

FINANCIAL RESPONSIBILITY LAWS IN CONSTITUTIONAL PERSPECTIVE

Hundreds of thousands of individuals suffer bodily injury and property damage on this country's highways each year.¹ Though the controversy is an old one, the recent introduction of no-fault insurance in Massachusetts has sparked a resurgence of debate over the best method of compensating such victims. Most states do not require motorists to carry insurance of any kind; instead, they rely on financial responsibility laws to aid the injured party. Under these laws a motorist is allowed to drive without showing proof of ability to respond in damages until he is involved in an accident. At that point, he must either prove his financial responsibility or suffer loss of his driving privileges. Unfortunately, if the motorist is insolvent, suspending his license does not measurably increase the injured party's chances of recovery, and it may inflict great hardship on the insolvent motorist and his family. The ineffectiveness and harshness of this method of compensating accident victims opens it to attack not only on policy grounds but also on constitutional grounds. The purpose of this Comment is to analyze these constitutional issues.

Part I outlines the history of the development of financial responsibility laws. Using California cases as examples, it also describes the fourteenth amendment objections which these laws have met and overcome in the past. Part II focuses on the procedural sufficiency of the prejudgment half of financial responsibility laws in light of a recent series of United States Supreme Court cases which have effected a significant change in constitutional thinking. In particular, this section concerns the type of hearing on the question of fault an uninsured motorist must receive before he can be deprived of his license. Part III deals with the substantive sufficiency of financial responsibility laws. Even if all requirements of procedural due process are fulfilled by these laws, there is still some question whether depriving an uninsured motorist of his license for the sole purpose of affording a collection device to the injured party is consonant with the equal protection requirements of the fourteenth amendment. Part IV suggests that the constitutional infirmities of financial responsibility laws stem not from a basic weakness of state interest in protecting the welfare of the driving public, but from the adoption of a system which is poorly designed to

1. In 1969, auto accidents killed 56,400 people, disabled 2 million more, and caused \$12.6 billion in total damages. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 3-5 (1970).

achieve that goal. The Comment concludes that, in order better to serve both the compensatory needs of the accident victim and the economic interests of the indigent motorist, state financial responsibility legislation should be replaced altogether by another system of automobile accident reparations.

I.

A SHORT HISTORY

The nineteenth century tort concept of "no liability without fault" developed largely in response to a strong belief in the importance of unfettered private initiative and industry. It was felt that, for the good of society as a whole, the venturesome individual should be relieved of responsibility for the purely fortuitous harm his activity might cause.² That this doctrine dealt harshly with the party injured by such activity was nowhere more graphically illustrated than on the new turnpikes and improved roads of the time. Only in the most clear-cut cases of negligence was it possible for the victim of a horse-and-buggy or other traffic accident to obtain redress.³ Even if the plaintiff prevailed in court, he still ran the risk that the defendant would prove unable to respond in damages. As long as unrestricted mobility was considered a necessary adjunct to the smooth functioning of private enterprise, the hardship suffered by uncompensated accident victims could be discounted as one of the costs of a growing economy. With the stabilization of the country's economic structures near the turn of the century and the sharp rise in the number and violence of accidents occasioned by the advent of the automobile, however, the suffering of these unaided victims became increasingly difficult to justify.⁴

A. Development of Financial Responsibility Laws

1. Postjudgment Provisions

By the mid-1920's, the problem of uncompensated automobile injuries had become so acute that several states felt constrained to enact legislation designed to provide protection for those traffic victims who were free of fault and able to prove the negligence of the other party, but unable to collect from that party due to his insolvency. Massachusetts found a solution that was simple and direct. It enacted legislation requiring every motorist to show proof of liability insurance coverage as a prerequisite to vehicle registration.⁵ At the time, no other

2. J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 1-23 (1968). For a comprehensive list of sources, see U.S. DEP'T OF TRANSPORTATION, THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION 36 (1970).

3. L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE 11-12 (1958).

4. *Id.* at 58-68.

5. MASS. GEN. LAWS ch. 90, § 34 (1925).

state followed suit.⁶ Concerned that compulsory insurance would overly regiment the insurance industry and the driving public⁷ and undermine the cardinal principle of liability based solely on fault,⁸ most states, following the lead of Connecticut, adopted what came to be known as financial responsibility legislation.⁹ Under these laws, motorists were not required to carry insurance, but those who failed to so protect themselves and were unable to respond to a judgment suffered suspension of their driver's license and vehicle registration until the judgment was paid. Moreover, their driving privileges were not restored until they filed proof of ability to respond in damages in the future.¹⁰

Although promising on paper, the early financial responsibility laws had a serious defect: their provisions did not go into effect until a judgment had been rendered and left unsatisfied. Most accident victims assayed the financial position of their injurers before bringing suit, and few were willing to go to the time and expense of suing a defendant who appeared judgment-proof. Thus, the very drivers at whom the law was aimed often went untouched by its sanctions.¹¹

2. *Prejudgment Provisions*

In 1937, New Hampshire responded to the inadequacy of post-judgment financial responsibility remedies by providing that mere in-

6. New York made liability insurance mandatory in 1956 [N.Y. VEHICLE AND TRAFFIC LAW, § 93 (Supp. 1958)]; North Carolina followed in 1957 [N.C. GEN. STAT. SEC. 20-309 to -319 (Cum. Supp. 1957)]. In 1971 and 1972 five other states enacted compulsory insurance statutes. See note 13 *infra*.

7. The primary concern of the insurance industry was to avoid the state regulation of rates and policy content which they feared was an inevitable by-product of a compulsory insurance system: "Financial responsibility legislation was developed as a result of, and as the insurance companies' answer to, the growing demand for compulsory liability insurance of some kind." Grad, *Recent Developments in Automobile Accident Compensation*, 50 COLUM. L. REV. 300, 305 (1950). See also Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700, 717 (1959). Financial responsibility legislation, however, also found favor with legislators because of "[i]ts consistency with a basic principle of minimizing compulsion and introducing the least possible interference with personal liberty and individual choice" Braun, *The Financial Responsibility Law*, 3 LAW & CONTEMP. PROB. 505, 518 (1936).

8. Compulsory insurance takes the virtue out of safe driving by forcing careful motorists to pay for accidents in which they may never be involved. Braun, *supra* note 7, at 506; Feinsinger, *The Operation of Financial Responsibility Laws*, 3 LAW & CONTEMP. PROB. 519, 524 (1936).

9. CONN. PUB. ACTS ch. 183 (1925). By 1950, some 44 states had enacted financial responsibility laws. Grad, *supra* note 7, at 307. Presently, all 50 states and the District of Columbia have some form of financial responsibility legislation. See note 13 *infra*.

10. See note 23 *infra*.

11. Murphy & Netherton, *supra* note 7, at 705; Grad, *supra* note 7, at 308.

v involvement in a traffic accident would trigger prejudgment application of its financial responsibility law. The driver's license and vehicle registration of an uninsured motorist would be revoked unless he posted with the department of motor vehicles security sufficient to cover a claim for damages against him.¹² This scheme placed great pressure on the apparently insolvent defendant to raise, by whatever means, the funds necessary to pay a potential judgment. By 1952, some 41 states had incorporated prejudgment security provisions into their financial responsibility laws.¹³

12. N.H. LAWS ch. 161 (1937). The New Hampshire law first provided that the uninsured motorist receive a preliminary hearing to determine the probability of his fault. The 1937 statute eliminated this requirement because it was found to impair the efficient operation of the law. See Note, *Legislative and Judicial Assistance to Automobile Accident Victims—Compulsory Insurance, Financial Responsibility Laws and Automobile Accident Compensation*, 16 N.Y.U.L.Q. REV. 126, 134 (1938).

13. Murphy & Netherton, *supra* note 7, at 706. Eventually, every state but Massachusetts adopted the prejudgment security provision as well as the older post-judgment financial responsibility legislation. For a detailed breakdown of the provisions of the laws of the 50 states and the District of Columbia, see R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE, Appendix C (1965) [hereinafter cited as KEETON-O'CONNELL]. A recent listing of citations to the statutes can be found in Comment, *Auto Drivers' Financial Responsibility Statutes—Due Process Requires a Hearing to Determine Reasonable Probability of Judgment Adverse to Licensee*, 1971 U. ILL. L. FORUM 719, 719 n.2 (1971).

In 1970, Massachusetts modified its compulsory insurance scheme to provide that all policies issued in the state include "personal injury protection." MASS. ACTS 1970, ch. 670, § 4. This is first-party coverage which pays the insured up to \$2000 for damages incurred in a traffic accident, without regard to his negligence in that accident. Recovery in tort is limited to those cases in which actual damages exceed that amount. *Id.* There are also limitations on recovery for pain and suffering. *Id.* § 5. Collateral benefits under wage continuation plans are deducted from benefits payable under the no-fault provision. *Id.* § 2. To prevent double coverage, the motorist is allowed to deduct, in return for a reduced premium, the no-fault benefits from his policy; but he is still precluded from claiming tort damages to the same extent as if he had received the benefits that would have been due if the deductible had not been elected. *Id.* § 4. (For a more detailed analysis of Massachusetts' statutory scheme, see Ghiardi & Kircher, *Automobile Insurance: Analysis of the Massachusetts Plan*, 21 SYRACUSE L. REV. 1135 (1970) [hereinafter cited as Ghiardi & Kircher, *Automobile Insurance*].)

By November, 1972, statutes which could loosely be described as no-fault laws (although widely divergent in scope) had been enacted in eleven other states: Connecticut, Delaware, Florida, Illinois, Maryland, Michigan, Minnesota, New Jersey, Oregon, South Dakota and Virginia. For a detailed breakdown of the provisions of these statutes, see Ghiardi & Kircher, *The Uniform Motor Vehicle Reparations Act: An Analysis and Critique*, 40 INS. COUN. J. 87, 103-04 (1973) [hereinafter cited as Ghiardi & Kircher, *Uniform Act*]. Presently, virtually every other state in the country is considering no-fault legislation which parallels one or another of the laws now in existence. See *Current Status of No-Fault Legislation in the United States*, 21 CATH. U.L. REV. 466 (1972).

The effect no-fault legislation will have on the financial responsibility law of a state depends, first, on the degree to which the no-fault plan reduces the number of

California has had a postjudgment financial responsibility law

uninsured motorists in the state and, second, on whether insurance companies that pay first-party benefits have subrogation rights against a negligent uninsured motorist. The statutes of Massachusetts, Connecticut, Delaware, Florida, Maryland, Michigan, and New Jersey all require their motorists to carry both liability insurance and first-party insurance. North Carolina and New York also have compulsory liability insurance statutes [see note 6 *supra*]; but, as yet they do not require no-fault coverage. Though compulsory insurance reduces the number of uninsured motorists in a state, it does not eliminate the problem. See KEETON-O'CONNELL, *supra* note 13, at 89-90. In New York and North Carolina, a resident uninsured motorist who is involved in an accident is exposed not only to sanctions for violating the compulsory insurance laws, but also to license suspension for failure to post bond before judgment or respond in damages after judgment. See KEETON-O'CONNELL, *supra* note 13, at 85-88. Financial responsibility legislation can also be used against nonresident uninsured motorists as a means of inducing payment. (In 1962, it was estimated that seven percent of motorists involved in accidents were non-residents. *Id.* at 89. Almost every state which has a financial responsibility law will suspend, as a matter of reciprocity, the license of a motorist who fails to fulfill the requirements of the law of another state. *Id.* Appendix C.)

Adding compulsory no-fault coverage to a compulsory liability insurance scheme may not relieve the pressure exerted by financial responsibility legislation on the uninsured defendant. No-fault does not make him exempt from a tort action for negligence. To the extent of first-party benefits paid to a policyholder, an insurer is subrogated to the accident victim's rights against the uninsured defendant, whether he is a resident of the state or not. See Ghiardi & Kircher, *Automobile Insurance*, *supra* note 13, at 1137. To the extent the victim's damages exceed his first-party benefits, he retains his right to bring an action on his own behalf against the defendant. So long as some motorists are uninsured, and so long as financial responsibility laws are viewed as an acceptable means of inducing uninsured motorists to compensate their victims, these laws will continue to have utility in states with compulsory insurance schemes.

In contrast to the compulsory laws just described, the recently enacted statutes of Minnesota, South Dakota, and Virginia do not require a motorist to carry insurance of any kind. These laws require only that insurance companies *offer* their liability insurance policyholders additional no-fault coverage if those policyholders desire it. No motorist surrenders his right to sue in tort, even for minor injuries. Since uninsured motorists are free to remain uninsured and accident victims, insured or not, can still sue for damages, this kind of no-fault plan probably will have little effect on the operation of financial responsibility legislation.

Like the no-fault plans of Minnesota, South Dakota, and Virginia, the recently enacted laws of Illinois and Oregon do not require the motorist to carry insurance of any kind. If he chooses to take out liability insurance, however, his insurer is obligated to include limited first-party coverage in his policy. The problem of recovering from the uninsured defendant remains unchanged. To the extent of first-party benefits paid to the insured victim, his insurance company inherits tort rights against the defendant. Damages in excess of first-party benefits must be recovered by the insured plaintiff directly. The uninsured plaintiff in Oregon loses none of his tort rights against the uninsured defendant. (The Illinois law limited the rights of the uninsured accident victim to sue for general damages; but it was recently ruled unconstitutional. *Grace v. Howlett*, 51 Ill. 2d 478, 283 N.E.2d 474 (1972)). See Leone & Beale, *State Developments in Auto Insurance Reform: A Critical Survey*, 21 CATH. U.L. REV. 386, 387-389 (1972). If financial responsibility legislation has any utility, it is not diminished significantly by the type of no-fault statute enacted in Illinois and Oregon.

since 1929;¹⁴ it added the prejudgment security provision in 1948.¹⁵ The combined statutory scheme is similar to that of most other states.¹⁶ Any motorist involved in an accident resulting in property damage of over \$200, bodily injury, or death is required to file an accident report with the Department of Motor Vehicles within 15 days.¹⁷ Unless he qualifies for an exemption,¹⁸ he must also deposit with the Department sufficient security to satisfy any judgment which, in the Department's opinion, might be rendered against him.¹⁹ Failure to deposit this se-

14. CAL. VEH. CODE § 16370 (West 1971).

15. *Id.* § 16020. In 1959, California added one more element to its accident reparations scheme: uninsured motorist protection. CAL. INS. CODE §§ 11580.1-11580.5 (West 1972). Liability insurers in almost every state must offer this protection to their policyholders; in some states it is a mandatory provision of all policies. See KEETON-O'CONNELL, *supra* note 13, at 110-13. (For a complete listing of the statutes, see Woodroof, *Automobile Accident Reparations: A Jurisprudential Analysis of the Traditional System*, 8 WAKE FOREST L. REV. 201, 218-19 n.44 (1972).) Under this legislation, if the defendant uninsured motorist is judgment-proof and the accident victim has purchased uninsured motorist coverage, he may recover from his own insurer the amount of damages attributable to bodily injury or death he would have recovered from the defendant had the defendant been financially responsible. (This amount is determined by agreement or arbitration between the insured and his insurer.) The insurer is then subrogated, to the extent of benefits paid, to the rights of the accident victim against the uninsured defendant. See Donaldson, *Uninsured Motorist Coverage*, 34 INS. COUN. J. 57, 59-64 (1967). Thus, the beneficiaries of financial responsibility laws are insurance companies, uninsured accident victims, insured victims who have waived uninsured motorist protection, and insured victims who have suffered only property damage. (For a discussion of the myriad interpretive questions uninsured motorist statutes have raised, see Soich, *Uninsured Motorist Coverage: Past, Present and Future*, 6 DUQ. U.L. REV. 341 (1967-68).)

