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None for the Road: Addressing the Problem of Uninsured Vehicles and Drivers in Arkansas

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NONE FOR THE ROAD: ADDRESSING THE PROBLEM OF UNINSURED VEHICLES AND DRIVERS IN ARKANSAS

Philip D. Oliver[*]

I. INTRODUCTION

The legislatures of all states have enacted statutes whose goal is to assure, by varying means, that owners and drivers of vehicles will be able to respond in damages in case of accidents for which they are legally responsible.[1] Most states require liability insurance for all vehicles.[2] Subject to certain exceptions, Arkansas does so as well.[3]

Effective enforcement of compulsory insurance laws has proved to be difficult. Nationwide,[4] and in Arkansas, a large percentage of vehicles on the road are operated in violation of financial responsibility statutes. This article

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This article arose from my work with the Arkansas Bar Association Committee on Tort Law. Arising from its charge to "study . . . laws relating to personal injury . . . [and recommend] actions to promote justice," the Committee is concerned about the problem addressed in the article. The views expressed, however, are my own, and not necessarily those of the Committee. (In particular, I strongly suspect that my comments concerning significant modification of the tort system applicable to traffic accidents, *infra* at notes 68-89 and accompanying text, are *not* consistent with the Committee's views.)

1. The statutes can be divided into two principal types—compulsory insurance statutes and financial security statutes. "The difference between compulsory and 'security-type' insurance is that 'security-type' insurance requires security only after an accident has occurred, or where the operator is classified as a 'habitual offender.'" Thomas C. Cady & Christy Hardin Smith, *West Virginia's Automobile Insurance Policy Laws: A Practitioner's Guide*, 97 W. VA. L. REV. 583, 589 (1995).

2. Classification of particular statutes can vary. Professor Cady and Ms. Smith stated in 1995 that 26 states "make automobile liability insurance compulsory." *See id.* at 591 n.30. The following year, a student commentator classified 40 states and the District of Columbia as having "enacted compulsory automobile insurance statutes," and two more as having "some compulsory liability features." *See* Joel P. Williams, Note, *Insurance Law—Protecting the Public Under Maryland's Compulsory Motor Vehicle Insurance Scheme: The Abrogation of an Insurer's Common-Law Right to Void an Insurance Contract Ab Initio for a Material Misrepresentation in the Policy Application*, 25 U. BALT. L. REV. 289, 296-97 n.53 (1996).

Arkansas, which is omitted from the Cody & Smith list, but included in the Williams note, demonstrates the problem of classification. Arkansas requires liability insurance, but allows for certificates of self-insurance in relatively narrow circumstances. *See infra* notes 14-17 and accompanying text.

3. *See infra* notes 11-17 and accompanying text.

4. The problem is by no means unique to Arkansas. For example, the California Legislature found in 1996 that at least 28 percent of vehicles are in violation of that state's financial security laws. *See* 1996 CA. STAT. (1)(c).

examines the effectiveness of current Arkansas law, and considers alternatives. While the primary goal is to recommend appropriate measures for the State of Arkansas, extensive reference will be made to the laws and experiences of other states.

Certain measures could be taken that would improve the rate of compliance in Arkansas. However, it appears likely that effective enforcement will be difficult under any legal regime likely to command public and political support. The final portion of this article briefly considers significant departures from current tort law, which, unfortunately, are also unlikely to be enacted.

II. THE HYBRID NATURE OF THIRD-PARTY LIABILITY INSURANCE

An insurance policy is a contract. Normally, the decision to enter into a contract is voluntary, and therefore each contracting party must think that the benefits he[5] will receive from the contract exceed the costs of fulfilling it. Most insurance policies—termed "first-party" insurance—provide that in the case of an insured loss, some form of payment will be made either to the insured or to a beneficiary closely identified with the insured, such as a family member. Examples of first-party insurance include life, disability, health, accident, and fire insurance.

Certain common forms of insurance on vehicles are first-party insurance. Collision insurance protects against damage to one's own vehicle in an accident. Comprehensive insurance provides protection against damage to or loss of the vehicle resulting from causes such as theft and Acts of God. One form of first-party insurance—uninsured motorist coverage[6]— is of particular relevance, and is discussed in some detail below.[7]

Most first-party insurance policies provide some indirect benefit to society at large, or to members of society other than the insured and his family. For example, health insurance benefits health care providers and society in general by providing a source of payment for services that are likely to be provided either free of charge or at public expense to an individual who lacks both assets and insurance. Similarly, life insurance reduces the likelihood of a family going on welfare after the death of a breadwinner. Society encourages both forms of insurance by such means as providing favorable tax treatment.[8] Fire

5. Due to the inadequacies of the English language, I have used masculine pronouns to indicate individuals of indefinite sex.

6. Uninsured motorist coverage applies when the insured is harmed by the negligence of another motorist who does not have third-party liability insurance.

7. *See infra* notes 61-62, 65-67, and accompanying text.

8. For example, the Internal Revenue Code excludes from employees' income the value of most employer-provided health and life insurance, notwithstanding a general rule that fringe benefits are to be included in income. *See* 26 U.S.C. §§ 61(a)(1), 79, 106 (1998).

insurance protects a homeowner against loss of his home, but it also protects his lender's collateral. For this reason, the mortgagee usually requires that the borrower maintain insurance.[9]

In general, however, society is content to leave decisions about first-party insurance to each individual, as is the case with most economic decisions in a free market system. The owner of a vehicle is entirely free, for example, either to insure against theft or to bear the risk of theft and save the premium. The basic tenet of capitalism, after all, is that societal wellbeing is maximized by each individual pursuing his own benefit—Adam Smith's "invisible hand" at work.[10]

Liability insurance, however, is fundamentally different. Such coverage is referred to as "third-party" insurance. While the policy is a contract between the insured and the insurance company, it provides for possible payments to an unrelated and unknown third party—the victim of the insured's negligence. To be sure, liability insurance also provides valuable protection for the insured—protection against being held personally liable and against the burdens of securing and paying an attorney to defend the case, if necessary. However, the benefit to the third party may significantly outweigh the benefit to the insured. This is particularly true if the insured has little to lose, materially. If the insured is "judgment proof," apart from insurance, the benefit of third-party liability insurance inures almost entirely to the third party. In this situation, normal operation of the market would lead many rational motorists to conclude that the benefit of third-party liability insurance to them—and they are the ones footing the bill—is not worth its cost. Unfortunately, this rational, though unlawful, decision against third-party insurance is made tens of thousands of times each year in Arkansas, and millions of times across the nation.

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9. Most mortgagees place so much importance on the maintenance of insurance that they remit the premium payments themselves, rather than relying on a contractual undertaking by the mortgagor to do so. Typically, the mortgagee collects each month from the mortgagor an amount adequate to cover insurance and real estate taxes, holds these sums in escrow, and makes payments when due.

10. Smith states:

> As every individual, therefore, endeavours as much as he can . . . to direct that industry that its produce may be of the greatest value; every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest nor knows how much he is promoting it. . . . [B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention.

ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edwin Cannon ed., Random House 1937) (1776).

Compulsory responsibility laws reflect an unwillingness to allow motorists focused on their own interest to decide against protecting third parties. Societal interest in the protection of accident victims has been sufficient to lead Arkansas, like other states, to require third-party liability insurance or some alternative form of financial responsibility.

