

# AN ALTERNATIVE EXPLANATION FOR NO-FAULT'S "DEMISE"

*Nora Freeman Engstrom\**

## INTRODUCTION

Rumor has it that in 1896 there were only four motor vehicles in all of the United States and two, improbably, collided, thus ushering in the era of auto accidents on American soil—a problem that plagues us still.<sup>1</sup> Automobiles are central to the American way of life, “permit[ing] an impatient people to conquer space and time.”<sup>2</sup> Yet, as many of us know too well, they sometimes collide, and when they do, the cumulative toll they take is breathtaking. Since the time of that first auto accident, nearly 3.5 million Americans have perished, and today, auto collisions injure 2.5 million Americans per year, constitute the leading cause of death for those from age five to thirty-four, and kill roughly 35,000 Americans annually.<sup>3</sup> Their practical influence on tort law is unparalleled, accounting for the majority of all injury claims and three-quarters of all injury damage payouts.<sup>4</sup> And their economic cost is substantial, accounting for expenditures of \$255 billion annu-

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1. JEFFREY O’CONNELL, *THE INJURY INDUSTRY*, at viii (1971). Others date the first automobile death to New York in 1899. CHARLES MCCARRY, *CITIZEN NADER* 28 (1972).

2. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY*, at ix (1990).

3. For the fact that auto accidents are the leading cause of death for those between age five and thirty-four, see *Motor Vehicle Safety*, CDC, <http://www.cdc.gov/Motorvehiclesafety/index.html> (last visited Aug. 30, 2011). For automobiles’ annual death toll, see ANDERS LONGTHORNE ET AL., *NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., AN ANALYSIS OF THE SIGNIFICANT DECLINE IN MOTOR VEHICLE TRAFFIC FATALITIES IN 2008*, at app., at 27 tbl.A1 (2010) [hereinafter *NHTSA, 2008 DECLINE*].

4. JAMES M. ANDERSON ET AL., *RAND, THE U.S. EXPERIENCE WITH NO-FAULT AUTOMOBILE INSURANCE: A RETROSPECTIVE 1* (2010); *NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS* 28 (2010) (reporting that, in 2008, auto cases comprised 55% of the tort caseload in seventeen unified and general jurisdiction courts).

ally<sup>5</sup>—or, to put that sum in perspective, about as much as the federal government spent in 2010 on education and transportation, combined.<sup>6</sup> It is no wonder, then, that how to *pay* for auto accidents—and lessen their effect—has long been a subject of intense debate and a matter of profound concern.

In the second half of the last century, an innovative “no-fault” plan by Professors Robert Keeton and Jeffrey O’Connell seemed to supply the answer: it seemed to represent a workable solution to the age-old question of how to deliver more equitable, more efficient, more swift, and more certain compensation to auto accident victims in the United States. Under the Keeton–O’Connell plan, as it came to be known, tort law—with its individualized determination of fault and idiosyncratic calculation of damages—would be jettisoned for all but the most seriously hurt, and *all* auto accident victims would instead receive prompt, albeit partial, compensation from their own (meaning first-party) insurer.

As the no-fault concept gained traction in the late 1960s and early 1970s, its proponents believed that replacing tort with no-fault legislation was not only something that *should* be done; it was also something that *could* be done. It was, as President Richard Nixon boldly declared, “an idea whose time has come.”<sup>7</sup> During a roughly seven-year period from 1970 to 1977, some type of no-fault legislation seemed perennially on the verge of widespread enactment.<sup>8</sup> In 1971, Massachusetts’s insurance commissioner predicted that “[n]o-fault will sweep the country,” a prediction *Business Week* said many viewed as “a simple statement of fact.”<sup>9</sup> In 1972, *Time* ran an article entitled *No-Fault Catches Fire* and quoted a no-fault foe conceding that fight-

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5. For the \$255 billion figure (which comes from 2008), see NAT’L SAFETY COUNCIL, INJURY FACTS 90 (2010).

6. See *Government Spending Details*, [http://www.usgovernmentspending.com/year2010\\_US.html](http://www.usgovernmentspending.com/year2010_US.html) (last visited Aug. 26, 2011).

7. President Richard Nixon went on to call no-fault “a vast improvement and a genuine reform.” Carroll Kilpatrick, *Nixon Suggests States Approve No-Fault Plans*, WASH. POST, June 8, 1972, at A27. President Nixon made this statement in a telegram that he sent to Governor Arch A. Moore, Jr. of West Virginia, who was then serving as chair of the National Governors’ Conference. *Id.* President Nixon opposed federal legislation, however, preferring a state-by-state strategy.

8. See STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 102 (1989) (stating that “at one time auto no-fault seemed likely to sweep the nation”); *Rough Ride and New Roads Ahead for Auto Insurers*, BUS. WK., Mar. 28, 1970, at 118 (“Many industry observers feel that . . . eventually [no-fault insurance] will be enacted in all states.”). For more on no-fault’s “inevitability,” see *infra* note 21 and accompanying text.

9. *No-Fault Wins Its Case*, BUS. WK., July 31, 1971, at 74 (quoting C. Eugene Farnam, Massachusetts Insurance Commissioner).

ing the legislation had become a "losing cause."<sup>10</sup> In 1973, Senator Philip A. Hart of Michigan opened hearings on an ambitious national no-fault bill by declaring, "As of now, there is general agreement that we must change our present liability-based insurance system with its inefficiencies and inadequacies and inequities, and go to a no-fault plan."<sup>11</sup> Most remarkable of all, even Benjamin Marcus, a co-founder of the American Trial Lawyers Association (ATLA)—the organization that some say did more than any other to stymie no-fault's adoption—at least privately noted, "We feel it is probable that when the dust has all cleared, No Fault will be conceded by all to be substantially speedier, less wasteful, and more fair than our present system."<sup>12</sup>

Meanwhile, no-fault enjoyed the vocal and consistent support of the nation's most respected newspaper editorial boards.<sup>13</sup> It received at least the wavering support of the American people.<sup>14</sup> And it was the subject of a flurry of legislative activity. At the federal level, a few

10. *No-Fault Catches Fire*, TIME, Mar. 6, 1972, at 64, 64 (quoting Thomas Cargill, Jr., a Boston lawyer who waged an unsuccessful court challenge to the Massachusetts legislation).

11. *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 1 (1973) (statement of Sen. Philip A. Hart).

12. Philip A. Hart, *National No-Fault Auto Insurance: The People Need It Now*, 21 CATH. U. L. REV. 259, 303 (1972) (quoting Letter from Benjamin Marcus, Muskegon, Mich. to Senator Philip A. Hart (June 28, 1971)).

13. See, e.g., Editorial, *For Auto Insurance Reform*, CHI. SUN-TIMES, Apr. 7, 1971, at 37; Editorial, *It's Time for No-Fault*, CHI. TRIB., May 19, 1975, § 2, at 2; Editorial, *No-Fault Insurance Works*, BUS. WK., July 31, 1971, at 80, 80; Editorial, *No Fault: The Time Has Come*, WASH. POST, July 17, 1977, at B6; Editorial, *One More Reason for No-Fault*, N.Y. TIMES, Sept. 20, 1977, at 40; Editorial, *The No-Fault Auto Plan*, BOS. GLOBE, Mar. 21, 1969, at 20; Editorial, *A Promising Direction*, WALL ST. J., Nov. 6, 1968, at 20; Editorial, *The 'No-Fault' Insurance Plan*, S.F. CHRON., Mar. 24, 1971, at 38; Editorial, *The Tired Argument on No-Fault*, L.A. TIMES, May 15, 1975, pt. 2, at 6; see also *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 1792 (1971) (statement of T. Lawrence Jones, President, American Insurance Association (AIA)) ("The newspapers and all other news media have been overwhelmingly favorable.").

14. See Editorial, *A Reasonable Approach to No-Fault*, WASH. POST, Sept. 20, 1975, at A8 ("[N]o fault has gained wide popular acceptance in the last decade."); *3 of 4 in Poll Favor No-Fault Insurance*, N.Y. TIMES, July 14, 1977, at 22 (reporting on a nationwide poll commissioned by Kemper Insurance); *No-Fault Insurance Is Urged*, SPARTANBURG HERALD-J., Apr. 15, 1973, at A5 (describing polls favoring no-fault in North Carolina); Editorial, *Poll Finds No-Fault Insurance Backed when It Is Understood*, N.Y. TIMES, Apr. 22, 1971, at 82 (reporting on a nationwide Gallup Poll finding that those who understood no-fault supported it four-to-one); John Riley, *No-Fault Insurance Plan Gains Support in Midwest Poll*, BOS. GLOBE, May 11, 1969, at 58 (reporting on results of surveys in Minnesota and Illinois showing popular support for no-fault). Not all consumer surveys found support for no-fault, however. See, e.g., *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 998–1006 (1971) (statement of André Maisonpierre, Vice President and Manager of the American Mutual Insurance Alliance (AMIA)) (reporting on a survey that found staunch consumer opposition); Craig Spangenberg, *The Public Attitude: 'Let's Not Misrepresent It.'* TRIAL, Oct.–Nov. 1970, at 34, 34–35 (reporting on surveys finding support for the fault-based status quo).

muscular no-fault bills made it to the Senate floor, and one even passed in 1974 before dying in the House of Representatives.<sup>15</sup> But it was in the states, not in Congress, that no-fault really came of age. By 1974, all states had considered no-fault legislation.<sup>16</sup> And by 1976, little more than a decade after the modern no-fault movement began, more than two dozen states—encompassing the majority of Americans—had actually enacted some type of no-fault legislation, and sixteen states had enacted laws restricting motorists' right to sue.<sup>17</sup>

Then something remarkable happened: The no-fault movement stopped, quite abruptly, in its tracks. No new state has enacted a no-fault regime since 1976. A handful of states (Colorado, Connecticut, Georgia, Nevada, New Jersey, and Pennsylvania) have, in recent years, repealed their mandatory no-fault legislation.<sup>18</sup> On California's ballot in 1988 and 1996, voters twice rejected no-fault initiatives, the first time so convincingly the vote was dubbed a "massacre."<sup>19</sup> And

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15. In 1972, a restrictive no-fault bill, which would have dramatically limited tort access while also mandating generous first-party coverage, narrowly missed passage in the Senate by a vote of 49–46. See Spencer Rich, *Carter Backs No-Fault Bill*, WASH. POST, July 15, 1977, at A1. Two years later, another strong bill passed the Senate 53–42, but died in the House of Representatives. *Id.* Another bill again narrowly missed Senate passage in 1976 with a vote of 49–45. *Id.* These defeats were not preordained. See, e.g., Mike Feinsilber, *Support Rising for 'No-Fault'*, WASH. POST, Nov. 28, 1971, at F1 ("The betting is that Congress will pass a [no-fault] law next year . . ."); *No-Fault Wins Its Case*, *supra* note 9, at 74 ("[T]he talk in Washington these days is that the national no-fault bill backed by Senator Philip A. Hart (D-Mich.) could pass Congress in 1972.").

16. *No-Fault Motor Vehicle Insurance (Part II): Hearings on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the Comm. on Interstate and Foreign Commerce*, 93d Cong. 1362 (1974) (statement of the AMIA) ("Every state has considered no-fault legislation.").

17. EFFECTIVE DATE FOR NO-FAULT LEGISLATION (EXCLUDING ADD-ON LEGISLATION)

Year	States
1971	Massachusetts
1972	Florida
1973	Connecticut, Hawaii, Michigan, Nevada, New Jersey
1974	Colorado, Kansas, New York, Utah
1975	Georgia, Kentucky, Minnesota, Pennsylvania
1976	North Dakota

18. New Jersey and Pennsylvania have replaced their no-fault laws with choice systems, which permit motorists to choose to surrender the right to claim for noneconomic damages (at least for their less serious injuries) in return for discounted premiums. For more on auto choice, see *infra* note 92. Colorado repealed its no-fault legislation in 2003. Connecticut repealed its legislation in 1994. Washington, D.C. repealed its no-fault legislation in 1986. Georgia repealed its no-fault legislation in 1991. Nevada repealed its legislation in 1980. DAVID S. LOUGHRAN, RAND, *THE EFFECT OF NO-FAULT AUTOMOBILE INSURANCE ON DRIVER BEHAVIOR AND AUTOMOBILE ACCIDENTS IN THE UNITED STATES* 7 (2001).

19. Five auto insurance reform initiatives were on California's 1988 ballot, and no-fault forces (pro and con) spent a combined \$83 million variously championing and assailing these measures—a staggering sum that exceeded the cost of the entire 1984 presidential election. Of the \$83 million, pro-no-fault forces contributed the lion's share, roughly \$55 million. See ANDERSON

appearing on Arizona's ballot in 1990, choice no-fault was trounced, receiving a pathetic 15% of votes cast.<sup>20</sup> In short, in the span of one decade, automobile no-fault went from being widely viewed as "inevitable" to having, it is said, "breathed its last breath," become something of a "dead letter," and met its sad "demise."<sup>21</sup>

Why? It is a question of significant import. Automobile no-fault legislation is the second most ambitious alternative compensation scheme ever enacted in the United States.<sup>22</sup> The enactment of alternative compensation schemes is a topic that is both timely—as the recent creation of the September 11th and Gulf Coast compensation funds attest—and fundamental. Yet, until very recently, there was a notable absence of careful investigation into no-fault's heady rise and precipitous fall.<sup>23</sup> Most who *have* commented upon no-fault's failure, meanwhile, have told one of a few simple stories.<sup>24</sup> These accounts

ET AL., *supra* note 4, at 51 (providing the \$55 million figure). Even so, the 1988 no-fault provision, Proposition 104, received only 25% of the vote cast, while the 1996 no-fault provision, Proposition 200, fared only marginally better. Edward L. Lascher, Jr. & Michael R. Powers, *An Introduction to Choice No-Fault*, in THE ECONOMICS AND POLITICS OF CHOICE NO-FAULT INSURANCE 24 (Edward L. Lascher, Jr. & Michael R. Powers eds., 2001); see also THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 118 (2002) ("Prop. 104 was massacred, receiving only 25 percent of the vote."); BURKE, *supra*, at 131–32 (describing the 1996 initiative). For more on California's epic battles over no-fault, see Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683 (1990).

20. *Final Election Results*, USA TODAY, Nov. 8, 1990, at A6 (reporting on Arizona's proposition 203).

21. For "inevitability," see *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 Before the S. Comm. on Commerce*, 92d Cong. 2305 (1971) (statement of Melvin L. Stark, Vice President of Government Affairs, AIA) ("It now seems clear and unmistakable that no-fault auto insurance is inevitable . . ."); Editorial, *The 'No Fault' Insurance Plan*, S.F. CHRON., Mar. 24, 1971, at 38 ("'No Fault' insurance in various versions appears inevitable."); Robert N. Gilmore, General Counsel, American Insurance Association, Letter to the Editor, *'No-Fault': Inevitable or Improbable?*, N.Y. TIMES, June 14, 1971, at 36 (deeming no-fault "inevitable"). For no-fault's fall, see KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 100 (2008) (stating no-fault had "breathed its last breath"); Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 725 (2005) (observing that no-fault has become something of "a dead letter"); Harvey Rosenfield, *Auto Insurance: Crisis and Reform*, 29 U. MEM. L. REV. 69, 86 (1998) (documenting no-fault's "demise").

22. It is second, of course, only to workers' compensation, discussed in some detail below.

23. See ANDERSON ET AL., *supra* note 4, at 3 ("The field . . . lacks an overall retrospective of the experience in the United States with no-fault insurance that can provide a historical perspective on this policy question and help explain why no-fault was adopted, flourished, and then lost some of its political luster as a policy option.")

24. There are two main exceptions: Kenneth Abraham's *The Liability Century* and a recent RAND report authored by James M. Anderson, Paul Heaton, and Stephen J. Carroll. Both make significant contributions to the literature but are also incomplete in various respects. Abraham's treatment raises a number of important points, but, with only four pages devoted to no-fault's failure, necessarily leaves many questions underexplored and unanswered. ABRAHAM,

tend to either suggest that no-fault was fairly tried and lost on its merits, failed because the plaintiffs' bar's staunch resistance could not be overcome, or some combination of both.<sup>25</sup>

And, I readily admit, there is much truth to these accounts. In some respects, the no-fault concept itself (quite apart from any plaintiffs' lawyers' mischievous tinkering) did trigger problems that weren't anticipated. There is some evidence, for example, that no-fault is associated with increased fatality rates—a problem no-fault supporters did not predict. It is also true that the plaintiffs' bar lobbied hard against no-fault legislation—and sometimes won—defeating the legislation altogether. Meanwhile, even when no-fault managed to squeak by over plaintiffs' lawyers' vehement objections, the plaintiffs' bar often demanded, and sometimes obtained, certain concessions that made it harder for no-fault legislation to achieve its stated cost-cutting, court-clearing, and fraud-fighting goals. “The trial lawyers water it down, shoot it in the kneecap, and then protest that it doesn't work very well,” no-fault architect Jeffrey O'Connell lamented.<sup>26</sup>

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*supra* note 21, at 97–100 (discussing “The Demise of an ‘Incontestable’ Idea”). The recent RAND report, meanwhile, is more detailed but mostly focused on the cost question. ANDERSON ET AL., *supra* note 4.

25. Some take the position that no-fault failed because its costs were too high. See, e.g., ANDERSON ET AL., *supra* note 4, at 143 (concluding that “no-fault's decline in popularity is closely related to its expense”). Others take the position that the plaintiffs' bar, with its back to the wall, crushed the nascent reform. See, e.g., Editorial, *Who Faults No-Fault?*, NEW REPUBLIC, Jan. 20, 1973, at 9, 9 (“No-fault insurance is an old idea that long ago would have become law except for the fact that it deprives a whole class of lawyers of their income.”); Virginia E. Nolan & Edmund Ursin, *Dean Leon Green and Enterprise (No-Fault) Liability: Origins, Strategies, and Prospects*, 47 WAYNE L. REV. 91, 150 (2001) (attributing no-fault's failure to plaintiffs' lawyers' efforts); Rowland Evans & Robert Novak, *America's Most Powerful Lobby*, READER'S DIG., Apr. 1994, at 131, 133 (same). And indeed, even ATLA itself seems to take credit for no-fault's failure. See *Battle Enlisting Public Support Raises Questions on No-Fault*, TRIAL, Nov.–Dec. 1971, at 51, 51–52 (crediting ATLA's Washington, D.C. “information tour” with slowing down federal no-fault legislation). For those who believe that no-fault failed because trial lawyers watered it down, see *infra* note 26 and accompanying text.

26. Karl Stark, *No-Fault Insurance Idea Draws Renewed Interest*, PHILA. INQUIRER, Feb. 2, 2003, at E1 (quoting Jeffrey O'Connell). Echoing this sentiment, the AIA's T. Lawrence Jones has testified: “[N]o-fault's opponents have taken the new no-fault model, fouled up its spark plugs, watered down its gasoline, put on an artificially low price tag, then claimed the product doesn't run right.” *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings on H.R. 285 Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 450 (1977) (statement of T. Lawrence Jones, President, AIA); see also KENNETH J. MEIER, *THE POLITICAL ECONOMY OF REGULATION: THE CASE OF INSURANCE* 119 (1988) (“Even in states that passed no-fault laws, trial attorneys were able to gain concessions that rendered the laws ineffective.”); Peter Kinzler, *Auto Insurance Reform Options: How to Change State Tort and No-Fault Laws to Reduce Premiums and Increase Consumer Choice*, NAT'L ASS'N OF MUT. INS. COS. ISSUE ANALYSIS, Aug. 2006, at 12 (“In practice, many of the laws have failed to keep premiums in check. The main reason for this lies in the thresholds that the trial bar succeeded in weakening, as a matter of self-interest, before the laws

But even while the failed-on-the-merits/trial-lawyers-killed-it accounts of no-fault's failure get much right, they also miss important texture and gloss over interesting puzzles. A careful review of the voluminous legislative record surrounding no-fault, for example, underscores that even if one accepts that no-fault failed because its costs were higher than anticipated, arguably the prime culprit for that was not any "shot fired" by hostile trial lawyers but rather auto insurers' primary-payer status. And that primary status, we will see, was not in the original Keeton–O'Connell plan; nor was it championed by the plaintiffs' lawyer lobby. That no-fault feature, which arguably did more than any other to drive up the reform's cost, was, rather, demanded by those within the insurance industry, ostensibly supportive of the plan.

Furthermore, even if it is true that no-fault failed on the merits because promised insurance premium reductions did not materialize, a question remains: *Why* did sophisticated no-fault advocates sell the legislation to the public on that basis—particularly since promising rate reductions gave no-fault critics an objective yardstick against which the legislation could be judged and no-fault's ability to cut premiums was not clear. Indeed, throughout the early 1970s, many prominent (now we see prescient) voices within the insurance industry cautioned *against* pinning no-fault's success to rate reductions, repeatedly warning that rate reductions were speculative and, even if they came to pass, would represent "only a fraction of what the ardent advocates seem to be promising."<sup>27</sup> And though insurers' warnings might be discounted,<sup>28</sup> even unconflicted no-fault supporters ap-

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were adopted."); *What Ever Happened to No-Fault?*, CONSUMER REP., Sept. 1984, at 511, 546 (blaming trial lawyers for either "blocking" no-fault or so weakening the legislation as to make it ineffective).

27. Ross G. Hume, *A Review of "No-Fault,"* 39 INS. COUNS. J. 346, 348 (1972); see, e.g., *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 499 (1971) (statement of Harold Eustis, Chairman of Casualty Committee, National Association of Insurance Agents) ("There is also an apparent widespread belief that there would be an automatic reduction in the cost of insurance were such a no-fault system adopted. We believe this is a false, or at least speculative, assumption."); *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. Comm. on Interstate and Foreign Commerce*, 94th Cong. 395 (1975) (statement of André Maisonpierre, Vice President, AMIA) ("I do not think that anybody can say that there is going to be a cost reduction. I think that particular issue . . . is wide open."); *No-Fault Plans "First Aid"—"Major Surgery" Needed*, TRIAL, Nov.–Dec. 1971, at 5, 5 ("It is unfortunate that no fault's promise to lower rates has captured the headlines. . . . [T]here is no guarantee that . . . rate reductions will be established." (quoting Roger C. Wilkins, chairman of the board of Travelers Insurance Companies)).

28. Not all insurers wanted no-fault, and even those who did likely wanted to insulate themselves from committing to rate cuts.

peared to recognize that they were overstating this part of the case, privately conceding, the Associated Press reported, “that the money-saving claims were a come-on and not realistic.”<sup>29</sup> Given this obvious risk and uncertainty, one must inquire why certain no-fault proponents nevertheless made bold and insistent cost-cutting claims.<sup>30</sup>

Just as there are gaps in the conventional explanation to be filled, there is also, I believe, a broader and more sweeping narrative to be told. Robert L. Rabin has suggested “that the fundamental structure of rights to reparation and responsibilities for harm is likely to be altered only when tort reform rides on the coattails of [other] more powerful ideological impulse[s].”<sup>31</sup> To illustrate, he highlights why and when workers’ compensation—the other, more prominent no-fault movement of the twentieth century—took hold.

Between 1910 and 1921, with what was described at the time as a kind of “magical rapidity,” nearly all states jettisoned the tort system for workplace accidents and replaced tort with an administrative scheme, which (like auto no-fault) was something of a compromise.<sup>32</sup> In place of tort’s slow, uncertain, but theoretically complete recovery, workers’ compensation gave injured employees prompt, guaranteed—but limited—relief. The history of the workers’ compensation movement is rich, thickly written, and in some ways contested. But it seems clear that when workers’ compensation swept the nation in the early years of the last century, at least four powerful forces converged. First, workers’ compensation came about during the Progressive Era, a time when there was a flood of child labor and women’s rights legislation, a number of health and safety reforms, a broad reassessment of the state’s police power obligations, and a pervasive confidence in administrative competence.<sup>33</sup> Second, it was adopted at a time when Americans’ perception of workplace accidents subtly shifted. Ameri-

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29. Louise Cook, *No-Fault Insurance Has Faults, but Main Goal Succeeds*, WINONA DAILY NEWS, Oct. 31, 1977, at 8.

30. See, e.g., James S. Kemper, Jr., *The Basic Protection Plan: Reform or Regression?*, in CRISIS IN CAR INSURANCE 99, 110–11 (Robert E. Keeton et al. eds., 1968) (recounting fantastic promises and predictions made by Robert Keeton, Jeffrey O’Connell, and others). For additional examples, see *infra* note 145–47 and accompanying text.

A notable exception was Percy Foor of Pennsylvania. Foor sponsored a no-fault bill in Pennsylvania, even while he disclaimed any likely rate reduction and, in fact, warned that “no-fault insurance may mean a significant increase in costs for many.” *Foor Offers No-Fault Bill*, BEDFORD GAZETTE, Feb. 21, 1973, at 1.

31. Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 18 (1988).

32. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 127 (2004).

33. Rabin, *supra* note 31, at 17–18; see also Robert L. Rabin, *The Politics of Tort Reform*, 26 VAL. U. L. REV. 709, 710 (1992).

cans came to believe that accidents were not just the unhappy consequence of individual carelessness; accidents, instead, came to be viewed as predictable and inevitable, making it more sensible for the loss to be borne collectively.<sup>34</sup> Third, the legislation swept the nation when workplace injuries were on the rise,<sup>35</sup> and the human story behind these otherwise dry statistics was artfully conveyed to the American public, who *perceived* a crisis in their midst.<sup>36</sup> Fourth and finally, these developments came together when there was relatively limited first-party insurance<sup>37</sup> and profound dissatisfaction with the private law status quo, burdened as it was with the "unholy trinity" of employer defenses, which created serious and often insurmountable obstacles to workers' recovery.<sup>38</sup>

So too, initially, with automobile no-fault legislation. No-fault legislation burst onto the national stage as at least four factors coalesced to open a unique policy window for its enactment. First, as Rabin points out, no-fault—embraced by consumer groups as necessary consumer legislation—got its hearing during the "Public Interest Era" of the late 1960s, a time when there was a surge of support for consumer and environmental legislation and when at least twenty-five consumer, environmental, and social regulatory laws won congressional passage.<sup>39</sup>

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34. ABRAHAM, *supra* note 21, at 52–53 (describing the evolution); WITT, *supra* note 32, at 63–64 (explaining that, "[b]y the turn of the century, . . . many accidents seemed increasingly difficult to trace to any human fault" and there was an increasing sense that accidents were "the inevitable risks of enterprise").

35. The railway injury rate, for example, doubled from 1889 through 1906. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 60 (1967).

36. See PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 99 (2000) (discussing the growing attention paid to workplace accidents in the first decade of the twentieth century); Friedman & Ladinsky, *supra* note 35, at 69 ("By 1900, industrial accidents and the shortcomings of the fellow-servant rule were widely perceived as *problems* that had to be solved.").

37. ABRAHAM, *supra* note 21, at 44–45 (documenting workers' limited life, accident, and disability insurance around the turn of the century).

38. The "unholy trinity" of defenses were contributory negligence, the assumption of risk, and the fellow-servant doctrine. By the time workers' compensation was enacted, some of these common law defenses were already under assault as legislatures and courts were in the process of adopting a series of laws weakening or overturning the "unholy trinity." FISHBACK & KANTOR, *supra* note 36, at 23, 88.

39. Rabin, *supra* note 31, at 21 (observing that, just as workers' compensation must be viewed against the backdrop of the Progressive era, "automobile no-fault requires attentiveness to the consumer-environmental movement which began to crystallize in the late 1960s (the 'Public Interest Era'), and reached a crescendo of political activity at precisely the same time as the automobile no-fault movement"); see also VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 56 (1995) ("Appearing during the consumer movement . . . , the Keeton-O'Connell plan was the right plan at the right time."). For the twenty-five figure, see MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 5 (1982).

Second, it was a time when enterprise liability, or the “insurance rationale,” was in the vanguard, and there was a keen sense that the fault requirement had outlived its usefulness.<sup>40</sup> Third, the no-fault movement came to the fore at the precise moment when the auto fatality rate was peaking and the carnage caused by car crashes briefly captured the nation’s attention.<sup>41</sup> And finally, it was a time when there was relatively little first-party insurance (at least as compared to later decades), and there was also deep dissatisfaction with both the limits and the excesses of traditional tort.<sup>42</sup> These factors, I suggest, came together to make the late 1960s and early 1970s the *ideal time* to enact no-fault legislation, and situating the no-fault movement in this broader socio-legal context sheds light on why, as each factor in its own way eclipsed in the late 1970s, the no-fault movement stalled as well.

Stepping back, there may also be one additional explanation for no-fault’s failure—or more accurately—its inability to regain, in later decades, the momentum it had lost. I call this final point the adversarial equilibrium, a process by which distinct but parallel legal systems shed their excesses and patch their limits to become progressively more alike.