Mention at this point should also be made of the unsatisfied judgment fund legislation which has been enacted in a few states. Basically, these laws provide for a fund, managed by the state and financed partly from automobile registration fees and partly from general assessments against insurance companies, from which the plaintiff may recover an unsatisfied judgment. See KEETON-O'CONNELL, *supra* note 13, at 110, 115-18.

16. Most statutes are modeled after the Motor Vehicle Safety Responsibility Act of the Uniform Vehicle Code. [UNIFORM VEHICLE CODE ch. VIII (1972)]. Note, however, that in August 1972, the National Conference of Commissioners on Uniform State Laws endorsed a sweeping no-fault law (the Uniform Motor Vehicle Accident Reparations Act) which would make liability and no-fault insurance coverage mandatory. See Ghiardi & Kircher, *Uniform Act*, *supra* note 13.

17. CAL. VEH. CODE §16000 (West 1971).

18. *Id.* § 16050. No deposit is required if the operator's potential liability is covered by sufficient, approved insurance (\$15,000 for injury to one person, \$30,000 for injury to two or more persons, \$5,000 for property damage), if there is no injury or damage to anyone other than the operator or owner; or if the operator's vehicle was lawfully stopped, standing, or parked at the time of the accident. The requirement of a deposit may also be avoided by filing with the Department, with respect to all claims arising from the accident, a release from liability, a court judgment of nonliability, or a settlement agreement. *Id.* §§ 16052-59.

19. *Id.* § 16020. The amount of security that may be required is subject to the maximum limits of insurance required. As to the manner in which the Department makes its determination, see note 43 *infra*.

curity results in suspension of the motorist's driving license, vehicle registration, and license plates.²⁰ The suspension remains in effect until security is posted or one year elapses without suit being brought.²¹ If suit is brought and the uninsured motorist is found liable, the suspension remains in effect until the judgment against him is paid.²² However the suspension is terminated, the motorist must also show proof of future ability to respond in damages in order to regain his license.²³

B. *The Constitutional Issues*

In every state which has financial responsibility legislation, significant numbers of motorists drive without liability insurance coverage.²⁴ Many of these motorists cannot afford to post security following their involvement in an accident.²⁵ For those dependent on their automo-

20. *Id.* §§ 16080, 16100.

21. *Id.* § 16082.

22. *Id.* § 16371. This requirement is nullified, however, by a discharge in bankruptcy. See text accompanying notes 244-53 *infra*.

23. *Id.* §§ 16082, 16371. Proof of ability to respond in damages in the future is established either by showing proof of insurance coverage or by posting bond or cash equal to the minimal insurance coverage (\$35,000). *Id.* §§ 16430-35. This requirement must be met for at least three years following the date proof was first required, even if there is no action pending or judgment outstanding against the licensee. *Id.* § 16480.

Virtually every state requires a showing of future ability to respond in damages in those cases where suit is brought and a judgment is rendered against the defendant. In only 20 states, however, is such proof required for the simple failure to post security, whether or not an action is brought. See KEETON-O'CONNELL, *supra* note 13, Appendix C.

24. In California during 1970, some 15 percent of motorists involved in reported accidents—60,000 motorists—had no insurance. CALIFORNIA STATE DEP'T OF MOTOR VEHICLES, REPORT OF GENERAL ACTIVITIES (October 1971) [hereinafter cited as REPORT OF GENERAL ACTIVITIES].

Nationally, the Department of Transportation has estimated that 20 percent of automobiles are uninsured. In five states with financial responsibility laws, less than 65 percent of the cars registered are covered by liability insurance. U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 205 (1970).

25. In 1970, 63,324 security requirement requests were issued by the California Department of Motor Vehicles. Of that number, 53,253 lost their licenses for failure to post security. REPORT OF GENERAL ACTIVITIES, *supra* note 24. It is impossible to know with certainty what percentage of these licensees was truly unable to post security and what percentage could afford it but chose to incur license suspension instead. A study by a committee investigating the operation of the California law, however, found:

The percentage of "FI" [financially irresponsible] drivers in racial minority groups is double the percentage in the matched comparison sample [of average motorists]. The average annual income of racial minority groups is considerably lower than the average annual income of the California Caucasian population. . . . Two out of every ten drivers in the matched comparison sample are rated as a bad credit risk, whereas, seven out of ten "FI" drivers are a bad credit risk.

biles for their livelihood, loss of driving privileges means loss of their job.²⁶ For others, the consequences may not be as drastic, but the deprivation is significant nonetheless.²⁷ The harshness of the sanction and the capriciousness of its application have exposed financial responsibility laws across the country to a variety of constitutional attacks. Until recently, these attacks were, for the most part, unsuccessful.²⁸

California's experience is representative.²⁹ The two decisions of

FINANCIAL RESPONSIBILITY STUDY COMMITTEE, JURISDICTION REPORT—CALIFORNIA 58 (January 1967) [hereinafter cited as FINANCIAL RESPONSIBILITY—CALIFORNIA]. Some 31 percent of "FI" motorists sampled reported that they had no insurance because they could not afford it. *Id.* at 63. Thus, it is safe to assume that a high percentage was honestly unable to post security. (The average cost of posting security is \$300. *Id.* at 40.)

26. "With factories now so widely dispersed and beyond the reach of obsolete public transit systems, their car is for many workers the lifeline to their jobs." *Hearings Pursuant to S.J. Res. 129 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 90th Cong., 2d Sess., ser. 90-60, at 21 (1968) (testimony of A.J. Bie-miller, Director, Department of Legislation of the AFL-CIO). Inner-city dwellers and farm workers are particularly hard hit by loss of their driving privileges. *See Hearings Pursuant to H.J. Res. 958 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. ser. 90-30, at 83 (1968) (testimony of A. Conard); *Hearings Pursuant to S. Res. 233 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess., pt. 14, at 8,303-20 (1968) (testimony of R.Y. Bell, California Rural Assistance League). *See also* J. REESE, *THE LEGAL NATURE OF A DRIVER'S LICENSE* 45-47 (1965); *Berberian v. Lussier*, 87 R.I. 226, 233, 139 A.2d 869, 873 (1958); *Escobedo v. Dep't of Motor Vehicles*, 35 Cal. 2d 870, 884-85, 222 P.2d 1, 10 (1950) (Edmonds, J., dissenting).

Note that California law provides:

The privilege of a person employed for the purpose of driving a motor vehicle for compensation whose occupation requires the use of a motor vehicle in the course of his employment to drive a motor vehicle not registered in his name and in the course of his employment shall not be suspended . . . even though his privilege to drive is otherwise suspended

CAL. VEH. CODE § 16081 (West 1971). This section does not apply to jobholders who are required to drive an employer's vehicle only as one incident of their employment [*see Sogawa v. Dep't of Motor Vehicles*, 100 Cal. App. 2d 181, 223 P.2d 269 (2d Dist. 1950)]; nor does it cover motorists who drive their own vehicles in the course of their employment or as a necessary means of reaching their jobs.

27. In many areas of the country an automobile is essential for basic transportation:

Our investigation has brought into clear focus the fact that the inadequate and costly public transportation currently existing throughout the Los Angeles area seriously restricts the residents of the disadvantaged areas

This lack of adequate transportation handicaps them in seeking and holding jobs, attending schools, shopping, and fulfilling other needs.

GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS (McCONE COMMISSION REPORT): *VIOLENCE IN THE CITY—AN END OR A BEGINNING?* 65 (1965). The situation is aggravated in rural areas, where public transportation is often nonexistent. *See Lindsey, The Stranded Populace*, S.F. Sunday Examiner & Chronicle, Sunday Punch, March, 11, 1973, at 4.

28. *See* 35 A.L.R.2d 1011 (1954) for an exhaustive annotation.

29. California's treatment of the constitutionality of its financial responsibility law has not, however, paralleled in every respect the deference shown these laws in

the California Supreme Court upholding the California law present most of the important fourteenth amendment issues raised in other state courts. *Escobedo v. Department of Motor Vehicles*³⁰ was decided in 1950, shortly after enactment of California's security provision. *Orr v. Superior Court*³¹ followed some 19 years later.

In *Escobedo*, the plaintiff contended that California's financial responsibility law violated both the due process and equal protection clauses of the Federal Constitution. His due process argument was that a citizen's right to drive is a valuable property interest and thus notice and a hearing are prerequisites to its derogation. The statute failed to provide these protections; therefore, it was unconstitutional.³² The court acknowledged that free use of the highways was "a common and fundamental right" and not simply a privilege.³³ Suspension of that right without a prior administrative or judicial hearing was justified, however, by the state's compelling interest in protecting the public from the "obvious carelessness and financial irresponsibility of a substantial number of drivers."³⁴ It added that plaintiff was only one of some

other states. Significant differences in interpretation are discussed in notes 33 & 45 and accompanying text *infra*.

30. 35 Cal. 2d 870, 222 P.2d 1 (1950).

31. 71 Cal. 2d 220, 454 P.2d 712, 77 Cal. Rptr. 816 (1969).

32. 35 Cal. 2d at 874, 222 P.2d at 4.

33. *Id.* at 875, 222 P.2d at 5 (quoting 25 AM. JUR. § 163, at 456-57). This language is significant because many state courts denied due process protection to drivers' licenses on the grounds that they were mere privileges and could be rescinded by the state at will. See, e.g., cases cited in Annot., 35 A.L.R.2d 1011 (1954); *Prucha v. Dep't of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961); *Johnson v. Sanchez*, 67 N.M. 41, 351 P.2d 449 (1960). The court in *Gillaspie v. Dep't of Pub. Safety*, 152 Tex. 459, 259 S.W.2d 177 (1953) summed up this view:

Fundamental in the consideration of this contention and other points attacking the constitutionality of the Act is the settled principle that a license or permit to drive an automobile on the public highway and streets is a privilege and not property or a property right.

Id. at 466, 259 S.W.2d at 181-82. See note 139 *infra*.

34. 35 Cal. 2d at 876-77, 222 P.2d at 5. The meaning of this cryptic phrase is unclear. Justice Carter commented in dissent: "It does not follow from the failure to post security that the drivers were careless. Nor does it follow from the fact that they were in accidents that they were careless drivers. They may have been wholly blameless." *Id.* at 880-81, 222 P.2d at 8. Justice Carter was hard-pressed to find a "compelling public interest" in depriving the uninsured motorist of his license without a prior hearing:

There is no issue of immediate danger to the public health involved nor is there any question of indispensable government revenue. *The sole need is that a private person shall have security for the payment of any damages caused by him to another individual.* Certainly that presents no urgency for immediate action which will justify depriving a person of the use of his automobile, his sole means of livelihood [T]here is no connection between careless drivers and posting of security, that is, the statute is not designed to keep seemingly careless drivers off the highways. *That is true because they are permitted to drive, careless or not, if they post security.* Hence the purpose of the statute is only security for payment of damages to the innocent person.

1600 drivers whose licenses were suspended each month under the new financial responsibility law. To require a hearing in every case would place the state under a tremendous administrative burden.³⁵

Plaintiff's equal protection argument in *Escobedo* was two-fold. First, he contended that the statute arbitrarily discriminated against drivers who might not be culpable by requiring that they post security before any judicial determination of liability.³⁶ The court answered that there was no discrimination against nonculpable drivers, since the statute, "presumptively properly administered,"³⁷ did not require security of every operator involved in an accident but only of those against whom, in the opinion of the Department of Motor Vehicles, a judgment might be recovered.³⁸ Second, plaintiff charged arbitrary discrimination against the poor, in that only the indigent uninsured driver suffered license suspension under the statute. The rich driver who was able to post security was free to continue driving.³⁹ The court rejected this argument on the ground that the Constitution requires only equality of opportunity—not equality of ability to take advantage of that opportunity.⁴⁰

Orr was virtually a replay of *Escobedo*: the issues were the same; the outcome identical. As the Department of Motor Vehicles claimed that the only criterion for applying California's financial responsibility law was the *mere involvement* of an uninsured motorist in an accident, however, the court found it necessary to explain its holding in *Escobedo* with respect to the potential culpability of such drivers.⁴¹ As the court interpreted it, "the statute requires the department to find that there is a *reasonable possibility* that a judgment may be recovered against an uninsured operator before it can demand security and suspend his license if he fails to post it."⁴² The court noted, however, that constitutional requirements would be satisfied if the Department could find "*any credible evidence* on the basis of which he [the uninsured motorist] could reasonably be considered culpable."⁴³ The Department was not required to resolve evidentiary conflicts in the accident reports.

Id. at 880-81, 222 P.2d at 8 (original emphasis). See text accompanying notes 233-43 *infra*.

35. *Id.* at 877, 222 P.2d at 5-6. See note 74 *infra*.

36. *Id.* at 874, 222 P.2d at 4. See note 183 *infra*.

37. *Id.* at 878, 222 P.2d at 6.

38. *Id.*

39. *Id.* at 874, 222 P.2d at 4.

40. *Id.* at 878, 222 P.2d at 6. See text accompanying notes 182-231 *infra*.

41. 71 Cal. 2d at 225-26, 454 P.2d at 715-16, 77 Cal. Rptr. at 819-20.

42. *Id.* at 225, 454 P.2d at 715, 77 Cal. Rptr. at 819.

43. *Id.* at 227, 454 P.2d at 717, 77 Cal. Rptr. at 821 (emphasis added). The Department of Motor Vehicles has a team of evaluators whose responsibility it is to

California was not the only state to uphold its financial responsibility law.⁴⁴ Indeed, in most other states the courts concluded that, under their statutes, mere involvement in an accident was sufficient grounds for suspension of an uninsured motorist's license if he failed to post the required bond.⁴⁵ Thus, until quite recently the constitutionality of these laws appeared firmly established. Hard on the heels of *Orr*, however, came a series of United States Supreme Court decisions which radically altered the constitutional climate.

determine, from accident reports (which include damage estimates) and other written materials submitted to the Department, the amount for which a motorist may be found liable. See *Pricer & Wyckoff, Practices and Procedures of the Department of Motor Vehicles*, 14 HAST. L.J. 355 (1963). Before *Orr*, if a motorist was found to have been involved in an accident and not to qualify for an exemption [see note 18 *supra*], apparently the determination was based entirely on the amount of damage that the other party had suffered. After *Orr*, the Department changed its accident report form to give its evaluators more information on the circumstances of an accident. It also added the following sentence to the instructions for filling out the form: "Suspension of the driving privilege or the automobile registration may also be prevented by submitting evidence which, in the judgment of the Department, *conclusively shows the driver was not to blame in the accident*. Any document supporting this claim should be submitted with this report." Accident Report Form SR-1 (emphasis added), see note 75, *infra*.

Though a conclusive finding of nonliability seems several steps removed from a finding of a "reasonable possibility" of liability, a comparison of pre-*Orr* and post-*Orr* statistics shows that the number of security requirement requests issued and the number of suspensions ordered was nearly halved:

April 1968-April 1969: 97,954 suspensions.

October 1970-October 1971: 55,192 suspensions.

CALIFORNIA STATE DEPARTMENT OF MOTOR VEHICLES, REPORT OF GENERAL ACTIVITIES (April 1969 & October 1971).

44. The vast majority of fourteenth amendment attacks in other states, as in California, were aimed at the prejudgment security provision of financial responsibility laws. These attacks succeeded only in Colorado. See *People v. Nothaus*, 147 Colo. 210, 363 P.2d 180 (1961) (license suspension for failure to post security a denial of due process). Challenges to the postjudgment half of the laws were usually based on the Bankruptcy Act. See text accompanying notes 244-53 *infra*. Of those courts which heard due process and equal protection arguments against the postjudgment ("unsatisfied judgment") provision, only two found them convincing. See *In re Lindley*, 108 Cal. App. 258, 291 P. 638 (2d Dist. 1930) (license suspension for failure to satisfy a judgment violates due process and equal protection), apparently discredited in *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 298 P. 481 (1931); *Miller v. Depuy*, 307 F. Supp. 166 (E.D. Pa. 1969) (suspension of principal's license for failure to satisfy adverse judgment arising out of negligence of agent contrary to due process and equal protection). But see *Ortiz v. Depuy*, 313 F. Supp. 156 (E.D. Pa. 1970).