III. PRESENT ARKANSAS LAW REGARDING THIRD-PARTY LIABILITY INSURANCE

A. Required Insurance

Liability insurance is mandatory for the overwhelming majority of Arkansas vehicles. Subject to special rules for certain commercial vehicles,[11] the policy must provide coverage of "25-50-15"—$25,000 for injury or death of a single person, $50,000 for injury or death of more than one person in a single accident, and $15,000 for damage to property.[12] Motorists may contract for higher policy limits if they wish, but any such excess is not subject to the extensive statutory structure applicable to the minimum coverage.[13]

A narrow exception to the requirement of third-party liability insurance is available to individuals and entities who obtain a certificate of self-insurance.[14] This certificate can be sought by only three categories of vehicle owners—municipalities and subdivisions of the state,[15] owners of at least twenty-five Arkansas vehicles, and individuals whose religion prohibits the

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11. The variations may call for either higher or lower limits. For example, businesses that move manufactured homes must maintain 100-300-100 coverage, which is much higher than normal. *See* ARK. CODE ANN. §§ 27-35-301(3), 27-35-305(a) (Michie 1994). On the other hand, taxicabs need maintain coverage of only 25-50-10, which is lower coverage for property damage than normal. *See* ARK. CODE ANN. § 27-14-1501 (Michie 1997). Municipalities can set higher limits for taxicabs in some cases, however. *See* ARK. CODE ANN. § 27-14-1501(g)(1) (Michie 1997).

12. *See* ARK. CODE ANN. § 27-22-104(b) (Michie 1997).

13. *See* ARK. CODE ANN. § 27-19-713(g) (Michie 1994).

14. *See* ARK. CODE ANN. § 27-22-104(a)(1) (Michie 1997).

15. As a general rule, political subdivisions of the state are immune from liability "except to the extent that they may be covered by liability insurance." *See* ARK. CODE ANN. § 21-9-301 (Michie 1996). However, political subdivisions must either maintain insurance or "become self-insurers," presumably by obtaining a certificate of self-insurance. *See* ARK. CODE ANN. § 21-9-303(a) (Michie 1996). Liability is limited to the minimum limits of required liability insurance, unless the political subdivision chooses to carry a policy (or participate in a self-insurance pool) with higher limits. *See* ARK. CODE ANN. § 21-9-303(b) (Michie 1996).

Unfortunately, political subdivisions of the state, like individuals, sometimes violate the state's financial responsibility laws. In such a case, the Arkansas Supreme Court has held that, notwithstanding sovereign immunity, the political unit is liable to the extent of minimum required coverage. *See* Sturdivant v. Farmington, 255 Ark. 415, 500 S.W.2d 769 (1973).

purchase of all insurance.[16] Upon application, the Office of Motor Vehicle "may, in its discretion" issue a certificate of self-insurance if satisfied that the applicant "is possessed and will continue to be possessed of ability to pay" adverse judgments.[17]

It is clear that issuance of certificates of self-insurance does not undercut the ability of accident victims to recover damages. Entities that own twenty-five vehicles and governmental units can be expected to have financial resources exceeding the required minimums for insurance coverage. The narrow religious exemption affects very few vehicles, and even there, the Office of Motor Vehicle is empowered to condition the exemption on a showing of financial wherewithal. The problem is not motorists who are exempt from the insurance requirement, but those who disregard it. Subsequent discussion will generally ignore certificates of self-insurance, and simply refer to compulsory liability insurance.

B. Enforcement of the Insurance Requirement

The Arkansas General Assembly attempts to assure compliance with its insurance requirements through a variety of statutes. These may be divided into three categories: registration, traditional traffic law enforcement, and information gathering.

1. *Registration*

The best known enforcement provision, and the most important, is that proof of minimum insurance is required in order to obtain license tags, both initially and at annual renewals.[18] Effective in 1998, this verification will normally be effected by a computerized review of the Vehicle Insurance Database conducted by personnel of the Department of Finance and Administration (DFA).[19] Although the primary purpose of this change may have been to simplify the renewal process for motorists, it seems likely to lead to more efficient and accurate determinations concerning coverage.

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16. *See* ARK. CODE ANN. § 27-19-107(a) (Michie 1994).

The religious exemption is dependent upon membership in a denomination which "prohibits its members from purchasing insurance of any form as being contrary to its religious tenets." Individual objection does not satisfy the terms of the statute, nor does a denomination's objection only to automobile liability insurance. Presumably these limitations are designed to assure that the exception is limited to those whose religious objection to insurance is bona fide. Apparently the limitations have never been challenged in court.

17. *See* ARK. CODE ANN. § 27-19-107(b) (Michie 1994).

18. *See* ARK. CODE ANN. § 27-13-102(a) (Michie Supp. 1997).

19. *See* ARK. CODE ANN. § 27-13-102(b) (Michie Supp. 1997).

2. *Traditional Traffic Law Enforcement*

Apart from proof of insurance at registration, the primary means of enforcing compliance with compulsory insurance laws is essentially the same as that for most traffic offenses. Law enforcement personnel, incident to stopping a motorist for another violation or at a checkpoint, or while investigating an accident, can cite a motorist for violation of compulsory insurance laws along with any other violations. By statute, the motorist's failure to present proof of insurance coverage coupled with the absence of insurance information in the computerized Vehicle Insurance Database creates a rebuttable presumption that the vehicle is uninsured.[20] In such case, the officer is "to remove and impound" the vehicle's tag.[21] And, "in addition to any traffic citation issued for violation of this section," the officer is to issue the motorist a notice of noncompliance with the compulsory insurance statute, and send a copy of the notice to DFA. In order to have the registration reinstated and the tag reissued, the motorist must provide proof of insurance and pay a reinstatement fee of $20.[22]

The primary penalties for violation of the mandatory insurance provisions are graduated fines, but include the possibility of incarceration for a repeat offender. The first offense is punishable by a fine of $50 to $250; the second by a fine of $250 to $500; and the third and subsequent offenses by a fine of $500 to $1000, or up to one year in jail, or both.[23] Interestingly, the statute provides that the minimum fines are "mandatory" for the first and second offenses, but is silent concerning the judge's discretion to suspend the sentence for a third or subsequent violation.[24] One might have expected that the General

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20. *See* ARK. CODE ANN. § 27-22-104(a)(2) (Michie Supp. 1997).

21. *See* ARK. CODE ANN. § 27-22-104(c)(3)(A) (Michie Supp. 1997). The tag "shall be returned" either to the Office of Driver Services of DFA or to the local revenue office. *See* ARK. CODE ANN. § 27-22-104(c)(3)(B) (Michie Supp. 1997).

22. *See* ARK. CODE ANN. § 27-22-104(g)(1) (Michie Supp. 1997).

23. *See* ARK. CODE ANN. § 27-22-103(a)-(b)(2) (Michie Supp. 1997).

24. *See id.* In another curious twist, the General Assembly provides that the judge "may" dismiss the charge and impose no penalty "[u]pon a showing that [required] liability coverage ... was in effect at the time of arrest." *See* ARK. CODE ANN. § 27-22-103(b)(3) (Michie Supp. 1997). The suggestion that the judge might have discretion *not* to dismiss the charges is surprising, because if insurance were in effect, the statute would not have been violated. On the contrary, surely it is the state's burden to prove, beyond a reasonable doubt, the absence of such coverage. The state may or may not be aided in discharging its burden by ARK. CODE ANN. § 27-22-104(a)(2), discussed *supra* in text accompanying note 20. That section provides that a "rebuttable presumption" of noncompliance arises if the motorist fails to prevent proof of insurance "at the time of arrest" and the Vehicle Insurance Database does not show coverage "at the time of the traffic stop." Whether the rebuttable presumption is applicable only for purposes of arrest, and not of ultimate conviction, is open to question. The statutory language "at the time of arrest," and "at the time of the traffic stop," however indicative of violation at

Assembly would be more likely to have insisted on mandatory sentencing of repeat violators.

