert that the liability system penalizes the faulty driver by forcing him to bear the cost of his own injuries and the full cost of the injuries that he inflicts on innocent victims. For example, Craig Spangenberg argues that "[i]t is the purpose of the tort system to differentiate between right and wrong, between good driving and bad, and impose liability upon the wrongdoer for the whole loss he inflicts." Leroy Jeffers, president elect of the State Bar of Texas, defends the Texas statute which "permits total recovery by an innocent automobile accident victim from a guilty offender of the entire amount of damages sustained." Jeffers scorned the federal threshold bill because, with respect to the below-threshold cases, "it does not make any difference about your mental pain, and surgery, [sic] or how gross and aggravated the wrongdoing of the driver of the other car was. He goes scot-free under this enlightened reform measure." If we postulate an economic system in which everyone is affluent and no one has liability insurance, this view is quite reasonable. Such a society could and should hold culpable drivers responsible for the consequences of their negligence. In our imperfect society, however, few people can be without liability insurance. Only the rich and the poor can drive uninsured. The middle class cannot risk being forced to choose between loss of driving privileges and bankruptcy by the financial responsibility laws which apply in the event of an accident. If the rich are uninsured, their victims may still be compensated from their assets. But, if less affluent drivers are uninsured, innocent victims are left without a source of reparations. In order to close this solvency gap, financial responsibility

There have been numerous variations in methods of rating used with liability insurance, but all have had in common the characteristic that they have dealt with potential size of loss as a random factor. That is, they have used average claim cost in calculating rates rather than trying to tailor a policyholder's rates to factors bearing on the probable size of his loss from a given severity of injury. It is quite natural to proceed in this way since under a liability insurance system an injured person claims against somebody else's insurance company, not his own.

155. Spangenberg, supra note 123, at 52.
156. 1973 Senate Commerce Hearings 532-33.
157. Id. at 527.
158. See notes 42 & 102 supra.
laws, compulsory insurance, uninsured motorists coverage, and other devices have been developed. 159

The catastrophic loss potential of automobile accidents coupled with the realities of income distribution has made reasonably priced liability insurance a necessity. 160 Regulators influenced by public pressure to make coverage affordable have manifested an unwillingness to permit liability rates to rise to necessary levels. 161 The result has been rates which the industry perceives as inadequate. Some critics have suggested that rates are adequate to produce reasonable profits for the industry if investment income is considered. Whether rates are actually inadequate is a rather insignificant academic question. The fact is that the industry is behaving as if rates are inadequate to earn a sufficient profit. 162 The industry response has been extreme selectivity with respect to risks in an effort to earn an underwriting profit. 163 Whether rates are held down by regulation or by competition, selectivity with respect to risks will increase company profits. 164 Thus, for many drivers the problem has been not only the cost of insurance, but also its unavailability at any price. The Department of Transportation found that "8 percent or more of all drivers are unable to obtain insurance through standard channels. In some States the substandard market ranges as high as 20 percent." Some drivers in this substandard market obtain insurance from high-risk specialists in the private market. The coverage provided by such insurers is "often of questionable quality." 165 Subjective factors such as the race, financial status, and personality of the insured do not enter into rate calculations;

159. For a discussion of devices designed to close the solvency gap, see Basic Protection 109-18.
161. Id. at 422; Monitoring Competition 62-63, 73.
162. Id. at 74. Investment income can compensate for the lack of underwriting income in the short run, but, unless an underwriting profit is permitted, capital will flow from the industry to other sorts of investments. Cf. Kimball, The Regulation of Insurance, in Insurance, Government, and Social Policy 3, 14 (S. Kimball & H. Denenberg eds. 1969).
164. See notes 75-76 supra and accompanying text.
165. Insurance Accessibility 6. Insolvencies and generally poor service are common to this latter group of insurers. Id. at 66. The other alternative is an assigned-risk plan. In many jurisdictions, assigned-risk plans are inadequate because of eligibility restrictions, unrealistically low coverage limits, lack of premium financing, and prices above those paid by similar risks in the voluntary market. D. REINMUTH & G. STONE, A STUDY OF ASSIGNED RISK PLANS: REPORT OF THE DIVISION OF INDUSTRY ANALYSIS OF THE FEDERAL TRADE COMMISSION TO THE DEPARTMENT OF TRANSPORTATION 97-100 (1970).
however, they are considered by agents when deciding whom to cover. Poor people, particularly members of racial minorities, may be denied liability coverage in the private market because insurers and agents believe that they are bad drivers or because judges and juries demonstrate a prejudice against them. Subjective factors such as race are significant to a liability insurer because it must view the insured as a potential defendant in a tort suit.

When liability insurance is a necessity, the burden of accident costs is allocated by the insurance rating system, not by tort suits between drivers. The courts can and do allocate costs after an accident has occurred by applying tort rules. Insurers, however, must allocate costs prospectively. The equitable allocation of insurance costs is a near obsession in the private insurance industry. Insurance regulatory laws in all states prohibit unfair discrimination in liability insurance rates. Prohibited unfair discrimination in rates charged must be defined in terms of the relationship between the rate and the expected cost of insurance protection, not the actual cost. A rate structure would be unfairly discriminatory if "there are premium differences that do not correspond to expected losses and average expenses or if there are expected average cost differences that are not reflected in premium differences."

In pursuit of equity, insurers gather and apply actuarial data in order to classify risks. Actuarial science is inexact and the compromises in rating are many:

Determining relative expected costs . . . is a highly complicated, technical task involving considerable judgment and many compromises. For example, in determining how many rating classes should exist, one must balance the desire for a refined classification against the desire for credible statistical information.

Even if a satisfactory compromise is reached with respect to the number of classes of insureds, there are many ways in which these classes can be defined. True causal factors that would serve as a basis for these definitions are extremely difficult to identify; the compromise with respect to the number of classes limits the number of

166. INSURANCE ACCESSIBILITY 17. An agent is stimulated to select risks carefully by contingency contracts and contingency commissions which make his earnings depend in part on the losses experienced by his insureds. See J. ATHEARN, GENERAL INSURANCE AGENCY MANAGEMENT 56-62 (1965).


168. See note 74 supra.


170. Id. at 212.
causal factors that can be considered; and practical problems involved in applying the definitions cannot be ignored.\(^{171}\)

Basic liability insurance rates are computed by using the age, sex, and marital status of the driver as well as his or her expected use of the automobile to predict future costs. These factors determine the "primary classification."\(^{172}\) Merit factors such as past accidents and traffic violations are of lesser value for this purpose. The performance characteristics of the automobile and the merit factors considered under the "Safe Driver Insurance Plan Rule" enter into the "secondary classification" decision resulting in an appropriate adjustment to the basic rate.

To illustrate the relative importance of merit factors in comparison to the basic factors, consider the following example. A 24-year-old male driver who owns an automobile and drives to work would pay 1.35 times the base premium rate. If he were to be divorced, the same driver would pay 2.20 times the base premium rate. By contrast, if he remained married but had one chargeable accident, his rate would be 1.75 times the base premium. In other words, a divorce adds .85 to his rating factor while an accident adds only .40. Switching from a standard performance car to a high performance car would add only .30 to his rating factor.\(^{173}\)

When considering prior accidents for rating purposes, insurers avoid the complexities of applying fault rules to unclear cases. An insured is surcharged for his involvement in an accident unless he was clearly innocent and the other party was clearly at fault.

171. \textit{Id.}


173. \textit{See id.} at 6-10. The change in marital status is significant for men until age 30 and for women until age 25. The example is cited not to attack the rationality of the rating system but to point out the actuarial significance of an accident in comparison to another, nonmerit, factor. An unmarried male who owns and drives to work a standard performance car pays 2.20 times the base premium because of his youth and marital status if he is age 24. If he were over 30, he would have to have had four chargeable accidents within three years to add that much to his rating factor. \textit{Id.} at 4-10.

True "merit rating" would be "a system based exclusively on individual driving records." Flannigan & Johnson, "Merit Rating" for Automobile Liability Insurance, 619 Ins. L.J. 425 (1974). It would run counter to the present trend toward more and more rating factors and narrower and narrower refinement of classifications. \textit{Id.} Premiums could be reduced for the majority of drivers who have no accidents on their records but very heavy surcharges on those with accidents would be necessary. \textit{Id.} at 434. Past accidents and violations are just not very good predictors of future accidents. \textit{See J. Stewart & B. Campbell, The Statistical Association Between Past and Future Accidents and Violations} 30, December, 1972 (unpublished paper from the Highway Safety Research Center, University of North Carolina).
For example, under one plan a rating point will be assigned for post-accident involvement unless "the insured demonstrates that the accident occurred under [certain excepted] circumstances." No point is charged if the insured's automobile was lawfully parked; if the insured is reimbursed or has a judgment against the other driver; if the insured's automobile was struck in the rear and the insured was not convicted of a violation; if the other driver was convicted of a violation and the insured was not; or if the insured's automobile was damaged by a hit-and-run driver and the insured reported the accident within 24 hours. The burden on the fault issue is on the insured. The rating point is assigned immediately after the accident. If the insured is later found not to have been at fault, the premium surcharge is refunded.  

The achievement of equity in rating is hampered by the actuarial necessity of large rating classes and by the administrative cost of classifying risks. The loss-causing focus in liability insurance is responsible for a serious rating inequity. Those who have the most to lose will collect the most in benefits from a reparations system so long as the objective is to compensate for pecuniary loss. Even with respect to pain-and-suffering damages, in the liability system the more affluent people tend to collect more. An affluent person may be a low-risk driver to his own liability insurer if he is unlikely to be at fault in a future accident. The same person is a high risk to the reparations system in that an injury to him would require the system to pay more in benefits than it would pay to a person of average income. It would seem equitable to charge a higher premium of those who are likely to collect more from the system if injured. This is not done in the liability system because the con-

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176. In a competitive market, an individual insurer will add rate classifications only if the addition will result in improved profits. If the cost of the additional classification is offset by the additional business which lower rate for that group will bring to the company, the additional classification is profitable. Unless the new classification enables the company to charge sufficiently lower premiums to some potential insureds to induce them to switch from other companies, it is not worthwhile. See note 77 supra.