45. Only three other courts took the same tack as the California Supreme Court, holding as a matter of legislative intent, not constitutional compulsion, that some determination of fault was necessary before an uninsured motorist's license could be suspended. See *Schecter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963); *Williams v. Sills*, 55 N.J. 178, 260 A.2d 505 (1970); *Hague v. State*, 23 Utah 2d 299, 462 P.2d 418 (1969).

II.

THE PROCEDURAL CONTROVERSY

A. *Sniadach and its Aftermath—Requirement of a Hearing*

The first and most far-reaching decision was *Sniadach v. Family Finance Corp.*⁴⁶ In that case, the United States Supreme Court ruled unconstitutional a Wisconsin prejudgment garnishment procedure which did not afford the employee a hearing before allowing the garnishment of part of his wages. Noting that garnishment "may as a practical matter drive a wage earning family to the wall,"⁴⁷ the Court held that to deprive an individual of his wages, even temporarily, without an opportunity to defend his interest was a taking of property without the procedural due process required by the fourteenth amendment.⁴⁸ In the second case, *Goldberg v. Kelly*,⁴⁹ the Supreme Court extended to welfare recipients the protection it had afforded wage earners in *Sniadach*. In arriving at the decision that a recipient was entitled to a hearing prior to the suspension of his welfare benefits, the Court asserted:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding the loss outweighs the governmental interest in summary adjudication.⁵⁰

Inevitably, the Court was asked to consider whether the logic of *Sniadach* and *Goldberg* might apply to the rights of uninsured motorists. The case was *Bell v. Burson*,⁵¹ challenging the constitutionality of Georgia's financial responsibility law. At issue was whether an uninsured driver who has been involved in an accident has the right to a hearing on the question of his potential liability before his license can be suspended for failure to post security.⁵² The Court balanced the

46. 395 U.S. 337 (1969).

47. *Id.* at 341-42.

48. *Id.*

49. 397 U.S. 254 (1970).

50. *Id.* at 262-63.

51. 402 U.S. 535 (1971).

52. Petitioner in *Bell* received an administrative hearing before his license was suspended, but the department considered only the questions of whether he was in fact involved in an accident and whether he came under any of the exceptions to the Georgia law. *Id.* at 537-38. The Georgia Court of Appeals upheld this procedure on the ground that under that state's prejudgment statutory scheme "[f]ault' or 'innocence' are completely irrelevant factors." 121 Ga. App. 418, 420, 174 S.E.2d 235, 236 (1970). The Supreme Court's reply was that, on the contrary, "liability, in the sense of an ultimate judicial determination of responsibility, plays a crucial role in the Safety Responsibility Act." 402 U.S. at 541. A presuspension hearing which did not include a consideration of the potential culpability of the defendant was, therefore,

state's interest in protecting the injured party from the possibility of an unrecoverable judgment against the interest of uninsured drivers in retaining their licenses (which may have become "essential in the pursuit of a livelihood")⁵³ and held that Georgia's summary procedure fell short of the fourteenth amendment standard.⁵⁴ Due process would be satisfied, however, by "an inquiry limited to the determination whether there is a reasonable possibility of judgments in the amounts claimed being rendered against the licensee."⁵⁵ It need not constitute "a full

neither "meaningful" nor "appropriate to the nature of the case." *Id.* at 541-42.

At first blush, the Supreme Court's position appears self-evident. If the purpose of financial responsibility laws is "protecting a claimant from the possibility of an unrecoverable judgment," *id.* at 540, then a hearing that does not consider whether there will in fact be a judgment seems wholly inadequate. The history of the constitutional struggle over financial responsibility laws, however, lends support to the position of the Georgia court. The question of whether an uninsured motorist's license could be suspended before judgment without a determination of probable fault was long considered a substantive rather than a procedural matter. Legislators and jurists alike viewed rapid and summary license suspension as a basic component of the pre-judgment scheme. See Netherton, *Highway Safety Under Differing Types of Liability Legislation*, 15 OHIO STATE L.J. 110, 121-22 (1954). The primary issue was whether placing all uninsured motorists involved in accidents in one class—regardless of fault—was rationally related to the purpose of compensating the accident victim. (The California Supreme Court in *Escobedo* and in *Orr* was not required to decide this question, since it held that as a matter of *statutory interpretation* some determination of fault was necessary.) Not surprisingly, given that motorists who have been involved in accidents are more likely to have been negligent than accident-free motorists, and given the "minimum rationality" which traditional equal protection analysis requires of a statutory scheme [see text accompanying notes 176-86 *infra*] financial responsibility laws everywhere passed the constitutional test. See Annot., 35 A.L.R.2d 1011 (1954).

Under this view of the security provision, fault was not literally irrelevant; but involvement in an accident was sufficient indication of fault to justify depriving the motorist of his license until a full-scale trial was held on the issue. It followed that if a motorist was to receive a hearing, it could be limited to the question of whether he had in fact been involved in an accident. See *Polion v. Lewis*, 320 F. Supp. 1343, 1349 (N.D. Ill. 1970). The petitioner in *Bell* received just such a hearing.

By focusing on procedural due process, the Court in *Bell* effectively made a substantive change in Georgia's financial responsibility law without using substantive analysis. A similar approach by the majority in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), elicited a strong dissent from Justice Black. *Id.* at 344-51. The traditional constitutional question of the rationality (for the purposes of equal protection) of a law which sacrificed individual fairness to general efficacy became in *Bell* the question of the meaningfulness (for the purposes of procedural due process) of a prejudgment hearing which made that sacrifice. In light of the constitutional history of financial responsibility laws, it is not surprising that the Georgia Court of Appeals either failed to see, or refused to credit, the argument that an individual's procedural rights could force such a substantive change in the law.

53. 402 U.S. at 539.

54. *Id.* at 539-41.

55. The Court may have used the term "inquiry" to avoid the implication that the procedural safeguards normally associated with the term "hearing" are required in this context. See note 68 *infra*. In discussing Georgia's statutory scheme, however, the Court repeatedly asserted that before a state can terminate an important interest

adjudication of the question of liability.”⁵⁶ The Court carefully refrained, however, from dictating the exact form such an inquiry should take.⁵⁷ The only specific requirements laid down in the opinion were that the hearing include consideration (but not necessarily full adjudication) of culpability, that it take place before suspension of the motorist's license, and that it be “meaningful” and “appropriate to the nature of the case.”⁵⁸

B. *The Bell Question—Extent of the Hearing*

The Supreme Court's decision in *Bell* had a decisive impact on the country's financial responsibility laws. Like Georgia, the vast majority of states had long held that uninsured motorists who failed to post security when required should suffer license suspension without regard to fault.⁵⁹ Under *Bell*, this practice was now clearly unconstitutional. Less clear, however, was how thorough an inquiry into the question of liability the Supreme Court's decision necessitated.⁶⁰

of the individual he must be afforded a “hearing” which meets the standards of the due process clause. 402 U.S. at 541-43. In addition, in a later case the Court characterized *Bell* as having required “an opportunity for a fair hearing” before license suspension. *Fuentes v. Shevin*, 407 U.S. 67, 89 (1972). It is probable, therefore, that the Court did not intend by its language in *Bell* to distinguish an “inquiry” from a “hearing.”

56. *Id.* at 540.

57. *Id.* at 542.

58. *Id.* at 541-42.

59. See note 33 *supra* for cases holding that no hearing was necessary, since a driver's license was a “privilege” and need not be accorded due process protection. Some courts held that a license was more than a privilege but that summary procedures were justified by the tremendous administrative costs of conducting evidentiary hearings and the “compelling interest” of the state in alleviating the financial hardship suffered by uncompensated accident victims. See, e.g., *Berberian v. Lussier*, 87 R.I. 266, 139 A.2d 869 (1958); *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930). A few courts interpreted the statutes of their states to require some presumption determination of fault; only the Colorado Supreme Court held this was a constitutional necessity. See notes 44-45 *supra*.

60. In *Jennings v. Mahoney*, 404 U.S. 25 (1971) (per curiam), the Supreme Court was faced with a Utah statute like that of Georgia. The motorist involved was afforded no departmental hearing before his license was suspended; and, on appeal, the lower court limited its review to the written evidence that was submitted to the Department. After this procedure was upheld by the Utah Supreme Court, the motorist appealed on two grounds:

(1) by not requiring a stay of the Director's order pending determination of judicial review, the scheme leaves open the possibility of suspension of licenses without prior hearing; (2) in confining judicial review to whether the Director's determination is supported by the accident reports, and not affording the motorist an opportunity to offer evidence and cross-examine witnesses, the motorist is not afforded a meaningful hearing.

Id. at 26.

The Supreme Court noted: “There is plainly a substantial question whether the Utah statutory scheme on its face affords the procedural due process required by *Bell*

The post-*Bell* controversy over procedural adequacy has focused on the questions of whether the interested party should have the opportunity to testify at the hearing, to present witnesses in his behalf, and to confront and cross-examine adverse witnesses.⁶¹ The broadest reading of *Bell* would give the uninsured motorist all these rights—that is, a full evidentiary hearing.⁶² The narrowest interpretation would give

v. Burson." *Id.* at 26 (emphasis added). It avoided deciding the issue, however, by observing that the suspension had in fact been stayed pending review; and, more important, the appellant had had the opportunity to testify and to cross-examine the Director of the Department of Motor Vehicles. The Court ignored the fact that the lower court refused to consider the oral testimony, limiting its decision to whether or not the Department had abused its discretion based on the written evidence. See *Jennings v. Mahoney*, 26 Utah 2d 128, 485 P.2d 1404 (1971). Thus far, this opinion is the only direct pronouncement the Court has made on the question of the quality of hearing *Bell* requires.

For more recent examples of such avoidance by the Supreme Court in similar situations, see *Richardson v. Wright*, 405 U.S. 208 (1972), and *Indiana Employment Security Div. v. Burney*, 409 U.S. 540 (1973).

61. Queries by the author directed to a number of states soon after the Court's decisions in *Bell* and *Jennings* revealed a wide variety of interpretations of the kind of hearing *Bell* required. Georgia reported that it intended to follow a procedure similar to that of Utah. See note 60 *supra*. Maryland and North Dakota had decided to allow the defendant an informal hearing at which he would be allowed the assistance of counsel and the opportunity to present his side of the story orally. New Jersey and Kansas were providing a full trial-type hearing, including the right to subpoena and cross-examine witnesses. Washington's hearing was simply a re-evaluation of the written evidence: the motorist could be present, but he could not testify. Letters from state officials to the author are on file with the California Law Review.

The experience of Idaho is especially interesting. After *Bell*, the Idaho Department of Motor Vehicles attempted to institute a California-style system. An examination of the system after it had been in effect three months by the Attorney General's office revealed that "many accident reports are so deficient it is impossible to make any decisive finding as to fault." Letter from Idaho Attorney General's Office to Commission of Law Enforcement, Regarding Safety Responsibility Uninsured Motorist Hearings, Sept. 28, 1971, at 2 (on file with the California Law Review). Also, the effort of the evaluator to determine the potential liability of the parties to an accident was inordinately time-consuming. *Id.* Further:

Since [Idaho's Financial Responsibility Law] was enacted for the sole purpose of providing leverage for the collection of a private debt and has no bearing upon public safety, health, morals or welfare the question is then raised as to whether or not the state must use it's office and public monies to determine by administrative means the liability of an uninsured motorist growing out of a motor vehicle collision.

Id. at 3 (emphasis added). Most important, even though *Bell* held that the presuspension inquiry might be limited to determining whether there is a reasonable possibility of a judgment adverse to the motorist, "it is our opinion that when the Court uses the term 'meaningful' it is referring to an adversary hearing which would require the presence of witnesses to prove (1) liability and (2) amount of damages." *Id.* at 4 (emphasis added).

In short, it was the opinion of the Idaho Attorney General's office that the California system was unfair and inadequate, that the time and expense of a hearing could not be justified in view of the limited private interest it served, and that, therefore, Idaho should suspend the enforcement of the security provision of its financial responsibility laws altogether. *Id.* at 5.

him none of those rights, confining the determination of his possible culpability to accident reports and other written information submitted to the appropriate state agency.

1. *The California Cases*

It is in California that the battle over the proper interpretation of *Bell's* procedural requirements has been most decisively joined. Both the California Supreme Court, in *Rios v. Cozens*,⁶³ and the United States District Court for the Northern District of California, in *Rivas v. Cozens*,⁶⁴ have heard arguments against the state's practice under its financial responsibility law of conducting only a minimal presuspension inquiry into the question of an uninsured motorist's fault in an accident. In both cases the state's defense of this procedure placed heavy reliance on the California Supreme Court's earlier decision in *Orr v. Superior Court*.

In *Orr*, the court rejected the plaintiff's due process claim to a presuspension hearing, on the ground that the state had a compelling public interest in expediting license suspensions under its financial responsibility law.⁶⁵ As a matter of statutory interpretation, however, the court held that prior to suspending an uninsured motorist's license for failure to post bond, the Department of Motor Vehicles must determine that "there is reasonable possibility that a judgment may be recovered against the driver."⁶⁶ Confronted with a United States Supreme Court decision (*Bell*) which used virtually the same language to describe the kind of presuspension inquiry into fault which due process requires in this situation, the state contended in both *Rios* and *Rivas* that the determination of potential liability made by the Department of Motor Vehicles in accordance with *Orr* was sufficient to satisfy the procedural requirements laid down in *Bell*.⁶⁷

The state's argument placed a very narrow construction on the Supreme Court's use in *Bell* of the word "hearing."⁶⁸ At the time, the

62. See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

63. 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972), *vacated*, 93 S. Ct. 1019 (1973). See note 78 *infra*.

64. 327 F. Supp. 867 (N.D. Cal. 1971), reconsidered after the Supreme Court's decision in *Bell*, in an unreported memorandum decision, No. 70-2554 (July 26, 1971), *vacated*, 409 U.S. 55 (1972). See note 78 *infra*.

65. 71 Cal. 2d 220, 224, 454 P.2d 712, 714, 77 Cal. Rptr. 816, 818 (1969).

66. *Id.* at 226, 454 P.2d at 716, 77 Cal. Rptr. at 820.

67. Brief for Respondent at 6-7, *Rios v. Cozens*, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972).

68. In *Londoner v. Denver*, 210 U.S. 373 (1908), the Supreme Court considered proceedings which afforded a small group of taxpayers the opportunity to object to a special assessment on their property—but only in writing. Holding that such an abbreviated procedure was a denial of due process, the Court stated:

Department's decision to suspend a motorist's license was based entirely on accident reports and other written evidence submitted to it.⁶⁹ There was no right to testify personally; nor was there a right to present favorable witnesses or confront adverse witnesses.⁷⁰ Still, if this kind of "hearing" could be construed as "meaningful" and "appropriate to the nature of the case," it would fulfill all the requirements laid down explicitly in *Bell*. The state's position was that, since the only matter at issue in the hearing is whether there is a reasonable possibility of a judgment against the motorist, and not whether the motorist is actually at fault, a determination of the question by administrative review of written evidence is consonant with due process.⁷¹ If the motorist were permitted an "actual hearing," the argument continued, the Department would be forced into a "full adjudication of the facts"⁷²—a procedure which the Court in *Bell* found unnecessary.⁷³ Moreover, the monumental expenditure of time and resources necessary to provide a personal hearing for every motorist involved in an accident would virtually cripple the law.⁷⁴

[A] hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal.