I take as my point of departure John Witt’s “convergence thesis.” Writing for a previous Clifford Symposium, Witt suggested that, for certain classes of recurring torts, the on-the-ground settlement of claims tends to “converge[ ] with the practice of publicly administered systems.”<sup>43</sup> Over time, he observed, tort’s procedures become progressively more routinized and less individualistic, idiosyncratic, and adversarial. I agree, and my past work on settlement mills—which process mostly auto claims in high volumes—lends support to Witt’s claim.<sup>44</sup> But in carefully examining auto claims data, I take Witt’s suggestion a significant step further.

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40. See ABRAHAM, *supra* note 21, at 97 (“[S]tates that adopted auto no-fault did so toward the end of a distinct legal era.”).

41. Compare Presidential Message to the American Trial Lawyers Association Meeting in New York City, 1 PUB. PAPERS 137 (Feb. 2, 1966) (“Since 1960, 1,675 Americans have been killed in Vietnam fighting Communist aggression. But the number of Americans killed on the highways in 1965 *alone* was more than 30 times greater.”), with WITT, *supra* note 32, at 24 (stating that, around the turn of the last century, carnage from work accidents “seemed to many to overshadow the casualties of modern warfare”).

42. See discussion *infra* Part IV.D.

43. John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 268 (2007).

44. See generally Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485 (2009); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011).

The data suggest that it is not just the on-the-ground practice of processing tort claims that has become more routinized. Rather *both* the tort system *and* the no-fault systems have changed substantially. And not just their processes but their *outputs* have actually converged. No-fault has become increasingly lawyer driven and adversarial. All the while, the tort system in the automobile context has become less litigious and has started to deliver broader yet shallower compensation—much like its former foe. Over time, in other words, the two seemingly diametrically opposed systems have reached something of an equilibrium. They have become progressively more and more alike—raising provocative questions about no-fault's legacy and certainly, in recent decades, making the case to jettison one in favor of the other a tougher sell.

This Article proceeds as follows. Part II traces the history of the no-fault movement, starting with the Columbia Plan of 1932 and continuing to the modern no-fault era.<sup>45</sup> Part III considers conventional accounts of why no-fault failed.<sup>46</sup> Specifically, drawing on a broad mix of previously untapped primary source material—including voluminous congressional testimony and thousands of contemporaneous press and journal accounts, as well as recent data, collected by the Insurance Research Council (IRC), the National Highway Traffic Safety Administration (NHTSA), and RAND—Part III considers that no-fault was associated with an arguable uptick in accidents and inarguably spiraling costs. Part IV then again utilizes this broad mix of primary source material to situate the no-fault movement within broader social and political forces of the 1960s and 1970s and, in so doing, lends additional support to Robert Rabin's "coattails" thesis.<sup>47</sup> No-fault fizzled, Part IV asserts, not *just* because its costs were too high or its plaintiffs' lawyer opponents too fierce, but rather because the "policy window" that was opened in the late 1960s and early 1970s was, by the late 1970s, firmly closed.<sup>48</sup> Part V then introduces the concept of the adversarial equilibrium, contending that a final possible reason no-fault faltered is that it became less necessary—and also less distinctive—as time went by.<sup>49</sup>

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45. See *infra* notes 50–120 and accompanying text.

46. See *infra* notes 121–99 and accompanying text.

47. See *infra* notes 200–309 and accompanying text.

48. For the classic account of "policy windows," see JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 173–204 (1984).

49. See *infra* notes 310–35 and accompanying text.

## II. A SHORT HISTORY OF THE AUTO NO-FAULT MOVEMENT IN THE UNITED STATES

Academics, judges, and policymakers have been seeking a better way to minimize, or at least better allocate, the cost of auto accidents since the dawn of the last century. In this quest, reformers have long toyed with the idea of eliminating the finding of fault as a prerequisite to payment. As early as 1919, one commentator wrote:

[T]he general aim should be to eliminate entirely the question of negligence in motor vehicle accidents; to make certain and payable at all events a reasonable compensation . . . , spreading the cost of such compensation over all users of motor vehicles on the public highways; and to provide a summary method of determining the amount of such losses.<sup>50</sup>

During the 1920s and the early 1930s, meanwhile, the no-fault idea was actively considered. No fewer than nine state legislatures considered bills that would have replaced tort litigation in the auto accident arena with compensation schemes resembling workers' compensation.<sup>51</sup>

### A. *The Columbia Plan*

The most notable early effort, though, was the Committee to Study Compensation for Automobile Accidents.<sup>52</sup> Formed in November 1928 under the auspices of Columbia University's Council for Research in the Social Sciences, funded by the Rockefeller Foundation, and headed by Shippen A. Lewis, a leading advocate of liability reform, the Committee was composed of prominent reform-minded

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50. Ernest C. Carman, *Is a Motor Vehicle Accident Compensation Act Advisable?*, 4 MINN. L. REV. 1, 2 (1919). Similarly, in 1924, Ohio Superior Court Judge Robert S. Marx delivered an address to the Cincinnati Bar Association calling for the creation of a state compensation fund, paid for by a premium levied on automobiles, to compensate those who were injured or killed "upon the streets." Such a fund was needed, Judge Marx asserted, because the status quo was "slow, expensive, wasteful, and impracticable" and, worst of all, it left "the vast majority of those who are injured and killed to bear the burden of the injury, and bear it individually." Robert S. Marx, Judge of Superior Court, Cincinnati, Ohio, *The Curse of the Personal Injury Suit and a Remedy*, Address Before the Cincinnati Bar Association, in 10 A.B.A. J. 493, 497; see also Weld A. Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L.Q. 392, 392-96 (1919) (calling for no-fault reform).

51. WITT, *supra* note 32, at 195.

52. Fleming James declared this project "probably the most significant contribution to the study of torts to appear so far in the twentieth century." Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408 (1959). For rich discussions of the Columbia Plan, see ABRAHAM, *supra* note 21, at 74-76; ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 125-40 (1965); Jonathan Simon, *Driving Governmentality: Automobile Accidents, Insurance, and the Challenge to Social Order in the Inter-War Years, 1919-1941*, 4 CONN. INS. L.J. 521, 567-86 (1998).

judges and lawyers of the day. Once organized, the Committee engaged in a three-year, multistate empirical examination of the automobile accident status quo.<sup>53</sup> What it discovered was disquieting. Among other conclusions, the Committee found that the death toll due to auto accidents was rapidly mounting—climbing more than 500% since 1913.<sup>54</sup> Victims' and survivors' compensation, meanwhile, left much to be desired. Not surprisingly, the Committee found that injuries caused by insured motorists were far more likely to be compensated than those caused by uninsured motorists.<sup>55</sup> But even when insurance was available (as it very rarely was<sup>56</sup>), the adequacy of compensation varied systematically (but paradoxically) by injury severity, as those with minor injuries received comparatively more in relation to economic loss, while those with serious or fatal injuries received comparatively less.<sup>57</sup> Furthermore, even when awards did come, they were—particularly when injuries were grievous—delayed in delivery, unpredictable in amount, and often significantly reduced in practice by attorneys' fees and litigation expenses.<sup>58</sup>

Finding the situation untenable—and writing closely on the heels of workers' compensation's successful enactment—the Committee ultimately called for the abolition of fault as a prerequisite to payment. “[N]o system based on liability for fault,” the Committee concluded, “is adequate to meet existing conditions.”<sup>59</sup> Because automobile accidents were “inevitable,” it was “sound policy” for the cost of those accidents to be shared by the motoring public.<sup>60</sup>

53. See Young B. Smith, *Compensation for Automobile Accidents: A Symposium* (pt. 1, *The Problem and Its Solution*), 32 COLUM. L. REV. 785, 785 & n.1 (1932). Between December 1929 and March 1931, project participants investigated 8,849 individual cases from ten localities in six states. REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES 2, 4 (1932) [hereinafter COLUMBIA REPORT].

54. COLUMBIA REPORT, *supra* note 53, at 17. Of course, part of the increase was attributable to more drivers on the road. But not all was. Since 1926, there had been an increase “in the proportion of deaths to number of cars registered.” *Id.* at 18.

55. See *id.* at 55–56.

56. In 1929, only 27.3% of all private passenger and commercial vehicles registered in the United States carried liability insurance. *Id.* at 45.

57. *Id.* at 204 (“The case studies show that the large losses resulting from these very serious cases receive much less adequate payment than do the smaller losses . . .”).

58. *Id.* at 36, 152 (discussing the toll taken by contingency fees, which typically ranged from 25% to 50%); *id.* at 63 (discussing the “unevenness of payments”); *id.* at 63–64, 92–94, 151–52 (discussing delays). Precisely the same critique was leveled at compensation for those injured on the job prior to the advent of workers' compensation. FISHBACK & KANTOR, *supra* note 36, at 1 (describing reformers' critique).

59. COLUMBIA REPORT, *supra* note 53, at 217.

60. *Id.* at 134–35.

Under the Columbia Plan, as it came to be known, all vehicle owners would be compelled to purchase liability insurance, and all would be strictly liable for the injuries their vehicles caused.<sup>61</sup> In a two-car collision, then, each driver would be liable for the other's injuries, and both would be jointly and severally liable for the injuries of nondriver victims. Unlike traditional tort, the remuneration following accidents would be reasonably certain, "would bear a fair and constant relation to the loss sustained," would be quickly delivered, and would come at relatively small administrative expense.<sup>62</sup> Compensation would also, however, be limited. As with workers' compensation, there would be no recovery for noneconomic loss (often known as "pain and suffering"), and payment for wage loss would be partial. Such a system, the Committee maintained, "would be workable" in practice, reasonable in cost, and consistent with "the due process clause of the federal constitution."<sup>63</sup>

The Columbia Plan was seriously debated in a handful of states but was never enacted, save partially in the province of Saskatchewan, Canada.<sup>64</sup> It was immediately opposed by the insurance industry, which at that time vigorously opposed any form of compulsory automobile insurance.<sup>65</sup> Others, meanwhile, chafed at the Columbia Plan's guiding premise that there was a "close analogy" between auto accidents and "the industrial situation."<sup>66</sup> To the contrary, opponents insisted that the structural relationship between colliding drivers and employers/employees was too different in hierarchy, intimacy, con-

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61. *Id.* at 138.

62. *Id.* at 132.

63. *Id.* at 217.

64. The Columbia Plan received serious consideration in New York, Virginia, Wisconsin, and Connecticut. Frank P. Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 318 n.79 (1950). The Columbia Plan also provided the template for a reform enacted in Saskatchewan, Canada in 1946. Saskatchewan's plan provided auto accident victims scheduled compensation from a state insurance fund, without regard to fault. *See id.* at 320-25.

65. Insurers fought compulsory insurance tooth and nail, in part because they feared that compulsory insurance would be accompanied by regulations to prohibit them from charging high-risk drivers sufficiently high premiums. For more on insurers' historic and near-hysterical resistance to compulsory insurance, see KEETON & O'CONNELL, *supra* note 52, at 89-102, and Shippen Lewis, *The Merits of the Automobile Compensation Plan*, 3 LAW & CONTEMP. PROBS. 583, 586 (1936) ("[T]he stock insurance companies have so far opposed compulsory insurance with all their heart, with all their soul, with all their mind and with all their strength.").

66. The Committee asserted there was "a close analogy between the industrial situation . . . and the motor vehicle situation." COLUMBIA REPORT, *supra* note 53, at 134-35. In both contexts, accidents were "inevitable" and the tort system had failed "to measure up to a fair estimate of social necessity." *Id.* at 134-35.

tinuity, and resource allocation to merit similar treatment.<sup>67</sup> Complaints were also leveled at the Plan's cost estimates (too optimistic), constitutionality (they said it wasn't), and general orientation ("socialistic," "contrary to a system of free enterprise," and "destructive" of "individual responsibility").<sup>68</sup> Moreover, the Columbia Plan was not well timed. It was, as noted, published in 1932, just as the problem of auto accidents dimmed—both absolutely (as the Depression and then World War II reduced miles traveled) and comparatively (as the problem of auto accidents paled in comparison to the more urgent issues of the day).<sup>69</sup>

In the decades that followed, the auto accident problem never disappeared and, if anything, became more acute. Indeed, in 1951, Fleming James and Stewart Law conducted an empirical study of automobile accidents in New Haven, Connecticut and glumly concluded that little had changed in the intervening two decades.<sup>70</sup> Ten years later, a Pennsylvania study reported much the same: "the present system does not adequately protect many who, by dint of accident, come to need help desperately."<sup>71</sup> But though academics periodically issued calls for reform,<sup>72</sup> and though auto injuries and fa-

67. See Donald W. Kramer, *Fallacies of a Compensation Plan for Automobile Accident Litigation*, 26 *INS. COUNS. J.* 420, 423 (1959); Austin J. Lilly, *Compensation for Automobile Accidents: A Symposium* (pt. 2, *Criticism of the Proposed Solution*), 32 *COLUM. L. REV.* 803, 804–07 (1932).

68. See Grad, *supra* note 64, at 320 ("The Committee's estimate of the cost of the plan was considered too optimistic . . ."); *id.* at 320 (noting that some derided the plan as "'socialistic' and contrary to a system of free enterprise"); Kramer, *supra* note 67, at 424 (dismissing the plan as "destructive" of "individual responsibility"); Crandall Melvin, *Compulsory Compensation Automobile Insurance*, Address at Annual Meeting of the New York State Bar Association, in 6 *N.Y. ST. B.A. BULL.* 268, 278 (1934) (raising doubts about the Plan's constitutionality). For further discussion of the Columbia Plan's chilly reception, see Witt, *supra* note 32, at 195; Simon, *supra* note 52, at 578–80; Herbert Harley, *Bar Association Delegates Discuss "Compensation Without Fault,"* 20 *A.B.A. J.* 710 (1934).

69. See Simon, *supra* note 52, 585–87.

70. See Fleming James, Jr. & Stuart C. Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 *CONN. B.J.* 70, 81 (1952) ("The present study shows that the same facts and the same problem are still with us today.").

71. Clarence Morris & James C. N. Paul, *The Financial Impact of Automobile Accidents*, 110 *U. PA. L. REV.* 913, 924 (1962). A contemporaneous Michigan study reached similar conclusions. See generally ALFRED F. CONARD ET AL., *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964) (chronicling a system plagued by long delays, high transaction costs, and "amazingly uneven" payments to those hurt).

72. There was one particularly notable non-academic call for reform: In his 1959 inaugural address, then-Governor of California Edmund G. Brown suggested that auto cases ought to be removed from the courts and turned over to a compensation commission. According to the *Los Angeles Times*, after sending lawyers and the insurance industry into a "tizzy," the proposal "died a quick death." Gene Blake, *New Auto Liability Plan Stirs Legal Controversy*, *L.A. TIMES*, Mar. 15, 1968, at A6. Within academic circles, calls for reform most prominently included ALBERT A. EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954), LEON GREEN, *TRAFFIC VICTIMS: TORT LAW AND INSURANCE* (1958), and Grad, *supra* note 64.

talities continued to mount, the notion of no-fault auto payments more or less faded from view.<sup>73</sup>

### B. *The Modern No-Fault Era*

This all changed in 1965, when Professors Keeton and O'Connell published a book entitled *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* and, in so doing, ushered in the modern no-fault era.<sup>74</sup> In *Basic Protection*, Keeton and O'Connell began by describing the auto accident status quo.<sup>75</sup> Their findings echoed what had been said for decades: Too many of those suffering economic loss from personal injuries sustained in automobile accidents failed to recover compensation from any source at all, and a solid majority of all victims (63%) got nothing whatsoever from the tort liability system.<sup>76</sup> Moreover, even when there was compensation, it was—especially for those suffering from grievous injury—too small in amount and too slow in delivery. In their words: “[O]ur system for compensating traffic victims is inadequate—rife with undercompensation or complete lack of compensation of many victims and overcompensation of others, as well as hardship, waste, and delay.”<sup>77</sup> The present tort system for auto accidents, they believed, needed to be abolished. In tort’s place, Keeton and O’Connell proposed a comprehensive no-fault plan in which the burden of providing traffic victims’ basic protection would fall on motorists as a cost of driving. Pragmatists, they included in the monograph a formal actuarial opinion that their plan would save money and a draft statute, the Motor Vehicle Basic Protection Insurance Act, which they said was complete and ready for immediate enactment.<sup>78</sup>

Puerto Rico passed the first (government-administered) no-fault scheme in 1968.<sup>79</sup> Then, explicitly inspired by the Keeton–O’Connell

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73. See NHTSA, 2008 DECLINE, *supra* note 3, at 27 (showing, inter alia, that 34,494 Americans perished in auto accidents in 1935; 26,785 perished in 1945; 36,688 perished in 1955; and 47,089 perished in 1965).

74. See KEETON & O’CONNELL, *supra* note 52. Their book itself never used the term “no-fault.” But the term was banded about in the course of adopting the Massachusetts legislation, and it ultimately stuck. While the book was published in 1965, the authors had published a similar law review article the previous year. See Robert E. Keeton & Jeffrey O’Connell, *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 HARV. L. REV. 329 (1964).

75. KEETON & O’CONNELL, *supra* note 52, at 34.

76. *Id.* at 43 (referring to Conard’s Michigan study).

77. *Id.* at 67.

78. In retrospect, O’Connell views the actuarial study and model statute as critical. “[T]hose two things,” he said, “changed the whole world.” Telephone Interview with Jeffrey O’Connell, Samuel H. McCoy II Professor of Law, Univ. of Va. Sch. of Law (Apr. 27, 2011).

79. ROBERT H. JOOST, *AUTOMOBILE INSURANCE AND NO-FAULT LAW* 2D § 2:16 (1992).

proposal, Massachusetts was the first state to pass a no-fault auto insurance law, which it did with great public fanfare (and after great private wrangling) in 1970—five years after *Basic Protection* hit bookstore shelves.<sup>80</sup> Just one year later, Florida passed its own no-fault law to great acclaim.<sup>81</sup>

Also in 1971, the movement got a powerful boost as the newly created U.S. Department of Transportation (DOT) issued a twenty-four volume, 11,000-page report that comprehensively assessed the automobile accident situation in the United States. In the report, the DOT concluded that the loss of life occasioned by the automobile was “truly monstrous” and that, when it came to compensating those hurt, the tort system wasn’t up to the task.<sup>82</sup> “[T]he existing system,” the DOT declared, “ill serves the accident victim, the insuring public and society.”<sup>83</sup> Following that report, Transportation Secretary John A. Volpe did not mince words, reporting to Congress: “We believe that the States should *begin promptly* to shift to a first party, non-fault compensation system for automobile accident victims.”<sup>84</sup> States, at least initially, heeded Volpe’s call. By 1975, every state had considered at least one of the more than 600 no-fault bills then in existence, and roughly two-dozen states had followed Massachusetts down some version of the no-fault path.<sup>85</sup>

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80. See MASS. GEN. LAWS ch. 90, §§ 34A–34R (2009). The Massachusetts bill’s success was due, in large part, to the tireless efforts of Michael Dukakis, one of Professor Keeton’s former students. Indeed, Peter Kinzler recalls, “Dukakis took the appendix from [*Basic Protection*] and introduced it” without change. Telephone Interview with Peter Kinzler, former Counsel, Consumer Prot. and Fin. Subcomm., House Interstate and Foreign Commerce Comm. (July 21, 2011) [hereinafter Kinzler Interview]. The Massachusetts bill was signed into law on television before a statewide viewing audience. Massachusetts was a natural place for the no-fault movement to get its start because, according to the Department of Transportation, Massachusetts had the most litigious citizenry of the nineteen states surveyed. Perhaps as a consequence, its drivers paid the country’s highest auto insurance premiums. DOT, STATE NO-FAULT AUTOMOBILE INSURANCE EXPERIENCE, 1971–1977, at 41 (1977) [hereinafter DOT, 1971–1977] (for litigiousness); *Finding No-Fault*, NEWSWEEK, Jan. 24, 1972, at 61 (for premiums). For more on the Massachusetts legislation’s tumultuous path to passage, see Michael S. Dukakis, *Legislators Look at Proposed Changes*, in CRISIS IN CAR INSURANCE, *supra* note 30, at 223.

81. DOT, 1971–1977, *supra* note 80, at 6 (describing Florida’s no-fault legislation).

82. JOHN A. VOLPE, DOT, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES: A REPORT TO THE CONGRESS AND THE PRESIDENT 2 (1971) [hereinafter DOT 1971 REPORT].

83. *Id.* at 2, 100. This study was conducted pursuant to Public Law 90-313, which directed the DOT to conduct a comprehensive study of the automobile reparation system.

84. *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 102–03 (1971) (statement of John A. Volpe, Secretary, DOT).

85. By 1975, the National Association of Independent Insurers reported that over 600 no-fault bills had received “serious consideration.” *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 and Others Before the S. Comm. on Commerce*, 94th Cong. 329

### 1. *Plan Specifics*

As advocated by Keeton and O'Connell and as enacted in Massachusetts, Florida, and elsewhere, however, "no-fault" was never really true to its name.<sup>86</sup> Cognizant that the complete abrogation of the common law would be a political nonstarter, Keeton and O'Connell advocated, and all states ultimately adopted, a hybrid system that combined elements of no-fault with traditional tort.<sup>87</sup> Though state schemes varied substantially in the specifics, all obligated each vehicle owner to purchase her own (first-party) insurance against economic loss. Known as Personal Injury Protection (PIP), this insurance would cover pecuniary losses (typically medical expenses and lost wages) sustained by the car owner, passengers, and injured pedestrians promptly, automatically, and irrespective of negligence. But the compensation, while broad, would be shallow: Noneconomic loss would go uncompensated, and most states capped PIP benefits at fairly modest sums.<sup>88</sup> The Keeton–O'Connell plan, for example, capped PIP benefits at \$10,000 (roughly equivalent to \$70,000 today).<sup>89</sup>

In addition, all states included in their no-fault legislation a safety valve for the most seriously hurt, giving "seriously injured" claimants the right to seek recovery of noneconomic damages through the traditional tort system. States identified "seriously injured" claimants in

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(1975) (statement of National Association of Independent Insurers) (stating that the states had paid "serious consideration" to "well over 600 no-fault measures"). Some states considered no-fault on multiple occasions. *E.g.*, Larry Stammer, *No New Insurance Bills in Sight: No-Fault Clamor Now a Whimper*, L.A. TIMES, Jan. 28, 1977, pt. 1, at 3 (reporting that, between 1971 and 1976, thirty-two no-fault bills were introduced in California).

86. Pure no-fault is in effect elsewhere—in Israel, New Zealand, Sweden, Finland, and the Canadian provinces of Quebec, Manitoba, and Saskatchewan. JOOST, *supra* note 79, § 1:1. Pure no-fault was also recommended by the powerful AIA in 1968, *see* Paul S. Wise & T. Lawrence Jones, "No Fault" Auto Insurance: Two Approaches, CRISIS, Dec. 1972, at 331, 333, and by the New York Insurance Department in 1970, *see* STATE OF N.Y. INS. DEP'T, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?: A REPORT TO GOVERNOR NELSON A. ROCKEFELLER (1970). Neither recommendation went far.

87. KEETON & O'CONNELL, *supra* note 52, at 164 (stating that a true no-fault plan would be "doomed to founder as unable to muster the necessary widespread political support").

88. As noted in the text, most states capped PIP benefits, meaning, for example, that if an accident victim accrued high medical bills, not all her bills would be covered. Michigan is an exception; it currently provides unlimited medical benefits, though there has been a push to enact a \$1 million ceiling. JOOST, *supra* note 79, § 1:3A; *see also* Mich. Lawmakers Must Address Auto Rates, *Industry Expert Says*, ANDREWS LITIG. REP., Jan. 2010, at 7. A further note is that the original Keeton–O'Connell plan specified that benefits for pain, suffering, and inconvenience could be purchased on an optional basis. KEETON & O'CONNELL, *supra* note 52, at 285–86.

89. *See* KEETON & O'CONNELL, *supra* note 52, at 283. Throughout this Article, I converted sums to 2011 dollars using an inflation calculator available at BUREAU OF LABOR STATISTICS, [http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm) (last visited Nov. 19, 2011).

one of two ways. Some, notably Michigan and, eventually, Florida and New York, enacted a "verbal threshold" that permitted claimants to seek compensation in tort if their injuries satisfied a descriptive statutory definition—if they suffered "permanent serious disfigurement," for example.<sup>90</sup> The balance of states, meanwhile, imposed less rigid "monetary" or "dollar" thresholds. These monetary thresholds permitted claimants to seek compensation in tort if, and only if, their medical bills exceeded a particular sum. Monetary thresholds varied, from Hawaii's fairly stringent monetary threshold, which was adjusted annually to take account of inflation and was, by the mid 1980s, a fairly substantial \$4,500, to the modest and easy-to-surpass (or "pierce") New Jersey threshold of \$200.<sup>91</sup> A third group of states took an even more partial approach, enacting "add-on" plans, which simply provided limited no-fault benefits without restricting access to traditional tort.<sup>92</sup>

As first enacted, the path-breaking Massachusetts plan, for example, contained the following three main features. First, drivers were obligated to purchase PIP coverage, which provided first-party insur-

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90. See, e.g., MICH. COMP. LAWS § 500.3135(1) (West 2010) (providing Michigan's verbal threshold). New York initially enacted a no-fault system with a \$500 monetary threshold but replaced the monetary threshold with a verbal threshold in 1977. DOT, COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES 101 (May 1985) [hereinafter DOT, 1985 FOLLOW-UP]. Like New York, Florida initially enacted legislation with a monetary threshold, but, concerned that the monetary threshold was tempting claimants to consume excessive medical care, Florida's legislature abandoned the monetary threshold in favor of a verbal threshold in 1976. *Id.* at 100.

91. States with dollar thresholds also tend to have verbal thresholds to allow tort access in cases of serious injury, regardless of monetary loss. See JOOST, *supra* note 79, § 2:34. For more on Hawaii's system, see DOT, 1985 FOLLOW-UP, *supra* note at 90. For more on New Jersey's system, see *id.* at 36.

92. In states with add-on legislation, the right to recover no-fault benefits was always in addition to, rather than in lieu of, the traditional right to sue the tortfeasor. States adopting add-on plans took one of two approaches, adopting either mandatory or optional add-on legislation. Mandatory add-on states require drivers to purchase first-party coverage. Optional add-on states require insurance companies to offer first-party coverage to drivers, who are then free to reject it. During the push to enactment, no-fault proponents tended to view add-on plans as cop-outs, or in Robert Keeton's words, "corruptions of the no-fault principle." *No-Fault Motor Vehicle Insurance (Part I): Hearing on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the Comm. on Interstate and Foreign Commerce*, 93d Cong. 408 (1974) (statement of Robert E. Keeton, Professor of Law, Harvard Law School). In addition, three states (Kentucky, New Jersey, and Pennsylvania) maintain "choice" systems. Choice no-fault is a relative newcomer to the no-fault world and was enacted in a handful of states in the late 1980s and early 1990s in response to dramatically increasing insurance rates. Choice systems offer drivers a choice between less expensive limited tort insurance (which restricts recovery for noneconomic loss) and more expensive full tort insurance (which retains recovery for noneconomic loss). For more on choice systems, see Stephanie Owings-Edwards, *Choice Automobile Insurance: The Experience of Kentucky, New Jersey, and Pennsylvania*, 23 J. INS. REG. 25 (2004).

ance of up to \$2,000 (roughly \$11,650 today).<sup>93</sup> Following an auto accident, this PIP coverage would cover the driver, passengers, and pedestrians for lost wages, medical expenses incurred within two years, and the cost of replacement services (back-up childcare, for example). Thus, if a hypothetical driver was trivially injured in a car accident, this PIP coverage would immediately and automatically cover his medical bills and lost wages up to the \$2,000 maximum. Second, the legislation created a limited tort safety valve. If our hypothetical driver was *seriously* injured in a car accident by another at-fault driver, he could receive not just his first-party PIP benefits, but also could pursue additional damages via traditional tort. In tort, he could seek recovery not just for his entire economic loss (above PIP's \$2,000 maximum), but also for his noneconomic loss, including his pain and suffering, loss of enjoyment of life, inconvenience, disfigurement, and so on. A "serious injury" was defined as one where an accident victim's medical expenses exceeded \$500 (roughly \$2,900 today) or where the victim was killed, broke a bone, lost a body member, suffered permanent or serious disfigurement, or lost his sense of hearing or sight.<sup>94</sup> Third, to provide legal protection against still-sometimes-available tort actions, all drivers were required to maintain bodily injury liability insurance in the amount of \$5,000 per person and \$10,000 per vehicle (today, \$29,000 and \$58,000, respectively).<sup>95</sup>

## 2. *No-Fault's Friends and Foes*

As noted at the outset, no-fault was extremely popular with many constituencies. It enjoyed the strong support of most academics, the vocal support of the nation's preeminent editorial boards, and at least the tentative support of the American public.<sup>96</sup> A number of powerful lobbies also lined up in favor, including most insurers, most consumer groups (including the Consumer Federation of America, Consumers Union, and National Consumers League), most unions, the American Association of Retired Persons, and the National Association of Insurance Commissioners.<sup>97</sup> Yet, predictably, it also had its

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93. DOT, 1971-1977, *supra* note 80, at 9 (summarizing the Massachusetts plan).