From a societal viewpoint, the cost of classification of risks is justifiable if it is offset by a reduction in the number and cost of accidents brought about by the deterrent effect of charging more dangerous drivers higher premiums. G. CALABRESI, THE COSTS OF ACCIDENTS 146-47 (Student ed. 1970); see notes 80-81 supra and accompanying text.

177. See note 107 supra and accompanying text.
tructural relationship exists between the insurer and the tortfeasor. The victim pays no premium to protect himself against loss and thus is not charged according to his loss potential.

With respect to the total reparations fund in a liability system, the poor subsidize the more affluent who collect more when injured. "It is basically as unfair to charge the same rate to a $5,000-a-year and a $50,000-a-year earner as it is to charge the same total fire insurance premium for full coverage on a $5,000 house and a $50,000 house. Yet that is just what the liability insurance system does." The poor will fare much better in a first-party no-fault insurance system. Income loss is a major portion of the pecuniary loss compensable under a no-fault plan. An insurer should charge less to cover a poor person or family because there is a lower income-loss potential. Accordingly, the Michigan insurance commissioner has required the industry to take into account the low income-loss potential of certain groups in filing rates under the no-fault statute.

Defenders of the liability system argue that another kind of subsidy exists in threshold plans; innocent drivers subsidize the guilty. However, this phenomenon occurs in any insurance system; it is the essence of insurance. Those who suffer no losses contribute premium money which, when pooled, pays the losses of

179. According to the Department of Transportation:

On the average, slightly more than half of all paid personal injury economic losses to date of settlement were medical costs and about 40 percent reflected lost income. However, in small cases (e.g., where economic losses were less than $500) medical costs loomed larger, about two-thirds of the total, and income loss was less important accounting for less than a third of total losses. For very serious cases (e.g., with losses over $25,000) these relationships were reversed.

Seriously injured victims (excluding fatalities) had an average loss to date of interview (18 to 30 months after the accident) of $4,200. Of this amount, about 45 percent was wage loss, 38 percent medical expense, 12 percent property damage and 5 percent other types of loss. DEPARTMENT OF TRANSPORTATION, AUTOMOBILE INSURANCE AND COMPENSATION STUDY, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 34 (1971) (footnotes omitted).
181. For example, trial lawyer Craig Spangenberg asserts that

The tort system does not pay the driver on the wrong side of the road. It does attempt to pay the driver on the right side of the road. A system to pay all drivers on the wrong side of the road and drivers who crash into trees, brick abutments and poles, that kind of system is costly, and it seems to us wrong to say the payings [sic] of the system should come from those victims who are on the right side of the road and give up their rights in order to pay the fellow who hit them.

1973 Senate Commerce Hearings 388.
those who are accident victims. In the liability system only the guilty insureds get any tangible benefit from the policies they purchased. Guilty drivers in a liability insurance system pay only a very small percentage of the loss they cause. In fact, premiums collected from innocent drivers who have no assets to protect are added to a pool which protects the assets of guilty drivers who are affluent.

A no-fault threshold plan can adjust for an insured victim's care and driving skill as reflected by his driving record as well as his income-loss potential. The liability system takes into account only the first factor. Predictions about the likelihood of future accidents can be made in a no-fault system in the same way that they are made in a fault system. The same rating factors can be used. Presumptive fault criteria now used in surcharging for accidents could be retained. For example, drivers whose cars are rear-ended or damaged while parked need not be surcharged. Criminal convictions could still be used. The use of civil liability in the rating process, however, would preserve much of the cost of the fault-determining process. Rating criteria based upon tort judgments or settlements should be eliminated. Keeton and O'Connell prefer a system which uses involvement rating rather than one which ignores accident records or which surcharges only those drivers found to be at fault. To them the cost of assigning fault for rating purposes may be prohibitive. In any event, they argue that rating is a separable collateral issue in relation to the desirability of their threshold plan.

In addition to a reduction in the subsidy to the affluent, the shift

182. P. KEETON & R. KEETON, CASES AND MATERIALS ON THE LAW OF TORTS 528 (1971). Of course, one of the principal values of insurance is intangible. Insurance "provides the policyholder with a sense of security, a feeling of confidence about the future, a freedom from anxiety about parts of the unknown." Kimball, supra note 175, at 478.


184. Id. at 90.

185. See notes 172-74 supra and accompanying text.

186. BASIC PROTECTION 269 & n.28, 526.

Obviously, if a no-fault plan charged everyone the same premium or simply related premiums to income level, the low-risk drivers would be subsidizing the high-risk drivers. D. OLSON, DEPARTMENT OF TRANSPORTATION, AUTOMOBILE INSURANCE AND COMPENSATION STUDY, THE PRICE AND AVAILABILITY OF AUTOMOBILE LIABILITY INSURANCE IN THE NONSTANDARD MARKET 30-31 n.2 (1971). Because poor people tend to dominate the high-risk classifications, this could be beneficial to the poor as a class. See note 94 supra. All enacted plans and proposed plans under serious consideration will permit loss-causing propensity to enter into rate calculations. Classification systems should take into account both loss-causing potential and loss-incurring potential.
to a loss-incurring focus in rating offers another important advantage. Ratemaking in the liability system is complicated by the availablity of pain-and-suffering damages and by the fact that the potential victim is a random third party and not the insured. The change to a first-party system which pays benefits for pecuniary loss only, would make predicting losses much less complicated and more accurate.\(^\text{187}\) Assuming that there is a considerable overlap between the class of drivers who are high risks and the class of

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187. & \text{ Testimony of Dr. John L. Hazard, Assistant Secretary for Policy and International Affairs, Department of Transportation, in } D.C. \text{ Hearings 19. According to Frederick D. Watkins, president of Aetna Life & Casualty Company:} \\
& \text{Today, sharp fluctuations in losses make the insurer's position too precarious to tolerate premium levels based on narrow or non-existent profit margins and require the application of long-range trend factors in the pricing computation. Under a first-party system, however, we would be able to predict losses with greater degree of accuracy. Thus we would be in a better position to develop adequate rates based on moderate but realistic profit margins, avoiding the violent swings that have characterized our business for the past ten years.} \\
& \text{[The liability system itself makes it necessary for insurers to try to identify and insure only the best drivers—those likely to escape accident involvement—in order to avoid the unpredictable costs of accidents involving unknown third parties and their automobiles.} \\
& \text{[A] no-fault system would lead to expansion of the automobile insurance market. Underwriting standards would be significantly changed. An individual's driving record would still be significant, but so would his income, the size of his family, the kind of car he drives. These are predictable factors, with assignable values. In short, insurers would be able to figure more accurately the costs of the risks they assume, and, in a free and competitive market-place, would be able to offer coverage to virtually all licensed drivers.} \\
& \text{1971 House Commerce Hearings, pt. 1, at 252-53.} \\
& \text{Because of the greater number of random variables in the liability system, the dispersion of probable losses in that system is greater than in a no-fault system. This means that losses may be predicted with greater accuracy in the no-fault system. Predictions for the whole insured class and for individual members of the class are more likely to be accurate. The need for what is referred to as a contingency loading—an increase in the premium to cover the uncertainty of the prediction—is reduced or eliminated in a no-fault system. Of course, the maximum improvement in the accuracy of loss predictions will occur only if tort liability is completely abolished. Threshold plans will improve predictions to a lesser extent and add-on plans will have no effect because liability is preserved in every case.} \\
& \text{One of the reasons for the difficulty in predicting losses in the liability system is the length of time required to resolve the issues of fault and the amount of pain-and-suffering damages. The insurer must predict not only the future losses but future costs of settling the claims as well. Department of Transportation, Automobile Insurance and Compensation Study, Motor Vehicle Crash Losses and Their Compensation in the United States 63-64 (1971); cf. Hofflander, Minimum Capital and Surplus Requirements for Multiple Line Insurance Companies: A New Approach, in Insurance, Government, and Social Policy 69, 78-79 (S. Kimball & H. Denenberg eds. 1969).}
\end{aligned}\]
drivers who have low incomes, this should result in a narrowing of the range of premiums from the lowest- to highest-rated drivers and in generally lower underwriting costs. It should also substantially reduce the pressure for extreme selectivity with respect to risks.

Two factors should tend to reduce the pressure for selectivity if a threshold plan is enacted. First, the cost savings inherent in a threshold plan, except perhaps one with very high benefit levels, should make possible premium reductions. In open-competition states, companies which reduce premiums to a lesser extent than their competitors may lose some customers. However, if the liability system remained unchanged and prices rose, consumers would seem even more likely to shop for cheaper coverage. In states which have retained prior-approval laws or other direct regulation of rates, the political situation of the insurance commissioner will be considerably changed. For years he has been under pressure to hold back rising premiums. With the change to no-fault, he will be urged to reduce premiums to the full extent possible. A commissioner concerned about the viability of the insurance market and the availability of insurance to all drivers will find it much easier to reduce rates to a level which permits a reasonable profit than he found it to raise them to that level. In other words, the industry can get the effect of a rate increase and improved profits by lowering rates so long as the rate reduction does not eat up the entire cost savings inherent in a threshold plan. The combination of a high threshold and a low no-fault benefit level offers the best prospect for reducing the total dollars paid out by the system and facilitates a substantial reduction in premiums while still improving insurer profits.

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188. Although accurate data are not available, the assumption is commonly accepted and not unreasonable. See note 94 supra.

189. See note 187 supra.

190. According to one insurance executive, this would be true because of the reduced variation in losses from year to year and because of the improved predictability of losses. 1971 House Commerce Hearings, pt. 1, at 252-53. Actually, selectivity is a response to rate inadequacy in a competitive market and is likely to continue, even under a no-fault system, unless rates are high enough to provide insurers with what they consider a reasonable profit. See notes 75-76 supra and accompanying text; cf. C. CULP & J. HALL, CASUALTY INSURANCE 448-52 (4th ed. 1968).