Id. at 386. There is strong support in this language for the view that the word "hearing" always denotes *oral* process. In *F.P.C. v. Texaco, Inc.*, 377 U.S. 33 (1964), however, the Court repeatedly used "hearing" to apply to a proceeding which allowed written submissions but involved no oral argument. *Id.* at 36, 44, 45. Professor Davis has termed this use of the word "[h]ighly exceptional." K. DAVIS, *ADMINISTRATIVE LAW TEXT*, § 7.01, at 157 n.1 (3d ed. 1972).

69. CAL. VEH. CODE § 16020 (West 1971).

70. *Rios v. Cozens*, 7 Cal. 3d 792, 797, 499 P.2d 979, 982-83, 103 Cal. Rptr. 299, 302-03 (1972).

In fact, until *Rios* and *Rivas* induced the state to amend its policy, the uninsured motorist was not even permitted to see the written statements submitted by the other driver involved in the accident. *Id.* at 792 n.4, 499 P.2d at 983 n.4, 103 Cal. Rptr. at 303 n.4. But see CAL. VEH. CODE § 16005 (West 1971).

71. Brief for Respondent at 6-9, *Rios v. Cozens*, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972).

72. *Id.* at 9.

73. 402 U.S. 535, 540 (1971).

74. California suspends more than 4,000 licenses every month (or 53,253 during the 12 months ending in April 1971), pursuant to implementing the Financial Responsibility Law. If the Department would be required to hold a hearing in each of these cases, they would be conducting more trials under this one statute than *all* of the Superior Courts in the entire State of California conducted on *all* contested matters during fiscal 1969-1970.

Brief for Respondent at 12, *Rios v. Cozens*, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972).

These figures depend on the assumption that all uninsured motorists who are unable to post security will request a hearing. Though it is clear that this would not be the case, it is difficult to know with any degree of certainty what percentage *would* desire hearings.

Informal adjudication involves neither the time nor expense of a full-scale trial. "Every month [in adjudicating suspension cases other than those arising under Cal-

In *Rivas*, the United States District Court for the Northern District of California, sitting as a three-judge court, found the state's logic persuasive. Given the limited nature of the issue to be resolved, the court was of the opinion that the presuspension inquiry into fault provided by the Department of Motor Vehicles constituted a "hearing" sufficient to protect the interest of the uninsured motorist in avoiding the unwarranted suspension of his license.⁷⁵ A year later, in *Rios*, the California Supreme Court observed:

ifornia's financial responsibility law] the Department conducts thousands of personal examinations, hearings, and interviews, each dealing with the particular facts and circumstances of an individual driver's case." Brief for Respondent at 8, *Rios v. Cozens*, *vacated*, 93 S. Ct. 1019 (1973). Furthermore, the United States Supreme Court has made rather short shrift of arguments that administrative efficiency justifies the deprivation of procedural due process. See *Fuentes v. Shevin*, 407 U.S. 67, 90-91 n.22 (1972). Clearly, this factor cannot be ignored, but neither can it constitute the primary justification for refusing due process protection to the motorist. See *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970). If the percentage of uninsured motorists who request hearings is high and the administrative cost sufficiently great to impair the operation of the law, the solution would appear to be another system of compensating accident victims, rather than summary procedures. See part IV *infra*.

75. *Rivas v. Cozens*, unreported memorandum decision, No. 70-2554, at 3 (July 26, 1971). A significant factor in the court's decision was undoubtedly its acceptance of the view, first expressed in *Orr* [see text accompanying notes 41-43 *supra*] that the preliminary inquiry could be limited to "the narrow (but constitutionally sufficient) issue whether there is any evidence which, if later believed by a trier of fact, would render a judgment against the licensee reasonably possible." *Id.* (emphasis added). So long as such evidence exists, under this formulation of the standard of proof any conflicting evidence offered by the licensee can be ignored by the hearing officer. "[T]he relevant issue at an evidentiary hearing under California's statute, is not the truth or falsity of the statement concerning the driver's fault . . . but whether the statement was received by the Department and whether it refers to the driver in question." Motion to Affirm at 6, *Rivas v. Cozens*, *vacated*, 409 U.S. 55 (1972). Only a *conclusive* showing of non-liability will serve to avoid license suspension. See note 43 *supra*.

That this is the relevant standard of proof under *Orr*, however, does not necessarily mean it fulfills the *Bell* requirements. Plaintiff in *Orr* was denied a hearing on the question of the probability of his culpability. It was only as a matter of statutory interpretation, not constitutional compulsion, that the California Supreme Court required the Department of Motor Vehicles to find some evidence of fault before suspending the uninsured motorist's license. Such a procedure may be sufficient to avoid a charge of denial of equal protection, but it is doubtful whether it can overcome a procedural due process attack. See notes 52 & 68 *supra*.

The natural inference from the Supreme Court's language in *Bell* is that the determination of a "reasonable possibility" of culpability should be based on *all* the evidence. 402 U.S. 535, 540 (1971). In other words, the decisionmaker must weigh the evidence and gauge the probability of a final judgment being rendered against the defendant. The state contended in *Rivas*, and in *Rios*, that such a procedure would be tantamount to a "full adjudication of the question of liability," which *Bell* explicitly found unnecessary. The Court's disclaimer in *Bell*, however, must be viewed against the backdrop of a similar disclaimer in *Goldberg v. Kelly*. Observing that a hearing preceding the termination of welfare benefits need not take the form of a full trial on the merits, the Court nevertheless held that such a hearing must at least

This posture is in conflict with both *Bell v. Burson* . . . and *Jennings v. Mahoney* Manifestly that the department is required only to decide whether there is a reasonable possibility of a judgment against the driver does not render a hearing inconsequential. Certainly it is not inconceivable that a licensee may be able to demonstrate to the department, if given the opportunity to do so at a hearing, that there is no reasonable possibility that a judgment will be rendered against him.⁷⁶

Overruling both *Escobedo* and *Orr*, the supreme court held that *Bell's* requirement of a presuspension hearing includes both the right to review and rebut orally all written evidence to be considered by the Department and the right to present testimony on one's own behalf.⁷⁷ The court emphasized that many uninsured motorists lack both the ability adequately to express their position in writing and the resources to have a professional prepare a forceful presentation of their assertions for them. Thus, a hearing which does not afford the licensee the opportunity to argue his case personally, rather than in writing, cannot effectively protect the licensee's interest and is invalid.⁷⁸

include the right to present one's case orally and to confront and cross-examine adverse witnesses. "Full adjudication" of the liability of the uninsured motorist would require complete discovery procedures, rigid evidentiary rules, compulsory process, a complete record, and a comprehensive opinion. The fact that the decisionmaker has an adjudicative rather than a strictly mechanical role to play does not turn the informal hearing contemplated by *Bell* and *Goldberg* into a full trial.

76. 7 Cal. 3d 792, 799, 499 P.2d 979, 984, 103 Cal. Rptr. 299, 304 (1972).

77. *Id.*

78. *Id.* at 799-800, 499 P.2d at 984, 103 Cal. Rptr. at 304. After the California Supreme Court's decision in *Rios*, the state petitioned the United States Supreme Court for certiorari. Plaintiffs in *Rivas* had previously appealed the decision of the district court. Pending resolution of the question, the state passed emergency legislation under which an uninsured motorist could avoid license suspension simply by requesting a hearing. He would *not* receive a hearing; nevertheless, his license would not be suspended unless and until the Supreme Court determined that a full hearing was not required.

In the belief that the California Supreme Court's decision in *Rios* had been fully implemented, the United States Supreme Court remanded *Rivas* to the district court to determine whether it had become moot. 409 U.S. 55 (1972). When it turned to *Rios*, the Court found that the opinion cited several California decisions which were based on both state and federal grounds. Though it was clear that the California Supreme Court had felt compelled by *Bell* and *Jennings* to hold as it did in *Rios*, the United States Supreme Court found that the reference to the California decisions rendered it impossible to determine whether the case was premised upon the Federal Constitution, the California Constitution, or both; therefore, it granted certiorari in the case, but vacated the judgment and remanded the case to the California Supreme Court for elucidation. 93 S. Ct. 1019 (1973). In a cursory decision on remand, the California Supreme Court ruled that reexamination of its opinion in *Rios* indicated that its earlier holding rested on state as well as federal constitutional grounds. 9 C.3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973). In consequence, the *Rios* decision will stand in its entirety; all uninsured motorists in California must now be afforded the opportunity for an oral hearing before their licenses are suspended.

2. *The Opportunity for Cross-Examination*

Although the procedural protection provided uninsured motorists by the California Supreme Court's decision in *Rios* is substantial, it falls short of that sought by petitioners in *Rios* and plaintiffs in *Rivas* in one important respect: the court makes no allowance for confrontation and cross-examination of adverse witnesses.⁷⁹ Whether the absence of the opportunity for cross-examination will render a presuspension hearing invalid under the fourteenth amendment is a difficult question.

In most of the post-*Sniadach* cases, as in *Bell*, the United States Supreme Court has carefully avoided delineating precisely what procedural safeguards are due the defendant in a preliminary hearing.⁸⁰ A major exception is *Goldberg v. Kelly*.⁸¹ In that case, in addition to the right to testify orally and to present witnesses in one's behalf, the Court held the right to confront one's accusers in a pretermination hearing fundamental to due process.⁸² In support of its determination the Court cited, *inter alia*, *Willner v. Committee on Character & Fitness*⁸³ and *Greene v. McElroy*.⁸⁴ *Willner* held that before an application for admission to the bar can lawfully be rejected, a candidate whose character and fitness are under attack must be afforded the opportunity to confront and cross-examine his accusers.⁸⁵ *Greene* extended the same rights to the employee of an aeronautics company who was forced out of his job when the government revoked his security clearance. Holding the revocation invalid because the government refused to reveal the source of its information as to his untrustworthiness, the Court stated:

[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance,

79. The court did not expressly reject this safeguard, but its omission from the basic protections afforded the defendant is too glaring to have been inadvertent.

80. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972). See also *McGautha v. California*, 402 U.S. 183 (1971).

81. 397 U.S. 254 (1970).

82. *Id.* at 268-70 (1970). See also *Morrissey v. Brewer*, 408 U.S. 471 (1972), discussed in text accompanying notes 107-11 *infra*.

83. 373 U.S. 96 (1963).

84. 360 U.S. 496 (1959).

85. 373 U.S. at 104.

prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination.⁸⁶

The Supreme Court's language in *Greene* is directly applicable to the presuspension inquiry into fault conducted by the Department of Motor Vehicles under California's financial responsibility law. In determining whether there is a "reasonable possibility" of a judgment being rendered against an uninsured motorist, the Department relies heavily on the accident reports submitted by the parties to a traffic collision. That an accident victim will tend to distort in his favor the facts of the accident is manifest. As the report cannot be used to impeach him in court,⁸⁷ the injured party may even falsify his report outright, forcing the uninsured motorist to choose between settling the claim against him or suffering suspension of his license. Petitioner in *Rios* pointed out, and the court noted, the ease with which the Department's procedure might be abused and the difficulty of protecting the licensee against such abuse without a full hearing.⁸⁸ Yet, the court apparently thought the licensee would be sufficiently protected if he was afforded the right personally to challenge the other party's written assertions.⁸⁹ Giving the Department the right to subpoena the injured party (or any other crucial witnesses) and affording the licensee the opportunity to cross-examine would certainly burden the administration of the law.⁹⁰ The United States Supreme Court has observed in a similar context, however, that "[s]ince the essential reason for the requirement of a prior hearing is to prevent unfair and mistaken deprivation of property . . . , it is axiomatic that the hearing must provide a real test [of the defendant's liability]."⁹¹ If the opposing party has distorted the facts or lied in his accident report, a hearing without the right of cross-examina-

86. 360 U.S. at 496. *But cf.* *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886 (1961).

87. *See* CAL. VEH. CODE § 16005 (West 1971).

88. 7 Cal. 3d at 798 n.5, 499 P.2d at 983 n.5, 103 Cal. Rptr. at 303 n.5. *Compare* *Richardson v. Perales*, 402 U.S. 389 (1971).

89. Compare this procedure with that suggested by Professor Davis for parole revocation hearings:

The right of cross-examination would be denied except when the officer in his discretion finds cross-examination desirable to bring out the facts. But the parolee would normally be entitled to know all evidence considered, and he would have full rights to explain or rebut.

K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.16 at 357-58 (Supp. 1970).

Contrast the recent decision of the United States Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972), requiring that parolees threatened with reincarceration be allowed to confront and cross-examine adverse witnesses—unless "the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed." *Id.* at 487.

90. *See* note 74 *supra*. On the question of subpoena power, see note 111 *infra*.

91. *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972).

tion can hardly afford "a real test" of the uninsured motorist's culpability.

3. *Identifying Minimal Procedural Standards*

Whether the right of cross-examination is a constitutional requirement for presuspension hearings under financial responsibility laws depends on how broadly cases like *Willner*, *Greene*, and *Goldberg* can be interpreted. The emphasis in *Goldberg* was on "minimal procedural safeguards" and "rudimentary due process."⁹² The implication was strong that a perfunctory hearing—one which did not afford the affected party the opportunity to testify, present witnesses in his behalf, and, most importantly, confront and cross-examine adverse witnesses—was constitutionally inadequate "in almost every setting where important decisions turn on questions of fact."⁹³ The lower federal courts were quick to respond: in the three years since *Goldberg* was decided, they have required a variety of agencies with important administrative powers to adhere to the principles laid down in that case. *Goldberg's* basic protection has been extended to tenants faced with temporary eviction from public housing projects,⁹⁴ unemployed workers deprived of their unemployment benefits,⁹⁵ prisoners summarily punished by prison disciplinary committees,⁹⁶ and teachers threatened with loss of their jobs.⁹⁷

It is not clear from those decisions, however, just how expansive a gloss the federal courts think it proper to place on *Goldberg*. On the

92. 397 U.S. at 267.

93. *Id.* at 269.

94. *Escalera v. New York City Housing Auth.*, 425 F.2d 853 (2d Cir. 1970), *cert. denied*, 400 U.S. 853 (1970); *Caulder v. Durham Housing Auth.*, 433 F.2d 998 (1970), *cert. denied*, 401 U.S. 1003 (1971).

95. *Java v. California Dep't of Human Resources Dev.*, 317 F. Supp. 875 (N.D. Cal. 1970), *aff'd on other grounds*, 402 U.S. 121 (1971); *Crow v. California Dep't of Human Resources Dev.*, 325 F. Supp. 1314 (N.D. Cal. 1970).

96. *Landman v. Royster*, 333 F. Supp. 621 (E.D. Va. 1971); *Clutchette v. Pro-cunier*, 328 F. Supp. 767 (N.D. Cal. 1971). *Contra*, *Burns v. Swenson*, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972). The decision of the Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972) (affording *Goldberg* protection to parolees in parole revocation hearings), lends support to the decisions of the district courts in *Landman* and *Clutchette*. See Note, *Right to Hearing at Parole Revocation*, 86 HARV. L. REV. 95, 101-02 (1972).

97. *McDonough v. Kelly*, 329 F. Supp. 144 (D.N.H. 1971). Cf. *Perry v. Sinderman*, 408 U.S. 593 (1972). The Court noted in *Perry* that if a teacher could prove sufficient "entitlement" to his job—even in a school system which did not offer tenure to its teachers—such a finding would "obligate college officials to grant a hearing [before dismissal] . . . where he could be informed of the grounds for his nonretention and challenge their sufficiency." *Id.* at 603 (emphasis added). Compare *Board of Regents v. Roth*, 408 U.S. 564 (1972) (holding that in a school system which offers tenure, a probationary teacher is not entitled to a hearing before dismissal).

one hand, the language of some opinions lends support to the following broad proposition:

[A] pre-determination hearing, with the right to confront and question witnesses *is the constitutional norm, and not the exception*, . . . when "government action seriously injures an individual," and where the crucial decision is based upon facts alleged by a third party.⁹⁸

This view by no means abandons the due process balancing test which determines what procedural safeguards are required in a given proceeding.⁹⁹ Its premise is, however, that in any adjudication where reliance is placed on third party information which exposes the individual to a significant deprivation the interests of the state in summary process will rarely outweigh the individual's interest in *Goldberg's* basic protection. In *Bell* the Supreme Court made it clear that a driver's license is a valuable, constitutionally protected right. Loss of that right can seriously injure an individual. If the "constitutional norm" view of *Goldberg* is correct, then the California Supreme Court in *Rios* may have provided a hearing which falls short of the applicable due process standard.¹⁰⁰

On the other hand, some lower courts have required a showing that the threatened deprivation was as severe as the loss of welfare benefits before they would grant increased procedural protection to affected individuals.¹⁰¹ This approach to *Goldberg* suggests that a "serious" or "significant" deprivation is not enough. To qualify for *Goldberg's* "rudimentary" protection, the individual must be exposed to the same sure suffering as the welfare recipient deprived of support. Whether this interpretation is correct, and whether suspension of a driver's license would qualify under it, are open questions. Recent Supreme Court cases in this area have not resolved the problem.