94. *Id.*

95. *See id.* For a more detailed description of the Massachusetts plan, see Alan I. Widiss, *Accident Victims Under No-Fault Automobile Insurance: A Massachusetts Survey*, 61 IOWA L. REV. 1 (1975).

96. *See supra* notes 13-14 and accompanying text.

97. *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 185 (1973) (statement of James R. MacKay, Senior Vice President, Fireman's Fund Insurance Company); *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 94th Cong. 529 (1975) (statement of Gary R. Frink, Executive Director, National Committee for Effective No-Fault).

critics: chiefly, the plaintiffs' bar, some other insurers, and the American Bar Association (ABA).

The plaintiffs' bar bitterly and steadfastly opposed no-fault from the start—in part, no doubt, because the legislation would wipe out some substantial portion of plaintiffs' lawyers' livelihoods. As a speaker at the annual meeting of the Trial Lawyers Section of the New York State Bar Association colorfully explained: "It is no exaggeration to say that if the automobile litigation is lost, the American trial lawyer will be a dead duck, and the entire profession will suffer damage from which I don't think it will ever recover."<sup>98</sup> Melvin Belli, a noted San Francisco plaintiffs' lawyer, former ATLA president, and vocal no-fault critic, is likewise on record acknowledging that lawyers' staunch opposition to administrative plans stemmed, in part, from the fact that they did "not relish the prospect of losing 75 per cent of their business in one fell swoop."<sup>99</sup>

More often, though, the plaintiffs' bar wisely cloaked its opposition in the public interest. The legislation, they said, discriminated against the poor, who would have trouble accumulating enough medical bills to overcome monetary thresholds; ran roughshod over core constitutional protections; was an affront to Americans' individualized conception of justice; would penalize good drivers, forcing them to pay higher premiums to compensate for the costs imposed by others; would upend the "ancient" concept of fault; and, perhaps worst of all, would serve as a template for future reform.<sup>100</sup> As Belli intoned: "As

98. Lewis C. Ryan, *Where Do We Go from Here with Tort Litigation*, Address Before the Trial Lawyers Section of the New York State Bar Association (Feb. 1, 1958), in 25 INS. COUNS. J. 500, 500 (1958).

99. JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 264 (2007) (quoting MELVIN M. BELLI, BLOOD MONEY: READY FOR THE PLAINTIFF 122 (1956)). There was more than a little hyperbole to these dark predictions. A post-no-fault study of Massachusetts's lawyers, for example, found that only about one-sixth of respondents reported that no-fault had substantially affected their practice. See Alan I. Widiss, *Massachusetts No-Fault Automobile Insurance: Its Impact upon the Legal Profession*, in NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN 107 (Alan I. Widiss et al. eds., 1977).

100. See, e.g., *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 527 (1973) (statement of Leroy Jeffers, President-Elect, State Bar Association of Texas) (raising constitutional objections); *No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 169 (1973) (statement of Leroy Jeffers, President, State Bar of Texas) (criticizing no-fault as a "vast erosion of the adversary system of justice"); Jacob D. Fuchsberg, *Lawyers View Proposed Changes*, in CRISIS IN CAR INSURANCE, *supra* note 30, at 210 (arguing that, under no-fault, "the most responsible and careful people," who "are usually also the ones with larger earnings and families," would be penalized with higher rates); William Morrissey, 'No-Fault Insurance' Foe Angered by Opposition Pressure, ONEONTA STAR, Feb. 4, 1972, at 2 (quoting ATLA President Marvin E. Lewis as arguing that no-fault plans discriminated against poor individuals).

soon as we get no-fault . . . we'll get socialism pervading the whole law."<sup>101</sup> Other less high-minded (and less well-founded) concerns were also occasionally voiced. For example, one 1971 ATLA press release directed at "Housewives" ominously warned: "If no-fault auto insurance is adopted in your state, you run a very good chance of bringing your family to the brink of financial ruin every time you drive the family car."<sup>102</sup>

Using a mix of high- and low-brow tactics, there is no question that plaintiffs' lawyers worked hard to defeat no-fault legislation. Indeed, it was the specter of federal no-fault that prompted the then-34,000-member ATLA to raise prodigious sums, develop a potent lobbying arm, and open a Washington, D.C. office for the first time.<sup>103</sup> There is also no doubt that this hard work paid handsome dividends, as trial lawyers defeated some legislation outright, left an imprint on many bills that *were* ultimately enacted, and, when laws were enacted over their objections, waged protracted—and occasionally successful—court challenges to have them invalidated on constitutional grounds.<sup>104</sup> In terms of leaving an imprint, plaintiffs' lawyers in many

101. Peter Vanderwicken, *Toward the Socialization of Injury*, FORTUNE, Nov. 1971, at 161, 181 (internal quotation marks omitted). Leroy Jeffers's prediction was even more dire:

In the wings is malpractice no-fault, products liability no-fault, other schemes and plans to close the court house door, to shut off the access of free citizens to free courts for the vindication of their rights to obtain reparation for their wrongs, and we say that is not the road to preservation of human freedom.

*National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 528–29 (1973) (statement of Leroy Jeffers, President-Elect, State Bar Association of Texas). These concerns were not without support. See *infra* note 116 and accompanying text.

102. Al Delugach, *Lawyers' Weight May Tip the Scales Against No-Fault*, L.A. TIMES, June 20, 1971, at H1.

103. In 2006, the group changed its name to the American Association for Justice. ATLA's membership grew rapidly during the period, from 7,176 members in 1961 to 21,865 in 1967 to 34,000 in 1977—when it changed its headquarters from Boston to Washington, D.C. *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 405 (1977) (statement of Robert G. Begam, President, ATLA). For more on ATLA's vigorous and varied efforts to fight no-fault legislation, see ABRAHAM, *supra* note 21, at 93; Linda E. Demkovich, *It's Time for Another Battle on No-Fault Insurance*, NAT'L J., Oct. 8, 1977, at 1572, 1572–73; Marvin E. Lewis, *The President's Report*, TRIAL, Mar.–Apr. 1972, at 8, 33; Morton Mintz, *Running Over No-Fault*, WASH. POST, Aug. 27, 1972, at B1; John D. Morris, *Inaction by States May Strengthen a New Drive for Federal No-Fault Insurance Law*, N.Y. TIMES, Oct. 3, 1972, at 23; Richard B. Schmitt, *Slick Tactics: Trial Lawyers Glide Past Critics with Aid of Potent Trade Group*, WALL ST. J., Feb. 17, 1994, at A1; Editorial, *No-Fault Is Coming*, WALL ST. J., Aug. 4, 1972, at 6.

104. In terms of defeat, see, for example, Tom Sherwood, *Trial Lawyers' Drive Sideswipes Proposal: Council Switches Lanes on No-Fault*, WASH. POST, Jan. 31, 1982, at A1 ("A majority of the D.C. City Council members who seven months ago sponsored a proposal for mandatory no-fault automobile insurance here have abandoned public support for the measure in the face of

states pressed hard for add-on no-fault (which detractors dismissed as “phony” no-fault), which left access to the tort system intact.<sup>105</sup> And, when that failed, they altered verbal thresholds and whittled away at monetary thresholds making it easier for plaintiffs to access the tort system, where noneconomic damages could be obtained.<sup>106</sup> These adjustments undoubtedly made some no-fault bills that did come into existence more expensive and less effective than they would have otherwise been.

Insurers, meanwhile, were hardly stalwart in support. In the early years of the no-fault campaign, insurers were badly divided, with some passionately in favor and others vehemently opposed.<sup>107</sup> Illustrating insurers’ unease, the mighty American Insurance Association (AIA), whose members wrote some 38% of all auto insurance policies, enthusiastically welcomed Massachusetts’s adoption of no-fault insurance and, indeed, actively lobbied for far more restrictive—and even federal—legislation.<sup>108</sup> But the President of the National Association

intense lobbying by trial lawyers . . .”). In terms of court challenges, see, for example, *Lasky v. State Farm Insurance Co.*, 296 So. 2d 9 (Fla. 1974) (invalidating parts of the legislation), *Pinnick v. Cleary*, 271 N.E.2d 592 (Mass. 1971) (upholding the legislation), and *Grace v. Howlett*, 283 N.E.2d 474 (Ill. 1972) (invalidating Illinois legislation with unusual provision limiting noneconomic damages).

105. *No-Fault Insurance: Hearings on S. 354 and Others Before the S. Comm. on the Judiciary*, 93d Cong. 1114 (1973) (statement of ATLA) (“The third type of No-Fault plan is called ‘Add-On.’ It is sometimes called ‘Phony’ no-fault by American Insurance Association spokesmen.”). For more on add-on legislation, see *supra* note 92.

106. For trial lawyers’ efforts in New York, see *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 264 (1977) (statement of John M. Murphy, Rep., State of New York) (stating that the trial lawyers lobbied hard for a \$500 threshold in New York, precisely because they knew such a low threshold, linked to high PIP benefits (\$50,000), was “doomed to failure from the outset”). For New Jersey efforts, see *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 353 (1977) (statement of Herb Jaffe, Editorial Department, Newark Star Ledger) (describing trial lawyers’ successful efforts to obtain an easily pierced \$200 threshold in New Jersey); Joseph F. Sullivan, *No-Fault Car Insurance May Set Off a Long Debate*, N.Y. TIMES, May 21, 1972, at 109 (same). For Maryland efforts, see Richard M. Cohen, *Car Surety Reform Dealt Blow in Md.*, WASH. POST, Mar. 29, 1972, at A1 (describing lawyers’ successful opposition to a \$750 monetary threshold in Maryland). For Illinois efforts, see Editorial, *No-Fault at the Threshold*, CHI. TRIB., June 20, 1975, § 2, at 2 (describing trial lawyers’ support for add-on legislation). For Michigan efforts, see Jeffrey O’Connell et al., *No-Fault Insurance at 40: Dusting Off an Old Idea to Help Consumers Save Money in an Age of Austerity*, NAT’L ASS’N OF MUT. INS. COS. ISSUE ANALYSIS, Dec. 2011, at 4 (describing the weakening of Michigan’s verbal threshold).

107. See *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 176 (1973) (statement of John E. Fisher, President, Nationwide Insurance Companies) (“[T]he insurance industry has . . . head[ed] in different directions on the auto insurance reform issue.”).

108. Editorial, *A Promising Direction*, *supra* note 13 (providing the 38% statistic).

of Independent Insurers, which counted Allstate and State Farm among its members, greeted the development by saying, “the so-called no-fault scheme adopted in Massachusetts is so obviously inimical to the public interest that we can envision no other state rushing to follow the precedent.”<sup>109</sup> Not one for understatement, William E. Knepper, former president of the International Association of Insurance Counsel, went further, saying that the Keeton–O’Connell plan “would certainly lead to the simultaneous destruction of the dignity of the individual and the even-handed justice of the common law.”<sup>110</sup>

Over time, however, resistance softened within the industry. And while it is true that insurers never marched in total lockstep, and most never supported robust federal legislation, by 1973, the vast majority of automobile insurers had come together to back real, albeit modest, state no-fault reform.<sup>111</sup>

109. Robert J. Cole, *No Bandwagon Expected for No-Fault Insurance*, N.Y. TIMES, Aug. 30, 1970, at 16 (quoting Vestal Lemmon, President of the National Association of Independent Insurers).

110. William E. Knepper, “*Alimony for Accident Victims?*” *A Review of Keeton-O’Connell’s “Basic Protection for the Traffic Victim,”* 15 DEF. L.J. 513, 530 (1966). What explains insurers’ early resistance? A few possibilities are (1) insurers recognized that their comparative advantage was in administering compensation on the basis of fault and defending policyholders against claims—not in administering compensation systems that more closely resembled health insurance—and a change to the latter would diminish the value of accumulated actuarial data; (2) if no-fault *did* result in lower premiums, insurers would have less money to invest, and if it did not, rate increases would pressure regulators to reduce profits; (3) general status quo bias; and (4) a fear that no-fault insurance would ultimately lead to federal insurance. See ANDERSON ET AL., *supra* note 4, at 37 (offering possibilities); O’CONNELL, *supra* note 1, at 140–41 (same). As James Kemper put it, in regard to the last point: “[T]he surest road to federal regulation and federal automobile insurance is the Basic Protection plan.” James S. Kemper, Jr., *The Basic Protection Plan: Reform or Regression?*, 1967 U. ILL. L. F. 459, 469.

111. See *No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 309 (1973) (testimony of T. Lawrence Jones, President, AIA) (“The organized major companies are all for it.”); John D. Morris, *No-Fault Gaining in States*, N.Y. TIMES, Apr. 8, 1973, at 32 (describing the recent “coalescence of the insurance industry in support of state laws providing limited no-fault benefits”). Some insurers’ positions, then, underwent a sea change. For example, Kemper’s evolution went something like this:

Over the years our thinking went from opposition to the original Keeton–O’Connell plan, to sponsoring additional research, to advocating experimentation in a few States, to a few years ago strongly pushing for adoption of no-fault in all States . . . to support[ing] congressional enactment of a no-fault auto insurance law.

*Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 311 (1977) (statement of Steven H. Lesnik, Vice President, Communications and Public Affairs, Kemper Insurance Company). An intriguing question, of course, is *why* so many insurers came around on no-fault. My reading of the history suggests the change was largely strategic. Insurers who initially opposed no-fault in all guises gradually recognized that resistance to modest state-level reform would ultimately invite substantially more robust federal legislation, which, as introduced, contained both high (and in some cases unlimited) PIP benefits and tough verbal

Finally, when it comes to no-fault opposition, the legal mainstream, as represented by the 150,000-member ABA, also lined up vocally against, as the ABA's Special Committee on Automobile Insurance Legislation concluded that no-fault proposals violated "a deep-rooted instinct that one should not profit by his own wrong."<sup>112</sup> In lieu of no-fault legislation, as we will see, by the late 1960s, the ABA had come to favor achieving some of no-fault's benefits, not by enacting no-fault per se, but by implementing sweeping changes to traditional tort.

### 3. *Early Appraisals: "No-Fault Will Sweep the Country Like a Prairie Fire Now"*<sup>113</sup>

Even though no-fault plans, as enacted, were far from pristine, and even though there were pockets of organized and determined opposition, throughout the early to mid-1970s, there were a number of fledgling no-fault plans in operation, and those plans were generally favorably—even ecstatically—reviewed.<sup>114</sup> "[N]o-fault automobile insurance laws not only succeeded in the first states to enact them, but also succeeded visibly, palpably, and almost immediately," Daniel Moynihan explained in 1974.<sup>115</sup> That same year, O'Connell declared

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thresholds. Such legislation would, of course, dramatically upset the status quo, while ushering in new and intrusive federal regulation.

If the why of insurers' change-of-tune seems fairly clear, the when is even clearer. A number of initially resistant insurers agreed to go along with modest state level no-fault at a secret meeting, attended by four of the top five insurers, in December 1972 at the Camelback Inn in Phoenix Arizona. For more on that meeting and its aftermath, see *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 133–99 (1973); *id.* at 258 (statement of Thomas C. Morrill, Vice President, State Farm Insurance Companies) ("[W]hat Camelback achieved was a relaxing of both the extreme and the moderate positions to achieve what can only fairly be called a consensus . . .").

112. *Report of the Special Committee on Automobile Accident Reparations*, 94 ANN. REP. A.B.A. 559, 577 (1969). For more on the ABA's opposition, see Franklin J. Marryott, *The Automobile Accident Reparations System and the American Bar Association*, 6 FORUM 79 (1970).

113. *No-Fault Wins Its Case*, *supra* note 9 (quoting C. Eugene Farnam, Massachusetts Insurance Commissioner).

114. *See, e.g.*, Cook, *supra* note 29 ("We consider it a smashing success . . ." (quoting Pennsylvania Insurance Commissioner William Sheppard)); Letter from Thomas C. Jones, Commissioner of Ins., to William G. Milliken, Governor (Oct. 6, 1976), in INS. BUREAU, MICH. DEP'T OF COMMERCE, NO-FAULT INSURANCE AFTER THREE YEARS (1976) ("I am pleased to report to you that no-fault has in fact fulfilled your hopes and the hopes of its many other supporters."); *Farnam Ecstatic over Early Results of Massachusetts No-Fault Program*, BUS. INS., Apr. 26, 1971, at 10, 10 (quoting Massachusetts Insurance Commissioner C. Eugene Farnam as describing his state's early experience with no-fault as "[e]xcellent, extraordinary, incredible, unbelievable"); Editorial, *The No-Fault Rate*, BOS. GLOBE, Nov. 29, 1971, at 10 (finding "convincing evidence that the new system [in Massachusetts] has worked better than even its most optimistic advocates had expected").

115. Daniel Patrick Moynihan, *Foreword* to JEFFREY O'CONNELL, *ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES*, at xi (1975).

the no-fault experiment a “success” and, emboldened by that success (and true to plaintiffs’ lawyers’ dark predictions), set his sights on transforming other areas of tort, from products liability to medical malpractice.<sup>116</sup> The following year, the president of the powerful AIA reported to the Senate “that in states where it has been adopted, no-fault has lived up to expectations.”<sup>117</sup> In the same hearings, the President of the ABA (on record opposing no-fault) grudgingly concurred, testifying “that, generally speaking, the plans are working.”<sup>118</sup> And in 1977, the DOT also voiced its assent. After conducting a study of the various plans in operation, it concluded:

No-fault plans of sharply varying objectives and character are widely seen as successes. No problem has arisen in the implementation of no-fault for which there does not appear to be a readily available and feasible solution, given the political will to make the necessary change. No-fault automobile insurance works.<sup>119</sup>

Yet since 1976, the year *prior* to the DOT’s glowing report, not a single state has adopted a new no-fault plan, and there has been, in one academic’s words, “something of a backlash” against no-fault legislation.<sup>120</sup> The next Part considers conventional accounts for why no-fault fizzled.

### III. CONVENTIONAL EXPLANATIONS FOR NO-FAULT’S FAILURE: MORE ACCIDENTS AND DRAMATICALLY HIGHER COST

According to the conventional failed-on-the-merits/trial-lawyers-killed-it accounts, two main factors contributed to no-fault’s sudden demise: (1) the revelation of an unanticipated (and still contested) association between no-fault legislation and additional fatal automobile accidents, and (2) no-fault’s undeniably high cost—traceable, many commentators assert, to plaintiffs’ lawyers’ mischievous tinkering. Drawing on recent accident and insurance data, a review of thousands of contemporaneous press and journal accounts, and no-fault’s voluminous (more than 11,000-page) federal legislative record, this Part

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116. Jeffrey O’Connell, *It’s Time for No Fault for All Kinds of Injuries*, 60 A.B.A. J. 1070, 1070 (1974) (“With the increasing spread and success of no-fault automobile laws, we should begin to consider the application of the no-fault principle to . . . injuries now covered by products liability, medical malpractice, and . . . other accidents.”). See generally O’CONNELL, *supra* note 115 (offering a blueprint for that expansion).

117. *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 94th Cong. 113 (1975) (statement of T. Lawrence Jones, President, AIA).

118. *Id.* at 158 (statement of James D. Fellers, President, ABA).

119. DOT, 1971–1977, *supra* note 80, at 80.

120. Ken Oliphant, *Landmarks of No-Fault in the Common Law*, in *SHIFTS IN COMPENSATION BETWEEN PRIVATE AND PUBLIC SYSTEMS* 52 (Willem H. Van Boom & Michael Faure eds., 2007).

sheds light on—and in a couple of places raises doubts about—these conventional accounts.

### A. *The Accident Dilemma*

As Kenneth Abraham points out, the first contributor to no-fault's downfall is the fact that it was, at least arguably, associated with higher fatality rates.<sup>121</sup> At the time no-fault was adopted, many doubted that no-fault legislation would impact the number or severity of auto accidents, and some went so far as to predict that no-fault would actually improve the safety of the streets.<sup>122</sup> In the words of Senator Philip A. Hart: "no-fault not only saves dollars but also saves lives."<sup>123</sup> Proponents advanced four main arguments for this prediction. They first pointed to past experience: Puerto Rico's public no-fault system went into effect on January 1, 1970, and early statistics suggested its adoption was accompanied by a significant (32%, by one estimate) drop in highway deaths.<sup>124</sup> Second, proponents argued that no-fault would improve emergency care (and thus reduce accident fatalities) by reassuring doctors and hospitals that any bills incurred would be promptly paid; indeed, some attributed Puerto Rico's drop in fatalities to just this fact.<sup>125</sup> Third, some analogized to the creation of the workers' compensation system, contending that its enactment was followed by a significant decrease in industrial accidents.<sup>126</sup>

121. ABRAHAM, *supra* note 21, at 99.

122. See David S. Loughran, *The Effect of No-Fault Auto Insurance on Driver Behavior and Auto Accidents in the United States*, in *THE ECONOMICS AND POLITICS OF CHOICE NO-FAULT INSURANCE*, *supra* note 19, at 95, 96 ("Curiously, the question whether no-fault auto insurance encourages careless driving behavior did not play a prominent role in legislative debates over the adoption of no-fault between 1971 and 1976."). *But cf.* Feinsilber, *supra* note 15 (noting that no-fault opponents predicted that "the system would lead to more accidents, more injuries, more deaths").

123. *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 297 (1973) (opening statement of Sen. Philip A. Hart); see also *No-Fault Catches Fire*, *supra* note 10, at 64 (quoting Sen. Warren Magnuson advancing this argument).

124. *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 297 (1973) (opening statement of Sen. Philip A. Hart); *No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 153 (1973) (statement of Sen. Frank E. Moss).

125. According to Senator Hart, "Administrators of the Puerto Rico plan attribute most of that decline to the no-fault coverage which increased the availability of emergency transportation equipment and opened up many private hospitals to the auto accident victim." *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 297 (1973) (opening statement of Sen. Philip A. Hart).

126. *E.g.*, James, *supra* note 52, at 416 (dismissing the argument that compensation is "an invitation to carelessness" by, *inter alia*, citing the fact that "[w]orkmen's compensation was followed by a very material decrease in industrial accidents"). For a summary of contemporary

Fourth, and most prominently, it was predicted that no-fault would increase the demand for safer vehicles. The argument went like this: Instead of computing premiums based on the expected injury to third parties (as an insurer does in a liability regime), in a no-fault regime, insurers would calculate premiums based on the probability and extent of injury to the policyholder and his family. So computed, owners of safer vehicles would be given discounts, which would, in turn, increase car buyers' safety-feature demand.<sup>127</sup>

On the other hand, there are clear reasons why no-fault might result in more accidents. Namely, economic models of liability, as developed by William Landes, Steve Shavell, Richard Posner, and others, suggest that no-fault plans, by relieving drivers of the costs of the accidents they cause, will reduce deterrence, to negative effect. Yet, just as the above safety arguments are susceptible to critique, this argument is as well; for a host of reasons, in other words, economic models may not accurately capture or predict the particular, real-world behavior of drivers.<sup>128</sup>

For starters, civil liability is hardly the only check on careless driving. There are numerous reasons to drive safely, ranging from avoiding fines and criminal penalties, to protecting one's passengers and property, to the humanitarian impulse not to maim others, to (perhaps most powerfully) simple self-preservation. In addition, tort's deterrence function is clouded by what careless driving entails. In many instances, it's characterized not by conscious or planned behavior, but by sheer bad luck or a split second of inattention, which is tough for even the most conscientious to avoid.<sup>129</sup>

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research on whether workers' compensation, in fact, decreased accident rates, see ABRAHAM, *supra* note 21, at 59–60.

127. Guido Calabresi was the most forceful proponent of this argument. See *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 94th Cong. 565–71 (1975) (statement of Guido Calabresi, Professor of Law, Yale University School of Law). The argument was also picked up by the popular press. E.g., Simon Lazarus, "No-Fault" Default, *NEW REPUBLIC*, Apr. 17, 1971, at 2, 23 (suggesting that no-fault's safety incentive could trigger "a more potent and durable system of pressures for safe vehicle design than is provided by the administrative controls of the Transportation Department's National Traffic Safety Administration").

128. See, e.g., Wex S. Malone, *Damage Suits and the Contagious Principle of Workmen's Compensation*, *NACCA L.J.*, Nov. 1952, at 44 (considering and promptly dismissing the notion that civil liability "encourage[s] drivers to be more careful").

129. See Patrick Butler & Twiss Butler, *Driver Record: A Political Red Herring that Reveals the Basic Flaw in Automobile Insurance Pricing*, 8 *J. INS. REG.* 200, 201 (1989) ("It is well known among insurance professionals that there are no 'safe' drivers because even 'at fault' accidents and traffic convictions are mostly random events—the luck of conditions existing when a mistake is made."). But see Brent Kabler, *The Case Against Auto Choice*, in *THE ECONOMICS AND POLITICS OF CHOICE NO-FAULT INSURANCE*, *supra* note 19, at 67, 70–72 (suggesting that a surprising number of fatal accidents result from forces other than mere momentary inattention).

Nor is true that traditional tort *actually* leaves the careless driver to shoulder all the consequences of his carelessness. Even in tort states, most drivers have first-party health insurance, which pays for medical care for even negligently caused injuries; the vast majority of drivers carry first-party medical payment (MedPay) insurance, which provides some additional guaranteed (albeit limited) compensation for medical bills and funeral expenses; and most drivers carry first-party collision insurance, which pays for even an at-fault driver's car repair.<sup>130</sup> In addition, when a third party is harmed, liability insurance is now compulsory in almost all states, and it (rather than the driver herself) typically pays the victim's expenses. And, even when liability coverage is insufficient to fully compensate a seriously injured victim, individual tort payments from at-fault drivers are quite rare.<sup>131</sup> One might reply that, even if individual driver defendants don't pay financially, they still pay in other ways—via inconvenience, stress, or uncertainty. But that too seems doubtful. Alfred Conard's classic Michigan study found that, although 55% of all defendants in auto accident cases did miss some work for case-related reasons (an average of 2.6 days), the remainder did not report any lost time.<sup>132</sup> Perhaps more striking, 33% of all driver defendants were so uninvolved in settled auto accident cases that they could not even recall if the claim had resulted in payment.<sup>133</sup> Another rejoinder is that, in tort states, careless drivers will pay *eventually* via insurance premium hikes. But the extent to which insurers reliably experience-rate premiums to account for drivers' accident costs (as opposed to merely adjusting rates based on crude calculations such as a drivers' "territory" or credit worthiness) remains surprisingly unclear.<sup>134</sup>

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130. MedPay insurance is optional first-party insurance that pays for a driver's own medical and funeral expenses, as well as the medical and funeral expenses his passengers incur, regardless of the driver's fault. The coverage, however, is fairly modest, typically topping out at \$5,000 or \$10,000. For more on MedPay, see *infra* note 281 and accompanying text.

131. See LOUGHRAN, *supra* note 18, at 11 (reporting that, based on data from the IRC's 1998 Survey of Auto Accident Victims, only 6.7% of total reimbursements come from at-fault drivers in tort states). The reluctance to pursue individual payment seems to stem both from the act's futility (many individual defendants are effectively judgment proof) and also (and less obviously) from a kind of moral code among plaintiff lawyers that frowns upon seeking "blood money" (that is, damages in excess of liability limits, extracted from individual defendants), in the absence of special circumstances. See generally Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001).

132. CONARD ET AL., *supra* note 71, at 299.

133. *Id.* at 296–97.

