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# The Injury Industry and the Remedy of No-Fault Insurance, by Jeffrey O'Connell

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# BOOK REVIEWS

THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE.

By Jeffrey O'Connell. Chicago: Commerce Clearing House, Inc. 1971. Pp. xiii, 253. \$8.50.

For a number of years Professor Jeffrey O'Connell has investigated and criticized the traditional methods used to compensate traffic accident victims. As coauthor with Professor Robert Keeton of *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*,<sup>1</sup> a book containing a proposal popularly called the Keeton-O'Connell plan, O'Connell has played a major role in generating interest in reform and in developing proposals to achieve it. In his latest book, *The Injury Industry and the Remedy of No-Fault Insurance*,<sup>2</sup> O'Connell abandons his roles as investigator, critic and designer and adopts those of advocate and polemicist. He carries his case to the general public in an effort to stimulate support for the reform for which he long has labored.<sup>3</sup> Unfortunately, O'Connell's efforts as polemicist and advocate do not achieve the performance level he has consistently attained in his other roles. *The Injury Industry* is a superficial and misleading work, one which does credit neither to the man nor to the cause he serves.

The book's title suggests both the superficiality and misleading nature of its contents. O'Connell has written an exposé of what he labels "the injury industry." The "industry" to which he refers consists of the major opponents of no fault insurance reform: insurance companies and organized bar groups. The author's thesis is simple. Since the fault system operates unfairly and inefficiently, it does a poor job of compensating victims of motor vehicle accidents. O'Connell argues that no fault insurance would provide better and fairer compensation more efficiently than does the fault system. He accuses the injury industry of having a financial stake in retaining the fault system and, therefore, he is suspect of its opposition to no fault reform.<sup>4</sup> Insofar as he attacks the

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1. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* (1965) [hereinafter cited as KEETON & O'CONNELL].

2. J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* (1971) [hereinafter cited as THE INJURY INDUSTRY].

3. See, e.g., *id.* at 1-8.

4. See, e.g., *id.* at 37-38.

credibility of the opposition, O'Connell is adopting a new tactic for advocating no fault reform—impeachment through proof of interest and bias.

One feels a good deal of sympathy for no fault advocates like O'Connell. For several years their efforts have been frustrated because their opponents have ignored the evidence, failed to confront the issues and, worst of all, belittled the efforts of individuals like O'Connell by dismissing no fault reform as the aberration of cloistered academicians.<sup>5</sup> By idealizing fault, the opponents of no fault have disregarded the merits of reform. They have constructed arguments from premises which can be disproved historically, logically or empirically. No fault opponents have made a fetish of deterrence despite overwhelming evidence that negligence law does not and cannot prevent most vehicular accidents. They have argued for retention of general damages without confronting the economic and social costs that such a reparative goal demands. Thus, one can understand and forgive a display of exasperation by the no fault advocates. Since the opposition to no fault insurance has come largely from two groups that have a financial interest in motor vehicle accident claims, insurers and the bar, it is easy to understand why O'Connell attributes opposition to no more than an unwillingness to relinquish a lucrative system. Unfortunately, his impeachment of no fault opponents, besides seeming irrelevant to the merits of the argument, is seriously misleading. His injury industry is a straw man.

By coining the phrase "the injury industry" and attacking it so vehemently, O'Connell misleads his reader in two ways. Initially, he misrepresents the roles played by insurers and attorneys within the context of the present compensation system. More importantly, however, he misstates their roles under a no fault plan. O'Connell attacks the injury

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5. Examples of arguments in opposition to no fault insurance of the type described may be found in almost every issue of the magazine published by the American Trial Lawyers Association. See, e.g., *No-Fault Plans "First Aid"—"Major Surgery" Needed*, TRIAL, Nov./Dec., 1971, at 5; Lewis, *As I See It*, id. at 8, *Nothing Wrong in Principle Can Be Right in Practice*, id. at 9; Spangenberg, *The Federal No Fault Plan: Benefits for Sale*, id. at 30; Ring, *Illinois No Fault Plan: Legalized Consumer Fraud*, id. at 34; Schwartz, *The Fair Pay Plan: Fair Play for Consumers*, id. at 39. These articles represent an extreme. They should be compared with other studies which are more carefully documented and better reasoned. See, e.g., W. BLUM & H. KALVEN, JR., *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM: AUTO COMPENSATION PLANS* (1965) [hereinafter cited as BLUM & KALVEN]; G. CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter cited as CALABRESI]; A. CONARD, J. MORGAN, R. PRATT, JR., C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION* (1964); KEETON & O'CONNELL, *supra* note 1; H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970) [hereinafter cited as ROSS].