In *Fuentes v. Shevin*,¹⁰² the latest of several Supreme Court cases engendered by *Sniadach v. Family Finance Corp.*,¹⁰³ the Court held unconstitutional the prejudgment replevin statutes of Florida and Penn-

98. *Crow v. California Dep't of Human Resources Dev.*, 325 F. Supp. 1314, 1318 (N.D. Cal. 1970) (original emphasis). See also *Jones v. Robinson*, 440 F.2d 249, 250-52 (D.C. Cir. 1971); *Escalera v. New York City Housing Auth.*, 425 F.2d 853, 861-64 (2d Cir. 1970); *Caulder v. Durham Housing Auth.*, 433 F.2d 998, 1003-04 (4th Cir. 1970); *Krause v. Schmidt*, 341 F. Supp. 1001, 1006 (W.D. Wis. 1972); *McDonough v. Kelly*, 329 F. Supp. 144, 149 (D.N.H. 1971).

99. See text accompanying note 50 *supra* and note 123 *infra*.

100. Under this interpretation the presuspension inquiry sanctioned by the district court in *Rivas* would fall even further short of fourteenth amendment requirements.

101. See, e.g., *United States ex rel. Carioscia v. Meisner*, 331 F. Supp. 635, 649 (N.D. Ill. 1971).

102. 407 U.S. 67 (1972).

103. 395 U.S. 337 (1969).

sylvania. The states argued that plaintiffs were not deserving of due process protection because the household goods seized were not as essential to the well-being of the debtor as his wages (*Sniadach*) or welfare benefits (*Goldberg*). The majority responded that for due process purposes the relative magnitude of the deprivation was immaterial, so long as it could not be characterized as de minimus.¹⁰⁴ In support of this assertion the Court observed that *Bell* had afforded procedural protection to a motorist's interest in his driver's license even though "[a] driver's license [like household goods] clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits."¹⁰⁵ The Court noted, however, that the magnitude of the liberty or property loss threatened is material to the form of notice and hearing required by due process.¹⁰⁶ This language buttresses the argument that the hearing and notice requirements of *Goldberg* were closely geared to the kind of deprivation involved in that case. Since neither drivers' licenses nor household goods rise to the same level of necessity as welfare benefits or wages, the argument would conclude that an individual threatened with these losses need not be afforded the same procedural protection.

There are two responses to this argument. The first is that the Court's language in *Fuentes* is not inconsistent with the view that *Goldberg* set minimal standards of due process for all significant deprivations not justified by a compelling state interest. That the strength of the private interest threatened is relevant to the quality of hearing required does not necessarily mean that the states can institute procedures which fall below *Goldberg's* basic requirements. Since *Goldberg*, only one Supreme Court case, *Morrissey v. Brewer*,¹⁰⁷ has laid down guidelines for an informal hearing before an administrative agency. Though continuing to emphasize the flexibility of due process¹⁰⁸ and refusing to prescribe precise procedural rules for the states,¹⁰⁹ the court in *Morrissey* held that a state may not revoke parole, even temporarily, without affording the parolee, at the least, all the

104. 407 U.S. at 90 n.21.

105. *Id.* at 89.

106. *Id.* at 90 n.21. The Court did not detail exactly what procedural rights were due the debtor in replevin proceedings, but it is clear that he must at least have "notice of the case against him and an opportunity to meet it." *Id.* at 81 [quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)]. Cf. *Perry v. Sinderman*, 408 U.S. 593 (1972). It is unclear whether the opportunity to challenge necessarily includes the right to cross-examine or even to make an oral rather than a written rebuttal.

107. 408 U.S. 471 (1972).

108. *Id.* at 481.

109. *Id.* at 488.

procedural safeguards granted welfare recipients in *Goldberg*.¹¹⁰ Of course, parole revocation is a serious threat to the parolee—certainly as harsh a deprivation as the loss of welfare benefits. Even a narrow view of *Goldberg* would allow for the result in *Morrissey*. Still, it can be argued that, by its application of *Goldberg's* requirements outside the field of welfare, the Court has strengthened the view that these rights are at the core of procedural due process and properly applicable to any adjudicative situation where third-party allegations threaten the individual with serious injury.¹¹¹

The second response to the argument suggested in *Fuentes* is that the Supreme Court has underestimated the importance of household goods and driving licenses to the indigent family. In many cases the loss of important possessions will inflict the same hardship on a family as the loss of essential income.¹¹² Indeed, in the case of driving privileges, license suspension may cut off income as surely as does wage

110. *Id.* at 487, 489.

111. See Note, *Right to Hearing at Parole Revocation*, 86 HARV. L. REV. 95, 102-03 (1972). In addition to requiring the right to see adverse evidence, the right to present one's case orally, and the right to cross-examine adverse witnesses, the Court in *Morrissey*, as in *Goldberg*, required that an impartial decisionmaker preside at the hearing. 408 U.S. at 485-86. The California Supreme Court in *Rios* did not reach this issue. The potential for bias which exists when the parole officer or welfare worker who brought charges against a parolee or welfare recipient also judges his defense is great. Though presumably the potential for bias is reduced in the less personalized setting of hearings before employees of the Department of Motor Vehicles, a conflict might arise if the evaluator of the written accident reports also controlled the hearing. Cf. *Lois R. v. Superior Court*, 19 Cal. App. 3d 895, 97 Cal. Rptr. 158 (2d Dist. 1971). But cf. *Richardson v. Perales*, 402 U.S. 389 (1971).

The California Supreme Court in *Rios* also did not address the question of whether the uninsured motorist might be represented by an attorney in his hearing before the Department. The court's recent decision in *Brooks v. Small Claims Court*, 8 Cal. 3d 661, 105 Cal. Rptr. 785, 504 P.2d 1249 (1973), however, makes it clear that the court is sensitive to the importance of this right. In *Goldberg*, this right was specifically accorded the welfare recipient, though the Court declined to hold that the indigent recipient had the right to appointed counsel. 397 U.S. 254, 270 (1970). In *Morrissey*, the Court explicitly did not reach or decide whether the parolee was entitled to retained or appointed counsel. 408 U.S. 471, 489 (1972). Justice Douglas, dissenting in part, argued that the parolee should be entitled to counsel. *Id.* at 498. (For a full discussion of this issue, see Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 CALIF. L. REV. 1215 (1971).) The majority of eleven states surveyed by the author after the Supreme Court's decision in *Bell* reported that they intended to allow the motorist to be accompanied by an attorney at his hearing. See note 61 *supra*.

Neither the California Supreme Court nor the United States Supreme Court has considered the question of subpoena power. There is little authority on the question, [see K. DAVIS, *supra* note 68, at § 8.05] but the right to subpoena adverse witnesses appears concomitant with the right to confront and cross-examine. The more difficult question is whether the decisionmaker may, or must, also subpoena witnesses favorable to the defendant.

112. See text accompanying notes 126-30 *infra*.

garnishment.¹¹³ Even if the Court adopts a narrow view of *Goldberg*, when confronted directly with the question whether comparability exists between the deprivation of wages or welfare benefits and the deprivation of driving privileges or household goods, the Court may reconsider its dictum in *Fuentes* and grant *Goldberg's* "minimal" protection to those threatened with loss of the latter as well as the former.

C. *The Randone Question—Standard of Proof*

In contrast to the United States Supreme Court in *Fuentes*, the California Supreme Court in *Randone v. Appellate Department*¹¹⁴ recently observed that certain household goods are as much a "necessity of life" to their owners as wages or welfare benefits.¹¹⁵ Such essentials, according to the California court, are deserving of a maximum of procedural protection. Thus, the court held that *no* preliminary determination of the validity of a creditor's claim against a defendant could satisfy the dictates of due process when the sole purpose of an attachment statute was to secure a debtor's necessities for the benefit of a private creditor: "[D]ue process requires that all 'necessities' be exempt from prejudgment attachment as an initial matter."¹¹⁶ With respect to the attachment of certain kinds of property, then, the California Supreme Court has carried the development of the procedural rights of defendants much further than the United States Supreme Court. Even a *Goldberg*-type preliminary hearing falls short of *Randone's* requirement that the individual not be deprived of necessities before a final adjudication of his liability.

The court's decision in *Randone* rested on both state and federal constitutional grounds,¹¹⁷ and was one of several California decisions cited in *Rios* in support of the rule that an individual is entitled to some kind of hearing before being deprived of a significant interest.¹¹⁸ This section discusses whether there is a dichotomy between the position the California court took in *Randone* with respect to prejudgment attachment of property and the position it took in *Rios* with respect to prejudgment license suspension under financial responsibility laws.

Before *Randone*, in response to the Supreme Court's decision in *Sniadach v. Family Finance Corp.*, the California court had invalidated

113. *Id.*

114. 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

115. *Id.* at 560, 488 P.2d at 29, 96 Cal. Rptr. at 725.

116. *Id.* at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726.

117. *Id.* at 541, 488 P.2d at 15, 96 Cal. Rptr. at 711. See note 211 *infra*.

118. 7 Cal. 3d 792, 795, 499 P.2d 979, 981, 103 Cal. Rptr. 299, 301 (1972). See note 78 *supra*.

not only California's wage garnishment statutes¹¹⁹ but also its claim and delivery law, which had provided for prejudgment replevin without notice or hearing.¹²⁰ *Randone* upset that portion of the state's prejudgment attachment law which permitted summary attachment of any property of a defendant-debtor.¹²¹ In all three decisions, the court observed that none of these provisions served a state or creditor interest of sufficiently "overriding significance" to justify depriving the individual of a substantial property right without a hearing.¹²² Sensitive to the due process balancing test which the United States Supreme Court has prescribed for such cases, the court stated in *Randone*:

[T]he greater the deprivation an individual will suffer by the attachment of property, the greater the public urgency must be to justify the imposition of that loss on an individual before notice and a hearing, and the more substantial the procedural safeguards that must be afforded when such notice and hearing are required.¹²³

The California court, however, has evidenced even more concern for the hardship suffered by the individual than the United States Supreme Court. Though there was little discussion in *Sniadach* of the kind of hearing that must be afforded the defendant wage earner, Justice Harlan indicated that a preliminary inquiry into the probable validity of the creditor's claim would suffice.¹²⁴ In contrast, the California court's

119. *McCallop v. Carberry*, 1 Cal. 3d 903, 464 P.2d 122, 83 Cal. Rptr. 666 (1970); *Cline v. Credit Bureau of Santa Clara Valley*, 1 Cal. 3d 908, 464 P.2d 125, 83 Cal. Rptr. 669 (1970).

120. *Blair v. Pitchess*, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

121. *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971).

122. *Id.* at 541, 552, 488 P.2d at 15, 24, 96 Cal. Rptr. at 711, 720.

123. *Id.* at 558, 488 P.2d at 28, 96 Cal. Rptr. at 724. See text accompanying note 50 *supra*.

124. 395 U.S. 337, 343 (1969) (Harlan, J., concurring). This standard of proof was reiterated by the Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972), in connection with replevin proceedings. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), on the other hand, the Court, citing *Goldberg*, stated that the standard in parole revocation hearings should be one of "probable cause or reasonable ground." *Id.* at 485. The Court used no such qualifying language in *Goldberg*, but the citation in *Morrissey* implies that the Court might approve similar criteria in welfare revocation proceedings. A third standard, that of a "reasonable possibility" of culpability, was introduced in *Bell*. See text accompanying note 55 *supra*.

It is possible to set up a "standard-of-proof" scale, with the *prima facie* showing of probable cause required for an arrest or search warrant at one extreme and the requirement of guilt "beyond a reasonable doubt" used in criminal prosecutions at the other. Between these extremes can be placed the familiar standard in civil class of "preponderance of the evidence." If the "probable cause," "probable validity," and "reasonable possibility" requirements of *Morrissey*, *Fuentes*, and *Bell* are to be fulfilled as readily as the showing of "probable cause" needed for an arrest, the protection which these cases have afforded parolees, debtors, and licensees is relatively weak. (See Comment, *Due Process: Right to Hearing Before Taking of Property*, 86 HARV. L. REV. 85, 89-90 (1972).) Doubtless the Court meant to set higher standards in

view of the defendants' plight in *Randone*, which involved the attachment of the small bank account of a family completely dependent on unemployment insurance, led it to declare certain prejudgment attachments unconstitutional *per se*. In announcing its holding, the court said:

[T]he state cannot properly withdraw from a defendant the essentials he needs to live, to work, to support his family or to litigate the pending action before an impartial confirmation of the *actual, as opposed to probable, validity* of the creditor's claim after a hearing on that issue.¹²⁵

In light of the fact that the court held such essentials to be exempt from prejudgment attachment, "actual . . . validity of the creditor's claim" can only mean validity established in a full trial. Thus, the court in *Randone* not only required a standard of proof higher than that suggested in *Sniadach* but also required the full panoply of procedural safeguards which accompanies a trial on the merits.

The significance of *Randone* for California's financial responsibility law seems great. First, if a defendant's driver's license can be considered essential for daily living and, second, if suspension of a license under the act can be equated to the attachment of property under the attachment statutes, then *Randone* would appear to dictate that the state is powerless to suspend a defendant's driving privileges until he has been afforded a complete trial on the merits of his case.

That a driver's license is a "necessity of life" is a distinct possibility. Leaning heavily on *Sniadach*, the court in *Randone* asserted that "[a]ttachment of any asset critical to the debtor's immediate well-being exerts the same type of pressure [upon the debtor and his family] as does wage garnishment."¹²⁶ As examples of such assets, the court

these cases, but just how far up the standard-of-proof scale they belong is difficult to determine.

The standard of proof adopted by an administrative agency in a preliminary hearing is fully as important to the defendant as the kinds of procedural safeguards he is afforded. Full procedural protection will avail him little if mere suspicion of guilt is sufficient to warrant a deprivation of his liberty or property. Likewise, a high standard of proof can be undermined by summary procedures. Thus, by and large, as the importance of a proceeding to the individual increases, the standard of proof rises, and the number of procedural safeguards he receives also increases. As the controversy surrounding *Bell* has shown, however, these factors are not strictly interdependent. Compare text at notes 102-13 *supra*.

125. 5 Cal. 3d at 562, 488 P.2d at 30, 96 Cal. Rptr. at 726 (emphasis added). See note 136 *infra*; Jackson, *Attachment in California—What Now?*, 3 PAC. L.J. 1, 12 (1972); Comment, *The Demise of Summary Prejudgment Remedies in California*, 23 HAST. L.J. 489, 505 (1972) [hereinafter cited as *Demise*].