If the uninsured vehicle is involved in an accident, the consequences are somewhat more severe. The operator is guilty of a Class A misdemeanor,[25] and, upon conviction, the court may order the vehicle impounded until proof of insurance is provided.[26] Moreover, the owner and driver of an uninsured vehicle involved in an accident resulting in injury, death, or property damage of $500 or more are subject to a statutory regime designed to protect an injured party's possible claim against the owner or driver.[27]

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the time of arrest, is surely not the proper measure to create a presumption at the time of trial. At trial, it might seem reasonable to allow the state a rebuttable presumption if at that time—at trial—neither the motorist's written evidence nor the Vehicle Insurance Database indicated that the vehicle was insured. However, the statute refers only to the time of the traffic stop and arrest, and basing a presumption at trial on the state of evidence at an earlier time seems questionable.

In the form in which the 1997 legislation was initially proposed, failure to maintain proof of insurance in the vehicle at all times would have been an offense separate from the failure to maintain insurance. *See* Ark. H.R. 81-1156, §§ 1-2 (1997). Violation would have resulted in a fine of $25 to $50, which the judge was *not* to dismiss upon a showing that insurance had, in fact, been in force. *See* Ark. H.R. 81-1156, § 1 (1997). These provisions were not included in the final act, however.

25. *See* ARK. CODE ANN. § 27-22-105(a) (Michie Supp. 1997). The maximum penalties for a Class A misdemeanor are a fine of $1,000 and incarceration of one year. *See* ARK. CODE ANN. §§ 5-4-201(b)(1), -401(b)(1) (Michie Supp. 1997).

26. *See* ARK. CODE ANN. § 27-22-105(b) (Michie Supp. 1997).

27. *See* ARK. CODE ANN. § 27-19-601 to -621 (Michie 1994). Among the several exceptions to the security requirement is the motorist's having a liability policy, or a certificate of self-insurance, in effect at the time of the accident. *See* ARK. CODE ANN. § 27-19-604(1), (4) (Michie 1994). The required deposit tracks the 25-50-15 coverage that should have been in effect—in case of an accident involving injury or death of one person, security of $25,000 is required; for injury or death of two or more persons, the requirement is $50,000; and for property damage, $15,000 is required. *See* ARK. CODE ANN. § 27-19-603(a)(1)(A)-(C) (Michie 1994). If, as is very likely in any accident resulting in bodily harm, the accident resulted in both bodily harm and property damage, the requirement is "a combination of the amounts specified in subdivisions (a)(1)(A)-(C)." *See* ARK. CODE ANN. § 27-19-603(a)(1)(D) (Michie 1994).

If it is clear that there is no liability, the bond is not required in the first instance. For example, if an uninsured vehicle were lawfully parked at the time of the accident, no security would be required. *See* ARK. CODE ANN. § 27-19-604(6) (Michie 1994). Similarly, the owner of an uninsured vehicle is not required to post security if the vehicle were being used by another without the owner's permission. *See* ARK. CODE ANN. § 27-19-604(7) (Michie 1994). Once the other person releases the driver or owner from liability, the security requirement ends. *See* ARK. CODE ANN. § 27-19-613(a) (Michie 1994).

These provisions are not primarily directed at assuring that vehicles are properly insured, even prospectively. Instead, they seek to ameliorate, after the fact, the failure to maintain insurance.

3. *Information Gathering*

Certain Arkansas statutes are designed to ensure that the state will be notified when a liability policy lapses. First, termination of coverage is ineffective unless the Office of Driver Services is given ten days' notice.[28] Absent such notice, this statute keeps the policy in force even after the policyholder has ceased paying premiums with the knowledge that payment is due and that nonpayment will result in termination of coverage.[29]

Effective in 1998, the notification process has been greatly expanded. Every insurer is required to report on a monthly basis, in a computerized form,[30] detailed information about its policies insuring Arkansas motorists, including effective and expiration dates.[31]

The same 1997 legislation that mandated increased reporting by insurers also established the Vehicle Insurance Database.[32] DFA is directed to release information from the database to state and local law enforcement agencies.[33]

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28. *See* ARK. CODE ANN. §§ 27-19-714(a), -209 (Michie 1994).

29. In such a case, notification of the Office of Driver Services would appear to serve the function of alerting the state to the termination of coverage so that the state can (in theory) intervene to prevent the vehicle from being operated without proper coverage. This provision seems to be designed almost entirely for the protection of the third-party victim of the insured, and not of the insured himself. Logically, therefore, the company's failure to notify should keep the policy in force only for the benefit of the third party, and not for the benefit of the insured. By this reasoning, the company could not deny coverage to the third party, but could sue the former policyholder for indemnity. As the Georgia Court of Appeals observed, the effect of the policy and statute is to "leave the [policy] in effect for the protection of the public and not for the protection of the insured." Garden City Cab Co. v. Fidelity & Casualty Co., 80 Ga. App. 850, 853, 57 S.E.2d 683, 685 (1950). The Arkansas statutory provision includes no such limitation, however, and there appears to be no Arkansas case on point.

30. The insurance department may, by regulation, exempt "a small or low-volume insurer" from the requirement of "electronic or electro-magnetic" reporting. Reports in some other form would still be required. *See* ARK. CODE ANN. § 27-22-107(a) (Michie Supp. 1997).

31. *See* ARK. CODE ANN. § 27-22-107 (Michie Supp. 1997).

32. *See* ARK. CODE ANN. § 27-14-414 (Michie Supp. 1997).

33. *See* ARK. CODE ANN. § 27-14-414(e)(1)(C) (Michie 1994). In general, information in the database is closely held. Apart from the insured and, if the insured is a minor, his parents, information in the database is to be disclosed only to law enforcement agencies, the Arkansas Crime Information Center, and to "other government offices upon showing of need." *See id.* The information is explicitly exempted from disclosure under the Freedom of Information Act (FOIA). *See id.* at § 27-14-414(e)(2).

The wisdom of this broad confidentiality is debatable. The information seems less sensitive than much that is subject to FOIA disclosure. I can see that the amount of coverage might be confidential, as an indication of financial position. And I can see that the company with which the motorist does business should perhaps not be subject to disclosure, due to unwanted marketing approaches by competing insurance companies.

The naked fact that a motorist is or is not in compliance with state law, however, should likely be a matter of public record. Publicity of noncompliance, perhaps by newspapers, might encourage maintenance of insurance. Facilitating marketing to uninsured motorists by

IV. EFFECTIVENESS OF CURRENT LAW

The next step is to consider the effectiveness of the laws currently on the books. This evaluation takes two forms. First is the empirical question of the extent to which motorists comply with the insurance requirement. Second is the examination of existing statutes for inherent weaknesses.

A. Extent of Noncompliance

It is unknown, and unknowable with data currently available, how many uninsured vehicles are being operated in Arkansas. Uninsured vehicles can be divided into two categories—vehicles that are registered but not insured, and vehicles that are neither registered nor insured. Although we now have solid information about the former category, we remain ignorant about the latter.