134. Compare WALTER J. BLUM & HARRY KALVEN, JR., PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS 66 (1965) ("[W]ith some important exceptions, all motorists are charged as though they represented the same risk."), and Mark M. Hager, *No-Fault Drives Again: A Contemporary Primer*, 52 U. MIAMI L. REV. 793, 799 (1998) ("No strong evidence indicates that underwriters systematically link premiums to driver danger-

The converse is also true. Just as “tort in action” shifts much of the cost of accidents away from negligent drivers, “no-fault in action” leaves significant accident costs thereon. Through a variety of avenues, in other words, careless drivers in no-fault states still pay a price for their carelessness. Namely, in all no-fault states save Michigan, the tort system still governs compensation for property damage, which can be pricey. In most states, PIP payments are limited, so some of a seriously injured at-fault driver’s medical bills might not get paid. If a careless driver causes another to sustain a serious injury, the injury victim may pierce the no-fault threshold (as happens roughly 29% of the time), where tort still reigns.<sup>135</sup> And finally, some no-fault plans exclude coverage if the insured is engaged in malicious or intentional conduct—meaning repercussions from the clearest breaches of duty are not blunted at all.<sup>136</sup>

All this means that when no-fault was initially considered, it was hardly clear what effect no-fault would have on highway safety or, indeed, whether it would have any effect at all. Yet, as early as 1978, sources contended that no-fault *was* resulting in higher accident rates in adopting states.<sup>137</sup> And, in 1982, Elisabeth Landes conducted the first empirical study of this effect. Using state-level data from 1967 to 1975, Landes concluded that no-fault legislation increased fatalities by

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ousness.”), with Richard W. Grayston, *Deterrence in Automobile Liability Insurance—The Empirical Evidence*, 40 INS. COUNS. J. 117, 126–27 (1973) (noting that underwriters successfully focus high premiums on bad drivers), and Christopher J. Bruce, *The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature*, 6 LAW & POL’Y 67, 85 (1984) (“[V]irtually all private insurance companies have a system of premium surcharges which are levied when drivers have been found at fault for accidents.”). In California, Proposition 103, passed in 1988, required insurers to set premiums based largely on driver safety. CAL. INS. CODE § 1861.02(a) (West 2005) (providing that insurers must base automobile rates on, inter alia, the insured’s driving safety record). Prior to Proposition 103’s enactment, however, insurers had substantial leeway in setting rates, and only some based premiums on driver dangerousness. Sugarman, *supra* note 19, at 693–94; see also *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 460 (1977) (statement of T. Lawrence Jones, President, AIA) (stating that “the most important classifications” in determining premiums are territory, miles customarily driven, and whether driving occurs at night, and suggesting that some but not all companies reliably consult accident reports). Moreover, even if insurers do levy surcharges on at-fault drivers, there is little evidence that these surcharges differ across liability regimes. See LOUGHRAN, *supra* note 18, at xvi (“Getting into an accident in a no-fault state is just as likely to increase insurance premiums as getting into an accident in a tort state.”).

135. LOUGHRAN, *supra* note 18, at 9 (reporting that about 29% of PIP claims in 1997 exceeded tort thresholds).

136. MICH. COMP. LAWS § 500.3105 (West 2010). Some states also exclude coverage if the insured is injured while driving under the influence of alcohol or drugs. See, e.g., MASS GEN. LAWS ANN. ch. 90, § 34A(1) (West 2001); N.Y. INS. LAW § 5103(b)(2) (McKinney 2001).

137. E.g., ABA, AUTOMOBILE NO-FAULT INSURANCE: A STUDY BY THE SPECIAL COMMITTEE ON AUTOMOBILE INSURANCE LEGISLATION 27 (1978).

as much as 15%—a finding that did not help no-fault proponents' cause.<sup>138</sup> Since Landes's controversial study, the question of whether no-fault leads to additional accidents has been repeatedly—even exhaustively—examined, yet has remained stubbornly unresolved. Some researchers have examined accident rates in New Zealand and Quebec—jurisdictions with pure no-fault laws—and these researchers, like Landes, have found that no-fault substantially increases the rate of fatal accidents.<sup>139</sup> But other researchers, using state-level data and deploying ever-greater statistical sophistication, have variously confirmed and rejected Landes's provocative report.<sup>140</sup> All told, roughly half of the studies published thus far claim that no-fault coverage increases fatal accidents, while the other half find no effect, and the notion that no-fault *reduces* fatalities has been seemingly put to rest.<sup>141</sup> The proposition that no-fault may be associated with greater accidents thus lingers.

### B. The Premium Problem

The second—and unambiguously important—factor that impeded the spread of no-fault was that, despite assurances it would be, it was

138. Elisabeth M. Landes, *Insurance, Liability, and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49, 50 (1982); see also Telephone Interview with Jeffrey O'Connell, *supra* note 78 (stating his belief that these safety allegations significantly eroded support for no-fault legislation). But see Kinzler Interview, *supra* note 80 (disagreeing that the safety accident issue had a significant impact on the debate, at least vis-à-vis federal legislation).

139. See generally Rose Anne Devlin, *Liability Versus No-Fault Automobile Insurance Regimes: An Analysis of the Experience in Quebec*, in CONTRIBUTIONS TO INSURANCE ECONOMICS 499 (Georges Dionne ed., 1992); R. Ian McEwin, *No-Fault and Road Accidents: Some Australasian Evidence*, 9 INT'L REV. L. & ECON. 13 (1989).

140. Compare Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & ECON. 357 (2004) (finding no-fault is related to a 6% increase in fatalities), and J. David Cummins et al., *The Incentive Effects of No-Fault Automobile Insurance*, 44 J.L. & ECON. 427 (2001) (finding that no-fault is associated with a 13% increase in the rate of fatal accidents), and Frank A. Sloan et al., *Tort Liability Versus Other Approaches for Deterring Careless Driving*, 14 INT'L REV. L. & ECON. 53 (1994) (showing a 5% increase for adults), with LOUGHRAN, *supra* note 18 (finding no effect), and Paul Zador & Adrian Lund, *Re-analyses of the Effects of No-Fault Auto Insurance on Fatal Crashes*, 53 J. RISK & INS. 226 (1986) (same), and Paul S. Kochanowski & Madelyn V. Young, *Deterrent Aspects of No-Fault Automobile Insurance: Some Empirical Findings*, 52 J. RISK & INS. 269 (1985) (same), and DOT, 1985 FOLLOW-UP, *supra* note 90, app. B (same). A recent study extending beyond fatal accidents and considering a broad range of accident types similarly finds no effect. See generally PAUL HEATON & ERIC HELLAND, RAND, NO-FAULT INSURANCE AND AUTOMOBILE ACCIDENTS (2010).

141. See ANDERSON ET AL., *supra* note 4, at 80–82 (summarizing the voluminous empirical literature).

not a demonstrable cost saver.<sup>142</sup> In the heady days of enactment, no-fault legislation was packaged and sold as a cure to any number of ills. As previously discussed, it was sometimes touted as safety legislation. And, as we will see, it was also sometimes touted as necessary to close gaps in the social safety net, as a way to alleviate the congestion of the courts, as a way to increase the predictability of damage payouts, and as a way to combat fraud, among other virtues. Yet, it was primarily packaged and sold to the consumer as a way to control the cost of insurance. By (1) lowering transaction costs (particularly by reducing attorneys' fees, post-accident investigations, and court costs) and (2) eliminating payment for noneconomic loss, no-fault was, at long last, supposed to reduce billowing insurance premiums.<sup>143</sup>

This promise of rate reductions was the most politically potent argument in no-fault proponents' arsenal. And it was a promise that was "relentlessly paraded before the public."<sup>144</sup> Professor O'Connell got in the act, maintaining: "The savings under Basic Protection would be striking"—with automobile insurance costs dropping from 15% to

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142. See *id.* at xvi ("We conclude that the decline in no-fault's popularity is a result of (1) its unexpectedly high claim costs and (2) the political debate shifting from an overall assessment of the optimal insurance system to the impact of those high costs on consumers."). Likewise, Kenneth Abraham's recent appraisal also identifies no-fault's unexpectedly high cost as one of four explanations for no-fault's demise. ABRAHAM, *supra* note 21, at 98; see also JERRY J. PHILLIPS & STEPHEN CHIPPENDALE, WHO PAYS FOR CAR ACCIDENTS? THE FAULT VERSUS NO-FAULT INSURANCE DEBATE 62 (2002) ("In sum, the principal failing of no-fault plans is their failure to reduce premiums.").

143. For a description of how no-fault would be financed, see *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 110 (1973) (statement of Lindsey Cowen, Dean, Case Western Reserve Law School and Ohio Commissioner on Uniform State Laws).

144. PAUL GILLESPIE & MIRIAM KLIPPER, NO-FAULT: WHAT YOU SAVE, GAIN, AND LOSE WITH THE NEW AUTO INSURANCE 155 (1972) ("As the drive to institute no-fault reform continues across the country, the prospect of immediate consumer savings has been relentlessly paraded before the public."); see also Walter J. Blum & Harry Kalven, Jr., *Ceilings, Costs, and Compulsion in Auto Compensation Legislation*, 1973 UTAH L. REV. 341, 359 ("The dominant political rhetoric was to promise virtually all motorists an actual reduction in premiums."); Randall R. Bovbjerg, *Massachusetts No-Fault: A Note on Some Changes in the Law and in Rate Levels*, in NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN, *supra* note 99, at 248 ("Pocketbook issues were the mainspring of reformist sentiment [in Massachusetts]; concern for prompt claims payment, reduced tort litigation, and other hoped-for no-fault benefits was distinctly secondary."); Joseph W. Little, *A Critique of No-Fault Reparation for Traffic Crash Victims*, 51 IND. L.J. 635, 641 (1976) ("[I]t was the cost factor that caught the interest of the public and enabled the reformists to overcome institutional resistance to change."); John G. Ryan, *Massachusetts Tries No-Fault*, 57 A.B.A. J. 431, 431 (1971) ("For the most part legislative support depended on a single factor—the hope . . . that the plan could cut automobile insurance costs. Other motivations commonly advanced to support the no-fault idea were relatively unimportant.").

25%, which, he hastened to add, was "a conservative estimate."<sup>145</sup> The *New York Times* Editorial Board breathlessly reported that if a restrictive New York no-fault bill were enacted, "[e]limination of overhead would cut premiums to policyholders by as much as 50 per cent."<sup>146</sup> And, not to be outdone, the General Counsel of the AIA publicly declared that "all cost studies" found that no-fault auto plans will save money for the policyholder.<sup>147</sup> To bring the promise of rate reduction home, a number of states, including Massachusetts and Florida, legislatively mandated that insurers reduce premiums 15% in the plan's first year. And, early in its operation, Massachusetts far surpassed that 15% benchmark. There, rates dropped a whopping 42.5%, while early results from New York also showed significant reductions.<sup>148</sup>

Yet, lasting savings proved elusive. By January 1976, the *Chicago Tribune* reported that insurance executives were already privately conceding "that the rate-reduction potential of no-fault insurance was probably overstated."<sup>149</sup> And by 1977, the initial verdict was in: "No-fault auto insurance," the American Mutual Insurance Alliance's (AMIA's) Vice President declared, "does not lead to automobile insurance cost reduction."<sup>150</sup> As the years followed, that conclusion

145. Jeffrey O'Connell, *Is It Really Immoral to Pay Regardless of Fault?*, TRIAL, Oct.–Nov. 1967, at 18, 19. Of course, it is possible that the Keeton–O'Connell plan would have reduced premiums if it had been enacted as written. We will never know.

146. Editorial, *No-Fault Auto Insurance*, N.Y. TIMES, Feb. 19, 1970, at 46.

147. Gilmore, *supra* note 21; see also *Utah Senator Urges No-Fault Insurance Before Californians*, HERALD, Oct. 28, 1973, at 36 (quoting Sen. Frank E. Moss as stating that, even a "medium benefit" no-fault law would save Californians 35% on auto insurance); *Car Insurance Change Pushed*, BRIDGEPORT POST, Oct. 18, 1968, at 11 (quoting Connecticut Insurance Commissioner William R. Cotter as stating that a no-fault plan "could save motorists 'up to 50 per cent'").

148. For information on rate cuts in Massachusetts, see Editorial, *No-Fault Is Coming*, *supra* note 103 (calling no-fault "an innovation that reduced the cost of insurance by 42.5% in Massachusetts"); *No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 460 (1974) (statement of Michael Dukakis, former State Rep. from Massachusetts) ("[W]e have been able to save hundreds of millions of dollars in premiums for the motorists of Massachusetts."). For information from New York, see *Faultless Victory*, NEWSWEEK, May 13, 1974, at 119, 120 (reporting that, after no-fault's New York enactment, the premium for a typical policy offered by Allstate dropped precipitously, from \$134 to \$85).

149. Editorial, *No-Fault Auto Insurance: Did We Get a Lemon?*, CHI. TRIB., Jan. 26, 1976, § 1, at 4. A few months before, the *Los Angeles Times* had published an article declaring "no-fault has worked no miracles on price." Alexander Auerbach, *No-Fault Car Insurance—Still Faulty*, L.A. TIMES, Nov. 15, 1975, at 1.

150. *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 277 (1977) (statement of André Maisonpierre, Vice President, AMIA); see also *id.* at 462 (statement of Paul C. Blume, Vice President-General Counsel, National Association of Independent Insurers) ("[T]he various no-fault States have not achieved reductions in insurance losses and premiums, but have in fact experienced substantial increases.").

grew only more insistent and irrefutable. In 1983, two academics published a study concluding that no-fault had “failed spectacularly” in meetings its cost-cutting goal.<sup>151</sup> In 1985, a DOT study, generally favorable to no-fault, observed that no-fault states had higher overall insurance premiums.<sup>152</sup> In 1990, O’Connell conceded that “costs were reduced less than anticipated.”<sup>153</sup> And, a comprehensive RAND study recently concluded: “Per-policy costs are highest in no-fault states, and these states have also experienced more-dramatic cost growth over time.”<sup>154</sup>

Evidence of what happened in states that repealed no-fault is also instructive. Georgia repealed its no-fault legislation in 1991. Shortly thereafter, insurance liability premiums declined 20%, a level at which they have basically stayed.<sup>155</sup> Colorado repealed its legislation in July 2003. Between 2002 and 2004, the overall injury loss costs (the amount of loss paid per insured vehicle) decreased 27%, while auto insurance liability premiums declined 16%.<sup>156</sup> And in 1994, when Connecticut repealed its no-fault system, premiums also declined.<sup>157</sup>

The graph below, using data compiled by RAND, illustrates the point graphically, showing the cost of the average written liability premium between 1987 and 2004 in tort and no-fault states. No-fault costs more, and the gap between no-fault and tort is growing.

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151. BERNARD L. WEBB & CLAUDE C. LILLY, NO-FAULT—THE RECORD: PROMISE V. PERFORMANCE, MYTH V. REALITY 30 (1983).

152. DOT, 1985 FOLLOW-UP, *supra* note 90, at 4.

153. Jeffrey O’Connell, *A Model Bill Allowing Choice Between Auto Insurance Payable with and Without Regard to Fault*, 51 OHIO ST. L.J. 947, 948 (1990).

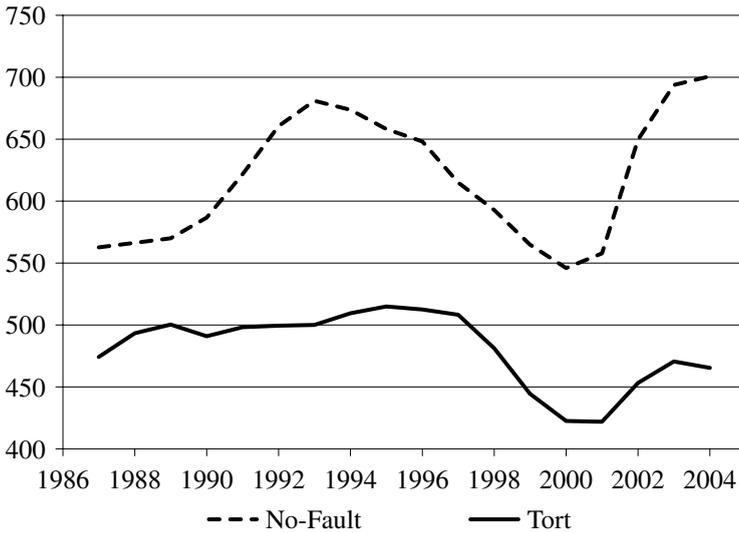
154. ANDERSON ET AL., *supra* note 4, at 135. Anderson and his co-authors reach this conclusion after adjusting for property-damage costs (to account for variation in general inflation) and accident prevalence across states. *Id.* at 76.

155. *Id.* at 74.

156. IRC, COLORADO AUTO INSURANCE—TRANSITION FROM NO-FAULT TO TORT 10–11 (2008).

157. For more on Connecticut’s repeal, which yielded rate reductions of approximately 10%, see Richard D. Hailey, *Traveling Same Old Road*, USA TODAY, Oct. 3, 1997, at 12A. For more on repeals generally, see ANDERSON ET AL., *supra* note 4, at 74–75. Anderson and co-authors point out that all three states experienced rapid cost increases in the years immediately prior to repeal, and so some of the observed reduction could reflect mean reversion. *Id.* at 74. However, they largely reject the notion that “these states would have experienced such large and abrupt cost reductions absent the change in insurance regime.” *Id.*

AVERAGE WRITTEN LIABILITY PREMIUM (YEAR 2000 \$)  
NO-FAULT VERSUS TORT



Source: ANDERSON ET AL., *supra* note 4, at 66 fig.4.1 (using data derived from IRC, TRENDS IN INJURY CLAIMS (2008), and IRC, AUTO INJURY INSURANCE CLAIMS: COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION (2008)), reprinted with permission.

Below we consider the five prime explanations for why no-fault was less of a cost saver than anticipated.

### 1. *More Compensated*

First, by its very design, no-fault expands the delivery of compensation: paying two parties following an accident is inherently more costly than paying only one.<sup>158</sup> So too, a nontrivial proportion of serious accidents (and a solid majority of fatal accidents) are one-car collisions, which, prior to no-fault, did not merit compensation and after no-fault did.<sup>159</sup> Finally, because the enacted no-fault plans all had tort safety valves, they all required that each driver *retain* (or in some cases, for the first time obtain) bodily injury coverage (because cata-

158. See *Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 277 (1977) (statement of André Maisonnier, Vice President, AMIA) (attributing no-fault's failure to reduce premiums to two facts, one of which is that "[m]ore automobile accident victims are being paid benefits").

159. According to NHTSA, 59% of fatal crashes and 33% of all injury crashes involved only one vehicle. *National Statistics*, NHTSA, <http://www-fars.nhtsa.dot.gov/Main/index.aspx> (last visited July 5, 2011).

strophic accidents could still result in tort liability) and simply pile on a new layer of mandatory coverage: PIP.

## 2. *The Exclusion of Property Damage Claims*

Second, no-fault, as initially proposed by Keeton and O'Connell, and as ultimately enacted in most states (save in Michigan and temporarily in Massachusetts and Florida), did not affect property damage claims.<sup>160</sup> Because property damage coverage accounts for more of each premium dollar than bodily injury coverage does, and it was left undisturbed, the huge premium reductions certain advocates touted were never in the cards.<sup>161</sup>

## 3. *Primary Payer*

Third, as originally conceived, Keeton and O'Connell called for PIP coverage to be secondary to the victim's health or disability insurance, meaning accident victims would first seek compensation from their health and disability insurers; only secondarily, and residually, would victims seek recovery from PIP.<sup>162</sup> Making auto insurance secondary, Jeffrey O'Connell asserted, was "absolutely essential . . . to help con-

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160. See KEETON & O'CONNELL, *supra* note 52, at 280–81 (excluding property damage). The property provision was repealed in Massachusetts after it had been in existence (and experiencing trouble) for five years. It was struck down by court action in Florida in 1973. For further information on these provisions and their respective abrogation and repeal, see Roger C. Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 OR. L. REV. 287, 298 & n.75 (1977); see also Kluger v. White, 281 So. 2d 1 (Fla. 1973) (invalidating Florida's property damage provision).

161. There are three types of property damage coverage: collision coverage (which pays for your post-collision vehicle repair, regardless of fault), comprehensive coverage (which pays for damage to your vehicle or its contents from perils such as fire or theft), and property liability coverage (which pays for the other driver's vehicle and property if you are legally at fault). Property damage coverage typically accounts for the lion's share of the premium dollar. See *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 1033, exhibit 1 (1971) (statement of André Maisonpierre, Vice President and Manager, AMIA) (chart showing that, in various jurisdictions, roughly two-thirds of auto premiums go to vehicle damage coverage); INS. INFO. INST., *THE INSURANCE FACT BOOK 2010*, at 63 (2010) (showing that \$.42 of every premium dollar goes to property damage, while only \$.30 goes to payments to injured persons).

162. See KEETON & O'CONNELL, *supra* note 52, at 278. For more on the choice and its consequences, see ANDERSON ET AL., *supra* note 4, at 38; STEPHEN J. CARROLL ET AL., *RAND, NO-FAULT APPROACHES TO COMPENSATING PEOPLE INJURED IN AUTOMOBILE ACCIDENTS* 38 (1991) ("Making private health insurance primary . . . would have a major effect on total injury coverage costs."); Gary T. Schwartz, *Auto No-Fault and First-Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611, 627 n.67 (2000) ("[R]endering health insurance primary to no-fault could reduce the aggregate of no-fault injury coverage costs by as much as 40%.").

trol skyrocketing insurance costs, and to discourage corrupting overutilization of insured services."<sup>163</sup>

This, however, was something even ostensibly supportive auto insurers could not abide. As a State Farm representative put it: "One of the few conditions on which we have adopted an absolutely non-negotiable position is that the automobile insurance policy must be the *primary* source of recovery for the costs involved in automobile accidents."<sup>164</sup>

To support their position, and defeat secondary status, insurers trotted out a number of arguments. Some were practical: it would be too difficult, auto insurers warned, to keep track of lapses or gaps in (optional) health insurance coverage, and making health insurers pay first would substantially delay auto payments. Some went to motivations: health insurers would have inadequate financial incentives to provide the injured with the very best in medical care since they, unlike auto insurers, would bear no responsibility for lost wages. Some appealed to basic fairness: it would be wrong to require nondrivers, participating in group health plans, to subsidize the driving public, and it would also be wrong for wealthy drivers, with generous health insurance policies, to pay less for auto insurance than impecunious (and less-comprehensively-insured) individuals. And, some appealed to legislators' own self-interest: because the majority of health insurers, unlike auto insurers, are nonprofits, adding auto health costs to health insurers would result in the loss of tax revenue.<sup>165</sup> ATLA, meanwhile,

163. O'CONNELL, *supra* note 1, at 98. Health insurers, too, advanced this position. *E.g.*, *No-Fault Motor Vehicle Insurance (Part II): Hearings on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the Comm. on Interstate and Foreign Commerce*, 93d Cong. 1571 (1974) (statement of Walter J. McNeerney, President, Blue Cross Association) ("We feel that health care program benefits should be primary.").

164. Hume, *supra* note 27, at 347; *accord No-Fault Motor Vehicle Insurance (Part IV): Hearing on H.R. 4994 Before the H. Subcomm. on Commerce and Fin. of the Comm. on Interstate and Foreign Commerce*, 92d Cong. 1334 (1971) (statement of National Affairs Committee, Independent Mutual Insurance Agents Association of New York, New Jersey, and Connecticut) ("On one point we are adamant and will not compromise: Automobile insurance absolutely must occupy the primary coverage position in the settlement of any and all claims arising from automobile accidents."); T. Lawrence Jones, *The Case for Making Auto Insurance Payments Primary*, WASH. INS. NEWSLETTER, Oct. 10, 1972, at 1 (stating that "within the property casualty insurance industry . . . there is nearly unanimous agreement on one facet of the issue: basic compensation for auto accident injuries should be paid by auto insurance and not by health care payment system").

165. *See, e.g., No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. Comm. on Interstate and Foreign Commerce*, 94th Cong. 580 (1975) (exhibit to the statement of John G. Cook, President, National Association of Mutual Insurance Agents) ("We are convinced that if health insurance were to be primary, the public would suffer confusion, administrative chaos, and premium increases from the duplication of effort."); *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before*

highlighted another, more cynical reason for insurers' resolve: "A plan which saves the consumer billions of dollars will take away from the private insurance industry billions of dollars in cash flow and reserves, and will correspondingly diminish investment income and agents' commissions."<sup>166</sup> And ATLA's suspicion had support. A 1970 *Business Week* article reported that AIA was "adamant that auto insurance should be the 'primary' coverage . . . because some members feel a de-emphasis would cut into their premium income."<sup>167</sup>

However motivated, though, insurers' arguments carried the day in most states: Except to workers' compensation benefits (received when a driver is injured on the job) and governmental benefits (like social security), auto benefits were almost uniformly deemed primary.<sup>168</sup> The repercussions of that political compromise were profound. For one, it meant that some policyholders who *had* health insurance would have duplicate coverage, meaning that, following a car accident, they could possibly receive a windfall and be paid twice.<sup>169</sup> Furthermore, even when coverage did not duplicate, having auto coverage primary meant not only that relevant medical bills would be paid mostly by auto insurers, rather than health insurers, but that *more* medicals bills would be paid, and they would often be paid at *substantially* higher

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*the S. Comm. on Commerce*, 94th Cong. 126–27 (1975) (statement of William G. Russell, former President, National Association of Casualty and Surety Agents) (listing eleven separate reasons why "auto insurance should be made the primary source of payment to accident victims").

166. *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 and Others Before the S. Comm. on Commerce*, 94th Cong. 456 (1975) (statement of Leonard Ring and Craig Spangenburg, ATLA).

167. *Rough Ride and New Roads Ahead for Auto Insurers*, *supra* note 8.

168. For the fact that, with a few limited exceptions, PIP payments were made primary, see DOT, 1985 FOLLOW-UP, *supra* note 90, at 25–41, which summarizes state plans. In 1974, the Michigan no-fault statute was amended to require insurers to offer insureds discounts if motorists substituted their health insurance for a portion of their no-fault coverage. When policyholders elected this option, they received approximately \$8 (which translates into roughly \$32 today) off their premiums. Relatively few policyholders made this election, however. See 2 JAMES K. HAMMITT, RAND, AUTOMOBILE ACCIDENT COMPENSATION: PAYMENTS BY AUTO INSURERS 23 (1985) (analyzing Michigan's closed-claims data and suggesting "that the option of designating one's private health insurance primary to PIP is not widely chosen"). In 1977, New York also amended its no-fault law to provide for a similar type of coordination, but as of 1995, Michigan and New York stood alone. Joost, *supra* note 79, §§ 3:11, 3:14.

169. It appears that duplicative recoveries are rare today, as medical providers charge auto insurers (rather than health insurers) directly for the charges patients incur. See Email from Ellen Melchionni, President, N.Y. Ins. Ass'n, Inc. (Jan. 26, 2012) (on file with author) (explaining that duplicative recoveries are "not customary"). It does not appear it was always thus. INS. BUREAU, MICH. DEP'T OF COMMERCE, NO-FAULT INSURANCE IN MICHIGAN: CONSUMER ATTITUDES AND PERFORMANCE 80 (1978) (concluding "duplicate recoveries add substantially to the total insurance bill"); *State No-Fault Automobile Insurance Experiences: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 511 (1977) (statement of Lawrence P. Kuvin, Co-chairman, Florida Bar Association No-Fault Committee) ("A lot of people collect two, three, four different times.").

rates. Medical insurers, that is, reduce costs via discounts and fee schedules, and they limit patient treatment using any number of mechanisms, including deductibles, co-payments, utilization controls, and medical protocols. Auto insurers, by contrast, tend to pay almost any bills that a victim incurs—and, in most states, at full freight—dramatically increasing (indeed, by one account, more than doubling) the cost of care.<sup>170</sup>

In sum, one of the main reasons that no-fault cost significantly more than expected was that it was ultimately deemed the primary payer. And this no-fault feature was not part of the original Keeton–O’Connell plan. Nor was it the result of plaintiffs’ lawyers’ lobbying. Enacted no-fault legislation was made far more expensive and thus weakened (perhaps fatally) by those in the ostensibly supportive insurance industry itself.

#### 4. *More Medical Care*

A fourth reason why no-fault cost more than anticipated was that, in practice, accident victims in no-fault states consumed dramatically more medical care of almost all kinds.<sup>171</sup> For this, there are three prime explanations, one salutary, one mostly innocent, and one less benign.

First, it should be no surprise that accident victims in no-fault states consumed more medical care, as an important *goal* of no-fault, from its inception, was to make medical care more widely available. Without no-fault, some accident victims might forego necessary but costly

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170. In 2005, State Farm reported that in Florida, “Charges to insurers for services under the PIP coverage are generally more than double the fees charged by providers under the workers’ compensation fee schedule.” *Questions for PIP/No-Fault Meeting: Hearings Before H. Ins. Comm.* (Fla. 2005) (State Farm Insurance Response to House Insurance Committee Questions, Nov. 2, 2005), available at [http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2246&Session=2006&DocumentType=Meeting%20Packets&FileName=insurance\\_11\\_08\\_05.pdf](http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2246&Session=2006&DocumentType=Meeting%20Packets&FileName=insurance_11_08_05.pdf); see also Kinzler, *supra* note 26, at 20 (observing that “the PIP system remains the last health insurance system in the United States that remains largely free of [cost] constraints”); Herb Jaffe, *Some Doctors, Hospitals Victimize New Jersey Reform System—Fraudulent No-Fault Claims Fuel Premium Spiral*, NEWARK STAR LEDGER, Feb. 14, 1977, at 1, 5 (noting that an absence of “fee schedules” or “controls over medical charges” are increasing costs and quoting a Kemper insurance manager as stating that doctors who normally charge “\$35 to \$50 for a first visit are charging \$75 and \$100 after they hear it’s a no-fault case”). New York has, for decades, had a fee reimbursement schedule, limiting PIP charges to those contained in the workers’ compensation fee schedule. See N.Y. INS. LAW § 5108 (McKinney 2009). Florida very recently enacted fee schedules, capping most PIP fees at 200% of the amount payable under Medicare. See FLA. STAT. § 627.736(5) (2010). In a number of other states, however, auto insurers are explicitly barred by statute or regulation from entering into managed-care arrangements with medical providers. ANDERSON ET AL., *supra* note 4, at 119 n.44.