126. *Id.* at 560, 488 P.2d at 29, 96 Cal. Rptr. at 725 [quoting Comment, *The Constitutionality of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A. L. REV. 837, 847 (1970)].

listed bank account proceeds, television sets, refrigerators, stoves, sewing machines, furniture of all kinds, accounts receivable, a debtor's dwelling, clothing, and other personal possessions.¹²⁷ The common denominator of these items is the fact that their deprivation can cause extreme hardship and oblige a debtor to settle a creditor's claim quickly, "whether or not it is valid."¹²⁸ Thus, their attachment "will in many cases effectively deprive the debtor of *any* hearing on the merits of the creditor's claim."¹²⁹ In such situations the defendant-debtor is entitled to a full adjudication of his liability before he can be deprived of his property.¹³⁰

There is little question that in today's highly mobile society a motor vehicle is a necessity for many families.¹³¹ In many communities, private automobiles constitute the sole means of transportation. "Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood."¹³² For a migrant worker dependent on his automobile to drive to the fields,¹³³ for a gardener whose vehicle is necessary to transport himself and his tools between his different places of employment,¹³⁴ license suspension as effectively cuts off essential income as does wage garnishment for a wage earner. Just as attachment of *Randone's* "necessities of life" may give a creditor "enormous leverage" over a potential debtor,¹³⁵ so the withdrawal of an uninsured motorist's driver's license may place him under extreme pressure to settle a claim against him, regardless of its validity. *Rios* affirmed the importance of the right to a driver's license, especially to the rural and urban poor.¹³⁶ Were substantiality of deprivation the only criterion for evaluating the applicability of *Randone* to California's financial responsibility law, it would be difficult to reconcile the two cases.¹³⁷

127. *Id.* at 560-61, 488 P.2d at 725-26, 96 Cal. Rptr. at 29-30.

128. *Id.* at 561-62, 488 P.2d at 30, 96 Cal. Rptr. at 726.

129. *Id.*

130. *Id.*

131. See notes 26-27 *supra*.

132. *Bell v. Burson*, 402 U.S. 535, 539 (1971). See Comment, *The Growth of Procedural Due Process into a New Substance*, 66 Nw. U.L. Rev. 502, 534 (1971).

133. *Rivas v. Cozens*, 327 F. Supp. 867 (N.D. Cal. 1971).

134. *Escobedo v. State Dep't of Motor Vehicles*, 35 Cal. 2d 870, 873, 222 P.2d 1, 3 (1950).

135. 5 Cal. 3d at 561, 488 P.2d at 30, 96 Cal. at 29-30

136. 7 Cal. 3d at 795-96, 499 P.2d at 981, 103 Cal. Rptr. at 301.

137. The court in *Randone* was well aware that many of the assets it would term "necessities" were already protected from attachment by the California exemption statutes. It noted, however, that "the scope of the specific exemptions has frequently proven insufficient" (5 Cal. 3d at 545, 488 P.2d at 714, 96 Cal. Rptr. at 18) and "[t]heir inequity and inadequacy have at times engendered serious criticism." *Id.* at 546, 488 P.2d at 714-15, 96 Cal. Rptr. at 18-19. Moreover, the court pointed out that the exemption provisions come into play only *after* the defendant has suf-

Even if an automobile can be considered a "necessity of life" for some motorists, however, there remains the question whether the attachment of a debtor's property under the attachment statutes and the suspension of an uninsured motorist's license under the financial responsibility law are truly parallel situations.¹³⁸ The United States Supreme Court in *Bell* laid to rest the idea that a driver's license was not a property right and, therefore, not entitled to fourteenth amendment protection. Citing *Sniadach* and *Goldberg*, the Court held that whether denominated a "right" or a "privilege," the motorist's interest in his license was sufficiently important that it could only be infringed if the procedural requirements of the fourteenth amendment were met.¹³⁹ The fact that property rights and driving privileges both

ferred the attachment of a "necessity," and only if he is aware of his legal rights. *Id.* at 562, 488 P.2d at 727, 96 Cal. Rptr. at 31. Because of the hardship suffered by defendants with families to support while awaiting hearings on their claims of exemption (if, indeed, they are aware of their legal remedies), the court held:

[T]he post-attachment operation of the present exemption procedure, placing the burden on the debtor to seek exemption, does not satisfy the constitutional requirements discussed above. Instead, due process requires that all 'necessities' be exempt from pre-judgment attachment as an initial matter. *Id.* at 563, 488 P.2d at 727, 96 Cal. Rptr. at 31.

Faced, on the one hand, with the difficulty of drafting exemption statutes which would protect all "necessities of life" and, on the other hand, with the administrative costs of conducting hearings on whether a particular asset was a "necessity" for its owner (see *Demise*, *supra* note 125, at 507), the California legislature completely overhauled its attachment statutes. Presently in California, prejudgment attachment is limited to contract actions (\$500 minimum) against corporations, partnerships, individuals engaged in a trade or business, and non-residents of the state. CAL. CODE CIV. PROC. §§ 537.1-2 (West Supp. 1973). The creditor of an individual engaged in a trade or business is limited to certain largely nonpersonal assets; and the individual debtor may still have excluded from attachment any property which the court finds is necessary for the support of him and his family. *Id.* § 537.3.

This legislation does not, of course, diminish the impact of the supreme court's reasoning in *Randone*. A driver's license may not be a necessity for all motorists, but if the *Randone* rationale can be applied to California's financial responsibility law, then every motorist must be afforded the opportunity, prior to suspension, to show that his driver's license is essential to the well-being of himself and his family—and, therefore, exempt. See generally *Demise*, *supra* note 125.

138. Otherwise stated, the question is whether the interest of the state in enforcing financial responsibility laws is so similar to its interest in enforcing attachment statutes that the rationale for requiring a high standard of proof and full procedural protection in preattachment proceedings applies equally to presuspension hearings.

139. 402 U.S. 535, 539 (1971). See note 33 *supra* for a list of cases which denied due process protection to drivers' licenses under the doctrine of "privilege." An exhaustive discussion of the effect of that doctrine on the individual's right to legal protection is contained in K. DAVIS, I ADMINISTRATIVE LAW TREATISE §§ 7.11-7.20 at 452-512 (1958):

The typical thinking is that one has no "right" to a government gratuity, that one who has no "right" at stake should not be entitled to a hearing, that in absence of a "right" one should not even be entitled to judicial review of an administrative denial of the gratuity or privilege, that due process protects

come under the aegis of the due process clause, however, does not necessarily mean that they must receive the same quality of hearing.¹⁴⁰ Once the threshold of protection demanded by the United States Supreme Court in *Bell* and in *Goldberg* is reached, any further protection which the California court may require depends upon the relative strengths of the competing public and private interests involved.¹⁴¹ It would appear that the interest of an uninsured motorist in retaining his driver's license is at least as strong as that of a potential debtor in retaining "necessities of life"; however, for *Randone's* full protection to run to the licensee, it must also appear that the interest of the state in summary process under California's financial responsibility law is no greater than its interest in prejudgment attachment under the attachment statutes.

The court in *Rios* explicitly addressed itself to this issue. Having observed that the purpose of California's financial responsibility law was not general highway safety but individual creditor protection, it stated:

We do not denigrate the desirability of making whole the victims of automobile accidents. But viewed in this economic context, the purpose of the statutes under consideration bears a remarkable relationship to prejudgment creditor's remedies and therefore does not justify a difference in treatment with regard to the right to a presuspension hearing.¹⁴²

Had the court considered that its equation in *Rios* of motorists' remedies with creditors' remedies should, under *Randone*, nullify the effect of California's financial responsibility law on those licensees for whom a driver's license is a "necessity," it might not have been so quick to compare them. Yet, the court's estimation of the equivalence of the

only "life, liberty, or property" and not privileges, and that therefore courts are not called upon to require fair hearings when nothing more than privileges are at stake.

Id. § 7.11, at 454.

In recent years the concept of "privilege" has fallen into disrepute. See W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Even before *Bell* the Supreme Court had come to accept the view that an interest may require due process protection regardless of whether considered a right or a privilege. See *Graham v. Richardson*, 403 U.S. 365 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Sherbert v. Verner*, 374 U.S. 398 (1963). Indeed, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court noted that certain "privileges" might well be considered property rights: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property." *Id.* at 262 n.8. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

140. See text accompanying notes 102-06 *supra*.

141. See text accompanying note 123 *supra*.

142. 7 Cal. 3d at 796, 499 P.2d at 982, 103 Cal. Rptr. at 302.

two procedures is buttressed by *Randone's* description of the purpose of the California attachment statutes as "simply to provide unsecured creditors with 'security for the satisfaction of any judgment that may be recovered,'" ¹⁴³ and by *Bell's* appraisal of the security provision of Georgia's financial responsibility law as a means "to obtain security from which to pay any judgments against the licensee resulting from the accident." ¹⁴⁴

Given this equivalence of purpose between the two procedures and the great importance of driving privileges to the well-being of many families, the argument is strong that in California a motorist must be afforded an opportunity to show that his driver's license is a "necessity of life," and therefore exempt from pre-trial suspension, before the state may take action against him. At the very least, *Randone* provides support for a more extensive hearing on the question of liability than that sanctioned by the court in *Rios*. ¹⁴⁵

In *Randone*, the California Supreme Court provided more procedural protection to the debtor than was constitutionally required by *Sniadach*. ¹⁴⁶ In *Rios*, the court may have afforded less protection to the uninsured motorist than required by *Bell*. Though in recent years the judiciary has made progress in identifying the kinds of hearings appropriate in different adjudicative contexts, ¹⁴⁷ this area of the law is still characterized by a high degree of uncertainty and confusion. Only in *Goldberg* and *Morrissey* has the United States Supreme Court been willing to lay down detailed procedural guidelines for administrative hearings. ¹⁴⁸ If the Court resolves the controversy surrounding

143. 5 Cal. 3d at 555, 488 P.2d at 25, 96 Cal. Rptr. at 721.

144. 402 U.S. at 540.

145. *Randone* equates the loss of essential household goods to the loss of essential wages or welfare benefits. 5 Cal. 3d at 560-62, 488 P.2d at 725-26, 96 Cal. Rptr. at 29-30. An automobile may well be as essential, if not more so, to a modern family than a refrigerator or a table. If, for the purposes of withdrawing welfare benefits or wages from the debtor, the debtor must be afforded those minimal procedural safeguards prescribed in *Goldberg*, then for the purposes of withdrawing household goods or drivers' licenses, the uninsured motorist should at least receive the same procedural protection.

146. The assumption here is that the United States Supreme Court has now adopted Justice Harlan's "probable validity" test for all cases involving prejudgment creditor remedies. See note 124 *supra*.

147. Commenting on developments in this area of the law through 1970, Professor Davis states:

[T]he law of requiring opportunity to be heard has become more sophisticated. No longer is the usual inquiry the relatively crude one of whether a party is entitled to a "hearing." More often it is, as it should be, into the question of what kind of hearing is appropriate.

K. DAVIS, *supra* note 89, § 7.20 at 367.

148. The Court's purpose in not dictating the terms of the hearing required in a particular situation is to allow the states to experiment with the kinds of proceedings best suited to their individual needs. See *Bell v. Burson*, 402 U.S. 535, 539-40 (1971).

Bell v. Burson in favor of a *Goldberg*-type hearing for uninsured motorists, the argument that the rights to review the other party's evidence, present one's arguments orally, and cross-examine adverse witnesses are fundamental prerequisites of procedural due process will be strengthened.¹⁴⁹ If, however, the Court affords less than this "minimal" protection to the uninsured motorist,¹⁵⁰ the argument that *Goldberg* set basic standards for all preliminary hearings will be substantially weakened.¹⁵¹ The Court's resolution of this issue not only will strongly affect the administration of financial responsibility laws but also will have ramifications for every administrative and judicial proceeding by which an individual can be deprived of his liberty or property without a full adjudication of his liability.

III.

SUBSTANTIVE WEAKNESSES

Thus far, this Comment has focused on the prejudgment provisions of financial responsibility legislation and on the kind of hearing which will afford the defendant motorist sufficient presuspension protection to satisfy the requirements of procedural due process. In recent years this has also been the principal area of judicial concern; the courts largely have avoided the deeper question of the substantive validity of financial responsibility laws.¹⁵² The extent to which pro-

The Court's reluctance to flesh out its holdings is understandable: judicial restraint is an essential ingredient of our federal system of government. Unfortunately, the price of the Court's repeated refusal to set down basic procedural guidelines for different types of preliminary hearings is widespread confusion in this area and numerous judicial battles over what is constitutionally required in a given context.

149. The right to an impartial decisionmaker and the right to be represented by counsel are additional candidates for status as prerequisites of procedural due process. See note 111 *supra*.

150. The Court might draw the line at the two safeguards afforded by the California Supreme Court in *Rios*. See note 106 *supra*.

151. Such a decision would reinforce the argument that the kind of hearing required in a given situation is completely dependent on the balance of public and private interests involved and that the right to a driver's license is not as important as the right to welfare benefits or parole.

152. As Part I of this Comment noted, early equal protection attacks on financial responsibility laws met with little success. See notes 44-45 and text accompanying notes 36-40 *supra*. As the view of driver's licenses as rights (not privileges) and the view of license suspension as a kind of creditor remedy (not a safety device) gained currency, however, it became possible to ameliorate the harshness of financial responsibility laws through the media of procedural due process and the Bankruptcy Act. See note 139 *supra* and text accompanying notes 244-53 *infra*. It is certainly understandable that lawyers and courts desirous of correcting the inequities of these laws should pursue the latter avenues of attack rather than attempt the more difficult task of overturning the laws on substantive fourteenth amendment grounds: to surround the sanction of license suspension with procedural safeguards and exceptions for bankrupt motorists provides necessary protection to the innocent and the insolvent.

cedural reforms can cure the basic defects of these laws, however, is limited.¹⁵³ This part of the Comment considers the rationale for financial responsibility legislation as a whole, including both its prejudgment and postjudgment provisions. The primary issue is whether these laws can be characterized as so arbitrary and irrational as to violate the fourteenth amendment guarantee of equal protection of the laws.

Section A appraises financial responsibility laws as creditor remedies, the view which is taken by the United States and California Supreme Courts. It concludes that, as such, the rationality of these laws is highly questionable; but whether they can be overturned on equal protection grounds may depend on the Supreme Court's willingness to recognize a motorist's right to a driver's license as constitutionally protected. Section B considers another view of financial responsibility laws: as a method to protect the public in general, by removing unsafe, financially irresponsible drivers from the road. It concludes, however, that these laws display even less rationality as highway safety devices than as creditor remedies.¹⁵⁴ Section C discusses a third possible rationale for financial responsibility laws: to protect the driving public generally by inducing motorists voluntarily to take out liability insurance. It concludes that although financial responsibility laws can be viewed as imposing a sanction on negligent, uninsured drivers in order to encourage other drivers to insure themselves, the arbitrary nature of the sanction and the irrationality of its application render this characterization also constitutionally infirm.

A. Financial Responsibility Laws as Creditor Remedies

1. The Parallel to Imprisonment for Debt

According to the United States and California Supreme Courts, the purpose of financial responsibility laws is similar to that of attach-

Such patchwork, however, also serves to increase the cost of administering the laws, reduce their coercive power, and disguise their substantive weaknesses. The states are left with a more expensive and even less effective apparatus which they can nevertheless point to as evidence that they are dealing with the problem of compensating accident victims. (See the discussion of alternatives to financial responsibility laws in Part IV *infra*.)

153. The United States Supreme Court in *Bell* showed how procedural due process could be used to make what was arguably a substantive change in financial responsibility laws. See note 52 *supra*. The California Supreme Court in *Randone* employed procedural due process effectively to eliminate the prejudgment attachment of certain kinds of property in this state. As the last section of Part II indicated, the *Randone* rationale might also apply to the suspension of driving licenses under financial responsibility laws. It is doubtful, however, that the United States Supreme Court will adopt the position of the California court with respect to prejudgment creditor remedies. See text accompanying notes 124-25 *supra*. Also, even if such a stance were taken, it would not affect the postjudgment operation of these laws.