As noted above, effective January 1, 1998 insurers began reporting comprehensive information about their policies in force.[34] Based on a comparison of the data submitted by insurers and the state's records of registered vehicles, it appears that approximately seventeen percent of vehicles registered in Arkansas are not insured.[35] At the present time, there is no means of ascertaining the number of vehicles that are neither registered nor insured. While one can view the glass as half full rather than half empty—most vehicles are properly insured, and some officials had suspected that the figures would show that more than seventeen percent of registered vehicles were uninsured[36]—unquestionably, a large number of uninsured vehicles are being driven in Arkansas.

B. Evaluation of Present Enforcement Provisions

1. *Insurance as Precondition of Registration*

It seems likely that the requirement of insurance at registration is the most effective measure in place. At first blush, an accurate review of insurance coverage in connection with issuance of tags might seem sufficient in itself to take care of the problem. However, there are two wide avenues of avoidance.

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insurance companies and their agents is a development that should be welcomed, not restricted.

34. *See* ARK. CODE ANN. § 27-22-107 (Michie 1994), discussed *supra* in notes 30-31 and accompanying text.

35. *See* Telephone Interview with Donald R. Melton, Liaison to the Governor for Local Government, Law Enforcement, and Transportation (Sept. 14, 1998).

36. *See id.*

First, while tags are renewed annually, insurance policies typically run for shorter periods, frequently six months. Moreover, the policy may be terminated before the end of the term of the policy for nonpayment of premiums.[37] If, for example, the insured paid only the first month's premium in order to renew his tags, then the policy would lapse after about two months (the month for which the premium was paid plus, normally, a thirty-day "grace" period). Thus, the vehicle might be uninsured for ten months of the year for which the tag was valid.

An even simpler expedient is simply to operate the vehicle without a valid tag. From the motorist's point of view, this entirely avoids the expense of insurance (even a single month's premium). As an added bonus to the motorist—and an added detriment to the state—the expense of tag renewal is avoided. This avoidance technique is probably fairly widespread, although, as noted above, we do not have reliable data.[38]

2. *Traditional Traffic Law Enforcement*

It might be argued that the whole tenor of present law indicates considerable reluctance to actually force uninsured vehicles off the road. For example, police officers are directed to impound an uninsured vehicle's license tag, but not the vehicle itself.[39] On the contrary, the statute directs the officer to issue a temporary sticker, valid for ten days, at the time the tag is impounded.[40]

In addition, present law may do little to undermine the cost-benefit analysis that leads many motorists to ignore the mandatory insurance requirement. For example, while the General Assembly uses mandatory language in directing the arresting officer to impound the tag of an uninsured vehicle, issuing a citation for violation of the compulsory insurance statute appears to be discretionary.[41] It is true that fines of at least $50 for a first

37. Insurers can terminate policies that have been in effect for 60 days only for stated reasons. While nonpayment of premiums accounts for most cancellations, insurers can also cancel for a variety of reasons that make the insurer's risk significantly greater than it had realized when it issued the policy. Valid reasons for cancellation include convictions for serious offenses such as driving while intoxicated and negligent homicide with a vehicle, and material fraud or misrepresentation in the policy application. *See* ARK. CODE ANN. § 23-89-303(a)-(b) (Michie 1992). These limitations are inapplicable in the case of nonrenewal, as distinct from cancellation. *See id.* at § 23-89-303(d).

38. *See* Melton, *supra* note 35.

39. *See* ARK. CODE ANN. § 27-22-104(3)(A) (Michie 1994).

40. *See id.* at § 27-22-104(d).

41. *See* ARK. CODE ANN. § 27-22-104(c)(1), which states: "[T]he operator shall be issued, in addition to any traffic citation issued for a violation of this section, a notice of noncompliance . . . ." I interpret this language to mandate issuance of the notice, but not of the citation.

offense, and much greater penalties for repeat offenders, are contemplated, and in some instances are "mandatory."[42] These fines are only triggered upon conviction, however, which presumably will not result merely from the officer impounding the tag and issuing a temporary sticker. At present, therefore, it appears possible that the $20 reinstatement fee may be the only sanction for operating an uninsured vehicle, apart from being required to obtain insurance to get the tag back. Given that proof of insurance is already required for any tag renewal, the most probable additional sanction for violation of the insurance requirements might be viewed as a slap on the wrist.

The most severe sanctions are imposed only if the uninsured vehicle is involved in an accident. This approach is understandable, and perhaps defensible. After all, the only time that the failure to have insurance actually causes harm is when an accident occurs. On the other hand, this approach can be condemned as locking the barn after the horse has been stolen. The point of compulsory insurance is that it be in force *before* the accident occurs, and punishing vigorously only after the fact might be viewed as missing the point.

3. *Information Gathering*

The informational statutes have the effect of requiring insurers to inform the state of apparent[43] violations of the insurance requirements. The statutes do not provide for action by the state or consequences to the motorist, and might therefore appear unimportant. However, by providing the state with information not previously available, these new reporting requirements allow us to consider adoption of enforcement tools that would not have been feasible earlier.

V. POSSIBLE NEW MEASURES TO INCREASE COMPLIANCE

The starting point in looking for an improved structure should be an understanding that we will never attain perfect compliance. There are, however, steps that might be taken—including some that have been taken in other states—to improve the rate of compliance to some degree. This section

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It is possible to read the statutes to remove discretion from the officer. The "in addition to" language of § 27-22-104(c)(1), when read in conjunction with the mandate for mandatory fines in § 27-22-103, may manifest a legislative intention that the motorist be fined. I find this reading strained, because it seems likely that the mandate for imposing a "mandatory" fine is directed at the judge, not the police officer.

42. *See* ARK. CODE ANN. § 27-22-103(a)-(b)(2) (Michie 1994).

43. One problem with reliance on reports from insurers is that there are legitimate reasons for a policyholder to terminate coverage. For example, the vehicle may no longer be operable.

discusses some of these possibilities, attempts to compare their probable benefits to their probable costs, and attempts to assess their political viability.

A. Requiring Prepayment of a Year's Insurance Premium

The problem of motorists lapsing their policies after renewing their tags could be addressed by requiring evidence at renewal that the premium had been prepaid for the entire year. Apart from problems arising from inconsistency in the state's license tag year and the term of the typical insurance policy,[44] the principal objection to this approach is that many motorists would find it burdensome, and some would find it impossible, to pay an entire year's premium in advance. Imposing substantial burdens on law-abiding motorists is a significant objection. Moreover, I believe that the General Assembly would (correctly) anticipate that this approach would create many unhappy constituents.[45] Thus, I seriously doubt that this proposal could pass the test of political viability.

Even if it could be adopted, this approach would be of questionable benefit. It would do nothing to address the problem of motorists simply driving without either registration or insurance. Indeed, it likely would increase the number of motorists who take that route. Many vehicle owners who now maintain insurance year-round pay premiums on a monthly basis. If faced with the requirement of paying a full year's premium in advance, they might instead opt against both insurance and registration.

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44. Implementation would require changes in the present methods of operation of both insurance companies and the state. Insurance policies are frequently written for periods of less than one year; policies of at least one year's duration would be required to implement this approach. An additional problem is that even a year-long policy would not be sufficient unless the vehicle's insurance-policy year coincided with the vehicle's license-tag year. This would probably be workable if the insured owned only one vehicle, but would necessitate changes in the state's licensing procedures for families owning more than one vehicle. At present, tag renewal for a given vehicle is in the anniversary month of the owner's first registration of that particular vehicle; only if the original registration of each vehicle were in the same month would tag renewal fall in the same month. Thus, if a family owns two or more vehicles, at present it is not probable that the license tags would expire in the same month. At the same time, a typical insurance policy normally covers all the vehicles in the household.