191. Massachusetts' experience with a law which has a moderate threshold level, $500 of medical expense or certain specific injuries, is instructive. The benefit level under the Massachusetts plan is quite modest. The required no-fault coverage has a $2,000 limit. MASS. GEN. LAWS ANN. ch. 90, § 34A (Supp. 1975). The decline in dollars paid out to victims after the changeover was startling. Despite rate reductions ordered by the insurance commissioner totaling 38 percent, insurers in Massachusetts improved their profits quite substantially in the first year of the no-fault law. Brainard, The Impact of No-Fault on the Underwriting Results of Massachusetts Insurers,
The second factor which would reduce the pressure for careful selection of risks is the consideration of the loss-incurring potential of the insured. The response of insurers to inadequate rates has been twofold: (1) a narrowing of rate classes and (2) careful selection of policyholders within such classes. A system which considers both the probability of an accident and the size of the victim's potential loss will necessarily have narrower classes. In other words, the need to consider factors which help make the estimate of accident probability more accurate will be reduced because the amount of loss can be more accurately estimated. Furthermore, subjective factors which have been used in selection of risks will be less relevant. Finally, because of the improved accuracy of predictions, the cost of more sophisticated, detailed classifications and underwriting guides is less likely to be justified by the improvement in the accuracy of the prediction.

Although the changeover in rating to a loss-incurring focus would have some benefits for the nonpoor, it is probable that poor people who are now rated as high risks will benefit most from the change. Obviously, the maximum impact of the shift from the loss-causing to loss-incurring focus will occur only in a pure no-fault system. Although that goal seems unattainable, representatives of the poor can choose among the various plans with this factor in mind. They should support those plans which minimize post-accident loss shifting on a fault basis. Threshold plans eliminate the direct shifting of loss from victim to tortfeasor for those cases below the threshold. The higher the threshold, the better the plan will serve to concentrate the rating process on loss-incurring potential.

Unfortunately, many of the enacted threshold plans retain post-accident loss shifting for below-threshold cases even though the victim has no tort action against the tortfeasor. The victim's in-
surer is permitted to recover the amount paid in no-fault benefits from the tortfeasor's liability insurer. It is unusual to permit an insurer to pursue a claim as a sort of subrogee even though the right of the subrogor-victim has been abolished. Most plans do not use case-by-case adjudication through the courts. They set up a system for shifting losses en masse; any disputes are adjudicated by arbitration. The basis for such loss-cost-transfer, however, is traditional tort law. Thus, although such plans may substantially reduce the administrative cost of imposing the burden on the tortfeasor through the courts, they will generate more administrative costs than plans which permit no shifting on a fault basis.

The tortfeasor's liability insurer. This means that both the victim and the tortfeasor must pay a premium to cover the victim's loss. Because of the cost of shifting the losses, the no-fault rate will not fully reflect the recoveries from tortfeasors. In Kansas, the shifting may be done by expensive case-by-case subrogation. KAN. STAT. ANN. §§ 40-3113, 40-3117 (Supp. 1974).

Several states permit transfer of all pecuniary loss where the victim has no tort claim but require that the shifting be done through a less expensive arbitration system. E.g., N.Y. INS. LAW § 674 (McKinney Supp. 1974-75); GA. CODE ANN. § 56-3405b(d) (Supp. 1974). Colorado's statute is similar but less objectionable because only losses in excess of $500 may be shifted. COLO. REV. STAT. ANN. § 10-4-713(1), 10-4-717(1) (1973).

Some states allow pecuniary loss to be shifted from the no-fault insurer to the liability insurer only in cases where the victim would have a right to pain-and-suffering damages. This obviously reduces the number of cases in which pecuniary loss is shifted. E.g., FLA. STAT. ANN. §§ 627.736(3), 627.737 (1972). The Hawaii statute also permits transfer only in above-threshold cases. However, it provides that only 50 percent of the loss may be shifted and therefore is less objectionable. HAWAII REV. STAT. § 294-7 (Supp. 1974).


The poor should support provisions which provide for loss-shifting based upon the weight of the vehicle or other loss-causing propensities not based on fault. E.g., UMVARA § 38; S. 354, 93d Cong., 2d Sess. § 111(a)(3) (1974). They should not object to provisions granting a lien or subrogation rights to a no-fault insurer when the victim has a right to collect pecuniary loss from a person not covered by automobile insurance. E.g., N.Y. INS. LAW § 673.2 (McKinney Supp. 1974-75); UMVARA § 6(b); S. 354, 93d Cong., 2d Sess. § 111(a)(2) (1974). Unless the no-fault insurer is given a lien or subrogation rights, the insured will be able to recover his pecuniary loss twice. This feature coordinates benefits to minimize the cost of no-fault coverage.

198. E.g., GA. CODE ANN. § 56-3405b(d) (Supp. 1974); MINN. STAT. ANN. § 65B.53 (Supp. 1975-76); N.Y. INS. LAW § 674 (McKinney Supp. 1974-75); UTAH CODE ANN. § 31-41-11 (Repl. vol. 4A 1974).

199. Harry A. Lansman, executive vice president of the Kemper Insurance Group, cited data with respect to the loss-cost-transfer system which provides for arbitration of intercompany disputes over fault in collision coverage cases. That data indicate that on the whole claimants won about half of the time and lost about half of the time in the arbitrated cases. 1973 Senate Commerce Hearings 241. It would seem,
Furthermore, they will preserve the inequities of the loss-causing rating system. Risks will continue to be viewed as potential causes of loss to the insurer because of legal liability. The affluent who are good risks in terms of potential liability will continue to be subsidized by the poor.

Strong elements in the insurance industry are dedicated to the preservation of loss-causing rating. Although they may argue the equities, they act upon the realities of the present market situation. Companies which have prospered in the liability system because of their ability to select the best liability risks may suffer if the rating focus shifts. They will have a disproportionate number of high-income earners in their pools, causing rates to rise. Companies that have been serving large numbers of poor people could benefit from the shift. Most important, companies that are just entering the market on a large scale could select the insureds who would be most attractive under the new system—good drivers with low incomes.

Given the position of a large and powerful segment of the insurance industry and the concurrence of a bar which supports the preservation of fault wherever and however possible, the elimination of loss-cost-transfer seems politically unlikely. The power of these select-risk companies and the survival of the belief that loss-causing rating is somehow fairer, has led to preservation of loss-cost-transfer therefore, that the costs could have been allowed to remain on the companies which paid the collision claims since their insureds were guilty half of the time and innocent half of the time. The recoveries were approximately offset by the dollars required to be paid out. If such trading of dollars among companies were costless, it might be justifiable. Professor Reinmuth estimates, however, that the arbitration system costs for 1971 amounted to about 2.5 percent of the amount awarded and that more significant costs were incurred by the companies to investigate fault and prepare their claims or defenses. D.C. Hearings 172. He further contends that personal injury cases are more complex and therefore more expensive to investigate and arbitrate than collision claims. Id.

200. Id. at 171, 173. According to Professor Reinmuth:

The retention of subrogation will also perpetuate the selective underwriting standards of insurance companies. The burden of such selective liability underwriting standards will continue to be felt by urban dwellers, the young, the elderly, the blacks or unmarried. Such are traditionally perceived by insurance companies as "high risk" under a liability system and would continue to be under a no-fault system which retains subrogation.

Id. at 171.

201. See notes 177-80 supra and accompanying text.

202. For example, at the Camelback meeting, the companies agreed that a no-fault threshold plan should be enacted but that loss costs should be transferred to the fault insurer whenever a claim for pain and suffering exists, no-fault benefits paid exceed $1500, or one of the vehicles exceeds 5,000 pounds unloaded. 1973 Senate Commerce Hearings 157-60; see note 39 supra.
in varying forms in most states which have enacted threshold plans.\textsuperscript{203}

As a secondary position, representatives of the poor should oppose any system which shifts losses on a case-by-case basis through the courts by the traditional, and very expensive, subrogation method. They will want the least expensive system and should insist that minor cases be excluded entirely from the loss-cost-transfer system. As in the threshold debate, the issue will then be the definition of a minor case. Representatives of the poor will want to eliminate as many cases as possible.\textsuperscript{204}

In addition to loss-cost-transfer among insurers, threshold plans preserve tort liability for pecuniary loss in excess of the no-fault coverage limits.\textsuperscript{205} If no-fault benefits are not adequate, the victim is permitted to collect his excess loss through the tort system. A decision about excess pecuniary loss is necessary because none of the plans covers income and replacement-services loss without limit, and nearly all limit medical coverage. Only the Uniform Act and S. 354 provide unlimited medical benefits.\textsuperscript{206} Once it has been decided that required coverage of such losses should be limited, there are two basic options. First, victims could absorb excess losses. They would be unable to recover such losses through the tort system and would remain free to choose whether to purchase some sort of additional no-fault insurance protection. Second, victims could be permitted to shift such losses to a tortfeasor where liability might be established.

\textsuperscript{203} See note 197 supra.

\textsuperscript{204} Both the Uniform Act and S. 354 virtually eliminate fault-based transfer of loss costs from no-fault insurers to liability insurers. UMVARA § 6(a); S. 354, 93d Cong., 2d Sess. § 111(a)(1) (1974). In the few cases in which the victim has a tort claim for the same loss which was covered by no-fault benefits, the insurer is given a lien on the recovery to the extent of the benefits it has paid. UMVARA § 6(b); S. 354, 93d Cong., 2d Sess. § 111(a)(2) (1974). Only a few states have taken this restrictive approach to loss-cost-transfer. \textit{E.g.}, \textit{Conn. Gen. Stat. Ann.} § 38-325 (Supp. 1975), \textit{Mich. Comp. Laws Ann.} § 500.3116 (Supp. 1975), \textit{Nev. Rev. Stat.} § 698.290 (1973). The effect of such provisions is to eliminate tort claims by insurers in all cases in which the insured victim himself would have no claim.

Many threshold plans undermine the abolition of tort liability by permitting insurers to continue to shift losses based on fault even where the victim would have no right to do so. Georgia and New York are typical in permitting a no-fault insurer to shift its loss to a fault insurer through an arbitration system in any case in which liability can be shown. \textit{E.g.}, \textit{Ga. Code Ann.} § 56-3405(b)(d) (Supp. 1974); \textit{N.Y. Ins. Law} § 674 (McKinney Supp. 1974-75). Others permit the shifting only if the amount involved exceeds a certain amount. \textit{E.g.}, \textit{Colo. Rev. Stat.} §§ 10-4-713(1), 10-4-717 (1973) ($500). Obviously statutes like that of Colorado are preferable to the Georgia or New York type. The higher the dollar threshold the fewer the cases which could result in shifting.