154. Indeed, the Supreme Court's recent decision in *Perez v. Campbell*, 402 U.S.

ment statutes—to provide a fund from which the accident victim can satisfy judgments rendered against the defendant.¹⁵⁵ Both schemes serve to secure assets of the defendant for the benefit of potential creditors before judgment and of proven creditors after judgment. When the defendant is insolvent, however, the analogy between the two remedies breaks down. The creditor of a debtor without attachable assets derives no benefit from the attachment statutes. The accident victim injured by an uninsured motorist, on the other hand, is able to use license suspension as a club to force his injurer to pay regardless of the injurer's financial status. In this respect, license suspension more closely resembles imprisonment for debt than attachment.¹⁵⁶ All three are creditor remedies theoretically designed to assure the plaintiff reimbursement rather than to punish the defendant.¹⁵⁷ While attach-

637 (1971), holding that motorists who have been declared bankrupt cannot be denied their licenses for failure to pay a judgment against them, may have dealt the highway safety argument its death blow. See text accompanying notes 244-53 *infra*.

155. See text accompanying notes 142-44 *supra*. See also *People v. Nothaus*, 147 Cal. 210, 215-16, 363 P.2d 180, 183 (1961); *Dempsey v. Tynan*, 143 Conn. 202, 208, 120 A.2d 700, 703 (1956); *City of St. Paul v. Hoffmann*, 223 Minn. 76, 77-78, 25 N.W.2d 661, 662-63 (1946); *Rosenblum v. Griffin*, 89 N.H. 314, 317-18, 197 A. 701, 704 (1938).

At common law, attachment was used more as a means to compel the defendant to appear in court than as a creditor remedy. This function was largely displaced when it became possible for plaintiffs to obtain default judgments against resident defendants. Attachment still plays a significant role, however, in inducing out-of-state defendants to make personal appearances in actions where quasi in rem jurisdiction has been established with regard to their in-state property. See S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION* 177-83 (1967).

156. The analogy between license suspension and imprisonment for debt has been recognized by a number of courts. In the seminal opinion upholding the substantive validity of financial responsibility laws, the Massachusetts Supreme Court stated:

There is no inequality or discrimination in a constitutional sense from the standpoint of the judgment debtor. . . . The proposed statute does not differ in principle from many others. . . . *Even imprisonment for debt does not violate constitutional guarantees.*

In re Opinion of the Justices, 251 Mass. 617, 619, 147 N.E. 680, 681 (1925) (emphasis added).

Most states amended their constitutions in the last century to prohibit the sanction of incarceration solely for failure to fulfill a private obligation. See J. HANNA & J. MACLACHLAN, *CREDITORS' RIGHTS AND CORPORATE REORGANIZATION* 70-73 (Consolidated 5th ed. 1957). In *Sullins v. Butler*, 175 Tenn. 468, 135 S.W.2d 930 (1940), Tennessee's financial responsibility law was attacked on the grounds that it imposed an analogous sanction, but the court held that the prohibition against imprisonment for civil debt found in the state's constitution applied only to cases of actual incarceration.

157. As one historian has put it: "Confinement in a debtor's prison was not then thought of as punishment, but as providing, by the safe custody of the debtor, some kind of guarantee . . . that the debt would be paid." D. OGG, *ENGLAND IN THE REIGNS OF JAMES II AND WILLIAM III* 109 (1955). That the sanction was considered a private rather than a public remedy is supported by the fact that, after 1670, if a creditor insisted that his debtor remain in prison, the creditor had to pay a weekly sum

ment is effective only if the debtor is solvent, however, imprisonment for debt and license suspension ignore the defendant's actual ability or inability to pay and, instead, attempt to coerce compliance through the threat of personal deprivation.

The rationality and fairness of a creditor remedy which is strictly coercive is questionable at best. Undoubtedly, some debtors who would not otherwise have fulfilled their obligations to their creditors have done so when the alternative was imprisonment. Similarly, today some uninsured motorists who are involved in accidents and cannot afford to lose their licenses are able to escape that sanction by raising sufficient funds to post bond before judgment, and to respond in damages after judgment. Unfortunately, a high percentage of uninsured motorists lack sufficient resources to satisfy the requirements of the law.¹⁵⁸ Indeed, those hardest hit by the sanction are often among those least able to pay.¹⁵⁹ Suspending the license of such a driver, like imprisoning a debtor, only aggravates his insolvency. Far from encouraging him to compensate his victim, the sanction makes it more difficult, by depriving him of an asset "which may have become essential in the pursuit of a livelihood."¹⁶⁰ To be sure, as the California Supreme Court noted in *Randone*, the attachment of any important (but non-exempt) asset can work a similar hardship on one who owes a debt arising out of a contract,¹⁶¹ but that sacrifice at least can be justified by the intrinsic monetary value of the assets to which the judgment creditor has recourse. No such justification exists for the suffering of the uninsured motorist. His victim cannot sell or otherwise redeem the suspended license in order to receive compensation for his injuries.

The weakness of the rationale behind license suspension under financial responsibility laws is particularly apparent in the postjudgment operation of these laws. If a negligent motorist is to pay a judgment against him, it must be either from current property holdings or from future earnings. His judgment creditor can reach the first by the process of attachment and execution; the second can be secured by garnishment. These remedies are limited only by exemption statutes

for the debtor's maintenance. HOLDSWORTH, 8 A HISTORY OF ENGLISH LAW 235 (2d ed. 1926).

Both license suspension and imprisonment for debt may be viewed as punishment for a public wrong; but such a characterization raises a host of constitutional questions, and, at least in the case of financial responsibility laws, is at odds with the manner in which the laws are implemented. See text accompanying notes 254-60 *infra*.

158. See note 25 *supra*.

159. See note 26 *supra*.

160. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

161. See text accompanying notes 126-30 *supra*.

which define those items which the legislature considers too important to the physical well-being and earning capacity of the debtor to warrant their withdrawal from him under any circumstances.¹⁶² Thus, suspending the motorist's driving license will benefit his creditor only in those relatively few instances in which the motorist has successfully concealed assets and is coerced into revealing them by the loss of his license.¹⁶³ There is little logic, and less fairness, in exposing the uninsured motorist to such great hardship in order to afford his victim such a doubtful benefit.¹⁶⁴

Prejudgment license suspension is, in one respect, more defensible. In most states the plaintiff in a tort action cannot attach or garnish the assets of a defendant until after a determination of his liability has been made in a full-scale trial.¹⁶⁵ Financial responsibility laws, therefore, provide the accident victim with his only means of securing property of the defendant (in the form of a security deposit) before judgment. On the other hand, prejudgment suspension is assailable precisely because the liability of the uninsured motorist has not been fully established.¹⁶⁶ A "reasonable possibility of culpability" is sufficient to ex-

162. See S. RIESENFELD, *supra* note 155, at 230-64. See also *Randone v. Appellate Dep't*, 5 Cal. 3d 536, 545, 488 P.2d 13, 28-32, 96 Cal. Rptr. 709, 724-28 (1971); note 137 *supra*. Among the most common statutory exemptions are the tools of a debtor's trade. See 1A W. COLLIER, *BANKRUPTCY* § 6.14, at 869 (1972). "The means of transportation to and from one's place of employment may also be viewed as an essential tool of his trade, where no other reasonable alternative, such as public transportation, is available." *The Growth of Procedural Due Process*, *supra* note 132, at 872-73. See notes 26 & 27 *supra*. Automobiles have received varied judicial and statutory treatment in this respect. See W. COLLIER, *supra*, at 872-73. In California, a motor vehicle with a value of \$500 over and above all liens and encumbrances (so long as the total value of the vehicle does not exceed \$1,000) is exempt from both attachment and execution. CAL. CODE CIV. PROC. § 690.2 (West Supp. 1973).

163. License suspension might also force the uninsured motorist to sell property which is exempt from attachment and execution in order to meet his obligation under financial responsibility laws. It is doubtful, however, that the legislative intent behind license suspension was to undermine the strong public policy which requires that a debtor's most essential possessions be placed beyond the reach of creditors. See note 162 *supra*.

164. Note that if the uninsured motorist's judgment debt is discharged in bankruptcy, he can recover his license. See text accompanying notes 244-53 *infra*. Under the Bankruptcy Act, however, he must pay a filing fee of approximately \$50 in order to be declared officially insolvent. This provision was recently attacked on both due process and equal protection grounds; but the Supreme Court, in a 5-4 decision, upheld its constitutionality. *U.S. v. Kras*, 409 U.S. 434 (1973). Cf. *Boddie v. Conn.*, 401 U.S. 371 (1970).

165. This is not usually true, however, if the defendant is a non-resident and attachment is used to establish quasi in rem jurisdiction. See note 155 *supra*; CAL. CODE CIV. PROC. § 688.1.

166. As the California Supreme Court observed in *Randone*, the possibility that the defendant is not liable also argues against prejudgment attachment in contract actions; but at least in that situation there is the assurance that the defendant's deprivation will redound to the plaintiff's benefit if he wins. Also, the creditor who

pose the defendant to a significant deprivation for months, often years, while he is waiting for his case to come to trial.¹⁶⁷ Only a small minority of the uninsured motorists whom the state asks to post bond each year actually do so.¹⁶⁸ Of those who do not post bond, it is probable that a large percentage are insolvent, or nearly so, and many are dependent on their automobiles for their livelihood.¹⁶⁹ To suspend these individuals' licenses not only subjects them to needless hardship but also decreases the probability that they will be in a position to respond in damages if found liable in a subsequent trial. If a prejudgment creditor remedy must be afforded the accident victim, it would be less harsh and more productive simply to allow the same prejudgment attachment of assets that is allowed in contract actions. Solvent motorists would more effectively be prevented from dissipating their assets, and insolvent motorists could be spared unnecessary punishment.¹⁷⁰

2. *The Constitutional Standard*

As creditor remedies, financial responsibility laws are unreasonably harsh, punitive, and counter-productive. These shortcomings, however, may not in themselves constitute sufficient justification for invoking the protection of the fourteenth amendment. Since the late 1930's, the Supreme Court has repeatedly affirmed that, "where the legislative judgment is drawn into question, [judicial review] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it."¹⁷¹ Though it has never absolutely repudiated the right to inquire into the rationality of challenged statutes, the Court has seldom invalidated legislation on substantive due process or traditional equal protection grounds.¹⁷² Es-

invokes the attachment statutes is limited to nonexempt assets—assets which the legislature considers are not vital to the physical well-being and earning capacity of the motorist. See notes 162-63 *supra*.

167. Note that a discharge in bankruptcy will not avail the uninsured motorist before judgment, since he is discharged only of past, not future, debts.

168. See note 25 *supra*.

169. See notes 26 & 27 *supra*.

170. As it now stands, it is impossible, before judgment, for the accident victim to secure the assets of the solvent motorist who is fortunate enough to have other means of transportation available and thus does not feel the hardship of license suspension.

171. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

172. See Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 226 (1958); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (1962); Rodes, *Due Process and Social Legislation in the Supreme Court—a Post Mortem*, 33 NOTRE DAME LAW. 5 (1957); Comment, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments—Equal Protection*].

pecially in cases of economic regulation, if a legislature in good faith has perceived a need for a particular enactment—however unnecessary, harsh, or wasteful in fact—the Court has refused to question the adequacy of the statutory scheme.¹⁷³ If the same lenient test is properly applicable to financial responsibility laws, it is unlikely they can be overturned on substantive fourteenth amendment grounds. Undoubtedly, some uninsured motorists who might otherwise dissipate their assets before judgment or conceal their assets after judgment are coerced by the threat of license suspension to reveal those assets for the benefit of the accident victim. For the purposes of substantive due process and traditional equal protection, this is probably sufficient justification for upholding these laws. That financial responsibility legislation unnecessarily imposes great hardship on the many uninsured motorists who do not have assets sufficient to post bond or respond in damages does not render the scheme totally irrational.¹⁷⁴ Even imprisonment for debt would pass the traditional test of “minimum rationality.”¹⁷⁵

It is possible, however, that a more stringent standard of review is

As used in this comment, “substantive due process” refers to the construction of the fourteenth amendment which argues that it protects substantive rights not specifically enumerated in the Constitution. See note 176 *infra*. “Traditional equal protection” is the equal protection analysis which is applied to legislation which involves neither a “suspect classification” [see note 178 *infra*] nor a “fundamental interest” [see text accompanying notes 187-218 *infra*].

173. See, e.g., *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Day-Brite Lighting v. Missouri*, 342 U.S. 421 (1952); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

The Supreme Court's view of substantive due process has not been universally accepted. In interpreting the provisions of their own state constitutions, the state courts are free to formulate independent doctrines, so long as they do not contravene federal law. See, e.g., *Giozza v. Tiernan*, 148 U.S. 657, 661 (1893). Many state courts have construed the due process clauses of their constitutions to require that state economic legislation be struck down if it is not supported by at least some facts showing it is in the public interest. See Hetherington, *supra* note 172, at 226-51; Comment, *Counterrevolution in State Constitutional Law*, 15 STAN. L. REV. 309 (1963). Professor Freund observed in 1949 that “[t]he Supreme Court's recent reluctance to declare state laws unconstitutional under the due process clause unless basic civil liberties are involved” might cause state constitutional law to become “of dominant importance.” P. FREUND, ON UNDERSTANDING THE SUPREME COURT 115-16 (1949). As yet, this possibility has been only partially realized; but the potential for constitutional litigation in the areas of due process and equal protection to shift to the state courts appears more likely today than ever. See *Brown v. Merlo*, 8 Cal. 3d 855, 866-67 n.7, 506 P.2d 212, 219-20 n.7, 106 Cal. Rptr. 388, 395-96 n.7 (1973); note 211 *infra*.

174. Under the “minimum rationality” standard the fact that there may exist more reasonable and effective alternatives to a particular law is irrelevant. See text at note 170 *supra*.

175. Imprisonment for debt, however, might not survive a charge that it violates the eighth amendment's prohibition against “cruel and unusual punishment.” As to the validity of viewing imprisonment for debt or license suspension as punishment for public wrongs, see note 157 *supra* and text accompanying notes 254-60 *infra*.

applicable to financial responsibility legislation. The Supreme Court's aversion to substantive due process and traditional equal protection as correctives for ill-conceived laws has not prevented it from invalidating statutes which it has felt infringed unreasonably on important personal rights. In the main, the Court has taken two approaches to overturning such laws. The first approach is to give special protection to certain "fundamental rights" which, if not explicitly safeguarded by the Constitution, are so basic to our scheme of justice or so similar to explicitly protected rights that they qualify for the same treatment.¹⁷⁶ The second and more important approach is to rely on an expanded concept of the equal protection clause—termed by some commentators "substantive equal protection."¹⁷⁷

a. *Traditional Equal Protection*

Traditional equal protection analysis focuses, first, on whether the classification created by a law is "suspect"¹⁷⁸ and, second, on whether the favored and disfavored classes are "similarly situated with respect to the purpose of the law."¹⁷⁹ The primary concern of the courts is

176. Rights specifically enumerated in the Constitution enjoy a privileged position which can only be encroached upon if warranted by a strong public interest. Certain other rights may share this status if deemed of equal importance by the Supreme Court. See generally, Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968). The Court is divided as to whether such rights need fall into a "penumbra" of constitutional protection emanating from the Bill of Rights or whether it is enough that they are basic to our "Anglo-American legal heritage." See *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right of travel is one such right. See *Kent v. Dulles*, 357 U.S. 116 (1958). It is possible to argue that financial responsibility laws should be subjected to strict judicial scrutiny because "[t]he right to drive an automobile is integrally bound up in the right to travel guaranteed by the Supreme Court's interpretation of the United States Constitution." *Miller v. Depuy*, 307 F. Supp. 166, 172 (E.D. Pa. 1969). The Supreme Court, however, has a decided aversion to overturning legislation on substantive due process grounds. See Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490 (1971). The right to travel is also a "fundamental interest" for the purposes of substantive equal protection [see *Shapiro v. Thompson*, 394 U.S. 618 (1969)], and the Court is much more receptive to arguments of unconstitutionality based on equal protection grounds. See Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41-43 (1972). The focus of part III's discussion of the substantive weaknesses of financial responsibility laws, therefore, is on equal protection. See text accompanying notes 187-218 *infra*.