industry because it profits from adjusting and litigating claims under the fault system. This, of course, is true. He also argues, quite correctly, that if litigation is unnecessary the major beneficiaries of the present system are the litigators, not the claimants. Further, he assumes that litigation concerning fault or negligence is unnecessary—an assumption subject to considerable debate.<sup>6</sup> Even if we concede that such an assumption is a plausible social judgment, O'Connell still misrepresents the situation. The adoption of no fault insurance will eliminate neither the institution of insurance nor the need to adjust claims. Indeed, no fault insurance merely alters the relationships among insurer, insured, victim and the legal system. Victims will continue to be compensated from one or more sources of funds which will have to be raised through payment of premiums or taxes. An apparatus must be provided to collect from one and distribute to another. This apparatus, together with medical personnel, hospitals, police and other persons and groups involved in providing care for accident victims, is and will remain the injury industry.

O'Connell's attack upon insurance companies and the bar is unwarranted. If his injury industry has been half as selfish and unjust as he suggests, it deserves exposure, condemnation and regulation or elimination. However, there is no such industry in the pejorative sense he implies. There is, indeed, an extensive apparatus for adjusting claims and raising funds to make payments. The apparatus has grown rapidly and may not be functioning as efficiently and fairly as it might. It needs adjustment, overhaul or redesigning. This may necessitate adopting some form of no fault insurance. Nevertheless, the complexities of victim claims cannot be eliminated. Many no fault plans rely upon several devices simultaneously to provide compensation. Coverage disputes will be increased. Periodic payment of benefits will give rise to disputes over termination of benefits. There will still be many disputed points and ample opportunity for systemic malfunctions under a no fault plan.

Besides misleading his reader about these points, O'Connell also misconceives the proper role of dispute in checking malfunctioning. O'Connell argues that no fault insurance would reduce litigation by reducing the number of "decision points."<sup>7</sup> Since litigation is time consuming and expensive, a reduction in disputes would provide major advantages. This argument, however, raises serious questions of its own. Under the present system, claimants' attorneys act as a check upon

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6. See, e.g., BLUM & KALVEN, *supra* note 5; CALABRESI, *supra* note 5.

7. THE INJURY INDUSTRY, *supra* note 2, at 154; see J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM 61-85 (1969).

arbitrary or capricious claims practices. These lawyers are able to challenge the rigidities which inevitably afflict any institution, particularly institutions which dispense money.<sup>8</sup> Under most no fault insurance plans, victims would have to seek reparation from several sources, the amount receivable from each source would be small and a dissatisfied victim would still have to go to court to establish his right to benefits, their amount and the source of payment. There would be less inducement to consult an attorney and the likelihood of effective external review of the actions of any single source would be decreased.

In the last few years concern with abuses of discretionary power by administrative institutions has become popular.<sup>9</sup> Low visibility administrative and adjudicative decisions, such as those made by police when deciding to arrest, are often challenged as arbitrary.<sup>10</sup> Similarly, insurer cancellation and claims adjusting practices have been studied and criticized,<sup>11</sup> Other compensation systems, such as workmen's compensation and social security disability, have provided elaborate adjudicative processes for resolving disputes.<sup>12</sup> Under most no fault plans, however, no similar review processes are contemplated; nor does O'Connell suggest a way of providing such controls.

It may be true, as O'Connell suggests in his epilogue, that "technology is too important to be left to the technicians."<sup>13</sup> However, a decision to change a technology cannot be based merely upon a dislike for technicians. Some technology and technicians must remain. The true quest must be for appropriate limitations upon discretion to prevent arbitrary and capricious actions.<sup>14</sup> So limited, technology will serve.

O'Connell also misleads by speaking of "the remedy of no-fault insurance." Unless his reader has made a careful and independent study of such disparate proposals as the New York plan, the Keeton-O'Connell

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8. For a portrayal of the extent to which plaintiffs' attorneys act as a check, from the adjuster's point of view, see Ross, *supra* note 5, at 56-86, 136-75.

9. See generally K. DAVIS, *DISCRETIONARY JUSTICES: A PRELIMINARY INQUIRY* (1969).

10. See, e.g., A. BLUMBERG, *CRIMINAL JUSTICE* (1967); J. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (1966).

11. S. REP. NO. 91-326, 91st Cong., 1st Sess. 6-7 (1968); S. REP. NO. 188, 90th Cong., 1st Sess. 12-13 (1967); S. REP. NO. 1480, 89th Cong., 2d Sess. 7-8 (1965).

12. See generally P. NONET, *ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY* (1969); Haviland & Glomb, *The Disability Insurance Benefits Program and Low Income Claimants in Appalachia*, 73 W. VA. L. REV. 109 (1971); Viles, *The Social Security Administration Versus the Lawyers . . . and Poor People Too* (pts. 1-2), 39 MISS. L.J. 371, 40 *id.* at 24 (1968).