171. See ANDERSON ET AL., *supra* note 4, at xv, 120–31.

care; with no-fault, that care is available. The second reason for this increased consumption is somewhat similar: In no-fault states, as noted directly above, victims' medical care is assured, free of any net-lesome deductible or co-payment, and sometimes even pleasurable (massages, for example, can be covered), creating a potent mix for moral hazard, particularly because healthcare professionals (afforded the rare opportunity to be paid without discount) are apt to be enthusiastic providers. Now, we are at the third explanation, and it is less benign. As also noted above, most no-fault states controlled access to the tort system using fixed monetary thresholds: claimants could recover in tort if, and only if, their medical bills exceeded a particular sum. The problem is that these medical thresholds, it now seems clear, did not provide a real barrier but instead became—in the DOT's words—unintended “targets” for accident victims and their lawyers to “shoot at” and surpass.<sup>172</sup> Put bluntly, the temptation became, as one lawyer put it, “Keep taking X-rays till you jump the threshold or you glow in the dark.”<sup>173</sup>

When assessing the unexpectedly high cost of no-fault, then, the problem of fraud looms large. Its prominence is also somewhat sur-

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172. DOT, 1971–1977, *supra* note 80, at 80; see also *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. Comm. on Interstate and Foreign Commerce*, 94th Cong. 316 (1975) (statement of William Cohen, Professor of Law, Stanford Law School) (describing the “tendency to inflate medical bills to get the full ticket in the negligence lottery”).

173. Patrick Bedard, *Auto Insurance Pays Off Big for Crooks and Trial Lawyers*, *CAR & DRIVER*, Jan. 1998, at 20 (quoting an unidentified lawyer). Graphically illustrating the interaction, congressional hearings turned up the following letter sent by a New York law firm to physicians prior to New York's adoption of a verbal threshold:

Dear Doctor: . . .

. . . .

We have taken the case of the above patient(s) on a contingent basis, pending determination as to whether or not the cost of reasonable medical care of the patient will exceed the \$500 minimum threshold limit.

. . . .

Since the patient(s) would not be able to recover for pain and suffering beyond the actual out-of-pocket expenses of his medical care, unless the medical care exceeds \$500, may we strongly ask you to constantly consider and remain aware of the fact that the medical care given will be promptly paid by the insurance carrier upon the presentation of your bills. Would you also send the patient(s) for X-rays, hospital care, diagnostic tests for treatment, orthopedic, neurological, or other specialist consultations to aid in treating the patient(s). . . .

You will be aiding the patient(s) in not only giving them the best and complete available medical care the insurance policy can buy but will also be aiding the patients in assuring them that they will have their day in court when they can sue for pain and suffering resulting from medical injuries.

*State No-Fault Automobile Insurance Experiences: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the Comm. on Interstate and Foreign Commerce*, 95th Cong. 624 (1977) (statement of John M. Murphy, Rep., State of New York).

prising. The tort system has long been thought to reward plaintiffs who seek extra, unnecessary medical treatment because, in the rough-and-tumble world of claims adjustment and settlement, a plaintiff's medical bills are often roughly multiplied by an arbitrary coefficient in order to calculate her total recovery.<sup>174</sup> Given this multiplication, as one lawyer told me: "If a person goes to a chiropractor and gets some treatment, gets some medical specials, all of a sudden instead of having a case that's worth \$1,500, you have a case that's worth \$3,500."<sup>175</sup> It is magical math. And it is tremendously costly. This perverse incentive to build one's claim by seeking unnecessary treatment has been called "one of the central weaknesses of the current tort system" and is estimated to cost insurers and their policyholders billions of dollars per year.<sup>176</sup>

As originally conceived, by eliminating most noneconomic damages, no-fault was supposed to reduce the incentive to build, feign, or exaggerate one's claim.<sup>177</sup> Soon after the Massachusetts plan went into effect, meanwhile, there was a striking 39% decline in the number of personal injuries reported to authorities, which some attributed to the fact that, under the tort system, many claims had been "phony" and these bogus claims had been deterred by the new rules in effect.<sup>178</sup> As the bill's sponsor, Michael Dukakis, put it at the time: "Apparently, motorists are beginning to realize that a fabricated accident or exaggerated claim of personal injury no longer pays the divi-

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174. As H. Laurence Ross reports from his classic study of insurance claims adjusting: "The hospital and physicians' bills are totaled, and are multiplied by an arbitrary coefficient—typically from two to five, depending on the practice of the area—to yield an agreeable figure for the intangibles of the case, the pain and suffering and inconvenience." H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 108 (1980). *But see* HAMMITT, *supra* note 168, at 33 (recognizing the "folklore" that general damages are a multiple of special damages but concluding, on the basis of 1977 closed-claims data, that "actual payments cannot be predicted accurately using medical or economic loss alone").

175. Telephone Interview with L.J. (Apr. 17, 2008).

176. STAFF OF JOINT ECON. COMM., 104TH CONG., *IMPROVING THE AMERICAN LEGAL SYSTEM: THE ECONOMIC BENEFITS OF TORT REFORM* 17 (Comm. Print 1996); *see also* IRC, *FRAUD AND BUILDUP IN AUTO INJURY CLAIMS: PUSHING THE LIMITS OF THE AUTO INSURANCE SYSTEM* 2 (1996) (concluding that approximately 36% of all paid bodily injury claims appear to involve fraud or buildup and estimating that excess injury payments total \$5.2 to \$6.3 billion per year).

177. GILLESPIE & KLIPPER, *supra* note 144, at 13 ("[N]o-fault plans seek . . . an end to the need to exaggerate injuries [and] the elimination of fraud."); *see also* KEETON & O'CONNELL, *supra* note 52, at 6 (describing their plan as one that would "minimize inducements to dishonesty").

178. *No-Fault Catches Fire*, *supra* note 10, at 64 ("In fact, there was a striking 39% decline in the number of personal injuries even reported to authorities, which suggests that many claims under the old system were phony.").

dends it used to.”<sup>179</sup> Yet, with the benefit of hindsight, it seems that particularly monetary threshold no-fault plans did little to alleviate, and may have even exacerbated, the fraud concern, as providing noneconomic damages only to those who pierce thresholds tempts some to seek treatment until the threshold is pierced. Illustrating this response, in 1989, when Massachusetts’s monetary threshold was raised from \$500 to \$2,000, the number of visits to chiropractors and physical therapists more than doubled.<sup>180</sup>

At the same time, while the no-fault system created powerful incentives to build claims, it also tied insurers’ hands in various ways. For one, it is particularly difficult to crack down on fraudulent PIP claims because these claims involve policyholders rather than third parties. Appearing “tough” in handling one’s policyholder is bound to be bad customer relations.<sup>181</sup> It is also both difficult and risky. It is difficult because all no-fault states require the prompt payment of PIP benefits, typically within thirty days of a claim’s receipt, which leaves little time for careful investigation.<sup>182</sup> It is risky because if a claimant successfully sues for overdue PIP benefits, an insurer must pay an interest penalty and reasonable attorney’s fees, or worse, might be subject to a bad faith failure-to-pay claim—where punitive damages could be assessed.<sup>183</sup>

##### 5. *Thresholds Were Less Effective than Anticipated*

The fifth and final reason why no-fault was less of a cost saver than anticipated was that thresholds were simply less effective than anticipated: No-fault has kept far fewer cases out of the court system than

179. Michael S. Dukakis & Stephen Kinzer, *Auto Accidents: Blame Is Not the Principal Issue*, L.A. TIMES, Apr. 9, 1972, at C1.

180. Sarah S. Marter & Herbert I. Weisberg, *Medical Expenses and the Massachusetts Automobile Tort Reform Law: A First Review of 1989 Bodily Injury Liability Claims*, 10 J. INS. REG. 462, 463, 487 (1992). In Hawaii, meanwhile, where the threshold was \$7,000 in 1990, claimants who visited chiropractors did so a median of fifty-eight times. IRC, AUTOMOBILE INJURY CLAIMS IN HAWAII 26 (1991); Hager, *supra* note 134, at 810.

181. MARJORIE M. BERGE, HIT ME—I NEED THE MONEY! THE POLITICS OF AUTO INSURANCE REFORM 32 (1991) (making this public relations point).

182. *No-Fault Auto Insurance Fraud Re: To Examine Ways to Reduce the Incidents of No-Fault Auto Insurance Fraud in New York: Hearing Before the N.Y. State S. Standing Comm. on Ins.*, 112–13 (N.Y. Apr. 26, 2011) (testimony of Kristina Baldwin, Assistant Vice President, Property Casualty Insurers Association of America), available at <http://www.nysenate.gov/files/04-26-11%20Public%20Hearing%20Transcript.pdf> (“[W]e have to pay or deny within 30 days. And if we miss that for some reason . . . we have to pay the claim no matter how ridiculous it is. . . . This hasn’t actually happened, but we would have to pay for a third prosthetic leg if we were billed for it and we missed the 30-day time frame.”).

183. ANDERSON ET AL., *supra* note 4, at 132 (“[S]ome auto insurers have cited the growth in bad-faith lawsuits as restricting their ability to investigate questionable claims under no-fault.”).

reformers boldly predicted, and reductions have eroded over time.<sup>184</sup> Analyzing data collected in 1977, RAND researchers concluded: "Tort thresholds, even those of moderate stringency, seem effective in reducing the number of [bodily injury] claims paid."<sup>185</sup> Since that time, however, tort thresholds have become substantially more porous. One study, for example, found that, nationally, the percentage of injured parties that pierce thresholds has increased from 17% in 1977 to 29% in 1997.<sup>186</sup> In some states, the increases have been even more dramatic. In Connecticut, for example, 63% of PIP claimants were judged eligible for a tort claim in 1992, compared to 41% in 1987 and just 19% in 1977.<sup>187</sup> In Hawaii, likewise, a meager 3% of PIP claimants were judged eligible for noneconomic damage payouts in 1977, compared to 21% in 1997.<sup>188</sup>

Though verbal thresholds are seemingly less susceptible to erosion, two of the three verbal threshold states have nevertheless seen increases in the proportion of threshold-piercing claims. Of the three, New York has appeared to hold the line on the proportion of PIP claimants eligible for noneconomic damages, even touting a decrease from 27% in 1977 to 22% in 1997.<sup>189</sup> By contrast, within the same period, Michigan witnessed more than a doubling of those who had pierced its tough threshold, from 6% to 15%.<sup>190</sup> In Florida, meanwhile, from 1990 to 2005, the proportion of threshold-piercing PIP claimants also increased substantially.<sup>191</sup> Also surprising, all three verbal threshold states have seen a rapid increase in their bodily injury (that is, tort) claims as a proportion of those in auto accidents. Flor-

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184. For example, after the Massachusetts law went into effect, it was predicted that "80 percent of claims for personal injury will be closed completely on a no-fault basis." *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 420 (1971) (statement of John Jackson, Washington Rep., Commonwealth of Massachusetts). In fact, by 1997, 52% of PIP claimants exceeded the state's monetary threshold. LOUGHRAN, *supra* note 18, at 10.

185. HAMMITT, *supra* note 168, at 75.

186. LOUGHRAN, *supra* note 18, at 9 (reproducing information compiled by State Farm and the IRC).

187. *Id.* at 10. Connecticut abandoned no-fault in 1994. For speculation as to why monetary thresholds have deteriorated, see *infra* note 312 and accompanying text.

188. LOUGHRAN, *supra* note 18, at 10.

189. *Id.*

190. *Id.*

191. Memorandum from William H. Stander, Regional Manager, Prop. Cas. Insurers Ass'n of Am. to Rep. Dennis Ross, Chairman, House Ins. Comm. (Nov. 4, 2005), available at [http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=committees&CommitteeId=2246&Session=2006&DocumentType=Meeting%20Packets&FileName=insurance\\_11\\_08\\_05.pdf](http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=committees&CommitteeId=2246&Session=2006&DocumentType=Meeting%20Packets&FileName=insurance_11_08_05.pdf) (reporting a 35% increase from 1990 to 2005). Between 1977 and 1997, statistics suggest that the percent of PIP claimants eligible for noneconomic damages increased marginally in Florida, from 31% to 34%. LOUGHRAN, *supra* note 18, at 10.

ida, for example, witnessed more than a doubling in bodily injury claims per 100 property damage claims (from 9.5 to 19.1) between 1980 and 1993.<sup>192</sup>

Once thresholds are pierced, meanwhile, litigation in no-fault states appears, if anything, more protracted—and thus more expensive—than litigation pursued via traditional tort. The reason is this: PIP payments, by tiding victims over, strengthen accident victim's hand vis-à-vis insurers. Much like workers' compensation benefits are thought to subsidize products liability claims and nonrecourse litigation loans are thought to subsidize and prolong accident litigation generally, PIP payments give accident victims the economic wherewithal to litigate claims to the hilt.<sup>193</sup> As one witness told a House Committee, once no-fault is in place, "[t]here is no more incentive to settle at a bargain price a substantial liability claim because the man's medical expenses are paid, his work loss is paid, and he will insist upon full value for his claims."<sup>194</sup>

These costs add up. In 1980, Nevada repealed its no-fault legislation because, some lamented, it merely provided "a vehicle to finance lawsuits."<sup>195</sup> Six years later, an analysis of published appellate decisions printed in the *Insurance Counsel Journal*, a publication for insurance defense attorneys, shared the sad news: "[W]hatever the advantages of no-fault, a reduction in court cases and court costs would not appear to be one of them."<sup>196</sup> Or, perhaps most telling of

192. In New York, the number of bodily injury claims per 100 property damage claims increased from 11.5 in 1980 to 16.3 in 1993; in Michigan it increased from 5.8 in 1980 to 8.2 in 1993. IRC, TRENDS IN AUTO INJURY CLAIMS, PART ONE: ANALYSIS OF CLAIM FREQUENCY 14 (2d ed. 1995).

193. Cf. ABRAHAM, *supra* note 21, at 67 (discussing workers' compensation's role in giving "employees access to capital, thereby providing them with staying power they would not otherwise have in tort suits against third parties").

194. *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. Comm. on Interstate and Foreign Commerce*, 94th Cong. 501 (1975) (statement of Patrick Chidness, Vice Chairman, Florida Bar No-Fault Insurance Committee); *id.* ("[T]he insurance companies, under the standard tort scene, were able to get settlements of many cases merely through economic pressure, that the injured person was out of work, that he had a lot of doctor bills and while his claim may have been worth \$25,000 he had to settle for \$5,000 or \$6,000 just to pay his creditors and continue to exist."). Some predicted and even intended this result. For example, in 1977 Professor Roger Henderson wrote: "Serious injury cases are often settled more because of the victim's economic necessity than because of the merits of the claim." He continued: "Thus, one of the hopes of no-fault is that the seriously injured will receive support from no-fault benefits while pursuing third-party tort claims, thereby avoiding improvident settlements caused by dire financial need . . ." Henderson, *supra* note 160, at 305-06.

195. Patrick F. Maroney, *No-Fault Automobile Insurance: A Success or Failure After Eleven Years?*, 51 INS. COUNS. J. 75, 75 (1984).

196. Norman K. Risjord, *Does No-Fault Reduce Litigation?*, 53 INS. COUNS. J. 389, 392 (1986).

all: When Florida recently considered abandoning no-fault—in a remarkable turnabout—it was many within the insurance industry, complaining of rampant fraud and spiraling premiums, who supported repeal, and it was the Florida trial lawyers, “united in the belief that the current system is working,” who championed the status quo.<sup>197</sup>

André Maisonpierre from the AMIA observed back in 1975: “[T]he polls have indicated time and time again when asked, ‘Why do you like no-fault,’ they say ‘Because it is going to reduce costs.’ If the promise does not follow through, there will be a backlash.”<sup>198</sup> Whether because of new payments to previously ineligible victims, the exclusion of property damage coverage, auto insurer’s ultimate status as the primary payer, the innocent or strategic increased utilization of medical care, or the erosion of thresholds, costs were not reduced. And backlash there was. In the handful of states where no-fault has been abolished, rising premiums were the prime reason typically cited for repeal.<sup>199</sup>

#### IV. THE OPENING AND QUICKLY CLOSING POLICY WINDOW FOR NO-FAULT INSURANCE

The above explanations supply the conventional accounts for why no-fault failed: no-fault was associated with arguably more accidents and inarguably higher cost. And though I believe there is undeniable truth and power to these accounts, I also believe there is more to this story. In order to understand no-fault’s heady rise and precipitous fall, one must not simply assess no-fault on the merits. One must also, as Robert Rabin instructs, situate the no-fault movement within a broader social and political milieu.

John Kingdon, in his classic book on public policy, highlights that enactments take place during “policy windows.”<sup>200</sup> Here, it is clear

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197. Tom Zucco, *Repeal No-Fault Law, Say Insurers*, ST. PETERSBURG TIMES, Mar. 4, 2006, at 1D (quoting Glenn Klausman, Vice Chairman of the Florida Trial Lawyers Auto Insurance Subcommittee).

198. *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. Comm. on Interstate and Foreign Commerce*, 94th Cong. 395 (1975) (statement of André Maisonpierre, Vice President, AMIA).

199. See, e.g., Rita Jameson, *Nevada Nixes No-Fault*, TRIAL, Aug. 1979, at 10 (stating that the Nevada legislature voted to repeal no-fault law because it “was concerned that the no-fault system had not proven to be the cost saver it was originally intended to be”); Mark Pazniokas, *House Votes to Repeal No-Fault Law*, HARTFORD COURANT, June 3, 1993, at A1 (describing no-fault’s repeal “as a way to save constituents money”); Otis White, *Georgia Dumping No-Fault Insurance System*, ST. PETERSBURG TIMES, Mar. 12, 1991, at 1A (quoting Tim Ryles, Georgia Insurance Commissioner, as saying that Georgia repealed no-fault because it “did not fulfill its promises of lowering insurance rates”).

200. See KINGDON, *supra* note 48, at 173–204.

that the no-fault era dawned during a roughly seven-year period when four factors converged to open a policy window for its enactment. First, as Rabin has observed, the no-fault era coincided almost perfectly with the Public Interest Era—an era when consumer groups enjoyed unprecedented success in passing consumer legislation.<sup>201</sup> Second, the no-fault era dawned just as enterprise liability or the insurance rationale was at its zenith. Third, no-fault arrived at the precise moment when auto accidents were taking an unprecedented toll and there was, for the first time, genuine, sustained, and widespread focus on the auto accident problem. And finally, no-fault was introduced just as there was a rising tide of frustration with various perceived excesses and limits in traditional tort. Each of these factors coalesced to make the late 1960s and early 1970s the *perfect time* to enact no-fault legislation. Yet, Kingdon cautions: “Once the window opens, it does not stay open long. An idea’s time comes, but it also passes.”<sup>202</sup> A policy window can close, Kingdon says, because of action or inaction, or because “the events that prompted the window to open may pass from the scene.”<sup>203</sup> That, I contend, is precisely what happened here.

#### A. *Public Interest Era*

First, as initially enacted, no-fault was typically viewed as consumer legislation. Indeed, one House witness representing the AFL-CIO dubbed no-fault legislation “one of the most significant consumer programs in history.”<sup>204</sup> So viewed, it fit within the broader consumer movement of the late 1960s and early 1970s, or as Rabin has dubbed it, the Public Interest Era.<sup>205</sup> This era marked a period when, spurred by a restive but financially strapped Congress and President, consumer causes, which offered great bang for the federal buck, moved to the top of the domestic legislative agenda. And it was a time when Congress’s attention to consumer issues yielded great dividends, as

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201. Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

202. KINGDON, *supra* note 48, at 177.

203. *Id.*

204. *No-Fault Motor Vehicle Insurance (Part II): Hearings on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the Comm. on Interstate and Foreign Commerce*, 93d Cong. 1283 (1974) (statement of Kenneth Meiklejohn, Legislative Rep., AFL-CIO); *accord No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 143 (1973) (statement of Sen. Warren G. Magnuson) (deeming auto insurance one of the “two biggest consumer issues in the United States”).

205. Interestingly, some contemporaneous observers also attributed no-fault’s early success to its association with the consumer movement. *See, e.g.*, Blum & Kalven, *supra* note 144, at 342.

Congress passed landmark legislation dealing with a host of issues, from occupational health and safety to hazardous waste.<sup>206</sup>

It is first noteworthy—and a bit surprising—that no-fault *was* viewed as consumer legislation, as it does not fit neatly within the consumer frame: For all its advantages, after all, the legislation closed the courthouse door to injured Americans. Furthermore, it was staunchly opposed by none other than Ralph Nader (the movement's progenitor and main proponent) and of course the plaintiffs' bar, which usually could be counted on to be in the consumer camp.<sup>207</sup> The coupling makes sense, however, once one recalls that no-fault was *most* prominently, frequently, and fatefully packaged as a way to bring down insurance rates, and it came along at a time when the cost of insurance was viewed as a critical consumer problem, touching the lives of most Americans.<sup>208</sup> From 1955 to 1970, automobile insurance liability pre-

206. For more on the Public Interest Era, see Rabin, *supra* note 201. For a broad discussion of the consumer movement, see MARK V. NADEL, *THE POLITICS OF CONSUMER PROTECTION* (1971).

207. As U.S. Rep. Robert Krueger explained on the pages of *Trial* magazine: "Although no-fault is advocated on behalf of consumers, it seems to be an odd program that assists consumers by depriving them of cherished rights." Robert Krueger, *The Faults of No-Fault Insurance*, *TRIAL*, Jan. 1978, at 22, 25; see also ANDERSON ET AL., *supra* note 4, at 44 ("No-fault . . . was the rare, consumer-oriented tort reform that *narrowed* the consumer's ability to sue."). For the fact that trial lawyers generally supported consumer legislation, see *No-Fault Motor Vehicle Insurance (Part II): Hearings on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the Comm. on Interstate and Foreign Commerce*, 93d Cong. 1584 (1974) (statement of Sen. Frank E. Moss) ("[O]f the work that we have done in the field of consumerism with this single exception I have found myself in agreement also with the position of the trial lawyers . . ."). For Ralph Nader's unparalleled prominence, see NADEL, *supra* note 206, at 42 ("Ralph Nader quickly became a personal symbol of the drive for consumer protection policy."). For Nader's opposition to no-fault legislation, see Thomas Whiteside, *Profiles: A Countervailing Force-II*, *NEW YORKER*, Oct. 15, 1973, at 46, 96. At least initially, Nader attributed his opposition to the fact "that [no-fault] went nowhere near far enough in attempting to reform insurance-industry practices." *Id.* Instead of no-fault, Nader favored "either a system of social insurance" or "enterprise liability, where the companies who produce the cars also have an insurance policy attached to the cars." *Id.* Much later, Nader pivoted some, attributing his opposition to the fact that "any system that eliminated pain-and-suffering damages was 'dehumanizing.'" BURKE, *supra* note 19, at 62 (citing Interview with Ralph Nader, Washington, D.C. (May 2, 1994)); see also *Auto Insurance Reform: Hearings Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 31 (1999) (statement of Ralph Nader, Consumer Advocate, Center for Responsive Law, and Harvey Rosenfield, President, Foundation for Taxpayer and Consumer Rights) ("By taking away the right of injured motorists to seek compensation for their human pain and suffering, *no-fault depersonalizes the human being, treating injured people as the equivalent of damaged property.*").

208. *Investigation of Auto Insurance: Hearings on S.J. Res. 129 and Others Before the S. Consumer Subcomm. of the Comm. on Commerce*, 90th Cong. 22 (1968) (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO) ("The mounting grievances over the unsatisfactory performance of the automobile insurance system have now reached a full head of steam. Few so-called consumer issues touch the lives of such a large proportion of American families.").

miums soared from \$2.4 billion to \$8.9 billion and the cost-per-driver far outstripped inflation, leading to, as the Consumers Union put it, “runaway rates.”<sup>209</sup> So packaged and so timed, no-fault won the affection and enthusiastic backing of organized labor and various consumer groups, and its chief congressional champions were Warren G. Magnuson, Philip A. Hart, and Frank E. Moss in the Senate and John E. Moss in the House of Representatives—four legislators who were widely credited for leading the consumer charge.<sup>210</sup>

No-fault’s association with the consumer movement, then, helps to explain a couple of critical points. First, no-fault supporters’ impulse to fit the legislation (however uneasily) within the powerful consumer movement provides a clue, I suggest, to solve the puzzle raised at the outset—namely, why no-fault supporters seemingly painted themselves into a corner by promising lower rates, even when those rate reductions could not be assured. It was only by packaging no-fault as a rate reducer that proponents were able to ride the consumer wave. But doing so was, of course, dangerous because, by selling no-fault on the promise of lower premiums, no-fault proponents were easily (and perhaps fatally) attacked when those reductions failed to materialize.

At the same time, situating the drive for no-fault within the consumer movement helps to explain no-fault’s sudden loss of momentum.<sup>211</sup> From the mid-1960s through the mid-1970s, when the consumer movement was at its most muscular, the stars were seemingly aligned for no-fault’s enactment. But then, in the late 1970s, the nation’s political winds started to shift, away from concern for social welfare and environmental and consumer protection, toward individualism, deregulation, and free market ideas.<sup>212</sup> In short, by around

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209. For the national premium figures, see ANDERSON ET AL., *supra* note 4, at 28. For the fact premiums had outpaced inflation, see Paul G. Edwards, *Allow Reform, Lawyers Urged*, WASH. POST, Aug. 8, 1968, at C9; *Can ‘No Fault’ Auto Insurance Offer Motorists a Better Break?*, CHI. TRIB., Oct. 11, 1970, at C13. For “runaway rates,” see *The ‘No-Fault’ Auto Insurance Controversy*, CONG. DIG., June 1, 1971, at 162, 184 (statement of Colston E. Warne, President, Consumers Union of United States).

210. For more on these leaders, see MICHAEL R. LEMOV, *PEOPLE’S WARRIOR: JOHN MOSS AND THE FIGHT FOR FREEDOM OF INFORMATION AND CONSUMER RIGHTS* (2011); PERTSCHUK, *supra* note 39, at 25; NADEL, *supra* note 206, at 108–11.

211. See Rabin, *supra* note 21, at 703 (attributing no-fault’s fall to the end of the Public Interest Era).

212. As P.S. Atiyah wrote in 1980:

In the United States, everyone is conscious . . . of a renewed faith in individualism. This belief in individual responsibility couples well, of course, with the traditional common law action for negligence. Individualism requires that those who are at fault for injuring their neighbors should make good the consequences; it also requires that individuals be treated as responsible for deciding against what risks, and to what extent, they should insure themselves. . . .

1978, experts agree that the consumer movement—to which no-fault had long been tethered—had itself “lapsed into a state of political insolvency,” naturally dimming no-fault’s prospects for passage.<sup>213</sup>

Importantly, though, when talking about the fall of no-fault, we can point to something more tangible than a subtle shift in national sentiment. There were personnel problems too. Namely, no-fault’s four most faithful congressional champions had, by 1979, all departed their positions of power. First, Senator Frank Moss, who had long sponsored no-fault legislation, was defeated in 1976.<sup>214</sup> Later that year, on December 26, 1976, Senator Hart, who had worked tirelessly on behalf of the no-fault cause, passed away.<sup>215</sup> Two years later, Representative John Moss retired home to California, while Senator Magnuson stepped down as Chair of the powerful Commerce Committee and was replaced by Senator Howard Cannon who was “less than enthusiastic” about no-fault’s enactment.<sup>216</sup> After these departures no-fault was left on Capitol Hill without those most knowledgeable about, and invested in, the no-fault cause.

Given that the legislation was only ever enacted in the states, it is easy to underestimate the importance of these federal developments—until, that is, one understands the particular political economy of the no-fault debate. Throughout the early to mid-1970s, the federal government, quite explicitly, used the specter (some said threat) of a robust federal no-fault bill to spur the states to act. As Senator Howard Baker warned: “if the States should fail to take meaningful action to rectify the glaring deficiencies of the present system, we should not fail to do so.”<sup>217</sup> Far from falling on deaf ears, this threat resonated

This is, therefore, a bad moment to be arguing for the virtues of no-fault compensation.

P.S. Atiyah, *No-Fault Compensation: A Question that Will Not Go Away*, 1980 *INS. L.J.* 625, 627–28 (1980).