If the choice were made to require annual policies paid in advance—a choice that I doubt seriously the General Assembly is prepared to accept—the problems described in this note should not prove major barriers to implementation.

45. Research has not revealed any state that imposes this requirement.

B. Letter Informing of Apparent Violation; Suspension or Revocation of Vehicle Registration and/or of Vehicle Owner's Driver's License

With the new system for reporting of insurance data, the Office of Motor Vehicle should be able to generate a computerized list of motorists in apparent violation of the insurance requirements each month.[46] However, the new statute does not mandate or authorize follow-up action by the state. Many states take action at this stage to encourage compliance and to punish noncompliance; Arkansas should consider doing so as well.

The initial step could be a certified letter advising the motorist that the computerized data indicates that the vehicle is not properly insured, and offering the opportunity to provide proof of insurance or an explanation of why it is not necessary. Such a letter might spur some motorists to obtain, and to maintain, insurance. However, the effect will be limited without the credible threat of more forceful state action in the event the motorist fails to respond. The letters alone might improve compliance considerably at the outset, but not after it becomes generally known that nothing will happen to a motorist who ignores such a letter.

The letters used by many states indicate that the vehicle registration will be suspended or revoked within a stated period of time.[47] If the vehicle's owner does not surrender the registration or license tag within the stated period, a number of states suspend the owner's driver's license.[48] And most states that use enforcement mechanisms such as suspension of license tag and registration do not allow reinstatement without a financial penalty much higher than the $20 charged by Arkansas.[49]

In fact, several provisions along these lines (and more modest than those in many states) were part of the 1997 legislation in the form initially proposed, but did not survive to become part of the final act. The bill would have directed the Office of Motor Vehicle to make a monthly computer comparison of insurance company reports and registration records, and to send a letter to the owner of any vehicle that appeared to have been uninsured for three

46. Several states utilize a random audit, which would have made sense in an era of paper. Given the current capabilities of computers, however, it is difficult to see any advantage of a random audit in comparison to a monthly review of all vehicles.

47. *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-4149 (West 1996); MASS. GEN. LAWS ch. 90 § 34H; N.C. GEN. STAT. § 20-309.

48. Among the states that suspend the driver's license of an uninsured vehicle's owner are three of our immediate neighbors. *See* MO. ANN. STAT. § 303.041; OKLA. STAT. ANN. tit. 47 § 7-605(A); TX. TRANSP. CODE ANN. §§ 601.057, 601.231.

49. While most states enact higher reinstatement penalties than does Arkansas, Kentucky's may be as low as $15. KY. REV. STAT. ANN. § 186.440(12) (Michie 1996). The reinstatement fee may increase depending on the period of time that the vehicle has been uninsured. *See* GA. CODE ANN. § 40-5-71(c)(1)-(2) (1997); MO. ANN. STAT. § 303.041 (West 1996).

consecutive months. The owner then would have had thirty days to present evidence of a new policy (or new certificate of self-insurance). If he failed to do so, the Office of Motor Vehicle was to notify the Office of Driver Services to suspend the driver's license of the owner. Reinstatement would have required proof of current insurance.[50]

Even if the General Assembly were now willing to adopt provisions along these lines, the problem of motorists simply deciding not to register their vehicles would be exacerbated. That limitation significantly reduces the attractiveness of this approach.

C. Changing Tags Annually

As we have seen above, a serious flaw of several approaches is that they can be defeated by a motorist who is willing to drive an unregistered vehicle. One reason that many motorists may be willing to operate their vehicles without current registration is that the evidence of their failure is relatively discreet. The tag does not change from year to year, only the small sticker indicating the year of expiration.

Perhaps the state should change license tags, rather than stickers, each year, and should make each year's tag look distinctive. For example, tags expiring in 2000 might be predominantly red, those in 2001 predominantly yellow, those in 2002 predominantly blue, etc. Violations would be obvious to police, which might encourage more motorists to obtain registration. This, in turn, would make it more likely that the state could utilize some of the tools described above without causing many motorists to forego registration.

Unfortunately, the costs of changing tags each year may be significant, and may well outweigh the prospective benefit. I suspect that the least of these costs would be the expense of producing the tags. Transporting, storing, and mailing the tags would be much more expensive than for the stickers currently in use.

More important, a choice would have to be made concerning whether the vehicle would be given the same number each year, or a new tag number with a new tag. If the tag number had to follow the vehicle, the state and the motorist would have the expense, delay, and bother of getting this year's yellow ABC123 to the holder of last year's red ABC123. This might prove

50. *See* Ark. H.B. 81-1156, § 4. The other significant enforcement provision that did not become part of the final act was a provision that made the failure to maintain proof of insurance in the vehicle at all times a violation. If a subsequent investigation revealed that the vehicle had in fact been insured, the motorist would be excused of the more serious offense of failure to maintain insurance, but still would be subject to a fine of $25 for failure to have carried the proof of insurance in the vehicle. *See id.* § 1.

especially burdensome for the large number of persons who move during a given year. The alternative would be that a new tag number would go with the new tag each year. That might make effective enforcement of certain violations more difficult. For example, a scofflaw with a large number of unpaid parking tickets would probably be harder to detect.[51]

VI. DOES COMPULSORY INSURANCE REALLY ENJOY PUBLIC SUPPORT?

The reader will observe that several approaches discussed above are unlikely to find sufficient political support to win enactment in the General Assembly—a reflection of public ambivalence. But the truth is that present laws are strong enough to raise the level of compliance significantly if law enforcement agencies enforced them vigorously. In addition to the usual problems of prioritizing scarce resources, I suspect that lax enforcement arises from the belief, which I share, that the public would not support vigorous enforcement. Public support is of particular import to sheriffs who must be reelected.[52] But public support for the law and its enforcement is a legitimate concern for any law enforcement official at any level, or should be. People support law enforcement much more enthusiastically when it is directed against "real criminals" than when it targets generally law abiding citizens. This may explain why the FBI is more popular than the IRS.

The public recognizes that certain traffic offenses are sufficiently dangerous to merit serious enforcement. After decades of public ambivalence, driving under the influence of alcohol is now in this category. Getting drunk drivers off the road has become a cause that will not threaten a sheriff's reelection or undermine public support for the law.

Driving without insurance does not evoke the same level of public concern. The issue here is not public safety, but "merely" money. The primary reason that people drive without insurance is that they feel they cannot afford it. Unlike drunk drivers, vehicles and their drivers do not become more dangerous because they lack insurance.

I do not believe that the Arkansas public would support vigorous measures to clear the roads of uninsured vehicles. This, rather than the statutory framework, is the primary stumbling block. Present law calls not only

51. Operation of private businesses might also be affected. For example, many private parking lots operate without attendants, depending upon patrons to put money in a slot. Despite threats, these lots are unlikely to tow a vehicle whose driver did not deposit money in advance, at least for the first such failure. Changing tag numbers would make it harder for the operator to identify vehicles whose drivers repeatedly fail to pay.

52. Considerable involvement by law enforcement personnel will be necessary to any effective program, and these must be primarily municipal and county officials. There are not enough state police to effectively enforce traffic laws alone.

for fines,[53] but for a one-year jail term;[54] lack of public support, and thus lack of enforcement (by judges and prosecutors as well as police officers), renders this potentially strong deterrent almost a dead letter.