13. *THE INJURY INDUSTRY*, *supra* note 2, at 156.

14. For a study of the practices of insurance claims adjustments, see Ross, *supra* note 5.

plan, the American Insurance Association proposal and the Colter plan,<sup>15</sup> the assumption would be that no fault insurance reform is a unit.<sup>16</sup> O'Connell portrays a battle between "the fault system" on the one hand and no fault on the other.<sup>17</sup> This is a false picture. There are many proposals to modify the current system which do not abandon fault. The uninformed reader, confronted in the media by a plethora of similar appearing proposals, needs help in evaluating and selecting the best possible compensation system. O'Connell might have provided yeoman service had he discussed, compared and contrasted the various plans for his lay audience.<sup>18</sup> He might have advocated the Keeton-O'Connell plan and demonstrated how and why it responds to his criticisms of fault. He might even have revealed his thoughts about the underlying social, political and economic issues. O'Connell adopts none of these formats but, instead, treats the debate over insurance reform as an either/or proposition. The problem is not that simple; neither is the remedy.

From O'Connell's statements in *The Injury Industry*, the reader would conclude that no fault insurance is a panacea. The author claims a greater number of victims would receive more benefits from some form of no fault insurance, while insurance purchasers would pay reduced premiums.<sup>19</sup> Unless the reader is rather sophisticated and knowledgeable, he might regard this as the inevitable result of adopting some form of no fault insurance. O'Connell's assertion is true, provided certain limitations are made clear. O'Connell neither confronts these limitations, nor purports to explore their implications for his readers.

No fault insurance can provide benefits more cheaply than liability insurance. The savings occur in two major ways. Administrative costs are reduced by reducing the expenses of litigation and claims adjustment. The risks of doing so, however, have already been mentioned. Administrative costs will allegedly also be reduced by utilizing more efficient compensation devices like health and accident insurance, workmen's compensation and social security disability programs. O'Connell does not

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15. For a review of and citation to various no fault plans, see Thorpe, *Compensation Reform, Accident Costs, and Traffic Safety: Toward a Unified Motor Transport Policy*, 46 IND. L.J. 301 (1971) [hereinafter cited as Thorpe].

16. See THE INJURY INDUSTRY, *supra* note 2, at 114-16.

17. O'Connell does criticize plans developed by the National Association of Independent Insurers and The American Mutual Insurance Alliance. *Id.* at 116-18. Since both plans retain fault, the characterization in text is accurate.

18. O'Connell devotes approximately seven pages of text to a discussion of no fault plans. *Id.* at 94-101. Appendix I contains a brief discussion of provisions for property damage claims which might supplement the Keeton-O'Connell plan. Appendix II contains recommendations for optional no fault insurance.

19. *Id.* at 106-21.

make clear, however, that reallocating costs among existing compensatory devices may not alter significantly the total costs.<sup>20</sup> Auto insurance premiums may be reduced, but the premium costs for maintenance of other funds will rise. The expansion of health, accident or disability benefits provided by a federal program will inevitably require a higher F.I.C.A. tax. Any meaningful long-range cost reduction can be achieved only through reducing the incidence and severity of accidents.<sup>21</sup> It is not a matter of devising a new accounting system.

No fault insurance, in short, is mislabeled a remedy for what ails our compensation system. It should more properly be labeled an instrument, a device for making our claims adjustment apparatus potentially more economical and efficient. When so viewed, no fault insurance becomes an attractive part of a larger reform package. That larger package, however, should include proposals directed toward safer vehicles, better roads, alternative forms of transport, modern licensing procedures, up-to-date enforcement methods for moving traffic violations and a system for regulating insurance rates and insurer cancellation and claims adjusting practices.<sup>22</sup> Such a package might properly be labeled a remedy.

The problem with the debate over no fault insurance is the superficiality of the dispute. I suspect that many citizens realize something is wrong with the fault system. I further suspect they will support correctives. However, I doubt that *The Injury Industry and the Remedy of No-Fault Insurance* will assist the public in an analysis of the problems of motor vehicle transport policies for this nation. If recalled from limbo at all, it will be as the exposé that failed—no mean feat in an era of activist reforms and widespread exposure of the alleged evils of institutions.

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20. O'Connell discusses coverage duplications. *Id.* at 97-105. He does not discuss the impact on costs of eliminating coverage duplications by shifting certain costs to other forms of insurance.

21. See CALABRESI, *supra* note 5, at 26-31, 68-129; Thorpe, *supra* note 15, at 316-18.

22. See generally Thorpe, *supra* note 15.

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