213. LEMOV, *supra* note 210, at 163 (“The end of the consumer decade can be traced to 1978.”); PERTSCHUK, *supra* note 39, at 11 (suggesting that, by 1980, “the public-interest entrepreneurs appear to have lapsed into a state of political insolvency”); *see also* MEIER, *supra* note 26, at 122 (identifying 1978 as the “end of the contemporary consumer movement”); Ralph Nader, *The Trial Bar and the Public Interest*, *TRIAL LAW. Q.*, Fall 1988, at 7, 8 (“Legislation advancing the safety and health rights of Americans came to a halt in Congress by the late ’70s.”).

214. *Deaths Elsewhere*, *BALT. SUN*, Jan. 31, 2003, at 7B (providing Sen. Moss’s obituary).

215. Linda E. Demkovich, *The Cautious Approach of Cannon’s Commerce Committee*, *NAT’L J.*, May 27, 1978, at 846, 846 (discussing Sen. Hart’s December 1976 death).

216. *Chairman Cannon Looks at His Committee’s Role*, *NAT’L J.*, May 27, 1978, at 848, 848; *see also* Demkovich, *supra* note 215, at 846 (describing personnel changes in the Senate Commerce Committee).

217. *National No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 93d Cong. 57 (1973) (opening statement of Sen. Howard H. Baker); *see also Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 113 (1971) (statement of John A. Volpe, Secretary, DOT)

and was often repeated. The *Washington Post* reported, for example, that “an often-cited reason for passage of a bill in [Virginia’s] General Assembly has been that if the state doesn’t act, the federal government will.”<sup>218</sup> The California Bar President, generally opposed to no-fault, nevertheless called for passage of a no-fault plan in the Golden State, explaining: “We are very much concerned that unless a large state, such as California, adopts a modified no-fault plan, the federal legislation will pass.”<sup>219</sup> So too, a Utah newspaper editorial urged: “[U]nless the industry and the legal profession move soon Big Brother will surely be called in to do the job.”<sup>220</sup> When the threat posed by “Big Brother” disappeared, a potent argument in state reformers’ arsenal likewise vanished.

### B. *No-Fault and Enterprise Liability*

Second, as Kenneth Abraham has observed, the period when no-fault received its warmest reception was also a time when scholarly commentary, popular sentiment, legislative activity, and formal tort doctrine all evidenced something of a turning away from the fault principle. Inspired by the work of Leon Green, Fleming James, and other Legal Realists, the 1960s and early 1970s comprised the golden age of “enterprise liability”—the notion that business enterprises ought to be strictly liable for harm they cause<sup>221</sup>—and what Mark Rahdert calls the broader “insurance rationale”—the notion that some losses ought to be passed to defendants, not because of fault, but

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(agreeing that the federal government’s position was to convey to the states that, if they refused to pass no-fault legislation, “[f]ederal action may follow”).

218. Helen Dewar, *Legislature Spins Wheels*, WASH. POST, Mar. 11, 1973, at D1; see also *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 94th Cong. 596 (1975) (additional submission) (statement of Philip M. Sadler, President-Elect, Virginia State Bar, and N. Samuel Clifton, Executive Director, Virginia State Bar) (“[D]uring the last session of the [Virginia] General Assembly one of the most pervasive reasons for the passage of a no-fault bill was, ‘if we don’t do it now, Congress is going to do it for us.’”).

219. David K. Robinson, *President’s Message: No-Fault and the State Bar*, 47 CAL. ST. B.J., 286, 291 (1972).

220. Editorial, *Needed: A New Concept in Auto Insurance*, SALT LAKE TRIB., Nov. 13, 1967, at 14; see also Editorial, *The Coming of No-Fault Insurance*, MIAMI HERALD, June 25, 1971, at 6A (“To forestall Sen. Hart’s national legislation, the insurance companies will have to stop dragging their feet and get with it in the other 48 states.”).

221. See NOLAN & URSIN, *supra* note 39, at 116 (“Beginning in the 1960s, the enterprise liability theory triumphed . . .”); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985) (“By the mid-1950s, the theory of enterprise liability commanded almost complete support within the academic community . . .”).

simply because of their superior ability to bear and spread the loss.<sup>222</sup> During this era, there was broad agreement within academic circles that the principal goal of tort law was not to define rules, express moral values, correct injustices, or deter carelessness but, rather, to *compensate the injured*.<sup>223</sup> So defined, tort law's function was to shift and spread losses with as little friction as possible, and the fault requirement was little more than an antiquated and inconvenient impediment in tort law's path. The time was, in other words, ideally suited for no-fault to flourish.<sup>224</sup>

Commentary of the era, too, reflects a broad (although certainly not unanimous) sense that the fault principle had outlived its usefulness. In 1965, the President of Royal Globe Insurance Companies declared: "We live in a time when the idea is widely accepted that the injured party deserves redress or compensation, regardless of fault."<sup>225</sup> The following year, Professor Alfred F. Conard, a pioneer in auto accident scholarship, proclaimed: "We are heading toward a socialization of compensation for injuries."<sup>226</sup> And Franklin J. Marryott, Vice President and General Counsel of Liberty Mutual Insurance Company,

222. See generally MARK C. RAHDERT, *COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM* (1995). Rahdert explains that the term "insurance rationale" has a somewhat broader meaning than "enterprise liability" in that it refers, not only to profit-oriented business activities, but to

any entity that enjoys advantages in obtaining insurance against the risks of injury associated with its activities. Thus, the rationale extends to nonprofit charitable organizations, municipalities, drivers of motor vehicles, and even homeowners, all of whom . . . should be subject to liability in circumstances where they enjoy material advantages in their ability to insure against the risk of injury.

*Id.* at 199 n.37. See generally Jeffrey O'Connell & John Linehan, *Neo No-Fault Early Offers: A Workable Compromise Between First and Third-Party Insurance*, 41 GONZ. L. REV. 103, 106–11 (2005) (discussing the rise and fall of the insurance rationale). This story is not accepted everywhere. See Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 608 (1992) (contending that post-1960 doctrine was a consequence of judges taking negligence seriously and creating "[a] full regime of negligence liability").

223. See, e.g., BLUM & KALVEN, *supra* note 134, at 15 (writing in 1965: "The question frequently now heard is: 'By what arrangement can we most expeditiously maximize the shifting of losses?'""); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713, 715 (1965) ("Many recent writers have tended to focus on compensation as the main purpose of accident law."); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972) ("[T]he orthodox view is that the dominant purpose of civil liability for accidents is to compensate the victim for the medical expenses, loss of earnings, suffering, and other costs of the accident.").

224. See NOLAN & URSIN, *supra* note 39, at 155 ("[N]o-fault alternatives to tort law are an implementation . . . of the enterprise liability theory.").

225. *Special Report on the Industry's No. 1 Problem—Auto Claims*, INS. MGMT. REV., July 3, 1965, at 24 (quoting H. Clay Johnson, President of the Royal-Globe Insurance Companies).

226. Vanderwicken, *supra* note 101, at 161 (quoting Professor Alfred F. Conard, University of Michigan Law School).

published a piece in the *ABA Journal* documenting, in numerous contexts, fault's "losing battle with the quest for security."<sup>227</sup> A few years later, these ideas were taken to the public via *Fortune* magazine:

Americans are more and more coming to feel that anyone who is accidentally injured—whether in an automobile crash, through use of a defective product, or by a harassed doctor—should be compensated for his injury without having to go to court to prove who was at fault. There is a growing consensus that the risks of life should not be borne by the individual but should be spread through the society.<sup>228</sup>

Formal tort doctrine both spurred and reflected this shift. This turning away from the fault principle is best exemplified by the 1963 case, *Greenman v. Yuba Power Products, Inc.*, in which a unanimous California Supreme Court, led by Chief Justice Traynor, announced a standard of strict liability for personal injury caused by products.<sup>229</sup> The following year, the American Law Institute promulgated *Restatement* § 402A, basically enshrining the *Greenman* ruling, which, in something of a tidal wave, was soon accepted by forty-one states.<sup>230</sup>

Legislation of the era also exhibited an acute sensitivity to human welfare and endeavored to spread the cost of injury. Broadly, this was the era when Medicare and Medicaid came into being, in 1965. And more specifically, it was an era when a number of no-fault plans were created: In 1957, Congress passed the Price-Anderson Act—a no-fault compensation scheme for nuclear accident victims.<sup>231</sup> In 1969, Congress passed the Federal Coal Mine Health and Safety Act so “disabled miners and their families will not be deserted by our society in

227. Franklin J. Marryott, *The Tort System and Automobile Claims: Evaluating the Keeton-O'Connell Proposal*, 52 A.B.A. J. 639, 643 (1966).

228. Vanderwicken, *supra* note 101, at 161; *see also* Edward W. Kuhn, *In Defense of the Tort System*, 56 ILL. B.J. 106, 108 (1967) (documenting “the national trend to compensate or take care of misfortune of every kind and the victims thereof”); Knepper, *supra* note 110, at 514 (“There is an attitude in our society today that all victims of accident or misfortune should be compensated—regardless of fault.”); Ursula Vils, *Tort System Evolves to a Point of Reform*, L.A. TIMES, Feb. 24, 1977, at F1 (quoting Edward K. Hamilton of Stanford University, who noted “since the middle ‘60s” the “increasing sense among the population that serious injury ought to be compensated”). *See generally* LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985) (detailing, in various contexts, American’s “general expectation of recompense for injuries and loss”).

229. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

230. William Prosser famously observed that the strict liability cases represented “the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts.” WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 654 (4th ed. 1971).

231. Price-Anderson Act, Pub. L. No. 109-58, 119 Stat. 814 (codified at 42 U.S.C. § 2210). Under the Act, claimants must establish causation and proof of loss but need not establish fault. Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 955–56 (1993) (describing the scheme).

their hour of critical and justified personal need.”<sup>232</sup> And in 1965, California became the first state to enact a crime victims’ compensation program, soon followed by New York, Maryland, and Massachusetts.<sup>233</sup>

The ascendance of automobile no-fault, then, tracks quite neatly a discrete era when the compensatory goal of tort was king and, in a drive to offer that compensation, it looked as if the negligence system might be dismantled entirely, with a regime of strict or enterprise liability erected in its stead. But then, almost as quickly as the era dawned, it went into, as Rabin has observed, a state of “eclipse.”<sup>234</sup> In the mid-1970s, a perceived crisis in insurance rates triggered a backlash against expanding liability, and in 1975, California started the country on a long, tumultuous, and apparently unfinished path of tort “reform” by enacting the Medical Injury Compensation Reform Act, which raised various *barriers* to victim recovery.<sup>235</sup> At the same time, within academia, the law-and-economics movement gained ground, and Chicago School theorists drew attention to the deterrence goal of tort, which was quite incompatible with the no-fault idea.<sup>236</sup> By the late 1970s, within academe, the goal of accident *prevention*, rather than *compensation*, prevailed.<sup>237</sup> Around that time, corrective justice scholars also came to the fore, and these scholars—focused on righting wrongs and achieving moral redress—shared law-and-economics

232. Presidential Statement on Signing the Black Lung Benefits Act of 1972, PUB. PAPERS 608, 609 (May 20, 1972); *see also* Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (codified at 20 U.S.C. § 901).

233. William E. Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 JUDICATURE 485, 485 (1979); *see also* Glenn E. Floyd, *Victim Compensation Plans*, 55 A.B.A. J. 159, 159 (1969). By 1980, a total of twenty-eight states had enacted legislation to compensate the victims of crime. *See* Hoelzel, *supra*, at 485. To be sure, not all no-fault legislation was enacted in the identified two-decade time span. Some post-date it, considerably.

234. Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1208 (1996) (“For the present, [enterprise liability] is perhaps in a state of eclipse.”); *see also* NOLAN & URSIN, *supra* note 39, at 125 (“During the 1970s and 1980s, leading torts scholars turned away from both the common law and legislative versions of the enterprise liability theory.”); Gregory C. Keating, *The Theory of Enterprise Liability and Common Law Strict Liability*, 54 VAND. L. REV. 1285, 1291 (2001) (“[E]nterprise liability has come under sustained attack during the past twenty years . . .”).

235. CAL. CIV. CODE § 333.2 (West 2007).

236. *E.g.*, Posner, *supra* note 223, at 33 (“[T]he dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety.”); *see also* Schwartz, *supra* note 222, at 694 (“Within legal education, the law-and-economics movement began in earnest in the early 1970s, and by the mid-1970s had become an important force in American legal scholarship.”).

237. NOLAN & URSIN, *supra* note 39, at 147 (“When the no-fault movement came to a standstill in the late 1970s, economic analysis, focused ‘on liability’ incentives for the prevention of future ‘injuries,’ was left as ‘the generally prevailing scholarly theory about the appropriate role of tort law.’”).

scholars' dim view of the compensation principle.<sup>238</sup> Soon thereafter, formal doctrine joined in the retreat, as the drafters of the *Third Restatement of Torts* "restated" the test to be used in product warning and design cases in a way that returned those cases to what is essentially negligence.<sup>239</sup> No-fault lost momentum, then, in the late 1970s—just as strict liability, enterprise liability, and the insurance rationale lost their luster, and just as scholars and courts, perhaps unexpectedly, reasserted and trumpeted the primacy of fault.<sup>240</sup>

### C. *Sharply Rising and then Falling Auto Accident Fatalities*

Third, the mid-1960s coincided with a sharp uptick in the number of auto accident injuries and fatalities and also marked a period when a particularly gifted policy entrepreneur (in the form of Ralph Nader) and a particularly receptive president (in the form of Lyndon Johnson) thrust the auto accident problem into the national spotlight. From the Second World War until 1960, traffic deaths per miles traveled had consistently declined. But beginning in 1960, the fatality rate started to climb—and it did not soon stop, rising four of the next five years, which constituted the worst surge on record. Then starting in 1965, that surge—and the auto accident problem generally—slowly started to attract attention.<sup>241</sup> In February 1965, Senator Abraham Ribicoff, Chair of the Senate Governmental Operations Committee's Subcommittee on Executive Reorganization, announced that he would hold hearings on the "fantastic carnage" caused by automobiles;<sup>242</sup> in April of that year, a group of physicians picketed the New York Automobile Show, protesting "safety defects in current auto de-

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238. See *id.* at 147, 148. See generally Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989).

239. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998) ("Assessment of a product design in most instances requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That approach is also used in administering the traditional reasonableness standard in negligence.").

240. See RAHDERT, *supra* note 222, at 61 (stating that the "prominence" of the insurance rationale "has proven to be remarkably short-lived"); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 280 (Expanded ed. 2003) ("[A] negligence model of tort liability has proved unexpectedly robust . . . in the late twentieth century.").

241. See Jack L. Walker, *Setting the Agenda in the U.S. Senate: A Theory of Problem Selection*, 7 BRIT. J. POL. SCI. 423, 432–33 (1977) (stating that "the upward turn had attracted attention" providing "stark, unavoidable evidence that a major social problem existed").

242. See Patrick Anderson, *Ralph Nader, Crusader; Or, the Rise of a Self-Appointed Lobbyist*, N.Y. TIMES MAG., Oct. 29, 1967, at 25, 112 ("fantastic carnage"); NADEL, *supra* note 206, at 138 (Ribicoff hearings).

signs";<sup>243</sup> and in November, Ralph Nader's *Unsafe at Any Speed*, a scathing critique of the automobile industry, hit bookstore shelves.<sup>244</sup>

Then, what was a trickle of concern in 1965, in 1966, became a torrent.<sup>245</sup> In January 1966, President Lyndon Johnson made a one-sentence mention of highway safety in his State of the Union address, and it received, according to the *New York Times*, "almost as much publicity as anything else in the speech."<sup>246</sup> The next month, President Johnson went further—improbably declaring that, among the vexing problems confronting the nation, automobile accidents ranked second, behind only Vietnam.<sup>247</sup> "There is cause for sacrifice in Vietnam," President Johnson intoned, but "no excuse for suicide at home."<sup>248</sup> In the spring of that year (after General Motors made the unwise decision to investigate the young Nader and thus turned his story into a scandal), Nader's monograph started to sell—spending fifteen weeks on the *New York Times* bestseller list.<sup>249</sup> And most astonishing of all, in September 1966, Congress deemed the problem of auto accidents so dire that, under Senator Warren Magnuson's stewardship, it passed the National Traffic and Motor Vehicle Safety Act—for the first time regulating what was then the largest and most powerful industry in the United States—and it did so unanimously.<sup>250</sup>

Auto accidents and auto insurance, meanwhile, were both logically and rhetorically linked. In part, the rise of serious auto accidents actually made the auto-compensation problem worse: the more serious auto accidents there were, the more accident victims there were. To the extent victims remained *uncompensated*, the social problem grew

243. Joseph C. Ingraham, *Physicians Picket Automobile Show*, N.Y. TIMES, Apr. 8, 1965, at 34.

244. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

245. See Walker, *supra* note 241, at 434 (showing that 1966 witnessed a "massive upsurge" in news coverage of the auto accident problem).

246. Anderson, *supra* note 242, at 112.

247. Presidential Message, *supra* note 41, at 137. The message declared: "You and I know that the gravest problem before this nation—next to war in Vietnam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year." President Johnson further estimated that, within the next decade, the annual death rate might exceed 70,000. *Id.*

248. *Id.*

249. When originally published, *Unsafe at Any Speed* sold a mere 25,000 copies. Sales took off after the GM investigation broke, and the book graced the *New York Times* bestseller list from April 24 through July 17, 1966. See *N.Y. Times Bestseller List*, <http://nytbestsellerlist.com/list/decade/1960>; see also NADEL, *supra* note 206, at 141 (describing GM's investigation and its aftermath).

250. See The National Motor Vehicle Safety Act of 1966, Pub. L. No. 97-449, 96 Stat. 2418 (codified at 49 U.S.C. § 301); see also MASHAW & HARFST, *supra* note 2, at 7. At the time, the automobile industry reportedly employed, either directly or indirectly, one in six Americans. Traffic Safety Act of 1966, S. REP. NO. 89-1301, at 2 (1966).

more dire. Conversely, to the extent more accident victims *were* compensated, premiums rose and the court congestion problem became more critical.<sup>251</sup> And in part, the rise of serious accidents rhetorically assisted reformers' cause: Both problems, some claimed, were simultaneously spiraling out of control and demanding attention. As Daniel Patrick Moynihan wrote in the *New York Times Magazine* in 1967:

The problem [with automobile insurance] is precisely parallel to that of automobile safety. The system is not working well as such, and its secondary effects are wasteful and expensive. On either ground change is in order, and given both, change is as near to urgent as a world of competing sorrows will permit.<sup>252</sup>

Or as Senator Magnuson, fresh off steering the Auto Safety bill toward its unanimous passage, declared in 1967: "Just as we developed reasonable and responsible programs to combat the growing death toll on our nation's highways, we must also devise programs . . . guaranteeing full and fair insurance coverage to every American motorist."<sup>253</sup>

Yet, as the following graph shows, auto accident fatalities peaked in 1966—the very year legislators were spurred to action. And then fatalities plummeted. The reasons for the decline are numerous and overlapping. They include dramatically improved automobile and highway design;<sup>254</sup> enactment of state laws cracking down on drunk driving and requiring seatbelts and child restraints;<sup>255</sup> and increased urbanization, which reduces vehicle speed and thus accident severity.<sup>256</sup> But whatever the reason or reasons, since the mid-1960s, as the

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251. See Daniel P. Moynihan, *Next: A New Auto Insurance Policy*, N.Y. TIMES MAG., Aug. 27, 1967, at 26, 76 ("The number of accidents goes up and up, and so does the number of claims and counterclaims.").

252. *Id.*

253. Warren G. Magnuson, *Probe of Abuses*, TRIAL, Oct.–Nov. 1967, at 14, 15.

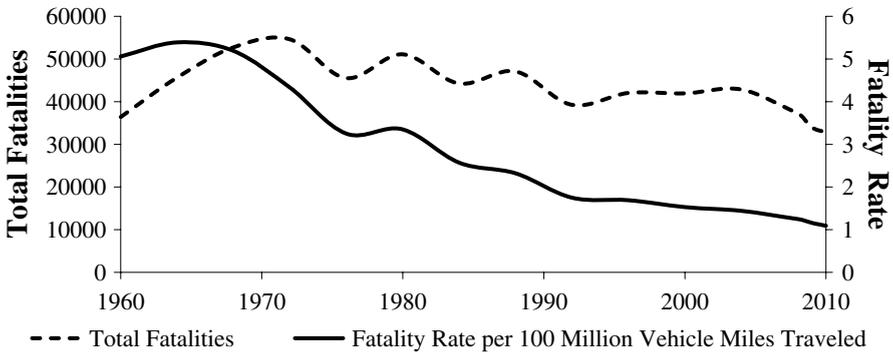
254. See Michael Cooper, *Happy Motoring: Traffic Deaths at 61-Year Low*, N.Y. TIMES, Apr. 1, 2011, at A15 (describing advances in automobile and road design). According to one NHTSA report, changes to vehicle design—including the introduction of collapsible steering wheels, laminated windshields, padded dashboards, energy-absorbing fronts, over-the-shoulder seatbelts, adjustable head rests, and front and side airbags—saved an estimated 328,551 lives from 1960 through 2002. CHARLES J. KAHANE, NHTSA, LIVES SAVED BY THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS AND OTHER VEHICLE SAFETY TECHNOLOGIES, 1960–2002 (2004), available at <http://www.nhtsa.gov/cars/rules/regrev/evaluate/pdf/809833Part1.pdf>.

255. New York enacted the first seat belt use law in 1984; all states (save New Hampshire) enacted laws by 1995. NHTSA, 2008 DECLINE, *supra* note 3, at 14. Tennessee enacted the first child safety law in 1978; by 1985, all states had followed suit. *Id.*

256. See *Auto Insurance Reform: Hearings Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 36–37 (1999) (statement of Ralph Nader, Consumer Advocate, Center for Responsive Law, and Harvey Rosenfield, President, Foundation for Taxpayer and Consumer Rights) (mentioning urbanization, among other reasons, for the decline in accident frequency and severity).

graph shows below, auto accident fatalities have dropped precipitously, both as an absolute matter and particularly when adjusted for miles traveled.<sup>257</sup>

MOTOR VEHICLE TRAFFIC FATALITIES 1960 TO 2010  
(PROVIDED BY TOTAL FATALITIES AND RATE PER  
100 MILLION MILES TRAVELED)



Sources: NHTSA, 2008 DECLINE, *supra* note 3, at 27; NHTSA, EARLY ESTIMATE OF MOTOR VEHICLE TRAFFIC FATALITIES IN 2010, at 1 (2011).

In other words, in both absolute and relative terms, the problem of auto accidents had simply become less dire. And just as mounting fatalities created momentum for no-fault legislation, plummeting fatalities likely took some of the wind out of reformers' sails.

#### D. Gaps Closed, Alleged Excesses Curbed

Finally, no-fault gained momentum at a time when there was increasing impatience with both the limits and excesses of traditional tort. In terms of limits, no-fault's ascendance marked a time when there was increasing frustration with the fact many needy accident claimants went wholly uncompensated. And in terms of tort's excesses, no-fault's ascendance marked a time when there was significant frustration with court congestion (reportedly traceable to too much automobile litigation) and mounting, allegedly exorbitant, payments for noneconomic loss. Since the mid-1960s, however, these concerns have also diminished.

257. NHTSA, 2008 DECLINE, *supra* note 3, at 27; NHTSA, EARLY ESTIMATE OF MOTOR VEHICLE TRAFFIC FATALITIES IN 2010, at 1 (2011).

### 1. Fewer Uncompensated

First, the need for no-fault had long been premised on the fact auto accidents took a tremendous, and too-often uncompensated, toll. No-fault thus promised to narrow the “gaps in the fabric of compensation for auto-related accidents.”<sup>258</sup> But between 1965 and the late 1970s when no-fault lost momentum, for reasons explained below, gaps in compensation had considerably narrowed, draining momentum from the no-fault movement.<sup>259</sup>

#### a. Broader Compensation Through Tort: Compulsory Liability Insurance and Liberalization of Doctrine

In 1971, the DOT study, which became the factual template on which no-fault reformers ultimately drew, found that less than half (only about 45%) of those seriously injured or killed in auto accidents received *any* benefit from the tort liability system.<sup>260</sup> Thereafter, this fact was seized on quickly and repeatedly endlessly, as tort’s incomplete compensation of the injured became a resonant rallying cry for no-fault supporters.<sup>261</sup> Yet, since the time of this critique, two changes have made it easier for drivers to recover.

First, when no-fault was initially debated, only three states—New York, North Carolina, and Massachusetts—required drivers to purchase liability insurance.<sup>262</sup> A number of states added compulsory

258. ABRAHAM, *supra* note 21, at 99.

259. *See id.* at 99–100 (discussing broader compensation’s fact and effect); Gary T. Schwartz, Foreword, *Tort Scholarship*, 73 CALIF. L. REV. 548, 550 (1985) (“By the mid-1970s . . . a non-trivial floor had been established that deprived compensation proposals much of their urgency.”); *see, e.g., National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. 354 Before the S. Comm. on Commerce*, 94th Cong. 144 (1975) (statement of Burton Johnson, Chairman, No-Fault Committee of the Oklahoma Bar Association) (suggesting that no-fault was losing momentum because other sources of payment, such as MedPay, Medicare, and Social Security, were increasingly available to reduce economic hardship following automobile accidents); Thomas F. Lambert, Jr., *Seeing the ’70s—Anticipations in Automobile Law in the ’70s*, 1970 A.B.A. SEC. INS. NEGL. & COMP. L. PROC. 478, 510 (“I believe that with the liability and solvency gaps progressively closing, the sharp break with the traditional tort system represented by the various auto compensation plans is unnecessary and should be earnestly resisted.”).

260. DOT 1971 REPORT, *supra* note 82, at 35. Injured persons were classified as “seriously injured” if they self-reported that they had (1) been hospitalized for two weeks or more; (2) incurred \$500 or more in non-hospital medical costs; or (3) missed three weeks of work or, if not working, six weeks or more of normal activities. *Id.* at 2. Of all claimants, about 47.7% received some tort recovery. *Id.* at 47.

261. *See* ABA, *supra* note 137, at 13 (“It is difficult to find any advocacy of changes in automobile insurance . . . that does not mention the DOT’s finding[] that: Only 45% of all those killed or seriously injured in auto accidents benefited in any way under the tort liability system.”).

262. The remaining states had financial responsibility laws, which, as Robert Joost has explained, “are a little like the dog-bite laws; you may get the ‘first bite’ free, but after that you

insurance in the early 1970s, however, and today, liability insurance is almost uniformly compulsory. And though compulsory insurance has not rid the roads of uninsured motorists as effectively as many had hoped, now marginally more at-fault drivers are insured (and thus equipped to pay damages) for the injuries they cause—which logically increases compensation.<sup>263</sup>

Second, formal tort doctrine has itself liberalized considerably: Starting in earnest in the late 1960s, whether by legislative action or judicial fiat, a number of liability-limiting common law doctrines met their demise. Most notably, from 1969 through the early 1980s, thirty-seven states replaced contributory negligence (wherein, at least formally, any fault on the plaintiff's part barred her recovery) with the more lenient comparative negligence,<sup>264</sup> which, a RAND study found, at least modestly expands the pool of compensated claimants.<sup>265</sup> Other liability-limiting doctrines were also abolished. In 1969, Vermont initiated the modern move to jettison guest statutes—which had previously barred passengers from suing drivers for mere negligence. By 1985, the move to repeal was almost complete, as guest statutes were retained in only five jurisdictions.<sup>266</sup> During the same period,

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have to have liability insurance." *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 907 (1971) (statement of Robert H. Joost). For more on financial responsibility laws, see KEETON & O'CONNELL, *supra* note 52, at 102–09.

263. At the time no-fault was debated, it was believed that compulsory insurance would "go a long way towards filling some of the [coverage] gaps." H. Laurence Ross, *A Review Article on Basic Protection for the Traffic Victim*, 34 J. RISK & INS. 647, 651 (1967) (book review). When it comes to filling gaps, however, compulsory insurance has been something of a disappointment. The proportion of motorists without insurance has, it appears, declined—but only marginally. Compare DOT 1971 REPORT, *supra* note 82, at 28 (estimating that 15%–20% of drivers were uninsured in 1967), with INS. INFO. INST., THE INSURANCE FACT BOOK 2010, at 68 (2011) (estimating that 13.8% of drivers were uninsured in 2007).

264. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 228 (1990).