VII. ALTERNATIVES TO COMPULSORY INSURANCE

If the public does not support strong enforcement of compulsory insurance, we should carefully examine the possibility that the public is right. If so—and I believe that a strong case can be made—the implications are far-reaching. They may call into question not merely enforcement policies, but the concept of compulsory insurance, and even the liability system governing automobile accidents.

A. Optional Insurance (De Jure or De Facto)

The case against mandatory insurance can be supported on various bases.

1. *Fairness and Efficiency*

The wisdom or fairness of laws restricting use of taxpayer-financed roads to those able to pay for insurance, or otherwise demonstrate their ability to respond in damages, is not self-evident. People are not generally required by law to carry insurance covering routine activities of daily life, notwithstanding the fact that many such activities can result in harm to others. Whether driving an automobile should be singled out in this fashion is a policy question of import. Certainly it is not irrational to do so, because driving—an activity undertaken by most Arkansas adults every day[55]—leads to more injuries to unrelated third parties than does any other activity. On the other hand, the law does not require insurance as a precondition to engage in activities that are much more dangerous to unrelated persons than is driving. For example, an hour of hunting surely poses much greater danger to others than does an hour of driving.

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53. *See supra* text accompanying note 23.

54. This penalty is possible upon a third conviction. *See* ARK. CODE ANN. § 27-22-103(b)(2) (Michie 1994).

55. The number of vehicles registered in Arkansas is very close to the state's adult population. (Of course, some vehicles are driven primarily by persons under age 18.) At present, there are approximately 1.9 million vehicles registered in Arkansas. Telephone Interview with Donald R. Melton, Liaison to the Governor for Local Government, Law Enforcement, and Transportation (Oct. 16, 1998). Arkansas' total population in 1996 amounted to just over 2.5 million, of which 1.85 million was aged 18 or over. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 33, at 33 (117th ed. 1997).

Moreover, unlike hunting, driving has enormous social value.[56] Driving is not a sport or a luxury, but for most people an essential requirement for living a normal life. Most driving is purposeful; relatively little driving is simple joyriding. Most Arkansas cities lack bus service; many towns and rural areas lack even taxis. Routine and important activities such as going to work and buying groceries would become much more burdensome for most Arkansans if they could not drive. Cracking down on uninsured drivers could even complicate the state's effort to move welfare recipients into the work force.

Requiring insurance is very different from using law to keep dangerous drivers or vehicles off the road. In the case of insurance, the limitation is based primarily on economics, not safety.[57]

Furthermore, what is the realistic effect of 25-50-15 coverage? It provides ample coverage for relatively minor accidents—admittedly, the majority—but abysmally inadequate coverage for severely injured accident victims. Even if every motorist in the state complied with the compulsory insurance laws, an adequate recovery for a seriously injured accident victim would still depend upon being injured by a tortfeasor with assets or insurance limits considerably higher than $25,000.

2. *The Role of First-Party Insurance*

Recovery from a third-party tortfeasor, or the tortfeasor's insurance company, is not the only route open to the innocent victim. Motorists may choose to insure themselves against both property damage and personal injury by purchasing first-party insurance; many, probably most, already have such coverage. Collision insurance provides protection against accidental damage to a vehicle on a no-fault basis—that is, regardless of whether the damage occurred without negligence, due to the negligence of the insured, due to the negligence of another, or due to a combination of negligence of the insured and another. Thus, apart from the deductible,[58] collision insurance protects against property damage caused by an uninsured tortfeasor.

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56. Whether there is any net social value in killing innocent animals for sport is open to debate.

57. There is a relationship between danger and uninsured vehicles and drivers. Drivers with bad driving records are more likely than the average driver to cause accidents in the future. This correlates to safety, and also to high insurance premiums. It is reasonable to assume that individuals facing high premiums—*i.e.*, unsafe drivers—are more likely to forego coverage.

58. Collision insurance is subject to a deductible, generally ranging from $50 to $1,000. Thus, collision insurance does not provide complete protection to the insured. The insured would be entitled to recover the deductible amount from a tortfeasor.

In the case of personal injury, the General Assembly requires, as a general rule, that any automobile insurance policy include no-fault, first-party coverage for limited medical, income continuation, and death benefits.[59] In keeping with the general rule that first-party insurance is voluntary, however, the insured may waive this coverage.[60]

The most relevant optional policy provision goes directly to the problem of being harmed by the negligence of an uninsured motorist. Unless rejected in writing,[61] every policy must include first-party "protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles" for bodily injury or death.[62]

Individuals may also protect themselves against the possibility of severe injury at the hands of a motorist who has complied with the legal requirements of 25-50-15 liability coverage. Because $25,000 is likely to be inadequate in the case of serious injury, many motorists purchase first-party *under*insured motorist coverage. The concept is similar to that of *un*insured motorist coverage, in that it depends on the legal liability of "the other" driver.[63] Like other first-party insurance, underinsured motorist coverage is optional.[64]

First-party insurance unrelated to vehicles can also come into play. For example, benefits from health, life, and disability insurance may be triggered by an accident occasioned by the negligence of an uninsured motorist.

What is the relevance of these various types of first-party insurance to the argument that third-party liability insurance should not be required? The fact that these forms of insurance are routinely available and widely purchased means that a law-abiding motorist[65] will not fail to obtain compensation for

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59. Medical benefits (including funeral expenses) are covered up to $5,000 per person. Income continuation is for 70 percent of earnings, up to a maximum of $140 per week, from the period beginning eight weeks after the accident and ending not more than 52 weeks after the accident. The accidental death benefit is $5,000. *See* ARK. CODE ANN. § 23-89-202 (Michie 1992).

60. *See* ARK. CODE ANN. § 23-89-203 (Michie Supp. 1997).

61. *See* ARK. CODE ANN. § 23-89-403(a)(2) (Michie Supp. 1997).

62. *See* ARK. CODE ANN. § 23-89-403(a)(1) (Michie Supp. 1997). The statute does not mandate that uninsured motorist coverage extend to property damage. However, collision insurance, which covers property damage regardless of cause, is normally available. *See supra* note 58 and accompanying text.

63. Coverage is triggered by the insured's entitlement to "damages for bodily injuries to or death of an insured which the insured is legally entitled from the owner or operator of another motor vehicle whenever the liability insurance limits of such other owner or operator are less than the amount of damages incurred by the insured." *See* ARK. CODE ANN. § 23-89-209(a)(3) (Michie Supp. 1997).

64. As with uninsured motorist coverage, underinsured motorist coverage is mandatory unless waived by the insured. *See id.* at § 23-89-209(a)(1).

65. Insurance is not so likely to be held by victims other than motorists and their passengers—pedestrians, bicyclists, etc. Certainly they will not be protected by uninsured motorist coverage; they may or may not have broader forms of first-party insurance, such as

harm caused by the negligence of an uninsured motorist unless he chooses[66] not to purchase insurance to protect against this well recognized danger.

This is not to argue that the unlawful failure to maintain third-party insurance does not affect law-abiding motorists. Clearly, it affects them adversely by placing them in a dilemma of risk or expense. They can decline to purchase insurance to protect themselves from the negligence of an uninsured driver, in which case (if we make the reasonable assumption that the uninsured driver is judgment proof) their loss will be uncompensated. Alternatively, they may pay a premium that reflects the cost of protecting others against the consequences of their own negligence *and* the cost of protecting themselves against the negligence of others.[67]

What can be said, however, is that the stakes are purely economic, and that the people likely to be injured by uninsured motorists have the option to protect themselves at relatively modest cost. It can be argued that that additional expense does not justify barring motorists from the public highways for reasons unrelated to safety. (Safety is another thing altogether. Society has a significant interest in keeping drunk drivers off the road even if they are fully insured. Insurance proceeds never fully offset the consequences of an accident.)