\textsuperscript{206} S. 354, 93d Cong., 2d Sess. § 204(a) (1974); UMVARA § 13, Comment.
With respect to income loss, the poor will seldom suffer loss exceeding the coverage limits. On the other hand, the affluent are very likely to incur such excess loss. In most plans, tort liability is preserved for such losses even where the serious injury threshold for pain and suffering is not reached. In effect, a judgment is made that a case involving excess economic loss is a serious case. For example, in the Uniform Act tort liability is preserved in one subsection for excess economic loss and in another for pain-and-suffering damages in serious cases.\textsuperscript{207} Connecticut is exceptional in barring such suits unless the pain-and-suffering threshold is met.\textsuperscript{208} If such excess-loss suits are common, the poor will be paying liability premiums to cover the losses of the rich just as they did under the previous liability system. Unless benefits are set too low, few tort claims for excess pecuniary loss will be filed because most will involve only small amounts of money. The number of cases which exceed aggregate benefit limits will be small and if the weekly income benefit limit is set at $200, few victims will lose substantial amounts in excess of that limit.\textsuperscript{209} However, claims will be made in conjunction with claims for pain and suffering in the above-threshold cases.

If the subsidy of the rich by the poor is to be eliminated, excess pecuniary loss must not be recoverable in tort. Once each motorist has purchased the basic no-fault coverage, he should be free to buy added no-fault coverage for his additional loss potential. The affluent should not have the option of attempting to shift such losses through the tort system. If compulsory spreading of these losses through insurance is desired, it should be done through no-fault coverage. The basic limits could be either increased or eliminated. Insurers should then be required to rate insureds on the basis of their actual loss potential rather than the policy limits. Otherwise, poor people might pay for coverage they would never use.\textsuperscript{210} Alternatively, each insured could be required to insure himself up to the full amount of his income when the policy is purchased. However, such a requirement would force the purchase of automobile insurance where a broader health and accident policy is what is needed. It would also involve substantial administrative costs. The argument for compulsory insurance is weak with respect to the

\textsuperscript{207} UMVARA § 5(a), (b).
\textsuperscript{208} CONN. GEN. STAT. ANN. § 38-323(a) (Supp. 1975).
\textsuperscript{209} Compare the argument made by add-on plan proponents that many small pain-and-suffering claims will not be filed once victims are compensated for their out-of-pocket loss. See notes 129-30 supra and accompanying text.
\textsuperscript{210} See notes 230-32 infra and accompanying text.
affluent; however, there is no practical way to force the poor to insure without also forcing the rich to buy the basic coverage.\(^{211}\)

Clearly the best option for the poor is the abolition of tort liability for excess pecuniary loss. There should be no objection on constitutional grounds.\(^{212}\) Such a feature might be less desirable if medical loss coverage were substantially limited. It would leave many poor people with excess pecuniary loss and no source of reparations.\(^{213}\) None of the enacted plans has abolished tort liability for excess loss, but S. 354 and the Uniform Act would eliminate many excess-loss cases by means of threshold requirements. Under S. 354, only economic loss in excess of the aggregate benefit limit is recoverable.\(^{214}\) The Uniform Act permits recovery of only that excess loss which is incurred after six months of disability.\(^{215}\) The use of threshold criteria would eliminate the excess-loss claims of the affluent who are not seriously injured. The more restrictive the threshold, the better the plan will be for the poor.

III. NO-FAULT BENEFITS: PROVIDING ECONOMIC SECURITY FOR THE POOR

A. The Problem of the Noncontributing Victim

In designing a no-fault plan, perhaps the most important step is choosing the nature and level of benefits to be provided. A plan which covers all sorts of loss, both pecuniary and nonpecuniary, and which has a high level of benefits will cost more than one with more modest benefits. Likewise, a plan which covers all victims will be somewhat more expensive than one which excludes certain victims.


\(^{212}\) In Kluger v. White, 281 So. 2d I (Fla. 1973), the Florida Supreme Court held that a provision of the Florida law abolishing tort liability for damage to automobiles in certain cases without substituting a no-fault right was unconstitutional. The court, applying a state constitutional provision guaranteeing access to courts for redress of injury, held that the state had failed to show "an overpowering public necessity" for eliminating the tort right without substituting an alternative. Id. at 4-5. The argument was rejected in Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971) which upheld the Massachusetts no-fault law and on at least two occasions by the United States Supreme Court. Silver v. Silver, 280 U.S. 117 (1929) (guest statute); New York Cent. R.R. v. White, 243 U.S. 188 (1917).

\(^{213}\) See note 225 infra and accompanying text.


\(^{215}\) UMVARA § 5(a)(6).
No-fault plans commonly exclude persons guilty of various kinds of misconduct from benefits. For example, some states exclude a person who uses a car in the commission of a felony, engages in drunken driving or intentionally injures himself.\textsuperscript{216} Although other means of deterring such conduct might be more effective and desirable, this class of victims usually engenders little sympathy from legislators. The exclusion based upon misconduct applies even to those who have contributed to the insurance fund. Of course, insurance generally does not cover loss one intentionally causes oneself since such a loss is not fortuitous.\textsuperscript{217}

The largest and most important class of victims who might be excluded from coverage is the class of noncontributing victims. The class may be divided into two subclasses: the "culpable," who were required to insure themselves but failed to do so, and the "innocent," who were not required to insure. Both subclasses are likely to be dominated by the poor.

Whatever the means of compelling insurance, there will always be some car owners who are uninsured at the time of an accident. The issue remains whether no-fault benefits should be withheld as one penalty for driving while uninsured. Nearly all jurisdictions have favored this sanction.\textsuperscript{218} Accordingly, poor people who cannot afford coverage or who let policies lapse because of financial problems are denied the benefits which they need more than anyone else.

The second subclass of noncontributing victims presents a different problem. These victims are noncontributors because they neither own cars nor live in households which do own cars. The poorest of the poor predominate in this group.\textsuperscript{219} Most plans protect these victims when they are injured in an accident involving an insured vehicle.\textsuperscript{220} However, some plans fail to cover them when injured by a hit-skip vehicle or by one which is uninsured.\textsuperscript{221} Al-

\textsuperscript{216} E.g., FLA. STAT. ANN. § 627.736(2)(b) (1972) (intentional injury, drunken driving, commission of felony); N.Y. INS. LAW § 672.2 (McKinney Supp. 1974-75) (intentional injury, drunken driving, commission of felony, racing, operating or riding in stolen car); UTAH CODE ANN. § 31-41-10(b) (1974) (intentional injury, commission of felony).

\textsuperscript{217} R. KEETON, BASIC TEXT ON INSURANCE LAW § 5.3, at 278 (1971).

\textsuperscript{218} E.g., CONN. GEN. STAT. ANN. § 38-321 (Supp. 1975); FLA. STAT. ANN. § 627.736 (4)(d) 4 (1972) (threshold states); ARK. STAT. ANN. § 66-4016 (Supp. 1973); DEL. CODE ANN. tit. 21, § 2118(a)(2)(c) (Supp. 1974) (add-on states).

\textsuperscript{219} See note 16 supra.

\textsuperscript{220} E.g., HAWAII REV. STAT. § 294-4(1)(A) (Supp. 1974); KAN. STAT. ANN. § 40-3109(a) (4) (Supp. 1974) (threshold states); MD. ANN. CODE art. 48A, § 539 (Supp. 1974); ORE. REV. STAT. § 743.800 (1973) (add-on plans).

\textsuperscript{221} E.g., COLO. REV. STAT. ANN. §§ 10-4-701 to 10-4-723 (1973); GA. CODE ANN. §§ 56-3401b to 56-3413b (Supp. 1974) (threshold plans); DEL. CODE ANN. tit. 21, § 2118 (1974); TEX. INS. CODE art. 5.06-3 (Supp. 1974) (add-on plans).
though many people in this group are likely to be on welfare, the class should be covered by an assigned-claims plan\textsuperscript{222} to make certain that all victims have access to the same benefits.

The interests of the poor will be best served by a plan which permits both culpable and innocent noncontributing victims to recover no-fault benefits. In order to minimize the costs which must be imposed upon insured motorists, some of whom are poor, vehicle registration requirements and sanctions should be used to compel all motorists to insure.\textsuperscript{223} The Uniform Act and S. 354 both take this approach.\textsuperscript{224}

\textbf{B. The Nature and Level of Benefits.}

Adequate medical benefits are of critical importance to poor people because they may mean the difference between full rehabilitation and permanent disability. The affluent often may have other resources to obtain the treatment they need; the poor must depend on their no-fault coverage. The affluent will be able to pay medical bills and await reimbursement, while the poor will have to find doctors and other health care providers willing to treat them and wait for payment. The poor therefore have more interest in plan features designed to promote prompt, efficient payment of medical bills.\textsuperscript{225}

Because they may determine the extent of other losses, medical benefits are the most important part of the benefit package. In order to finance good medical benefits the poor should press for a high tort threshold\textsuperscript{226} and should be willing to settle for less with respect to other benefits.\textsuperscript{227}

Income benefits must be scrutinized carefully to avoid unfair treatment of the poor. A periodic limit, weekly or monthly, is necessary in addition to an aggregate limit on income benefits. If an aggregate limit alone is employed, the poor person will recover far less than an affluent person suffering the same period of disability. In theory, it should be possible to adjust premiums to take into account the fact that the affluent will lose far more during a shorter period of disability. The periodic limit makes the rating process

\begin{footnotes}

223. See notes 44-54 \textit{supra} and accompanying text.

224. \textsc{S. 354,} 93d Cong., 2d Sess. \textsection\textsection 108(a), 203(a) (1974); \textsc{UMVARA} \textsection\textsection 2(a), 7(j), 18, 37.

225. See notes 125-28 \textit{supra} and accompanying text.

226. See notes 113-24 \textit{supra} and accompanying text.

227. See notes 228-49 \textit{infra} and accompanying text.
\end{footnotes}
simpler and less expensive. The insurer need only predict the likely period of disability for all insureds, regardless of income, and multiply that figure by the periodic limit to arrive at the predicted income loss. In this way low-income earners can be fully covered for long-term disability without fully covering the short-term loss of persons with very high earnings at the same time.\footnote{228} Although most plans have adopted a periodic limit in combination with an aggregate limit, a disturbing number have not.\footnote{229}

The poor should pay for no more than they expect to receive in income benefits. That is, rating must reflect income-loss potential.\footnote{230} There are two ways to force companies to rate the poor fairly. The first is to set the income benefit level for compulsory coverage so low that most poor motorists will normally earn that amount. Companies can be expected to rate on the basis of the maximum loss, the amount of the policy limit. A weekly income benefit level of $100 would be more desirable than the commonly used level of $200.\footnote{231} If the weekly or monthly benefit maximum is set low enough, few poor motorists will be compelled to pay for coverage they may never use. But setting a low limit has the disadvantage of compelling less than full coverage for those in the upper portion of the low-income group. A second option is to set the benefit level higher and to mandate consideration of actual income-loss potential in the rating process. This has been done by the insurance commissioner in Michigan\footnote{232} but could also be accomplished by statute. Representatives of the poor should settle for the latter option because it allows for full coverage of the whole class of low-income motorists while offering some assurance that the poorest of the poor will not be overcharged.