265. Prior to the formal shift, it was widely believed that juries, in administering contributory negligence rules, in fact, employed something resembling an under-the-table comparative negligence regime. See, e.g., *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1230–32 (Cal. 1975) (recognizing this belief); Malone, *supra* note 128, at 20, 27 ("Every practicing lawyer in a common law state knows that if the jury gets the issue of contributory negligence, it will probably ignore the plaintiff's fault, except as a factor to be considered in reducing the amount of the verdict."). And, it was said that insurers did much the same. See COLUMBIA REPORT, *supra* note 53, at 203. Yet, a RAND study nevertheless suggests that adopting comparative negligence did modestly increase the proportion of compensated plaintiffs. 1 JOHN E. ROLPH ET AL., RAND, AUTOMOBILE ACCIDENT COMPENSATION: WHO PAYS HOW MUCH HOW SOON? 18 (1985).

266. Guest statutes, which existed at one time or another in most states, were initially enacted between 1927 and 1939, with backing by the insurance industry. Their stated aim was to deter collusive actions and to protect drivers from lawsuits by ungrateful guests and (given the Depression-era lineage) particularly to keep hitchhikers from profiting from drivers' largesse. Guest statutes fell out of favor in the second half of the twentieth century. The modern, legisla-

intrafamily, spousal, governmental, and charitable immunities were also widely discarded.<sup>267</sup>

And, indeed, it is here—in examining *why* the above changes came about in the late 1960s and early 1970s—that an as-yet underappreciated irony in the rise and fall of no-fault is laid bare. In advocating no-fault, as already noted, proponents highlighted tort's incomplete compensation of the injured as a ground for jettisoning the tort system in the automobile context.<sup>268</sup> No-fault's opponents, meanwhile, seized on this critique and ran with it. They wholeheartedly agreed with proponents' diagnosis (compensation through tort *was* too spotty) but disagreed with proponents' proposed cure. No-fault's opponents, that is, insisted that compulsory liability insurance and the liberalization of tort doctrine—rather than its brute elimination—was the appropriate response.<sup>269</sup> The debate over no-fault thus helped to kindle a wide-ranging debate about the need for compulsory liability insurance as well as the need to dismantle various liability-limiting doctrines.

And though it might be too much to say that no-fault *caused* the adoption of compulsory liability insurance and the toppling of traditional tort doctrines—especially because all these developments took place against the backdrop of the enterprise liability era, with its own focus on compensation and momentum for change—it would certainly be wrong to view these developments in a vacuum. Indeed, some no-fault legislation simultaneously—in the same act—eliminated the

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tive move to repeal began in Vermont in 1969. The Florida legislature followed suit in 1972, and the next year California's Supreme Court declared its statute unconstitutional. By 1985, the drive to repeal was nearly complete; guest statutes were retained in only five jurisdictions. Stanley W. Widger, Jr., Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659 (1974). Guest statutes were particularly incompatible with no-fault, as they affected only auto claims and, after no-fault, passengers could recover automatically, irrespective of the driver's negligence.

267. J.L.W., Commentary, *Alabama's Automobile Guest Statute: The Edsel Lives!*, 33 ALA. L. REV. 143, 154–57 (1981) (cataloging the “recent trends” to abrogate traditional tort immunities); cf. KEETON & O'CONNELL, *supra* note 52, at 26 (stating that, even by 1965, these immunities were “on the wane—especially that of charities”).

268. See *supra* notes 260–61 and accompanying text.

269. E.g., ABA, *supra* note 137, at 18–19, 71 (suggesting that, if there is a desire to broaden coverage, states should abolish “the remaining tort immunities,” enact compulsory insurance, and adopt comparative negligence); *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 1639, 1641 (1971) (statement of Joe W. Henry, President, Tennessee Bar Association) (suggesting that “gaps in compensation” should be plugged by abolishing the doctrine of contributory negligence and certain immunities without toppling the “House of Tort”); Jacob D. Fuchsberg, *Economic Burden and Social Injustice Seen in W.C. System for Auto Claims*, TRIAL, Oct.–Nov. 1965, at 28, 30 (stating that, instead of jettisoning fault entirely, “comparative negligence, the rule now in only a handful of our states, should be made universal”).

common law doctrines referenced above.<sup>270</sup> Other states that did not enact no-fault, meanwhile, reported that they had, instead, addressed the problem no-fault reformers identified by repealing guest statutes and switching to comparative negligence, thereby removing impediments to tort recovery.<sup>271</sup> It was while enacting no-fault that eleven states, for the first time, passed legislation making automobile liability insurance compulsory.<sup>272</sup> It was a discussion of no-fault that prompted some insurers—who had long fiercely defended contribu-

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270. Connecticut simultaneously enacted no-fault, while repealing contributory negligence, 1972 Conn. Acts 438 (Reg. Sess.), amended by 1973 Conn. Acts 1458 (Reg. Sess.), and South Carolina's add-on no-fault statute also eradicated contributory negligence for auto claims, as well as intrafamily tort immunity. See 1974 S.C. Acts 2718. There were also near misses. For example, Ohio's House passed a no-fault bill (which did not become law), which simultaneously repealed the state's guest statute and enacted comparative negligence. *No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 262 (1973) (statement of Walter C. Beall, Executive Committee Member, Ohio State Bar Association). California's Assembly also passed a no-fault bill, which simultaneously abolished contributory negligence, but it too failed to win Senate passage. Dian Dickson Ogilvie, Comment, *Judicial Activism in Tort Reform: The Guest Statute Exemplar and a Proposal for Comparative Negligence*, 21 UCLA L. REV. 1566, 1610 n.201 (1974). The timing of other no-fault enactments suggests a close connection. For example, the Oregon Governor signed a bill enacting no-fault on June 28, 1971, and a bill enacting comparative negligence on the 30th. See OR. REV. STAT. § 742.520 (2009) (no-fault); OR. REV. STAT. § 31.600 (2009) (comparative negligence). And, in one busy month, between February 18, 1974 and March 14, 1974, the Kansas legislature adopted no-fault, repealed its host-guest statute, and enacted comparative negligence. See Linda L. Pfalzgraf, Note, *No-Fault Automobile Insurance: An Analysis of the Kansas Automobile Injury Reparation Act*, 20 WASHBURN L.J. 375, 405 (1980-1981) ("In Kansas . . . the repeal of the guest statute and the enactment of comparative negligence coincided with the adoption of no-fault." (footnote omitted)).

271. The Texas State Bar, for example, successfully sponsored legislation in 1973 to abolish contributory negligence and repeal the state's host-guest statute and thereby "bring[] swifter and more complete remedies to persons sustaining automobile accident injuries in the State." According to the State Bar's former president: "Instead of closing the courthouse door to recovery of compensation for injuries in automobile accident cases . . . the Texas statute broadens the right of recovery in a civilized and humane way . . ." *No-Fault Motor Vehicle Insurance (Part I): Hearings on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 476 (1974) (statement of Leroy Jeffers, former President, State Bar of Texas); *No-Fault Motor Vehicle Insurance (Part II): Hearings on H.R. 4994 and Others Before the H. Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 570 (1971) (statement of W. James Kronzer, Jr., Texas Trial Lawyers Association) ("[W]e in Texas keenly appreciate the efforts of the Congress and the Department of Transportation, for without these herculean efforts to clean up the 'Augean Stables' we would still be confronted with an archaic pure contributory negligence system."). Texas was not alone in seeing passage of pure comparative negligence as a way to deflect calls for no-fault. See *Vincent v. Pabst Brewing Co.*, 177 N.W.2d 513, 521 (Wis. 1970) (Hallows, C.J., dissenting) ("What I do fear is that if the doctrine of pure comparative negligence is not adopted, the whole fault system in torts will be repudiated and a no-fault system akin to workmen's compensation adopted.").

272. The states making automobile liability insurance compulsory were Colorado, Connecticut, Delaware, Georgia, Hawaii, Kansas, Kentucky, Minnesota, New Jersey, North Dakota, and Pennsylvania. DOT, 1985 FOLLOW-UP, *supra* note 90, at 17.

tory negligence—to change their tune.<sup>273</sup> And perhaps most important of all, it was while opposing no-fault that the ABA went on record supporting comparative negligence for the first time.<sup>274</sup>

Contemporaneous observers, meanwhile, were not shy about drawing the causal arrow. Writing in 1978, U.S. Representative Robert Krueger asserted: “State no-fault proposals, by all accounts, inspired the impetus of reform legislation (such as the elimination of guest statutes) in the last decade.”<sup>275</sup> In 1970, the president of ATLA called the new consensus in favor of jettisoning contributory negligence, “one good thing” that had come out of the no-fault furor.<sup>276</sup> And even more assertively, two commentators declared in 1973: “The recent legislative reforms of modified comparative negligence . . . and modification of the ‘guest statute’ are a direct outgrowth of the earlier ‘no-fault insurance’ proposals.”<sup>277</sup> A provocative possibility, then, is that the most enduring legacy of the no-fault movement in the United States was not the adoption of no-fault per se but the liberalization of traditional tort that the debate over no-fault helped to inspire.

But the irony cuts deeper still. The debate surrounding no-fault shone a harsh spotlight on tort’s selectivity, and in the glare, many liability-limiting doctrines met their demise. Compensation *was* ultimately expanded. Though precise statistics tracking doctrinal changes alongside compensation rates are not available, it is revealing that

273. See *Automobile Insurance Reform and Cost Savings: Hearings on S. 945 and Others Before the S. Comm. on Commerce*, 92d Cong. 475 (1971) (statement of Robert V. McGowan, President, National Association of Mutual Insurance Agents) (“We strongly urge the adoption of the Wisconsin comparative negligence rule wherever practical.”); *No-Fault Motor Vehicle Insurance (Part II): Hearings on H.R. 4994 and Others Before the H. Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 92d Cong. 613 (1971) (statement of André Maisonpierre, Vice President, AMIA) (advocating comparative negligence as part of a sweeping proposal). For insurers’ historic resistance, see Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 697 n.5 (1978) (“Auto liability insurers had traditionally resisted comparative negligence proposals. But by 1970, with auto no-fault plans looming, many insurers threw their support behind comparative negligence in an effort to expand the existing liability system so as to make it less vulnerable to the no-fault challenge.”).

274. See Marryott, *supra* note 112, at 82–83.

275. Krueger, *supra* note 207, at 25.

276. Leon L. Wolfstone, *Foreword to COMPARATIVE NEGLIGENCE: THE ATL MONOGRAPH SERIES* (William Schwartz ed., 1970).

277. Frank T. Abraham & Don R. Riddle, *Comparative Negligence—A New Horizon*, 25 BAYLOR L. REV. 411, 411 (1973); see also John G. Fleming, *Foreword, Comparative Negligence at Last—by Judicial Choice*, 64 CALIF. L. REV. 239, 239–40 (1976) (drawing a causal link between no-fault and the adoption of comparative negligence); John W. Wade, *Comparative Negligence—Its Development in the United States and Its Present Status in Louisiana*, 40 LA. L. REV. 299, 303–04 (1980) (same); Henry Woods, *The New Kansas Comparative Negligence Act—An Idea Whose Time Has Come*, 14 WASHBURN L.J. 1, 3 (1975) (“[B]etween 1969 and 1974 twenty states adopted some form of comparative negligence. Much of the impetus undoubtedly arose from the threat of so-called ‘no-fault’ automobile accident statutes.”).

52% of all accident victims (not just those seriously injured), received no recovery under the tort liability system according to the DOT's 1971 study.<sup>278</sup> Twenty years later (and when counting payments under uninsured motorist coverage), RAND reported that the number had dropped almost in half, to less than 30%—with the single largest category of uncompensated victims injured in single car accidents.<sup>279</sup>

b. Broader First-Party Coverage: Expansion of First-Party Insurance

As Kenneth Abraham and Gary Schwartz have observed, the 1970s witnessed not just an expansion of third-party coverage and compensation (through the tort system). It also witnessed a broad expansion of first-party coverage and compensation from both private and public sources, also reducing the force of the undercompensation critique.<sup>280</sup>

For starters, during the late 1960s and 1970s three distinct types of first-party auto insurance—MedPay, uninsured, and underinsured—appear to have expanded. First, MedPay coverage, which, as noted earlier, is a first-party coverage that provides limited (typically less than \$10,000) in guaranteed compensation for medical bills or funeral expenses, was, by 1975, widely available and frequently purchased, excluded from less than 15% of policies.<sup>281</sup>

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278. See DOT 1971 REPORT, *supra* note 82, at 36.

279. CARROLL ET AL., *supra* note 162, at 200 (reporting that, in the traditional system, 72.8% recovered something through third-party compensation); see also *id.* at 24 (noting, in a model comparing a no-fault plan (with a strong verbal threshold) with traditional tort, “the proportion of injured who suffered some economic loss but received no compensation is about the same”); Kinzler, *supra* note 26, at 15 (offering this comparison between RAND and DOT data); cf. BLUM & KALVEN, *supra* note 134, at 4 (“[I]f we add to the common law both compulsory liability insurance and comparative negligence . . . we end up with a negligence system under which the vast majority of victims recover something, albeit not promptly.”).

280. See ABRAHAM, *supra* note 21, at 99 (“By the time no-fault was being most hotly debated in the mid-1970s, . . . other important and substantial sources of insurance were increasingly available to compensate the victims of auto accidents for their medical expenses and lost wages.”); Schwartz, *supra* note 259, at 550 (“By the mid-1970s . . . a nontrivial floor had been established that deprived compensation proposals of much of their urgency.”).

281. MedPay coverage was apparently invented in the late 1930s because of “a felt need that victims of automobile accidents should be compensated . . . regardless of legal fault and more quickly.” *Medical Payments Coverage in the Standard Automobile Accident Liability Policy*, 1952 INS. L.J. 514, 514. For the proportion of insureds with MedPay coverage, see, for example, *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 432 (1975) (letter from Lionel Van Deerlin, Chairman, Subcommittee on Consumer Protection and Finance to Donald P. McHugh, Vice President and General Counsel, State Farm Mutual Automobile Insurance Company) (reporting that roughly 90% of policyholders carry MedPay coverage).

Second, insurers voluntarily developed uninsured motorist coverage in 1955 to compensate policyholders for losses (both economic and noneconomic) in the event a policyholder's claim against an at-fault driver could not be satisfied.<sup>282</sup> Within two decades of its invention, uninsured motorist coverage became an integral part of the auto insurance package, with forty-nine states requiring it to be at least offered and a substantial minority going further and making it compulsory.<sup>283</sup> Whether by choice or by law, by 1972, a State Farm representative reported that over 92% of its policyholders carried such coverage—meaning that, for almost all policyholders, the nagging problem of the insolvent tortfeasor had been mostly eliminated.<sup>284</sup>

Finally, invented in the late 1960s, underinsured motorist coverage also spread—often providing benefits equal to the difference between the tortfeasor's liability insurance limits and (within certain limits) the victim's loss.<sup>285</sup> In the early 1970s, according to one knowledgeable observer, underinsured-motorist insurance “barely existed” and “wasn't even part of our discussion.”<sup>286</sup> Not so in later years. By 1980, twenty-one states had enacted legislation requiring that insurers at least offer underinsured motorist protection,<sup>287</sup> and by 1990, the vast majority of jurisdictions had done so.<sup>288</sup>

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282. See 1 ALAN I. WIDISS, *UNINSURED AND UNDERINSURED MOTORIST INSURANCE* §§ 1.10–1.11 (2d ed. 1999) (recounting the invention of uninsured motorist coverage).

283. Gary T. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L.J. 419, 422 (1987). Indeed, when enacting no-fault, four states (Maryland, Minnesota, New Jersey, and Kentucky) simultaneously made uninsured motorist insurance compulsory, required that underinsured coverage be at least offered, or both. DOT, 1985 FOLLOW-UP, *supra* note 90, at 18.

284. Hume, *supra* note 27, at 347; see also Jeffrey O'Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, in *THE ECONOMICS AND POLITICS OF CHOICE NO-FAULT INSURANCE*, *supra* note 19, at 191, 207–08 & n.52 (showing that, by 1984, nearly all motorists were covered by uninsured motorist protection).

285. See JOOST, *supra* note 79, § 1:12; see also *Better Car Insurance Coming*, U.S. NEWS & WORLD REP., July 8, 1968, at 60, 62 (stating that underinsured motorist coverage is a “new type of protection” that “is being tried out”). Contemporary observers recognized that the invention of underinsured motorist protection might reduce the need for no-fault insurance by making “available to everyone even more protection than the no-fault advocates desire.” *E.g.*, Henry A. Hentemann, *Underinsured Motorist Coverage; A New Coverage with New Problems*, 50 INS. COUNS. J. 365, 365 (1983) (stating that a new Ohio law (effective in June 1980), “which mandated the offering of underinsured motorist coverage . . . could well be the death-knell for no-fault insurance in the state”).

286. Kinzler Interview, *supra* note 80.

287. Michael S. Miller, Comment, *Redefining Underinsured Motorist Coverage in Ohio*, 44 OHIO ST. L.J. 771, 773 (1983).

288. Martin J. Huelsmann & William G. Knoebel, *Underinsured Motorists: An Evolving Insurance Concern*, 17 N. KY. L. REV. 417, 421 & n.19 (1990).

Non-automobile first-party insurance has also grown considerably. Congress enacted Medicare and Medicaid in 1965—the very year *Basic Protection* went to press. By 1970, the programs were doling out roughly \$7 billion each year and paying most of the medical bills for the elderly, the poor, and many of the disabled.<sup>289</sup> Further expanding the social safety net, between the mid-1960s and mid-1970s, private health insurance also became much more widely available. This fact was not lost on no-fault's opponents, and indeed, by the mid-1970s, they had taken to reeling off health insurance statistics to argue “that the hysteria for change which prompted the DOT study is greatly diminished.”<sup>290</sup> To make the case, opponents most effectively showcased a 1977 article in *U.S. News & World Report*, which showed that between 1966 and 1976, the proportion of the American populace covered by private health insurance increased substantially (from 70% to 90%), while “[b]enefits paid by this insurance . . . more than tripled.”<sup>291</sup>

## 2. Identified “Excesses” Alleviated

Just as the gaps in compensation that so troubled no-fault proponents had, by the late 1970s, somewhat narrowed, identified *excesses* in the tort system—specifically, the clogging of courts and the allegedly excessive award of noneconomic damages—had also been curbed.

### a. Reduced Court Congestion

Between 1955 and 1970, the number of auto lawsuits increased by 50%.<sup>292</sup> And, in some jurisdictions by the mid-1970s, auto accident cases had proliferated to the point where they reportedly accounted for half—or, according to some, more than half—of state court civil

289. ABRAHAM, *supra* note 21, at 86.

290. *National Standards No-Fault Motor Vehicle Insurance Act: Hearings on S. Before the S. Comm. on Commerce*, 94th Cong. 161 (1975) (statement of James D. Fellers, President, ABA); see also *No-Fault Insurance: Hearings on S. 354 Before the S. Comm. on the Judiciary*, 93d Cong. 1115 (1974) (statement of Leonard Ring, ATLA) (documenting the “steady annual increase in the number and percentage of persons covered [by health insurance policies] every year for the past decade”).

291. *State No-Fault Automobile Insurance Experiences: Hearings Before the H. Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 542 (1977) (statement of William F. Blews, President, Academy of Florida Trial Lawyers) (citing *Nearly 9 out of 10 Americans Are Covered by Private Health Insurance Now*, U.S. NEWS & WORLD REP., Mar. 28, 1977, at 45).

292. 1 SELWYN ENZER, SOME IMPACTS OF NO-FAULT AUTOMOBILE INSURANCE—A TECHNOLOGY ASSESSMENT 88 (1974).

dockets.<sup>293</sup> This growth fed the often-articulated belief that the auto accident situation had grown untenable. The Massachusetts Supreme Court, for example, referred to motor vehicle claims as “a cancer.”<sup>294</sup> And the “choking”<sup>295</sup> of court calendars, and the concomitant freeing of courts “from their bondage to the automobile”<sup>296</sup> via no-fault legislation, thus became yet another no-fault reformer rallying cry.<sup>297</sup>

Yet, here too, we see that, though the data are admittedly sparse, there is some reason to believe that the problem no-fault proponents identified was alleviated about the time the no-fault movement stalled. Data suggest that, during the 1970s, auto accident litigation was on the decline. Between 1970 and 1974, for example, 48% of civil trials in San Francisco involved auto accidents. Between 1975 and 1979, that number dropped to 43%. And between 1980 and 1984, the number dropped further still, to 35%.<sup>298</sup> Cook County, Illinois trial data also show a drop from 76% in 1970–1974 to 59% in 1980–1984.<sup>299</sup> Likewise, between 1975 and 1985, auto cases comprised a declining fraction of California tort filings, comprising 65% of tort filings in 1975–1976 and only 43% in 1984–1985.<sup>300</sup>

More recent data suggest the decline continued. For example, a 1987 RAND study concluded: “Auto accident cases are a steady or declining percentage of court action.”<sup>301</sup> The study reviewed court filings in five state courts between 1980 and 1985, and reported: Auto

293. See, e.g., *Pinnick v. Cleary*, 271 N.E.2d 592, 603 (Mass. 1971) (reporting that, in 1967 in Massachusetts, of 34,730 civil cases pending in Superior Courts, the vast majority (23,279) involved motor vehicles); Robert E. Keeton, *The Plan Presented: Elimination of Fault Principle and Collateral Benefits Keys to Basic Protection*, TRIAL, Oct.–Nov. 1967, at 15, 16 (“Typically automobile accident cases are two-thirds or more of a court’s civil jury docket.”); John A. Hamilton, *How to Pay for 15,000,000 Auto Accidents a Year*, N.Y. TIMES MAG., May 10, 1970, at 32, 34 (quoting Richard E. Stewart, New York State Superintendent of Insurance, as stating that the “110,000 automobile liability cases now pending” in New York courts comprised “about half of the total civil docket”); Moynihan, *supra* note 251, at 80 (“[A]ccident litigation accounts for an estimated 65 to 80 per cent of the total civil court cases tried in the United States.”).

294. *Pinnick v. Cleary*, 271 N.E.2d 592, 604 (Mass. 1971).

295. KEETON & O’CONNELL, *supra* note 52, at 15.

296. STATE OF N.Y. INS. DEP’T, *supra* note 86, at 123.

297. See, e.g., Moynihan, *supra* note 251, at 26 (blaming “the system of accident insurance and claims litigation” for “steadily paralyzing the American legal system”); Editorial, *No Fault: The Time Has Come*, *supra* note 13 (supporting strong federal no-fault legislation, in part, because no-fault promised to “free[] the courts of a case load that has become almost intolerable”); Vanderwicken, *supra* note 101, at 174 (“Perhaps the weightiest criticism of the present reparations system is that it is a major factor in clogging the courts.”).

298. DEBORAH R. HENSLER ET AL., RAND, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 9 (1987).

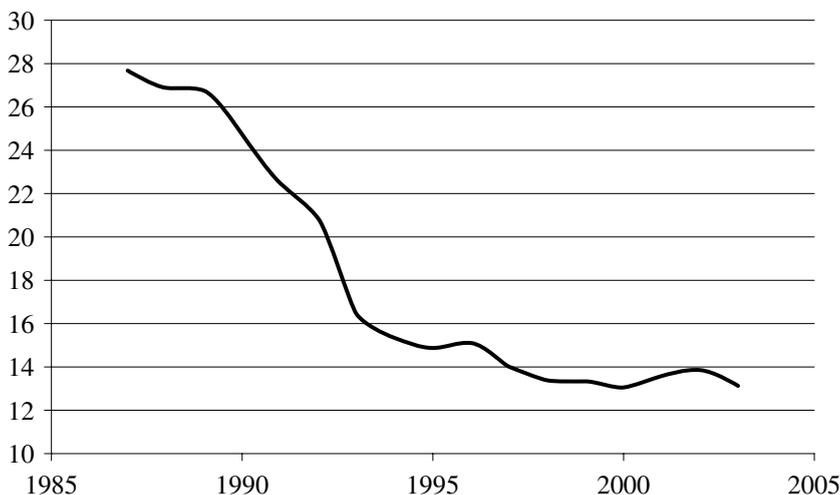
299. *Id.*

300. *Id.* at 8 tbl.2.1.

301. *Id.* at 11.

cases comprised 61% of tort filings in 1980 and only 55% in 1985.<sup>302</sup> The Bureau of Justice Statistics reported that the number of automobile accident trials concluded in the nation's seventy-five most populous counties decreased by 29% from 1996 to 2005.<sup>303</sup> A study by the National Center for State Courts similarly found that automobile state court filings declined between 1992 and 2001, a nontrivial 14%.<sup>304</sup> And a recent RAND study tracked per capita auto lawsuit filings in North Carolina, California, and Arizona between 1985 and 2003 and reported the following dramatic decline:

NEW AUTO FILINGS PER 10,000 RESIDENTS  
NORTH CAROLINA, CALIFORNIA, AND ARIZONA



Source: ANDERSON ET AL., *supra* note 4, at 95 fig.5.2, amended to reveal only tort states (using data from the National Center for State Court Processing Statistics Data), reprinted with permission.<sup>305</sup>

302. *Id.* at 8. The five states studied were California, Hawaii, Maryland, Michigan, and Texas.

303. THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 12 (2009).

304. The study considered seventeen states, representing 53% of the U.S. population. See NAT'L CTR. FOR THE STUDY OF STATE COURTS, EXAMINING THE WORK OF STATE COURTS: TORT AND CONTRACT, 2002, at 26 (2003), available at [http://www.ncsconline.org/D\\_Research/csp/2002\\_Files/2002\\_Tort\\_Contract.pdf](http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Tort_Contract.pdf). *But cf.* ANDERSON ET AL., *supra* note 4, at 93 (showing that the percentage of civil cases disposed by trial involving automobiles increased between 1992 and 2001 in tort states).

305. Anderson and co-authors report the following about their selection of California, Arizona, and North Carolina:

This set of states does not represent any selection on our part, but rather includes all of the no-fault and tort states that consistently reported auto case data to the National Center for State Courts. Examining the states individually reveals that, among the tort

In sum, though the data are admittedly time-limited, partial, and fragmentary, it seems likely that the “clogging the courts” claim was less true by the late 1970s than it had been previously—and that the share of court business devoted to auto cases has, since the early 1970s, markedly diminished.

#### b. Less in Noneconomic Damages

During the early 1960s, while court filings were on the rise, damages in auto cases were also rising, leading the *Insurance Management Review* to issue a “special report” on “the Industry’s No. 1 Problem—Auto Claims.”<sup>306</sup> An overcompensation critique was thus coined, and it quickly centered on the allegedly excessive payment for noneconomic loss, particularly for relatively minor injuries.<sup>307</sup> Yet, this too is an area where the purported excesses of the tort system have been substantially alleviated.<sup>308</sup> As the table below indicates, noneconomic damages are shrinking, with the average bodily injury payment per dollar of economic loss dropping from \$2.29 in 1977 (the first year the IRC collected such data) to \$1.65 in 1997, a reduction of nearly 28%. Or, as Jeffrey O’Connell noted in 1999, “the tort system as the years go by is paying less and less for noneconomic loss and more and more for only economic loss,”<sup>309</sup> which is, of course, a change that no-fault reformers had long advocated and desired.

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states, California and Arizona exhibited declining trends, while North Carolina exhibited a stable trend.

ANDERSON ET AL., *supra* note 4, at 94 n.16. Interestingly, Arizona and California have both taken steps to reduce accident litigation. For a discussion of Arizona’s efforts to reduce litigation, including mandatory court-annexed arbitration, see *The Auto Choice Reform Act, Hearing on S.625 Before the S. Comm. on Commerce, Sci., and Transp.*, 105th Cong. 35–41 (1998) (statement of Michael R. Perry, Esq., Carnahan & Perry, PLC, Phoenix, Arizona). In 1996, California’s voters adopted a referendum to disqualify uninsured motorists from collecting noneconomic damages—which would, it appears, also have the effect of reducing those individuals’ incentive to sue. CAL. CIV. CODE § 3333.4(a) (West 1997).

306. *Special Report on the Industry’s No. 1 Problem—Auto Claims*, *supra* note 225, at 23, 25 (quoting Jury Verdict Research report); *id.* at 27 (reporting that verdicts in cervical strain cases rose 57% between 1960 and 1964).

307. See *No-Fault Motor Vehicle Insurance (pt. I): Hearings on H.R. 10 and Others Before the H. Subcomm. on Commerce and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 93d Cong. 90 (statement of John A. Volpe, Secretary, DOT) (“We believe that recovery for general or intangible damages should be drastically limited and carefully circumscribed.”).

308. When adjusted for inflation, the median jury trial award for an automobile accident case fell a full 56.8%, from \$37,000 in 1992 to \$16,000 in 2001. THOMAS H. COHEN & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 9 (2004).

309. *Auto Insurance Reform: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 82 (1999) (statement of Jeffrey O’Connell, Professor of Law, University of Virginia Law School).