3. *Acknowledge Defeat?*

The preceding discussion suggests that an appropriate societal response to the problem of uninsured motorists may be a realization that we are not willing to do what is necessary to attain very high compliance rates, because

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health, disability, and life insurance.

If a vehicle is covered for the no-fault benefits described above (*see supra* note 59), those benefits extend to "occupants of the insured vehicle and to persons struck by the insured vehicle, including pedestrians, bicyclists, motorcyclists, persons in a horse-drawn wagon or cart, and persons riding on an animal, and to none other." ARK. CODE ANN. § 23-89-204(a) (Michie 1992). The coverage is secondary to any coverage the person struck may have under another policy. *See id.* at § 23-89-204(b).

66. "Chooses" is a fair word because motorists who never give the matter conscious thought *will* be covered. All these forms of first-party insurance are purchased by large numbers of individuals, and, in several instances discussed above, will automatically be included in a motorist's own liability insurance policy unless the motorist expressly informs the insurance company to delete the coverage.

67. This dilemma is present in decisions about purchasing first-party options on automobile insurance, such as collision and uninsured motorist coverage. In the case of broader first-party insurance, by contrast, the possibility of injury at the hands of a negligent, uninsured, and judgment-proof motorist is unlikely to be a factor. People do not buy life, health, or disability policies based on the fear of injury at the hands of an uninsured motorist. Nor will injuries attributable to that particular risk materially affect the premiums on those broad insurance policies.

the cure may be worse than the disease. We then would have two obvious options. We could continue our present laws and enforcement policies, realizing that tens of thousands will continue to disobey the law. Alternatively, we could repeal the mandatory insurance provisions, and leave insurance decisions to the market.

Neither route is entirely satisfying. Continuing present practice rewards those who disregard the law, while shifting the additional expense to those who follow it. Outright repeal, on the other hand, while not fostering disrespect for the law or rewarding lawbreakers, would swell the ranks of the uninsured. That development, in turn, would considerably increase the expense of uninsured motorist coverage.

B. Curtailment of the Tort System for Most Traffic Accidents

In my view, the most satisfactory approach to the problem would require fundamentally changing the tort system relative to vehicle accidents involving automobiles, vans, and small trucks.[68] Many of the problems of uninsured motorists would be resolved if we were willing to abandon the fault system for allocating losses in most traffic accident cases. Moving to a system of no-fault is too important a decision to be made on the basis of the problem of uninsured motorists. Moreover, this article, which is devoted to the very different problem of uninsured vehicles, is not the proper place for an extended discussion of no-fault. However, having concluded that adoption of no-fault would provide the best resolution of the problem of uninsured vehicles, I think that a brief discussion of no-fault is warranted.

Arkansas law currently provides for what is sometimes called no-fault insurance[69]—the payments for medical, income continuation, and accidental death benefits discussed above.[70] However, it is a misconception to think that Arkansas has adopted a no-fault *system* merely because these additional first-party benefits can be purchased as part of an automobile liability policy. These are benefits routinely available in health, disability, and life policies, except

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68. Big trucks constitute a significant separate risk category, which might justify their continued tort liability. Generally, vehicles and drivers pose reciprocal risks to each other; A endangers B while B endangers A. Big trucks pose a nonreciprocal risk. In a case of a collision between a big truck and an automobile, it is clear who the loser will be. Moreover, big trucks are commercial vehicles, so it is likely that assets or liability insurance is available to protect victims.

The no-fault provisions discussed here would require significant modification in the case of injuries to persons other than drivers and passengers of motor vehicles (mostly pedestrians).

69. *See* Aetna Ins. Co. v. Smith, 263 Ark. 849, 568 S.W.2d 11, 13-14 (1978).

70. *See supra* note 59 and accompanying text for a discussion of the insurance policy provisions contemplated by ARK. CODE ANN. § 23-89-202.

without the limitation that the injury must occur in a traffic accident. The statutory scheme retains fault-based tort liability,[71] coupled with the insurer's right to subrogation with respect for no-fault benefits paid.[72]

Under present Arkansas law, therefore, the ultimate economic effect of an injury caused by a negligent driver is supposed to be borne by that driver. If the victim has waived the optional no-fault coverage, full payment is to be made to the victim; if the victim has received no-fault benefits, then to the victim's insurer to the extent of such benefits, and any additional damages to the victim. Under this arrangement, if the tortfeasor is uninsured and judgment proof—the problem addressed by this article—the victim does not receive the compensation contemplated by law. Even if the victim receives the limited no-fault benefits, it is only because the victim has paid premiums inflated by the insurer's knowledge that it may be unable to exercise its subrogation rights.

Commentators describe Arkansas and other states with such legal arrangements "add-on" jurisdictions, because the no-fault benefits are in addition to, and not in lieu of,[73] fault-based tort recoveries. States that have adopted a purer form of no-fault have ended liability for negligence in most traffic accidents.[74] Using this terminology, approximately thirteen states have in effect some version of the purer form of no-fault.[75] Here, I am discussing this purer form.

Under a truly pure no-fault system, each party would look exclusively to his own insurance coverage for compensation. Society could continue to protect itself from unsafe drivers through the criminal law and the efforts of law enforcement personnel, which should enjoy relatively high public support.[76] Insurance would serve the function of compensating injured

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71. *See* ARK. CODE ANN. § 23-89-206 (Michie 1992).

72. *See* ARK. CODE ANN. § 23-89-207(a) (Michie 1992). The insurer bears a share of the cost of recovery proportionate to its share of the total recovery. *See id.* at § 23-89-207(b).

73. That the no-fault benefits displace tort recovery is crucial to a true no-fault system: "The most distinctive feature of no-fault plans, and the most significant as well, is the partial tort exemption." Robert E. Keeton, *Compensation Systems and Utah's No-Fault Statute,* 1973 UTAH L. REV. 383, 397.

74. *See* Jeffrey O'Connell et al., *The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States*, 55 MD. L. REV. 160, 161 n. 4 (1996); ROBERT H. JOOST, AUTOMOBILE INSURANCE AND NO-FAULT LAW 2d § 5.1, at 1 & § 5.9, at 19 (1992).