Because income benefits are not taxable no-fault plans usually pay less than actual income loss. Plan costs can be minimized with

\footnote{228}{Blum \& Kalven, \textit{supra} note 211, at 350-51.}
no disadvantage to victims if benefits equal income loss after taxes. Most plans pay only a fixed percentage of the gross income loss in calculating benefits.\textsuperscript{233} However, some allow the victim to show that the actual difference between his gross and net income is smaller than the percentage set by statute.\textsuperscript{234} Unless such a mechanism is provided, the lowest income earners will collect less in benefits than their actual net income loss because they are in the lowest tax brackets. The difference in benefits to individuals will be small because of the low level at which such percentage-reduction standards usually are set. If the figure is too low, the affluent will be recovering more than their actual net income loss. The best solution is to set the percentage at a figure which is fair for most people and then permit the poor to show that the percentage is too high in individual cases.

Replacement-services benefits are designed to compensate real, but difficult-to-measure, economic loss. Without such a benefit threshold plans which eliminate compensation for dignitary loss would pay only medical benefits to the poor who earn no income.\textsuperscript{235} The common law permitted victims to recover for the value of the impairment in their earning capacity as well as for income loss. With respect to impairment of earning capacity, the issue is "what the plaintiff would have been capable of earning had the injury not occurred."\textsuperscript{236} Keeton and O'Connell decided to avoid the problem of valuing loss of earning capacity and to cover only actual income loss as it accrues as well as the cost of substitute household services which are more readily measurable.\textsuperscript{237} Their view has been almost unanimously accepted in the enacted and proposed plans.\textsuperscript{238} Disability of an unemployed person can cause a serious economic loss to his family in the form of the loss of services he regularly performs in the home. A grandmother who lives with her daughter and takes care of the grandchildren while the daughter works is a good example. If replacement-services benefits are included in the no-fault plan, the grandmother's disability would be compensable to


\textsuperscript{236} J. Stein, Damages and Recovery: Personal Injury and Death Actions § 59, at 97 (1972).

\textsuperscript{237} See Basic Protection 399-400.

\textsuperscript{238} E.g., Mich. Comp. Laws Ann. § 500.3107(b) (Supp. 1975-76); N.Y. Ins. Law §§ 671.1(b)-(c) (McKinney Supp. 1974-75); UMVARA §§ 1(a)(5) (ii)-(iii).
some extent. Unfortunately, nearly all of the statutes contain replacement-services benefits which are not well-adapted to the realities of life for the poor. Few low-income families could afford to hire someone to perform all the services the grandmother formerly provided. Yet, they must actually incur the expense of substitute services in order to recover benefits. Under such plans, poor people are not likely to get what they pay for in replacement-services coverage.

Measuring the economic loss caused by the grandmother's disability by the cost of substitute services is not sound economics. An economist would value a housewife's services at

\[ \text{[T]he price that her time would have commanded in an alternative use.} \]

Courts do not use the opportunity cost concept in determining damages in such cases, but they approximate it by allowing testimony of the quality of the housewife's household services. This is an oblique method of avoiding the pitfall of valuing such services at the cost of domestic services. Moreover, the loss is suffered whether or not substitute services are obtained. The poor are the group least likely to obtain substitute services and to keep adequate records of them. If they are to receive full value for the premium cost of the replacement-services benefits, a different method must be used to determine loss. One way out of the dilemma is to accept the loss as a real economic loss but to eliminate the problem of proof and the costs of determining the amount by simply setting a dollar figure for such loss to be used in all cases. Apparently the only jurisdiction to adopt this strategy is Utah. A minimum figure, possibly $10 per day, could be set as part of the compulsory insurance package with higher coverage limits available for those who desired more protection. Questions concerning the actual value of such loss would be eliminated and the company would pay the policy limit whenever disability was established. With payments made periodically rather than in a lump sum and with a relatively low per-day limit for the coverage, the problem of malingering would be minimized.

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242. This could be accomplished in the same way it would be done with respect to the income-loss coverage. The Uniform Act has provisions designed to help insurers in gathering information about a claimant's condition. UMVARA §§ 32, 33. It also permits reduction or termination of future benefits when a claimant
less this sort of strategy is adopted, the poor should oppose replacement-services coverage as a part of the compulsory insurance package because it will cost them more than it will be worth to them.

Some threshold plans abolish tort liability for damage to the automobile of another.\footnote{243} However, requiring a no-fault substitute, collision insurance, could increase premiums for the compulsory insurance enough to offset the full cost savings on the personal injury coverage.\footnote{244} Collision insurance is generally a bad bargain\footnote{245} and is especially so for poor people driving old and inadequately maintained cars. To the extent that higher income earners drive more valuable cars, the affluent will collect more from the liability system than they pay in and the poor will collect less.\footnote{246} Compelling collision coverage would increase the premiums for the compulsory insurance package and would provide the poor with benefits they need far less than better medical or income benefits. The elimination of tort liability for damage to automobiles, at least in minor cases, will help reduce the subsidy of the affluent by the poor. Admittedly, there will be some poor families who spend a large portion of their income on an expensive car who seemingly might suffer serious, uncompensated loss. Those families, however, need not be compelled by the no-fault plan to buy collision coverage. Lending institutions typically require collision and comprehensive coverage as a condition of financing. Thus, the poor should prefer

\footnote{243} For example, Michigan abolished all negligence claims for damage to cars. \textit{Mich. Comp. Laws Ann.} \textsection\textsection 500.3123(I)(a), .3135 (Supp. 1975-76). Michigan does have strict tort liability for damage to property, including parked cars, caused by cars, and insurance coverage is required. \textit{Id.} \textsection\textsection 500.3121, .3123. Florida abolished tort liability for damage to cars amounting to less than $550. \textit{Fla. Stat. Ann.} \textsection 627.738(5) (1972). That provision was held unconstitutional in Kluger v. White, 281 So. 2d \textsection 1 (Fla. 1973). The Uniform Act also abolishes tort liability for damage to a car. \textit{UMVARA} \textsection 5(a)(4).

\footnote{244} The threshold plan enacted by Massachusetts substantially reduced the cost of personal injury coverage. That reduction was offset by the cost of optional collision insurance which became a necessity when tort liability for damage to cars was abolished. \textit{Mass. Gen. Laws Ann.} ch. 90, \textsection 340 (Supp. 1975); \textit{Kenney, A Pilgrim's Progress—Three Years of No-Fault in Massachusetts}, 10 \textit{The Forum} 129, 135 (1974).

\footnote{245} According to Dean Cowen, chairman of the Committee on the Uniform Motor Vehicle Accident Reparations Act of the National Conference of Commissioners on Uniform State Laws, the Uniform Act did not require collision insurance because it is the "worst buy" on the insurance market, meaning that it is very expensive in relation to benefits it provides. \textit{D.C. Hearings} 161.

\footnote{246} \textit{1973 Senate Commerce Hearings} 117; see notes 177-80 \textit{supra} and accompanying text.
plans which eliminate tort claims for damage to automobiles in most cases without requiring collision insurance as a substitute. In jurisdictions where constitutional provisions prevent abolition of tort liability without a substitute remedy, compulsory collision coverage would be preferable to liability coverage.

Probably the most difficult judgment representatives of the poor must make concerns the overall benefit limit. An unlimited-benefit plan which would provide full pecuniary-loss coverage to all victims is likely to cost more than the liability system costs, despite its recognized deficiencies. A very few catastrophically injured victims suffer an incredibly high proportion of the total economic loss caused by auto accidents. According to the Department of Transportation study, about 9 percent of all victims suffered over $25,000 in economic loss; however, those victims suffered about 67 percent of the total economic loss. Seriously injured victims who received less than full compensation for economic losses from the tort system represented less than .05 percent of the population in the year of the study and a surprisingly small number of those victims suffered substantial hardships. The desire to compensate fully these few seriously injured victims probably does not justify the burden of heavy premiums which would be imposed on poor motorists.

Because of their cost, unlimited-benefit plans are not likely to be enacted. Representatives of the poor should support plan features which will hold down overall costs and reduce the share borne by the poor. They should then review cost projections for their jurisdictions and support the highest benefit level they feel poor motorists can afford. They especially should be willing to support a high limit for medical benefits.

C. Coordination of Benefits

Because of the collateral source rule, some automobile accident victims have been able to collect from several different sources for the same out-of-pocket loss. Although the rule can be defended,


249. Pearson, supra note 247, at 91.

250. See notes 225-27 supra and accompanying text.

251. For example, Posner argues that the rule which permits an accident victim to collect from insurance he has purchased, such as health insurance, and from a tortfeasor for the same loss, is economically sound. He indicates that requiring the
it makes little sense to compel people to buy more insurance than they need. Allowing duplicate coverage is bad enough; compelling it amounts to forcing people to gamble.\textsuperscript{252}

Two issues emerge with respect to coordination of benefits. The first is whether no-fault benefits will be a primary or secondary source of reparations. Making no-fault insurance primary would mean that every accident victim would collect from the no-fault plan and from no other source. That would reduce the cost of other private and government insurance plans like Blue Cross, workmen's compensation, and Social Security which would no longer cover losses caused by automobile accidents. Making no-fault primary also simplifies the resolution of the issue of compulsory coverage. Every car owner must have no-fault insurance, and no other form of insurance acts as a substitute for any part of the benefit package. In addition, making no-fault insurance primary avoids the externalization of accident costs which occurs when other reparations sources are allowed to be primary.\textsuperscript{253}

The second issue is how to prevent insureds from paying for duplicate coverage even after double recovery has been eliminated. For example, whether no-fault or Blue Cross is primary, the victim will collect from only one of the two sources. If no-fault is primary, Blue Cross should reduce premiums because it no longer covers medical loss in automobile accidents. Making Blue Cross primary would reduce the cost of no-fault coverage, but it would require the no-fault insurer to ascertain whether a policyholder has Blue Cross at the time he buys automobile insurance and at the time of each claim. The burden on the no-fault insurer of determining the existence of health insurance coverage might even eliminate the cost savings produced by making no-fault secondary.\textsuperscript{254}

Some plans make no-fault coverage secondary in cases covered by workmen's compensation or government insurance, including Social Security disability benefits.\textsuperscript{255} Poor motorists will generally fare better if accident costs are externalized to the fullest extent

\textsuperscript{252} R. Keeton & J. O'Connell, \textit{After Cars Crash} 51-52 (1967).