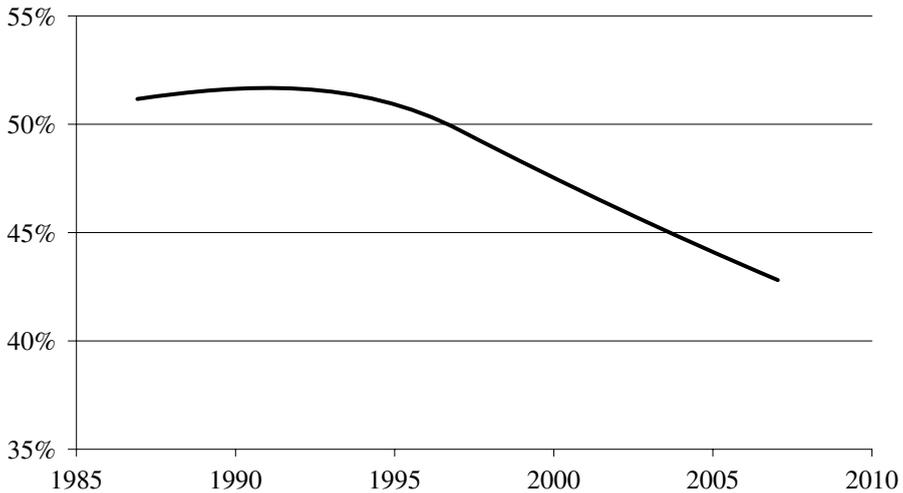
AVERAGE BODILY INJURY PAYMENT PER DOLLAR OF ECONOMIC LOSS BY YEAR

1977	1987	1992	1997
\$2.29	\$2.11	\$1.87	\$1.65

Source: IRC, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS 7 fig.1.4 (1999).

And here, the point is conveyed graphically, with data from 1985 through 2007: In tort states, noneconomic damages have declined sharply as a share of total payments.

NONECONOMIC DAMAGES AS A SHARE OF TOTAL PAYMENTS: TORT STATES



Source: ANDERSON ET AL., supra note 4, at 116 fig.5.12 (amended to reveal only tort data) (using data from the IRC), reprinted with permission.

V. ADVERSARIAL EQUILIBRIUM

To this point, I have mined a variety of primary sources to attempt to enrich conventional accounts for why no-fault fizzled and also situate the no-fault experiment within a larger socio-legal framework. In this Part, I step back to view the no-fault experience not in isolation but as an exemplar of what may be a larger story about the evolution, and ultimate convergence, of legal regimes over time. In particular, I suggest a tentative but intriguing possibility: When operating in parallel, even systems with very different formal rules may shed their excesses and patch their limits to gradually meet at a point I call the adversarial equilibrium. That shedding and patching may be precisely

what happened here. And, that shedding and patching might provide a clue to a final puzzle: not why the no-fault movement initially stalled in the late 1970s, as much of the convergence did not become evident until much later, but instead, why more recent attempts to revitalize the no-fault idea (including in California, Arizona, Rhode Island, and also at the federal level) have all failed.<sup>310</sup>

We take as a starting point the observation that automobile no-fault plans have become, by virtually any measure, gradually less effective over time.<sup>311</sup> In nearly every state, the costs of no-fault have progressively risen, and, more important for our present purposes, no-fault's benefits (whether in deterring fraud, limiting third-party claims, reducing court congestion, or curbing lawyer retention) have progressively diminished. *Why* did no-fault's benefits erode over time? In large part the answer is simple. Most states limited access to the tort system via monetary thresholds, and, except in Hawaii, these thresholds were not indexed for inflation. As time went by, they became easier to pierce. As more thresholds were pierced, more claims were routed to the tort system, with the costs, delays, and inefficiencies that that entails.<sup>312</sup> Fair enough, but this explanation is also incomplete. The reason why some states with *verbal* thresholds, which are not susceptible to monetary inflation, have seen thresholds erode, bodily injury claims rise, and fraud mount for example, remains something of a mystery.<sup>313</sup>

Likewise, it is also true that, over the past three decades, the tort system in the automobile context has become gradually less selective in its compensation, less generous in its awards, and less adversarial in

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310. No-fault was on California's ballot in 1988 and 1996. A choice no-fault measure was on Arizona's ballot in 1990. Choice no-fault legislation was considered (and rejected) on multiple occasions in the Rhode Island legislature in the early 1990s. And there was finally a serious, bipartisan campaign to enact federal choice no-fault legislation in the late 1990s. Those attempts all failed. To be sure, no-fault's opponents did not focus their critique on the points that follow; they were largely focused on no-fault's unexpectedly high cost, explored in Part III. But, while opposing federal no-fault, some congressional witnesses did note that (1) tort had itself changed in the intervening decades and (2) the test of time had revealed that no-fault was susceptible to some of the same abuses as the tort system. *See infra* notes 327 and 330. Moreover, congressional testimony from the 1990s is at times revealing for what it does not include. Early no-fault advocates focused heavily on the need to alleviate court congestion and remedy tort's incomplete compensation of the injured. By the late 1990s, these claims were scarce.

311. Recall that, when first enacted, most no-fault plans were seen as great successes. *See supra* notes 114–19 and accompanying text. It was only later that thresholds became easier to pierce, the cost of no-fault soared, the retention of lawyers nearly doubled, fraud increased, and bodily injury lawsuits rose.

312. *See* LOUGHRAN, *supra* note 18, at 10 (highlighting the erosion between 1977 and 1997).

313. In New York, the number of bodily injury claims per 100 property damage claims increased from 11.5 in 1980 to 16.3 in 1993; in Michigan it increased from 5.8 in 1980 to 8.2 in 1993; in Florida it increased from 9.5 in 1980 to 19.1 in 1993. IRC, *supra* note 192, at 14.

its operation. Again, two of these three trends are susceptible to any number of micro explanations. In Part IV.D., I suggested that broader compensation is traceable (at least in part) to the widespread adoption of compulsory liability insurance and the demise of host-guest statutes, common law immunities, and contributory negligence. So too, declining noneconomic damages can be traced to a swirl of factors, including bodily injury liability limits lagging behind inflation, the enactment of formal tort reform measures (particularly caps on noneconomic damages), and various groups' aggressive and insistent tort reform-related publicity campaigns.<sup>314</sup> But still, there are puzzles. A convincing explanation for the overall drop in automobile lawsuits, for example, remains elusive.

The adversarial equilibrium idea provides a possible explanation for the above anomalies. It takes as its point of departure Professor John Witt's "convergence thesis." Specifically, Witt has observed that, for "mature torts"—torts in which the law is relatively settled and in which injuries recur in clustered fact patterns (so, automobile cases fit nicely)—"tort practice converges with the practice of publicly administered systems such as workers' compensation."<sup>315</sup> Drawing principally on his work with Samuel Issacharoff and also on H. Laurence Ross's classic study of insurance claim adjustment, Witt writes: "Both [tort practice and publicly administered systems] are organized around bureaucratic administration. Both adopt rules rather than

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314. As noted in the text, when considering why noneconomic damages have dropped as a share of total payments, possibilities abound. One partial explanation is that bodily injury liability limits, which, in practical terms typically define the scope of recovery, *see supra* note 122, have not kept pace with inflation. IRC data show that 52% of all policyholders carry \$50,000 or less of liability insurance (with most of such policyholders carrying \$25,000 or less). Given rising medical costs, such limits leave little for noneconomic loss. IRC, *INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS* 104 (1999). Other explanations are that, by the late 1970s, the tort reform movement had started to assert itself and a slew of formal tort reform measures—alongside tort-reform-related publicity campaigns—influenced the ability and the willingness of juries to award large judgments. *See* Kenneth S. Abraham, *Stable Divisions of Authority*, 44 *WAKE FOREST L. REV.* 963, 965 (2009) (discussing various trends); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO. J. LEGAL ETHICS* 1485, 1528 & n.282 (2009) (same). Most notably a number of states have capped noneconomic damages, which, according to two researchers, corresponds to a substantial decrease in claim size. Mark J. Browne & Robert Puelz, *Statutory Rules, Attorney Involvement, and Automobile Liability Claims*, 63 *J. RISK & INS.* 77, 79–80 (1996) (analyzing bodily injury liability claims from twenty-one states and finding that caps on noneconomic damages correspond to a decrease in claim size by 62% and limits on punitive damages decrease claim size by 40%).

315. Witt, *supra* note 43, at 268. As noted in the text, to support his convergence thesis, Witt principally draws on Ross, *supra* note 174, and Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 *VAND. L. REV.* 1571, 1571 (2004).

standards to facilitate the claims processing; both construct grids to measure the damages that arise out of routine injuries.”<sup>316</sup>

Witt’s thesis is provocative, but I submit that, at least in the automobile context, it does not go far enough. While Witt suggests that the on-the-ground *process* of settling automobile claims in fault and no-fault regimes is destined to converge, I suggest that the bird’s-eye-view *product* of claims adjustment in fault and no-fault states *has converged* over time. In recent decades, the claiming practices in tort states have become less adversarial (as we see a rising tide of claims but paradoxically fewer filed lawsuits),<sup>317</sup> and compensation has become simultaneously broader and yet shallower, meaning that more accident victims recover but, when it comes to noneconomic damages, victims tend to recover less.<sup>318</sup> There has been a shift, in other words, toward something that more closely resembles a no-fault scheme. All the while, no-fault states have exhibited much the opposite. Over the years, no-fault states have exhibited a decisive trend toward adversarialism: more pierced thresholds, more bodily injury claims, more lawsuits, and more lawyers. When judged by the proportion of claimants who recover, the amount they recover, who they recover from, the legitimacy of the claims they are recovering for, and the processes claimants use to obtain that recovery, the two systems that have such different formal rules have, in operation, reached some kind of adversarial equilibrium. Tugged toward that adversarial equilibrium, no-fault’s vaunted benefits—and also, I hasten to add, tort’s limits and excesses—have faded over time.

Consider first the *breadth* of compensation. A significant reason for no-fault, its supporters long claimed, was that the tort system was too selective in its compensation, providing nothing to the majority of those hurt.<sup>319</sup> No more. By 1985, the Department of Transportation reported to Congress that “[m]odifications have been made [to the tort system] that have had the effect of reducing the role of fault in the system and thus permitting more and more auto accident victims to obtain compensation.”<sup>320</sup> “In most states today,” the report contin-

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316. Witt, *supra* note 43, at 268–69.

317. See Mark J. Browne & Joan T. Schmit, Patterns in Personal Automobile Third-Party Bodily Injury Litigation: 1977–1997, at 16 (Sept. 2, 2004) (unpublished manuscript), available at <http://ssrn.com/abstract=588481>.

318. See IRC, *supra* note 176, at 25 (noting a “steady increase in bodily injury liability claim frequency from 1980 to 1993”); STEPHEN CARROLL ET AL., RAND, THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES 2 (1995) (comparing data from 1980 and 1991 and finding that “[d]rivers who have accidents are more prone to submit claims”).

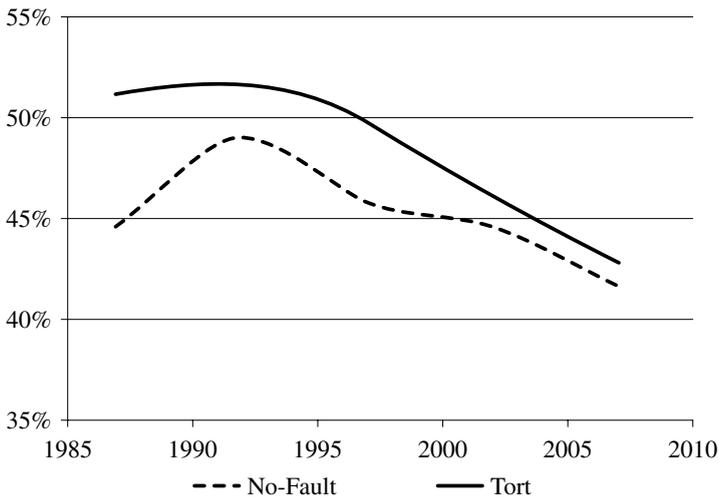
319. See *supra* notes 260–61 and accompanying text.

320. DOT, 1985 FOLLOW-UP, *supra* note 90, at 8.

ued, "injury victims represented by attorneys have a good chance of recovering at least some compensation in all but single-car accidents."<sup>321</sup> Indeed, IRC consumer-survey data reveal that, between 1998 and 2002, those in tort states recovered 79.7% of their economic loss following car wrecks, while those in no-fault states recovered 85.7%.<sup>322</sup> Those in no-fault states received, in other words, a little bit more—but the gap between the two systems had closed considerably.

The *composition* of compensation (meaning the allocation between economic and noneconomic damages) in fault and no-fault regimes has also become more similar. Recall that a goal of no-fault was to eliminate noneconomic damages for the vast majority of claims.<sup>323</sup> But now, the two systems pay almost the same in noneconomic damages, as a share of total payments.

NONECONOMIC DAMAGES AS A SHARE OF TOTAL PAYMENTS  
NO-FAULT VERSUS TORT



Source: ANDERSON ET AL., *supra* note 4, at 116 fig.5.12 (amended to reveal only tort and no-fault data) (using data from the IRC), reprinted with permission.

Automobile lawsuit filing rates reveal much the same. Recall that an important goal of no-fault, from its inception, was to alleviate court congestion,<sup>324</sup> and note too that it is widely believed that verbal thresholds—more robust than dollar thresholds—do this best. Moreover, by all accounts, when Florida, Michigan, and New York first im-

321. *Id.* at 12.

322. See ANDERSON ET AL., *supra* note 4, at 87.

323. See *supra* note 307 and accompanying text.

324. See *supra* notes 292–97 and accompanying text.

plemented verbal thresholds, a precipitous drop in automobile lawsuit filings soon followed.<sup>325</sup> For example, according to a 1984 report by the New York State Insurance Department, New York's verbal threshold (enacted in 1977) "resulted in a reduction in tort actions over the 1974 level of almost 80%."<sup>326</sup>

Yet the next graph compares automobile lawsuit filing rates in three states with the strongest verbal thresholds (Florida, Michigan, and New York) with the filing rates in the three tort states (California, Arizona, and North Carolina) we considered earlier. And it reveals something surprising. Around 1993, the auto filing rates in the two systems not only converged, but they actually *crossed*. Florida, Michigan, and New York have strong verbal thresholds limiting access to the tort system yet more per capita auto filings than three states where auto claims sound in traditional tort.<sup>327</sup>

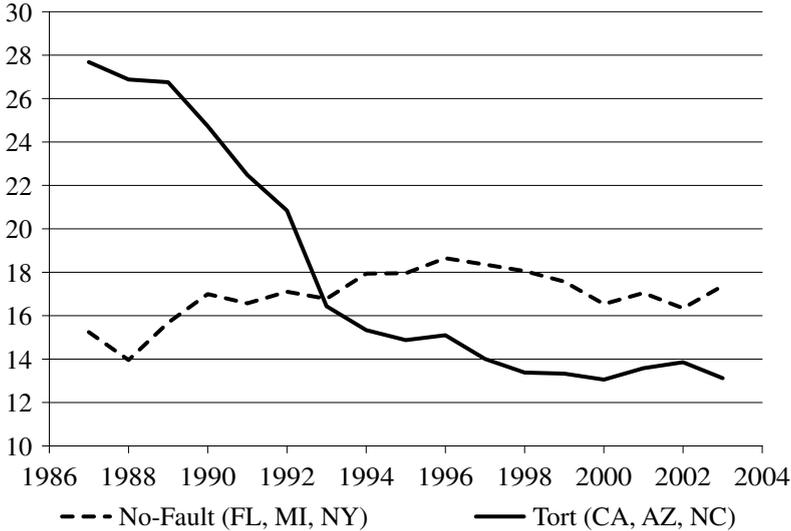
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325. DOT, 1985 FOLLOW-UP, *supra* note 90, at 113–15 (discussing steep drops in automobile lawsuit filings in Florida, Michigan, and New York soon after verbal thresholds were enacted). Other states also saw significant drops in case filings following no-fault's enactment. *See, e.g.*, DOT, 1971–1977, *supra* note 80, at 46–50 (providing Massachusetts court data from 1964 through 1975 and concluding that "the magnitude of the decline in motor vehicle tort cases [was] surprisingly large").

326. *See* DOT, 1985 FOLLOW-UP, *supra* note 90, at 115 (quoting Letter from N.Y. Dep't of Ins. to the DOT (Jan. 20, 1984)).

327. *See* ANDERSON ET AL., *supra* note 4, at xv ("[W]hile no-fault states had lower levels of litigation activity . . . in the 1980s than did tort states, by 2007, the two systems had largely converged on these characteristics."); *id.* at 96 (concluding that "no-fault's advantage at minimizing litigation has eroded over time"). And indeed, opponents highlighted no-fault's unproven ability to "reduc[e] . . . court cases and court costs" while testifying against choice no-fault in the late 1990s. *Auto Insurance Reform: Hearings Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 32 (1999) (statement of Ralph Nader, Consumer Advocate, Center for Responsive Law, and Harvey Rosenfield, President, Foundation for Taxpayer and Consumer Rights).

NEW AUTO FILINGS PER 10,000 RESIDENTS  
IN SELECT TORT AND NO-FAULT STATES



Source: ANDERSON ET AL., *supra* note 4, at 95 fig.5.2 (amended to reveal only tort and no-fault data), reprinted with permission. For information about the underlying data, see *id.* at 95.

Attorney retention data are similar. At the time no-fault was enacted, it was assumed that no-fault processes would be so simple that relatively few claimants would retain lawyers. But data reproduced below reveal that, between 1977 and 1997, the percentage of PIP claimants represented by attorneys nearly doubled, from 17% to 31%, while the percentage of bodily injury claimants retaining counsel has stayed roughly the same, meaning—once again—that the distance between the two systems has shrunk considerably.<sup>328</sup>

328. Most PIP claimants who hired attorneys reported that they did so in order to help with a PIP claim while also pursuing an associated tort claim. Only 10% of PIP claimants reported that help with a first-party claim was the sole reason for an attorney's involvement (although for an additional 23% of claimants, the purpose of attorney hiring was unknown). IRC, AUTO INJURY INSURANCE CLAIMS: COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION 61 (2008); see also ANDERSON ET AL., *supra* note 4, at 94 (stating that "there was a statistically significant increase in the use of lawyers in no-fault . . . states during the 1990s" although attorney involvement in tort states "was stable").

PERCENT OF CLAIMANTS REPRESENTED BY  
ATTORNEYS BY COVERAGE

Year	1977	1987	1992	1997	2002	2007
<b>Bodily Injury</b>	47	55	57	52	47	49
<b>PIP</b>	17	31	31	30	28	31

*Sources:* IRC, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS, 58 fig.6.2 (1999); IRC, AUTO INJURY INSURANCE CLAIMS: COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION 51 (2008).

Finally, the incidence of fraud continues this now-familiar pattern. Recall that when no-fault was first enacted, it was touted as a way to “minimize inducements to dishonesty.”<sup>329</sup> No-fault proponents suggested both that eliminating noneconomic damages would reduce the incentive to build one’s claim and that the ongoing, first-party relationship between the insurer and policyholder would give both parties “good reason to conduct themselves honestly and fairly.”<sup>330</sup> Recall too that soon after no-fault was adopted, there were promising indications that the reform had worked; fraud, observers believed, was on the wane.<sup>331</sup>

But now, when we consider a hallmark of fraudulent claiming—seeking compensation for hard-to-verify soft-tissue injuries—the two systems, fault and no-fault, again converge.<sup>332</sup> Though claims seeking compensation for soft-tissue injuries were, in 1987, much less prevalent in no-fault states than they were in tort states, between 1987 and 2007, the gap between the two systems closed dramatically.<sup>333</sup>

329. KEETON & O’CONNELL, *supra* note 52, at 6.

330. Alfred F. Conard, *Insurance Rates and Regulations*, U. MICH. L. QUADRANGLE NOTES, Fall 1970, at 14, 16 (suggesting that, because they have an ongoing relationship, a benefit of no-fault insurance “will be a diminution in the shameless efforts of claimants to claim too much and of insurers to pay too little”); *see also id.* at 17 (“People who will exaggerate a claim against somebody else’s insurer will be a lot more careful against their own, knowing that their losses simply escalate their own insurance premiums (instead of somebody else’s premiums.)”).

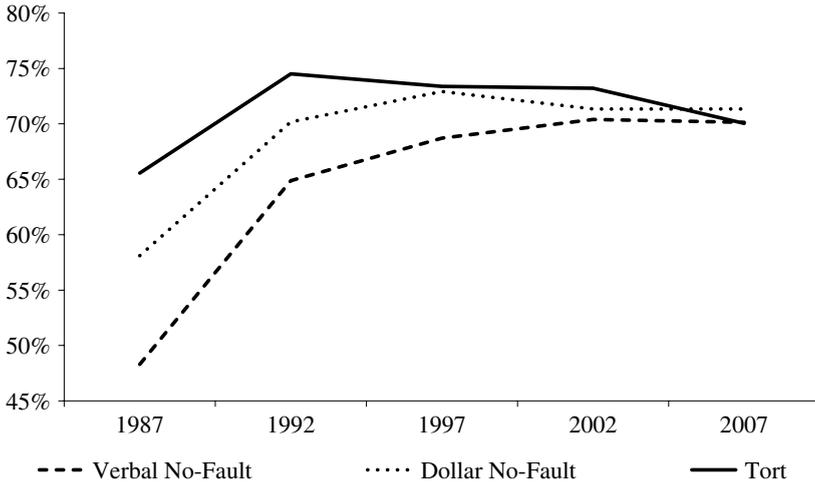
331. *See supra* note 177–79 and accompanying text.

332. Fraud is, of course, impossible to measure in any direct fashion. To get at it, researchers identify and measure “fraud indicators.” One important fraud indicator, explored below, considers the incidence of claims for soft-tissue injuries (mostly sprains and strains), which are exceedingly difficult to verify. Other fraud indicators are the incidence of claimed losses just above tort thresholds and use of certain medical providers (such as chiropractors). For more on researchers’ attempts to measure the incidence of fraud, *see* ANDERSON ET AL., *supra* note 4, at 98–99.

333. Indeed, by 2008, the IRC published a study with the following conclusion: “The incidence of apparent fraud in tort states was much lower than the incidence in no-fault states.” IRC, FRAUD AND BUILDUP IN AUTO INJURY INSURANCE CLAIMS 22 (2008). No-fault’s susceptibility to fraud was becoming evident even by the late 1990s. Indeed, in the 1997 Senate hearings, one witness from Georgia warned the Senators:

There’s a lesson here: no matter what proponents tell you about insurance fraud, no-fault will not do anything to control it. On the contrary, no-fault is to insurance fraud what octane level is to gasoline: the more no-fault you have, the greater the fraud. It

PERCENTAGE OF CLAIMS WITH HARD-TO-VERIFY INJURIES:  
NO-FAULT (VERBAL AND DOLLAR THRESHOLDS) VERSUS TORT



Source: ANDERSON ET AL., *supra* note 4, at 107 fig.5.7 (using data from the IRC), amended to reveal only fault and no-fault data; reprinted with permission.<sup>334</sup>

In sum, whatever the precise manner or mechanism, no-fault and tort—the two systems that look so different on paper and that engendered such bitter controversy at enactment—have become progressively more and more alike.<sup>335</sup> This convergence raises provocative questions about no-fault's legacy and tort's durability—and, as decades passed, may have chilled efforts to embark on bold reform.

## VI. CONCLUSION

Writing in 1975, Jeffrey O'Connell declared: "No-fault automobile insurance seems finally to have come of age. No army of trial attorneys or timid insurance executives will likely stop it now."<sup>336</sup> Within

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came as little surprise to me that when Georgia repealed no-fault, some medical providers who had participated in gaming Georgia's system moved to Florida, which has a generous no-fault system.

*The Auto Choice Reform Act of 1997, Hearing Before the Senate Comm. on Commerce, Sci. and Transp.*, 105th Cong. 83 (1997) (statement of Tim Ryles, former Insurance Commissioner, State of Georgia).

334. Anderson and his co-authors explain: "Our regression analysis controls for the time, location (urban/rural), vehicle count, impact severity, and reported injury severity of the accident, as well as age, gender, marital status, seat-belt use, and seat position of the victim." ANDERSON ET AL., *supra* note 4, at 106.

335. In a future paper I intend to explore the adversarial equilibrium idea in more detail to speculate on what mechanisms may be causing the observed trends and also probe whether the idea is generalizable.

336. O'CONNELL, *supra* note 115, at 70.

two years, though, the auto no-fault movement had stalled, if not for forever, for at least half a century—a fact that has profound implications for insurance markets and auto accident litigation, of course, but also for tort law generally, because if auto no-fault *had* been a roaring success, it is surely possible that additional alternative compensation schemes would have followed. Why, then, did no-fault stumble?

For one, “[l]ike hangover cures, campaign pledges and the rotary engine, no-fault automobile insurance may have promised more than it possibly could deliver.”<sup>337</sup> Easily lost in no-fault post-mortems is that the legislation was by no means an unmitigated failure. It *did* achieve a number of its stated goals. By all accounts, PIP payments help to level the playing field between claimants and insurers, tiding claimants over so they can obtain adequate awards. Under no-fault, “[t]here is no more incentive to settle at a bargain price a substantial liability claim because the man’s medical expenses are paid, his work loss is paid, and he will insist upon full value for his claims.”<sup>338</sup> Relieving claimants from coerced settlements is—one could certainly argue—a proud accomplishment. No-fault also speeds compensation—by an average of two months according to a RAND estimate.<sup>339</sup> Another RAND study found that “[n]o-fault approaches to compensation always reduce transaction costs, regardless of plan provisions.”<sup>340</sup> And a 2010 RAND study reports that claimant satisfaction in no-fault states is a little bit higher.<sup>341</sup> If such advances had been proponents’ primary aims, the no-fault landscape might look much less bleak. But that path was not taken. In part, I suggest, to shoehorn no-fault legislation within the vigorous consumer movement, many no-fault advocates promised rate reductions. And because of any number of factors outlined above, including insurers’ fateful insistence on being primary payers, rates went up—which surely did not help reformers’ cause.

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337. Tom Goldstein, *No-Fault Insurance Promised More than It Has Delivered*, N.Y. TIMES, Apr. 3, 1977, at 6.

338. *No-Fault Motor Vehicle Insurance: Hearings on H.R. 285 and Others Before the H. Subcomm. on Consumer Prot. and Fin. of the H. Comm. on Interstate and Foreign Commerce*, 94th Cong. 501 (1975) (statement of Patrick Chidness, Vice Chairman, Florida Bar No-Fault Insurance Committee).

339. STEPHEN J. CARROLL & JAMES S. KAKALIK, RAND, NO-FAULT AUTOMOBILE INSURANCE: A POLICY PERSPECTIVE 9 (1991) (“Injured people begin receiving payments on average about two months sooner under no-fault than under the traditional system.”); see also DOT, 1985 FOLLOW-UP, *supra* note 90, at 4 (“Compensation payments under no-fault insurance are made far more swiftly than under traditional auto insurance.”).

340. CARROLL ET AL., *supra* note 162, at 43; see also DOT, 1985 FOLLOW-UP, *supra* note 90, at 4 (“No-fault insurance systems pay a greater percentage of premium income to injured claimants than do traditional liability systems.”).

341. ANDERSON ET AL., *supra* note 4, at 91.

But to lay the blame for no-fault's demise only at the feet of soaring premiums, plaintiffs' lawyers' staunch resistance, or proponents' over-the-top promises misses an important part of the story. In order to understand why no-fault suddenly gained and then lost momentum we must not only assess no-fault on the merits. We must, as Robert Rabin has suggested, situate the no-fault movement within a broader socio-legal framework. So situated, it becomes clear that the no-fault era represents a time when Professors Keeton and O'Connell, two gifted and indefatigable policy entrepreneurs, thrust the idea of no-fault onto the national stage just as four factors coalesced to open a unique policy window for its enactment. It was the dawn of the public interest era; within tort doctrine, enterprise liability reigned; it was a time of rapidly rising auto accident fatalities; and there was deep dissatisfaction with the limits and apparent excesses of traditional tort. As each factor, for its own reasons, ebbed, no-fault's fade was arguably inevitable.

Finally, the no-fault movement, I suggest, was stung by what I call the adversarial equilibrium. Throughout the late 1970s and early 1980s, and partly because no-fault proponents' harsh critique of the status quo generated momentum for change, the tort system's gaps were patched and its excesses were curbed. The tort system was no longer as selective in its compensation, profligate in its payouts, or adversarial in its operation as early no-fault proponents had suggested. At the same time, as years went by, it became increasingly clear that no-fault did not represent as profound a departure from the tort system as it had initially appeared to be. Over time, in other words, the two systems that looked so different in theory became progressively more alike in operation—making the case to jettison one in favor of the other decidedly more difficult.