75. See O'Connell, *supra* note 74, app. C, listing fifteen states; JOOST, *supra* note 74, at 2, § 6:1, lists fourteen states. Both include Connecticut, which apparently has recently repealed no-fault. *See* Mark M. Hager, *No-Fault Drives Again: A Contemporary Primer*, 52 U. MIAMI L. REV. 793, 793 (1998). Professor Hager, incidentally, apparently uses a more inclusive definition of no-fault than that of other authorities, because he states that 26 states "have some sort of auto no-fault." *Id.*

76. Whatever police and prosecutorial resources are currently devoted to enforcement of mandatory insurance laws could be employed in enforcement of other laws that are more important to the public.

parties—all injured parties, not merely those injured by the fault of another. Payments would be determined based on the severity of injury, up to policy limits. Fault would be irrelevant in determining compensation, although a driver's record would be relevant in setting premiums;[77] the threat of higher premiums may create a deterrent to unsafe driving comparable to that of the tort system.[78]

No American[79] jurisdiction has ever adopted pure no-fault.[80] For example, the American statutory schemes "ban pain and suffering claims for minor injuries, but allow them for major ones. All allow suits for death and egregious injury. They differ in how minor an injury can be and still be major enough for lawsuit eligibility."[81]

No-fault insurance is first-party insurance. In theory, the state could leave decisions about its purchase to individual choice, as is the norm for first-party insurance. It is likely, however, that the public would be offended by a significant number of uncompensated innocent victims of negligent drivers who, even if able to pay, would not be held civilly responsible. In part for this reason, no-fault is usually mandatory, notwithstanding academic criticism.[82]

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77. "Premium-setting based on the number and severity of accidents . . . makes as much sense under no-fault as it does under tort." Hager, *supra* note 75, at 799. The idea that high-risk drivers would not pay anything for their poor driving habits has been disputed by proponents of no-fault for decades. *See* Robert E. Keeton, *Basic Protection and the Future of Negligence Law*, 3 U. RICH. L. REV. 1, 16-17 (1968).

78. Professor Hager thinks that both the tort system and no-fault are destined to fail in deterring the worst drivers:

> Young males and the inebriated, the two chief classes of deviantly bad drivers, are not likely to respond to tort liability with safer driving, because their dangerous behavior stems from impaired judgment from the start. . . . For these drivers, under either no-fault or tort, meaningful deterrence can arise only if they risk forfeiture of driving privileges or other harsh sanctions, even if they have not yet caused an accident.

Hager, *supra* note 75, at 800-01.

79. New Zealand, Israel, Sweden, Finland, and three Canadian provinces have pure no-fault automobile insurance. JOOST, *supra* note 74, at 3, § 7:1. The broadest no-fault system ever placed into effect is the New Zealand Accident Compensation Act. Under this sweeping act, "everyone injured in any type of accident in New Zealand, irrespective of the cause, will be entitled to claim compensation from the new Accident Compensation Commission." D.R. Harris, *Accident Compensation in New Zealand: A Comprehensive Insurance System*, 37 MOD. L. REV. 361, 362 (1974). At the same time, "no claim, either at common law or under a statute, may be brought for damages arising out of personal injury or death suffered by accident in New Zealand." *Id.* at 363.

80. *See* Hager, *supra* note 75, at 804.

81. Hager, *supra* note 75, at 805.

82. Professor Epstein has argued: "I have a strong preference for voluntary markets. . . . It may well be that the case is made for the abolition of all tort liability, but it does not follow that those same arguments require instituting compulsory first party insurance." Richard A. Epstein, *Automobile No-Fault Plans: A Second Look at First Principles*, 13 CREIGHTON L. REV. 769, 789-90 (1979-80).

If Arkansas were to adopt mandatory no-fault insurance, of course, tens of thousands would disregard this requirement, just as, at present, they disregard the statute requiring third-party liability insurance. However, the consequences of noncompliance would be squarely placed on the person who violated the law, and not on the victim of his negligence: If you buy insurance, you receive compensation in case of injury; if you disregard the requirement, you do not. One of the incongruities of current law is that an uninsured motorist does not protect others against the consequences of his own negligence, but is able to recover damages from an insured motorist who is at fault.[83]

The virtues of no-fault have been sung in the academic literature for the past three decades,[84] and need not be discussed in detail here. A signal advantage is the reduction in disputes and litigation, with their attendant expense, delay, uncertainty, error, inconvenience, and hard feelings. Most obviously, no-fault would end most legal disputes about whose negligence caused the accident.[85] Even in those cases where fault is clear, arguments concerning damages would be significantly reduced. A claimant can more easily work to a resolution with his own insurance company, with which there is a preexisting and continuing relationship, than with the other driver's liability insurance company, which has little reason to try to satisfy the claimant.

More important than these improvements is the different philosophy that no-fault embodies—injured people need compensation whether or not their injury occurred as the result of another's negligence. This is an extension of the workers' compensation idea, which I have advocated in other contexts.[86]

Having evaluated other proposals in terms of political reality, I should do the same with no-fault. I think it is extremely unlikely that the Arkansas General Assembly will adopt no-fault within the foreseeable future.[87] No state

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83. To the degree a state's no-fault system deviates from pure no-fault, the problem of uninsured motorists continues. For example, if the law preserves a tort action for wrongful death, that right continues to be worthless if the tortfeasor is uninsured and judgment proof. Even in that case, the victim would receive the no-fault benefits, which would be at least as much as minimum liability coverage under present law. Under any system, it is hard to obtain full recovery for serious injury unless the tortfeasor is deep-pocketed.

84. For a summary of the claimed advantages of no-fault, *see* Hager, *supra* note 75, at 807-08.

85. Because most no-fault plans allow tort actions for certain serious injuries, some legal disputes concerning fault would continue.

86. *See* Philip D. Oliver, *Once Is Enough: A Proposed Bar of the Injured Employee's Cause of Action Against a Third Party*, 58 FORDHAM L. REV. 117 (1989).

87. If no-fault is to come to Arkansas within the foreseeable future, it is most likely to come as the result of federal legislation. *See* Hager, *supra* note 75, at 818-19; *see also* Philip Buchan, *'Not-Ready-for-Prime-Time' No-Fault*, 34 TRIAL, July 1998, at 11.

has done so for over twenty years.[88] The opposition of the bar alone would doom such a change, and others would find abandonment of the fault system objectionable.[89]

VIII. CONCLUSION

If there is a politically viable solution to the problem of uninsured motorists in Arkansas, I have not thought of it, nor have I found it in the laws of other states or in academic literature. Any measure strong enough to make a significant dent in the problem is likely to create a new problem of equal or greater severity. For that reason, any such proposal is likely to lack political and public support. I believe that the public is not willing to force large numbers of people off the road on economic grounds, and I regard the public's view as reasonable.

Although a satisfactory solution to the problem is unattainable (assuming continuation of third-party liability and compulsory insurance), we may be able to achieve a modest increase in the percentage of vehicles that are lawfully insured. Compiling a monthly list of registered vehicles that apparently lack insurance, and sending registered letters to their owners, may have some effect. The impact of this measure will be greater if the letter conveys a credible threat of significant consequences for the motorist who does not respond. It must be recognized that any measure tied to vehicle registration will tend to increase the number of motorists who do not register (or insure) their vehicles. The most promising measure to combat the problem of nonregistration may be issuing tags of different colors each year, rather than merely giving motorists stickers to attach to the old tags. While the cost and inconvenience of this measure would be considerable, it may nonetheless be worthwhile.

In my view, the best approach would entail adoption of a no-fault tort system to govern most traffic accidents. No-fault would offer significant advantages, of which reasonably satisfactory resolution of the problem of uninsured motorists would be one. The Arkansas General Assembly is, however, unlikely to adopt no-fault within the foreseeable future.

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88. *See* Hager, *supra* note 75, at 793.

89. One no-fault opponent, an associate director of ATLA Public Affairs, dismisses the idea that no-fault has been thwarted by "the political clout of the trial lawyers. . . . It apparently has not occurred to them [proponents of no-fault] that, possibly, no-fault has failed because most people disagree with allowing those who cause injuries to buy immunity from liability." Buchan, *supra* note 87, at 11. Of course, it might be argued that the basic idea behind third-party liability insurance—which I doubt Mr. Buchan opposes—is to allow people to buy immunity from liability.