\textsuperscript{253} See notes 83-94 \textit{supra} and accompanying text.


possible. Costs borne by government insurance, workmen's compensation, and other sources will not be reflected in the premiums for the compulsory automobile insurance package. This will help make automobile insurance affordable for the poor. When the other source of reparations is another form of private insurance, like Blue Cross or other health insurance, making that source primary would help some poor people at the expense of others. For example, motorists would pay less for no-fault coverage if Blue Cross were primary, but nonmotorists would then pay more for Blue Cross. The difficulty occurs in adjusting individual premiums. If Blue Cross is primary, those who have it should pay less for no-fault insurance than those who do not. Making this adjustment can be expensive and difficult because of the desire to compel everyone to have coverage. If no-fault insurance is optional, an insured who claimed to have Blue Cross but did not have it would simply be left without a source of reparations.

On the other hand, if health insurance is made secondary, health insurance rates could be reduced; however, the actual cost savings might go to employers rather than to insured individuals. Some plans permit health insurers to make their coverage secondary to

256. At first glance, the order in which sources of compensation are looked to might be a matter of indifference. Since the cost of the source of compensation will reflect the amounts of compensation paid out, making, for example, no-fault primary and general medical insurance secondary will increase the cost of the former but decrease the cost of the latter. But a closer look reveals factors which suggest that the order in which sources of compensation are used does make a difference.

One of these factors is the lack of complete identity of the classes of no-fault insureds and collateral source insureds. If collateral sources are primary, the cost of no-fault insurance will be less, even to those who do not themselves pay for collateral source insurance. But since the reduced cost of no-fault insurance resulting from collateral sources will be spread among all no-fault insureds, including those without collateral sources, the reduction in the cost of no-fault insurance will be less to those with collateral sources than the increase in the cost of the collateral sources. In effect, those with collateral sources will subsidize those without. An even greater subsidy is extracted from those who pay for collateral sources but not for no-fault insurance—those who live in non-automobile owning households—for this group gets no benefit at all from the reduction in no-fault insurance premiums caused by making collateral sources primary.

Pearson, supra note 247, at 95.

There will be poor people in the classes which are being subsidized. This subsidy problem would exist, however, only if no-fault insureds are not classified for rating purposes into those who have health insurance and those who do not. By charging those with health insurance a lower premium, the plan would avoid spreading the cost saving derived from making health insurance primary over all no-fault insureds. Likewise, health insurers could charge those who own cars, and thus are more likely to be auto accident victims, more than those who do not own cars. Such rate classification involves costs which might offset the advantage of eliminating duplication of benefits.
no-fault but require that health insurance premiums be reduced and that the reduction be passed on to the individual policyholders.\textsuperscript{257}

Blue Cross and the private health insurers are expected to be able to provide medical loss protection and possibly other coverages at a lower cost than automobile insurers.\textsuperscript{258} Blue Cross is a non-profit organization exempt from the taxes paid by all private insurers.\textsuperscript{259} If Blue Cross could write the whole no-fault package, insureds would receive the cost advantage and coordination would be much simpler. Its nonprofit, tax-exempt status and its immunity from regulation as a casualty insurer would give the organization a considerable competitive advantage over other insurers. However, insurance commissioners are likely to insist on a change in Blue Cross's preferred status if it attempts to write no-fault coverage directly.\textsuperscript{260} Insurance company objections over the competitive advantage Blue Cross possesses because of its tax exemption might be met in two ways. If Blue Cross desires to compete for the no-fault business, it could be subjected to regulation and taxation on that business. The second option is to eliminate the premium tax on all insurers writing the basic no-fault coverage. If the state thinks no-fault coverage is important enough to compel people to buy it, the state should be willing to sacrifice the tax revenue to make it more affordable. Both Blue Cross and private health insurance are commonly sold on a group basis rather than through individual policies. Underwriting and administrative costs as well as agents' commissions are lower with respect to group insurance. In large groups the employer absorbs much of the administrative burden.\textsuperscript{261} Finally, health insurance is often a fringe benefit wholly or partly paid for by one's employer. Accordingly, unions are understandably upset about the prospect of losing the advantage of employer-paid health insurance if no-fault is made primary.

\textsuperscript{257} PA. STAT. ANN. tit. 40, § 1009.203(a) (Supp. 1975-76); MINN. STAT. ANN. § 65B.61 subd. 4 (Supp. 1975-76); S. 354, 93d Cong., 2d Sess. §§ 204(f), 208(c) (1974). Colorado requires the premium reduction but does not require that the savings be passed on to individual insureds. COLO. REV. STAT. ANN. § 10-4-709 (1973).

\textsuperscript{258} Spangenberg, supra note 254, at 29.

\textsuperscript{259} See, e.g., OHIO REV. CODE ANN. § 1739.02 (Page 1964); Id. § 5725.18 (Page 1973).

\textsuperscript{260} See D.C. Hearings 34. OHIO DEP'T OF INSURANCE, NO-FAULT INSURANCE: A SPECIAL STUDY PREPARED FOR THE OHIO SENATE COMM. ON FINANCIAL INSTITUTIONS, INSURANCE, AND ELECTIONS 16-17. Maryland permits Blue Cross and other health insurers to sell the whole no-fault package separately from liability insurance. MD. ANN. CODE art. 48A, § 539 (Supp. 1974). Blue Cross is willing to write income- and replacement-services coverage in addition to medical expense coverage. 1973 Senate Commerce Hearings 302.

\textsuperscript{261} R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 481 (5th ed. 1972).
Also, they may have negotiated employer-paid wage continuation plans, which would be replaced by no-fault coverage for auto accidents.\textsuperscript{262}

The best way to allow those who have health insurance to substitute their coverage for no-fault coverage is to encourage no-fault insurers to offer reduced rates to those who have health insurance and agree to collect their medical loss from that source. The no-fault coverage would then exclude benefits for medical loss covered by the health insurance. The same type of exclusion could be offered with respect to income-loss protection for insureds who are covered by wage continuation plans. This would allow people who have health insurance to use that coverage rather than buying new and perhaps more expensive coverage from an automobile insurer.

The Uniform Act permits insurers to offer reduced rates to insureds who elect to substitute their health insurance coverage. The premium reduction is likely to be offered to groups in which all members have health insurance. It is less likely to be offered on an individual policy basis due to the administrative burden of checking on the health coverage in individual cases. The Uniform Act also provides that the no-fault insurer is liable for those benefits which the collateral source is obligated to provide if that source fails to provide them.\textsuperscript{263} Insurers therefore are expected to exercise restraint in offering reduced premiums to insureds with collateral sources.\textsuperscript{264}

On the other hand, S. 354 permits the states to study the problem of coordination of benefits and to determine which of two approaches produces the most economical coverage. Either no-fault premiums will be reduced for those with group health insurance or health insurance premiums will be lowered.\textsuperscript{265} The choice will be based upon empirical evidence and will be reviewed by the commissioners every three years.\textsuperscript{266} One of the considerations in the decision is the possibility that permitting some insureds to use their health insurance might discriminate unfairly against those who are left to buy no-fault coverage for medical loss.\textsuperscript{267} Thus, representatives of the poor should become familiar with the number of poor people in their jurisdiction who do not have health insurance. It is likely that most of the people without health insurance will be poor.

\textsuperscript{262} P. Gillespie & M. Klipper, No-Fault 63 (1972).
\textsuperscript{263} UMVARA § 23(c).
\textsuperscript{264} UMVARA § 14, Comment, at 42.
\textsuperscript{265} S. 354, 93d Cong., 2d Sess. §§ 204(f), 208(c) (1974).
\textsuperscript{266} Id. § 208(c)(5).
\textsuperscript{267} Id. § 208(c).
The cost of their no-fault coverage will be higher if those who have group health insurance are allowed to opt out of the medical coverage portion of the no-fault plan. This could occur because many people left in the no-fault pool might be less desirable risks, the aged, the disabled, and the unemployed. If enough people opted to use their health insurance, the no-fault pool could suffer from adverse selection. Rates for no-fault insureds would have to be higher because the pool would be without many of the best risks who help hold down the rate of losses. If that many people did opt to use their health insurance plans, the great mass of insureds would be better off and those who remained in the no-fault market could be served by an assigned risk or pool facility.\textsuperscript{268} Those who must buy the no-fault medical loss coverage, can only hope that group automobile insurance will be legalized and that it will grow in popularity.\textsuperscript{269} Unreasonable legal barriers to group marketing should be removed by state or federal legislation so that consumers can enjoy the cost savings available through that marketing method.\textsuperscript{270}

Plans which fail to coordinate benefits, especially no-fault and health insurance benefits, will force poor motorists to pay for duplicate coverage which they do not need and cannot afford. Unfortunately, many enacted plans have made little attempt to deal with this difficult issue.

III. CONCLUSION

No-fault automobile insurance will affect both rich and poor, but it will not affect them equally. Proposed no-fault legislation presents legislators with the opportunity to improve the manner in which poor people are treated in the automobile accident reparations system. Unfortunately, as many of the deficiencies in the enacted plans demonstrate, some states already have missed this opportunity. In order to avoid future neglect, representatives of the poor should study the no-fault plans proposed or enacted in their jurisdictions to determine whether their constituents are deriving the maximum benefit at a minimum cost. Judged by this test, the


\textsuperscript{269} Most states prohibit group marketing of automobile insurance. W. Rokes, No-Fault Insurance 10 (1971).

\textsuperscript{270} Id. at 11-12; H. Denenberg & S. Kimball, Mass Marketing of Property and Liability Insurance 93-112 (1970). Indications are that with the removal of legal impediments and the conversion to no-fault, the giant health and accident insurers will enter the automobile insurance field and promote group coverage using their experience in group life and health insurance. P. Gillespie & M. Klipper, No-Fault 59 (1972).
State no-fault legislation enacted to date improves the situation of the poor only slightly. Pennsylvania and Michigan have the best plans although there is room for improvement in each. On the other hand, several of the state enacted add-on plans do little to improve the traditional tort liability system which they supplement.

In those states where no-fault legislation has not been enacted, plans which follow the format of the Uniform Act should be supported. While encouraging enactment, however, representatives of the poor also should advocate some reduction in the benefit limits which the Act employs. With this modification, the Act can be regarded as an acceptable solution to the problems which no-fault insurance raises for the poor.

National no-fault legislation, such as the National No-Fault Motor Vehicle Insurance Act in the form in which it passed the Senate in 1974, remains the best hope of the poor. That bill provided unlimited medical benefits and reasonable compensation for other pecuniary losses. It covered losses suffered by both innocent and culpable noncontributing victims. It compelled no-fault coverage, but allowed states to avoid compelling liability coverage. The

271. Both provide unlimited medical and rehabilitation benefits. They have relatively high income benefits, $1,000 per month for three years in Michigan and $1,000 per month up to $15,000 in Pennsylvania. Proof of expenses incurred for substitute services is necessary for replacement-services benefits in both states. Mich. Comp. Laws Ann. § 500.3107 (Supp. 1975-76); Pa. Stat. Ann. tit. 40, § 1009.202 (Supp. 1975-76). The plans could be improved by reducing income benefits somewhat and by providing for a scheduled benefit for replacement services rather than by requiring proof of substitute services. See note 241 supra and accompanying text. Michigan does mitigate the unfairness of the high income limit by requiring that actual income-loss potential be considered in rating. See note 180 supra and accompanying text.

restrictive tort threshold employed specified injury criteria only and avoided the inequities associated with criteria based on dollars of loss. The bill also restricted suits for excess economic loss, prohibited loss-cost-transfer, and provided for coordination of benefits.

Representatives of the poor should support similar federal legislation which would improve enacted state no-fault plans and impose a quality no-fault plan on states which have not enacted one.

Unless the interests of the poor are well represented as the no-fault debate continues, the poor will be exposed to the risk of paying more than their fair share of the cost of an inadequate accident reparation system.
Threshold Plans  No-Fault Benefits

**Colorado**
No aggregate limit. Medical benefit $25,000 per person. Unlimited rehabilitation (insurers obligation presumed satisfied by payment of $25,000 in five years). Income benefit $125/wk. —52 wk. maximum. Replacement services $15/day—52 wk. maximum. Death benefit $1000 lump sum—no income to survivors.

Noncontributor victims:
- Culpable—no benefits.
- Innocent—no assigned-claims plan but uninsured car owner liable as insurer.

**Connecticut**
Aggregate limit $5,000 for medical, rehabilitation; 85% of the value of income, replacement services up to $200/wk. Death benefits of $2,000 for funeral and $200/wk. Income or replacement services to survivors.

Noncontributor victims:
- Culpable—no benefits.
- Innocent—assigned-claims plan.

**Florida**
Aggregate limit of $5,000 for medical, rehabilitation, replacement services, income (without periodic limit), and funeral expenses up to $1,000 (no other death benefit).

Noncontributor victims:
- Culpable—no benefits.
- Innocent—no assigned-claims plan but uninsured car owner liable as insurer.

**Georgia**
Aggregate limit of $5,000 for medical, rehabilitation up to $2,500, 85% of the loss of income up to $200/wk., replacement services up to $20/day, funeral expenses up to $1500. Death benefit to survivors up to periodic and aggregate limits as if deceased were totally disabled.

Noncontributor victims:
- Culpable—no benefits.
- Innocent—no assigned-claims plan.

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1. "Noncontributor victims" are those who have not contributed to the insurance fund by paying no-fault premiums. "Culpable" victims are car owners who were required to buy insurance but failed to do so. "Innocent" victims are those who do not own cars and thus have no obligation to have insurance. Unless there is an assigned-claims plan, innocent victims will collect no-fault benefits only when the accident involves a contributor. See notes 218-24 supra and accompanying text.
Hawaii
Aggregate limit of $15,000 for medical, rehabilitation, income up to $800/mo., replacement services up to $800/mo. Death benefit to survivors up to periodic and aggregate limits for income and replacement services. Funeral expenses up to $1,500.
Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.

Kansas
No aggregate limit. Medical benefit $2,000, rehabilitation $2,000, income $650/mo.—1 yr. maximum. Replacement services $12/day—1 yr. maximum. Death benefit to survivors for income loss minus expenses avoided subject to monthly and 1-year limit. Funeral expenses not to exceed $1000.
Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.

Kentucky
Aggregate limit $10,000 for medical, rehabilitation, income and replacement services ($200/wk. total). Death benefits to survivors for income and replacement services subject to $200/wk. and aggregate limit. Funeral expenses $1,000.
Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.

Massachusetts
Aggregate limit $2,000 for medical, income (without periodic limit), replacement services (without periodic limit). Funeral expenses and benefits to survivors in death cases.
Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.
MASS. GEN. LAWS ANN. ch. 90, §§ 34A, 34N (Supp. 1975).

Michigan
No aggregate limit. Unlimited medical and rehabilitation. Income: $1,000/mo.—3 yr. maximum (subject to adjustment for inflation). Replacement services $20/day—3 yr. maximum. Death benefits for support and services victim would have provided subject to periodic and 3 yr. limits on income and replacement services. Funeral expenses up to $1000.
Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.

Minnesota
Aggregate limits: $30,000 including up to $20,000 of medical expense; 75% of income up to $200/wk.; replacement services
NO-FAULT INSURANCE

$15/day; survivor's economic loss benefits up to $200/wk., plus survivor's replacement services up to $200 per week; funeral expenses up to $1250. Non-medical losses limited to $10,000.

Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.


Nevada
Aggregate limit $10,000 for medical and rehabilitation. Income $175/wk., replacement services $18/day—for a maximum of 104 wks. Death benefits: minimum, $5,000; maximum, disability income victim would have received in 1 year, which would have been used for support of survivors minus expenses avoided and $1,000 funeral expenses.

Noncontributor victims:
Culpable—no benefits.
Innocent—assigned-claims plan.


New Jersey
No aggregate limit. Unlimited medical and rehabilitation. Income $100/wk.—52 wks. Replacement services $12/day up to $4,380. Death benefits to survivor subject to same limits as income and replacement services and $1,000 funeral expenses.


New York
Aggregate limit $50,000 for medical and rehabilitation. Income $1,000/mo.—3 yrs. Replacement services $25/day—1 yr. No death or funeral expense benefits.

NONCONTRIBUTOR VICTIMS
Culpable—no benefits.
Innocent—no assigned-claims plan.

NEW YORK INS. LAW §§ 671.1, 672.1 (McKinney Supp. 1974-75).

Pennsylvania
No aggregate limit. Unlimited medical and rehabilitation. Income $1,000/mo., adjusted by ratio of Pennsylvania per capita income to United States average, or up to $15,000 per year if insured discloses income to insurer at time of policy. Death benefits for support and services victim would have provided minus expenses avoided, subject to limit of $5,000.

NONCONTRIBUTOR VICTIMS
Culpable—assigned-claims plan pays minimum benefits which could have been purchased.
Innocent—assigned-claims plan.


Puerto Rico
No aggregate limit. Unlimited medical and rehabilitation. Income 50% of gross wage loss up to $50/wk. for 52 wks., and 50% of gross up to $25/wk. for second 52 wks. period. Replacement services for housewife victims $25/wk. for 12 wks. Death benefit maximum $10,000. Scheduled benefits for other serious injuries, e.g., loss of sight, $5,000.
Noncontributor victims:
  Culpable—covered.
  Innocent—covered.

P.R. LAWS ANN. tit. 9, §§ 2053, 2054 (Supp. 1974-75).

Utah

No aggregate limit. Medical and rehabilitation $2,000. Income $150/wk.—52 wks. Replacement services $12/day—365 days (no requirement that cost for services actually be incurred). Death benefit $2,000 payable to heirs.

Noncontributor victims:
  Culpable—no benefits.
  Innocent—no assigned-claims plan.

UTAH CODE ANN. §§ 31-41-6, 31-41-7, (Repl. vol. 4A 1974).

Proposed Threshold Plans

Ohio

Aggregate limit $10,000 for medical and rehabilitation. Income $200/wk. Replacement services $18/day. Death benefit of $5,000 (not included in aggregate limit) and funeral expenses $2,000 (subject to aggregate limit).

Noncontributor victims:
  Culpable—no benefits.
  Innocent—assigned-claims plan.

Am. Sub. H.B. No. 251, 110th Ohio General Assembly, Regular Sess. §§ 3938.04(B), (C), .10 (D), .13(A) (1973-74).

National No-Fault Motor Vehicle Insurance Act

No aggregate limit. Unlimited medical and rehabilitation. Income $1,000/mo., adjusted by ratio of state per capita income to United States average with total limit minimum of $15,000. Replacement services subject to reasonable exclusions or limits by states. Death benefit to survivors of support and services victim would have contributed minus expenses avoided or other reasonable limits set by state.

Noncontributor victims:
  Culpable—assigned-claims plan pays minimum benefits which could have been purchased.
  Innocent—assigned-claims plan.

S. 354, 93d Cong., 2d Sess. §§ 103(2), 108, 204(a), 204(b)(1)(a), 203, 204(c) (1974).

UMVARA

No aggregate limit. Unlimited medical and rehabilitation. Income loss and replacement services $200/wk. total without time limit. Death benefit to survivors for support and services victim would have provided minus expenses avoided, subject to $200/wk. limit without time limit.

Noncontributor victims:
  Culpable—assigned-claims plan pays minimum benefits which could have been purchased.
  Innocent—assigned-claims plan.

UMVARA §§ 1(a)(5), 2(a), 13, 18(а) & (d).
**Add-on Plans**

**Arkansas**  
No aggregate limit. Medical benefit $2,000 for loss incurred within 24 months of accident. 70% of income benefit up to $140/wk., for 52 wks. Replacement services $70/wk. for 52 wks. Death benefit $5,000 lump sum payable to personal representative.

Noncontributor victims:  
Culpable—no benefits.  
Innocent—no assigned-claims plan.


**Delaware**  
Aggregate limit $10,000/person, $20,000/accident for medical, income (without periodic limit), replacement services, and funeral expenses (up to $2,000).

Noncontributor victims:  
Culpable—no benefits.  
Innocent—no assigned-claims plan.

**Del. Code Ann. tit. 21, §§ 2118(a)(2) (1975).**

**Maryland**  
Aggregate limit $2,500 for medical, lost income (without periodic limit) or replacement services (without periodic limit), and funeral expenses up to $2,000.

Noncontributor victims:  
Culpable—no benefits.  
Innocent—no assigned-claims plan.


**Oregon**  
No aggregate limit. Medical benefit $5,000. Income $750/mo. for 1 yr. Replacement services $18/day for 1 yr. Funeral $1,000.

Noncontributor victims:  
Culpable—no benefits.  
Innocent—no assigned-claims plan.

**Ore. Rev. Stat. § 743.800 (1973).**

**South Carolina**  
Aggregate limit $1,000 for medical, income (without periodic limit), replacement services (without periodic limit), funeral expenses.

Noncontributor victims:  
Culpable—no benefits.  
Innocent—assigned-claims plan.

**S.C. Code Ann. §§ 46.750.111, 46.750.131 (Supp. 1974).**

**South Dakota**  
No aggregate limit. Medical benefit $2,000. Income $60/wk. for 52 wks. Funeral expenses (included in medical limit). Death benefit $10,000 for death of named insured only.

Noncontributor victims:  
Culpable—no benefits.  
Innocent—no assigned-claims plan.


**Texas**  
 Aggregate limit $2,500 for medical, income (without periodic limit), replacement services (without periodic limit), and funeral expenses.
Noncontributor victims:
   Culpable—no benefits.
   Innocent—no assigned-claims plan.
   
   Tex. Ins. Code art. 5.06-3(b) (Supp. 1974).

Virginia
   No aggregate limit. Medical benefit $2,000 (includes funeral expenses and rehabilitation expenses). Income $100/wk. for 52 wks.
   Noncontributor victims:
   Culpable—no benefits.
   Innocent—no assigned-claims plan.

APPENDIX B

COMPULSION

<table>
<thead>
<tr>
<th>Threshold Plans</th>
<th>Liability</th>
<th>No-Fault</th>
<th>Compulsion</th>
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<tbody>
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<td>Colorado</td>
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<td>Connecticut</td>
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<td>Florida</td>
<td>15/30/50</td>
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</table>

1. In this column insurance coverage is presented in the following order: dollars of personal injury per person, dollars of personal injury per accident, dollars of property damage per accident. All amounts given are x $1000.

2. In either the "Liability" or "No-Fault" column an "F" indicates that the financial responsibility mechanism is the only means of compelling that type of insurance coverage. A "C" indicates that some means, other than or in addition to the financial responsibility law, is used to compel coverage. An "O" means that the coverage is optional.

3. In this column symbols indicate the means used to compel car owners to insure. "R" indicates that some proof of insurance, either a certificate from an insurer or an affidavit from the car owner, is necessary to register a car in the jurisdiction. "Cr" means that a criminal penalty is provided for driving uninsured. "S" means that a car owner's driver's license may be suspended for driving uninsured even if he is never involved in an accident. "F" means that the traditional financial responsibility is used. See notes 44-54 supra and accompanying text.
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<thead>
<tr>
<th>State</th>
<th>Date</th>
<th>Policy Limits</th>
<th>Notes</th>
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<tbody>
<tr>
<td>Kansas</td>
<td>15/30/5</td>
<td>C C</td>
<td>KAN. STAT. ANN. §§ 40-3104(a) &amp; (e), 40-3107, 40-3118 (Supp. 1974). R, Cr, S</td>
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<td>Nevada</td>
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<td>F F</td>
<td>NEV. REV. STAT. §§ 698.190, 698.200, 698.320, 485.010-.420 (1973). F</td>
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<td>PA. STAT. ANN. tit. 40, §§ 1009.104(a), .601 (Supp. 1975-76); Id. tit. 75, §§ 1401-36 (1971). Cr, F</td>
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<td>Puerto Rico</td>
<td>O</td>
<td>C</td>
<td>P.R. LAWS ANN. tit. 9, § 2064 (Supp. 1974-75). R</td>
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<td>State</td>
<td>Proposed Threshold Plans</td>
<td>Add-On Plans</td>
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<td><strong>Utah</strong></td>
<td>15/30/5 or single limit of 25</td>
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<td><strong>Proposed Threshold Plans</strong></td>
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<td><strong>UMVARA</strong></td>
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<td><strong>Add-On Plans</strong></td>
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<td><strong>Oregon</strong></td>
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<td><strong>South Dakota</strong></td>
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</tbody>
</table>

**Utah Code Ann. §§ 31-41-4(1), 31-41-5(a), 31-41-13, 41-12-1 to 41-12-7 (1973).**


**Left up to states. S. 354, 93d Cong., 2d Sess. § 104(a) (1974).**

**Ark. Stat. Ann. §§ 75-1401 to 1493 (1957); 75-1466, 66-4015 (Supp. 1973).**

**Del. Code Ann. tit. 21, §§ 2118, 2901-72 (1975).**


**S.C. Code Ann. §§ 46-750.32, .111, .119, .120, .121, .146, .151, .152 (Supp. 1974).**


Virginia 25/50/5
F O
VA. CODE ANN. §§ 46.1-504;

<table>
<thead>
<tr>
<th>Plan</th>
<th>Pain &amp; Suffering¹</th>
<th>Excess Economic Loss²</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colorado</td>
<td>S or $500</td>
<td>All recoverable</td>
</tr>
<tr>
<td></td>
<td>COLO. REV. STAT. ANN. § 10-4-714 (1973).</td>
<td>Id. § 10-4-714(2).</td>
</tr>
<tr>
<td>Connecticut</td>
<td>S or $400</td>
<td>Recoverable only in cases above pain &amp; suffering threshold.</td>
</tr>
<tr>
<td>Florida</td>
<td>S or $1,000</td>
<td>All recoverable</td>
</tr>
<tr>
<td></td>
<td>FLA. STAT. ANN. § 627.737(2) (1972).</td>
<td>Id. § 627.737(1).</td>
</tr>
<tr>
<td>Georgia</td>
<td>S or 10-day disability or $500</td>
<td>All recoverable.</td>
</tr>
<tr>
<td></td>
<td>GA. CODE ANN. §§ 56-3410b(a) &amp; 56-3402b(j) (Supp. 1974).</td>
<td>Id. § 56-3410b(b).</td>
</tr>
</tbody>
</table>

1. In this column, the symbol “S” means specified injuries. Pain and suffering thresholds list injuries for which pain-and-suffering damages may be recovered. The list of injuries may be long or short and the definitions will determine the extent to which the threshold is restrictive. See note 138 supra. The dollar figure in the column is dollars of medical loss, except where otherwise indicated. A high dollar threshold could be liberal if the definition of medical loss were sufficiently broad. A low dollar threshold could be quite restrictive if medical loss were narrowly defined. Thus, in any jurisdiction, it is necessary to consider the list of specified injuries and how they are defined and the definition of medical expense in order to determine whether the threshold is high or low. Generally, however, the plans which have the higher dollar thresholds tend to be more restrictive on tort suits than the others.

2. In this column, the phrase “all recoverable” means that all economic loss in excess of specific limits on benefits for medical loss, income loss, etc., is recoverable in tort. For a high income earner, this can mean that a tort action is possible after the first week of disability. See notes 205-15 supra and accompanying text.
Hawaii

S or exhaustion of no-fault benefits or $1,500 medical loss until 9/1/75; thereafter medical threshold is adjusted to exclude 90% of cases.

HAWAII REV. STAT. §§ 294-6(a), 294-10(b) (Supp. 1974).

Kansas

S or $500


Kentucky

S or $1,000


Massachusetts

S or $500

MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1975).

Michigan

S; no dollar threshold

MICH. COMP. LAWS ANN. § 500.3135(1) (Supp. 1975-76).

Minnesota

S or 60 days disability or $2,000

MINN. STAT. ANN. § 65B.51 (Supp. 1975-76).

Nevada

S or 180 days disability or $750

NEV. REV. STAT. § 698.280(h) (1973).

New Jersey

S or soft tissue injury causing $200 medical loss


New York

S or $500


Pennsylvania

S or 60 days disability or $750


All recoverable

Id. § 294-6(a).

Id.

Id.

Id. ch. 90, § 34M.

Id. § 500.3135(2)(c).

Id.

Id. § 698.280(h).


Id.

Id.

Id. §§ 1009.202(6), .301(a)(4).
<table>
<thead>
<tr>
<th>Location</th>
<th>Damages for pain and suffering in excess of $1,000 are recoverable.</th>
<th>Damages, other than pain and suffering, in excess of $2,000 are recoverable.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Puerto Rico</td>
<td>P.R. LAWS ANN. tit. 9, § 2058 (Supp. 1974-75).</td>
<td>Id.</td>
</tr>
<tr>
<td>Utah</td>
<td>S or $500</td>
<td>All recoverable</td>
</tr>
<tr>
<td></td>
<td>UTAH CODE ANN. §§ 31-41-9(1) (Repl. vol. 4A 1974).</td>
<td>Id.</td>
</tr>
</tbody>
</table>

**Proposed plans**

<table>
<thead>
<tr>
<th>Location</th>
<th>S or $1,500</th>
<th>All recoverable</th>
</tr>
</thead>
<tbody>
<tr>
<td>National No-Fault Motor Vehicle Insurance Act</td>
<td>S or 90 days disability; no dollar threshold</td>
<td>Only loss in excess of aggregate no-fault benefit limit is recoverable.</td>
</tr>
<tr>
<td>UMVARA</td>
<td>Damages in excess of $5,000 if caused by specified injury or if victim is totally disabled for six months or more.</td>
<td>Only loss incurred after six months of disability or death is recoverable.</td>
</tr>
<tr>
<td></td>
<td>UMVARA § 5(a)(7).</td>
<td>Id. § 5(a)(6).</td>
</tr>
</tbody>
</table>