177. See Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

178. A "suspect" classification is one which is presumptively invalid per se. Only a compelling interest of the state can justify such a classification, regardless of whether the classification is rationally related to the purpose of the law. Classifications based on race, lineage, and alienage have received the strictest treatment. See *Developments—Equal Protection*, *supra* note 172, at 1124-27.

179. Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

with the justice of the discrimination between classes, rather than the justice of the state's interference with the interests of the individual.¹⁸⁰ Traditionally, the courts have deferred to the judgment of the states with respect to the wisdom of a particular classification: "One who assails the classification . . . must carry the burden of showing that it does not rest upon *any* reasonable basis, but is essentially arbitrary."¹⁸¹

Financial responsibility legislation differentiates between uninsured motorists on the basis of wealth. Those who can afford to post bond and pay an adverse judgment have a choice between fulfilling the requirements of these laws or losing their driving privileges. The indigent motorist has no such choice. The penalty for his poverty is license suspension. Under traditional analysis, however, it is difficult to argue that this scheme denies equal protection to insolvent motorists.¹⁸² The reasonableness of depriving a licensee of his driving privileges as a means of forcing him to pay is not at issue. Rather, the question is whether uninsured motorists who make the payments required under the law and those who do not are "similarly situated with respect to the purpose of the law."¹⁸³

180. See *Developments—Equal Protection*, *supra* note 178, at 1132.

181. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911) (emphasis added). See also *McGowan v. Maryland*, 366 U.S. 420, 426 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948).

182. Only one court has ruled that financial responsibility laws deny equal protection to the uninsured driver. Its decision, however, rested on the assumption that the primary purpose of financial responsibility laws was highway safety, not creditor protection. *In re Lindley*, 108 Cal. App. 258, 291 P. 638 (2d Dist. 1930), apparently discredited in *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 298 P. 481 (1931). The case is discussed in O'Keefe, *The Indigent Motorist and the Constitution*, 4 S. CAL. L. REV. 253 (1931). For an analysis of the highway safety argument, see text accompanying notes 232-53 *infra*.

183. A recent comment, *The Constitutionality of the California Financial Responsibility Law*, 4 CAL. W. L. REV. 89 (1968), assailed the validity of California's legislative scheme on the same equal protection grounds employed by the plaintiff in *Escobedo v. Department of Motor Vehicles*. See text accompanying notes 36-40 *supra*. The author argued first that although all uninsured motorists are similarly situated, in that all are uninsured, they are not treated equally under financial responsibility laws. The rich motorist retains his license; the poor motorist loses his license, "only because he is poor." 4 CAL. W. L. REV. at 91. Under traditional analysis, however, rich and poor uninsured motorists are not similarly situated with respect to the purpose of the law, if that purpose is to aid the individual accident victim. The law is aimed not at the insolvent motorist's failure to insure himself but at his failure to satisfy a private obligation arising out of a particular accident. One may question the reasonableness of using coercion, rather than the attachment of nonexempt property, as a means of securing a fund for the accident victim; but it is difficult to argue that the method shows *no* rationality. See text accompanying notes 171-75 *supra*. Only if a different purpose is ascribed to these laws [see note 182 *supra* and text accompanying notes 232-43 *infra*], or if a more stringent constitutional test than that of traditional equal protection analysis is applicable in this situation [see text accompanying notes 187-231 *infra*], is such an equal protection attack likely to succeed.

This position is borne out by an examination of the author's second argument:

The purpose of financial responsibility legislation is to provide a fund for the accident victim from which he may recover a judgment. If some uninsured motorists who would not otherwise make payment are coerced by the threat, or imposition, of license suspension to post bond and respond in damages, license suspension in fact advances the cause of providing compensation to accident victims. Thus, as a "rough" class,¹⁸⁴ uninsured motorists who fail to satisfy the requirements of financial responsibility laws are not similarly situated, with respect to the laws' purpose, with those who do make payment.

As was discussed earlier, coercion is an effective creditor aid only if the debtor is solvent. It is pointless to suspend the license of an uninsured motorists who has no assets to draw upon to make payment. That the classification created by these laws indiscriminately lumps together those uninsured motorists who are able, but unwilling, to pay and those who are willing, but unable, to pay, however, does not violate traditional equal protection standards:

If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."¹⁸⁵

Moreover, the Supreme Court has never flatly labelled "suspect" a classification based upon wealth.¹⁸⁶ That all indigent motorists are exposed to the hardship of license suspension, while all wealthier motorists are able to avoid that deprivation, therefore, is not in itself sufficient ground for invalidating financial responsibility laws.

that the class of uninsured motorists created by financial responsibility laws bears no reasonable relationship to its purpose. The comment predates both *Orr v. Superior Court*, 71 Cal. 2d 220, 454 P.2d 712, 77 Cal. Rptr. 816 (1969), and *Bell v. Burson*, 402 U.S. 535 (1971); thus, license suspension was not at the time dependent on a prior determination of a "reasonable possibility of culpability." The author argued that to include in the classification uninsured motorists who were not negligent could not contribute to the compensation of the injured party; therefore, the scheme denied non-negligent motorists equal protection. Traditional equal protection, however, does not demand that the classification created by a particular law be that which is most protective of the individual's private interests. It demands only some rational nexus between the classification and its purpose. Even without the procedural due process requirement of a preliminary finding of culpability, since motorists who have been involved in an accident are more likely to have been negligent than motorists who are accident-free, there is probably sufficient rationality in the classification to satisfy the traditional equal protection standard. See note 52 *supra*.

184. "The problems of government are practical ones and must justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70 (1913).

185. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911).

186. See Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 19-33 (1969).

b. Substantive Equal Protection

In recent years, however, when a classification based on ability to pay has been coupled with the deprivation of a fundamental personal interest—in voting,¹⁸⁷ in interstate travel,¹⁸⁸ in rights with respect to criminal procedure¹⁸⁹—the Court has placed the burden of justifying the classification on the state. In such cases, only a demonstration by the state of a “compelling interest” could overcome the Court’s predisposition to strike down the statute.¹⁹⁰ Although it is extremely difficult to predict which interests the Supreme Court will choose to regard as “fundamental”—the Court appears to approach each case on virtually an ad hoc basis¹⁹¹—“it may be that a common thread can be found in the severity of the detriment imposed on a complaining party.”¹⁹² If magnitude of deprivation is the critical factor, an argument can be made that a motorist’s interest in retaining his driver’s license is so strong that before it can be suspended the state must show that a compelling public interest is served by the motorist’s loss.

Three recent cases, however, indicate that the Supreme Court may be unwilling to accept this analysis. In *Dandridge v. Williams*,¹⁹³ the Supreme Court upheld a Maryland regulation placing an absolute maximum on the amount of welfare assistance an indigent family could receive, regardless of its size.¹⁹⁴ The severity of the deprivation suffered by the individual welfare recipient was considered irrelevant to the issue of the constitutional validity of the legislation. Writing for the majority, Justice Stewart acknowledged the overriding importance to the plaintiffs of welfare assistance, which “involves the most basic economic needs of impoverished human beings.”¹⁹⁵ He ruled, nevertheless, that the constitutionality of the maximum-grant regulation was to be judged by the “minimum rationality” standard of review typically applied in cases of business regulation,¹⁹⁶ and not by the more stringent standard of the substantive equal protection cases.¹⁹⁷

187. *E.g.*, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

188. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969).

189. *E.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956).

190. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

191. *Developments—Equal Protection*, *supra* note 178, 1127-31.

192. *Id.* at 1130.

193. 397 U.S. at 485.

194. *Cf.* *Richardson v. Belcher*, 404 U.S. 78 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972).

195. 397 U.S. at 485.

196. *See* note 173 *supra*.

197. 397 U.S. at 484-87. The disparity between the Court’s unwillingness to scrutinize the *substantive* validity of laws which regulate welfare benefits and its readiness to examine the sufficiency of the *procedural* provisions of these laws [*see* text accompanying notes 81-82 *supra*] has been frequently criticized. *See, e.g.*, Graham, *Poverty and Substantive Due Process*, 12 ARIZONA L. REV. 1, 21-34 (1970). *See also* note 52 *supra*.

In *San Antonio Independent School District v. Rodriguez*,¹⁹⁸ the Court reaffirmed its view that "the importance of a service performed by the state does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."¹⁹⁹ The Court held that a state school financing system which guaranteed a minimal educational grant to every child, but which permitted local school districts to augment their allotments of state funds with funds raised through local property taxation, was not unconstitutionally discriminatory because children in districts with high property values benefitted more than those in districts with low property values. As the majority interpreted it, there is a "critical distinction" between the situation in those cases in which the Court has strictly scrutinized state or federal legislation and the situation in *Rodriguez*.²⁰⁰ The cases applying substantive equal protection analysis all involved the denial to a particular class of citizens of a right or liberty considered the prerogative of all members of our society. *Rodriguez*, on the other hand, concerned the state's failure to extend a new benefit to all citizens on an absolutely equal basis. Strict scrutiny, the Court argued, is not appropriate for praiseworthy legislative reforms that happen to aid some recipients more than others. In support of its position, the Court cited *Katzenbach v. Morgan*:²⁰¹

[The federal law in question] does not restrict or deny the franchise but in effect extends the franchise to persons who otherwise would be denied it by state law We need decide only whether the challenged limitation on the relief effected . . . was permissible. In deciding that question, the principle that calls for the closest scrutiny of distinctions in laws *denying* fundamental rights . . . is inapplicable; for the distinction challenged by appellees is presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise.²⁰²

The Court in *Rodriguez* was reluctant to interfere with Texas' school financing system because it viewed the efforts of the legislature to pro-

198. 93 S. Ct. 1278 (1973).

199. *Id.* at 1295.

200. *Id.* at 1299.

201. 384 U.S. 641 (1966). The Court in *Morgan* reviewed the constitutionality of section 4(e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1970), which provided that, notwithstanding valid state English literacy requirements, no person who has completed the sixth grade in a Puerto Rican school shall be denied the right to vote because of his inability to read or write English. It was objected, *inter alia*, that this provision discriminated against those non-English-speaking persons who were not educated in Puerto Rico. Though recognizing the fundamental nature of the right to vote, the Court applied a rational basis, rather than a "compelling state interest," test to the statute in question. *Id.* at 657-58. Cf. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969).

202. 93 S. Ct. at 1299-1300, quoting *Katzenbach v. Morgan*, 384 U.S. at 656-57.

vide minimal state aid to every child and, additionally, to allow school districts discretion to tax and spend on a local level, as essentially "affirmative and reformatory"—not a denial, but a laudatory promotion, of the child's interest in a quality education.²⁰³

The Court's treatment of educational benefits in *Rodriguez* may explain the attitude it took toward welfare benefits in *Dandridge*. Arguably, the Court viewed Maryland's welfare program as essentially remedial, rather than regulatory. No state is required to provide its indigent citizens with public assistance benefits. Since the Court did not want to discourage welfare programs altogether, it was reluctant to demand more than minimum rationality of regulation placing limits on the scope of that assistance.²⁰⁴ This viewpoint does not, of course, make the plaintiff's interest in receiving adequate welfare payments or a good education any less important. Rather, it argues that there are limits to the state's responsibility in these areas. When the state voluntarily undertakes to extend a benefit beyond these limits, it is inappropriate to subject the reform measure to the close judicial scrutiny normally called for when fundamental interests or suspect classifications are present.²⁰⁵

Financial responsibility laws, however, are more properly characterized as regulatory than reformatory. The statutes are not designed to give more motorists access to the highways but to deny access, through selective license suspension, to certain motorists who fail to satisfy the statutory requirements. Unlike legislation relating to welfare benefits, or enhanced educational opportunity, financial responsibility laws do not extend to a group of citizens a right to which they were not previously entitled—the right to drive has always been afforded to every motorist of age who could pass a test of driving skill. Any circumspection of that right is in every sense a deprivation, and not a simple failure to share in a new legislative benefit on an equal basis with other individuals. Strict judicial scrutiny of financial responsibility legislation cannot, therefore, be avoided (as arguably it was in *Rodriguez* and *Dandridge*) on the ground that the uninsured motorist whose license is suspended suffers, not a loss, but an unequal gain.

The courts may still hesitate, however, to recognize the fundamental nature of the right to drive for fear of opening the floodgates, eventually requiring the application of the compelling state interest test to all legislation that governs an individual's right to any possession essential

203. *Id.* at 1300.

204. See Comment, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61, 77 (1971).

205. See text accompanying notes 200-03 *supra*.

to his well-being.²⁰⁶ In *Lindsey v. Normat*,²⁰⁷ the Supreme Court stated quite clearly that, although adequate housing may be of decisive importance to a family, "the Constitution does not provide judicial remedies for every social and economic ill."²⁰⁸ Thus, laws governing the rights of tenants (vis-à-vis landlords) to decent living conditions would not be subjected to strict judicial scrutiny.²⁰⁹ The fact that the Constitution does not guarantee every citizen a minimal standard of living or provide substantive protection to basic necessities when they are threatened, however, does not oblige the Court to deny such protection to the opportunity to achieve a decent standard of living by dint of one's own effort. The line is concededly fine, but arguably distinct. Although the Constitution may not erect a substantive shield around an individual's possessory rights in his house, or his automobile, it may well protect his right to gain access to such assets. A very large component of the deprivation involved in the loss of voting rights, the right to travel, and the right to appeal criminal convictions is the serious threat such deprivation poses to the ability of the poor to influence their position in society.²¹⁰ If they are unnecessarily denied access to these important means of social and economic advancement, they will be unjustly handicapped in their efforts to make their own way.²¹¹

206. Significantly, in *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 S. CT. REV. 34 (1962), Professor McCloskey dismissed every rationale for not substantively protecting the economic rights of the individual except that of "judicial economy." In his view, if the Supreme Court undertook to review the propriety of all social and economic legislation which significantly affected the rights of the individual, the Court would simply be unable to handle the caseload. *Id.* at 60-62.

207. 405 U.S. 56 (1972).

208. *Id.* at 74.

209. *Id.*

210. See *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966); Michelman, *supra* note 186, at 19.

211. See note 27 *supra*. This argument closely resembles that which has been advanced in favor of recognizing education as a fundamental interest for the purposes of equal protection analysis:

[F]irst, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community.

Serrano v. Priest, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). See also Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test of State Financial Structures*, 57 CALIF. L. REV. 305 (1969). The fact that this argument did not succeed in *Rodriguez* is not dispositive of its value. In the first place, in *Rodriguez* the Court placed great emphasis on the fact that Texas' school financing system guaranteed every child "an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and full participation in the political process." 93 S. Ct. at 1299. The Court was unwilling to scrutinize closely the imperfections in the method the state had chosen to extend public education be-

The right to drive thus can be generally analogized to the kinds of fundamental interests the Supreme Court has identified thus far for the purposes of substantive equal protection analysis. There is, however, more direct constitutional support for according the right to drive fundamental status in one of these well-recognized interests, the right to travel.²¹² The concept of free mobility is deeply rooted in America's

yond that basic level. See text accompanying notes 200-03 *supra*. In the second place, the California Supreme Court in *Serrano* overturned California's school financing system on both state and federal grounds. Thus, the rationale behind that case remains good law in this state despite *Rodriguez*. (See generally Falk, *Foreword—The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973)). It is possible that other states will follow the lead of California and use state constitutional provisions to carry the development of substantive equal protection analysis farther than the United States Supreme Court appears willing to go. (In *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), the New Jersey Supreme Court overturned New Jersey's school financing scheme on an alternative state constitutional ground.)

212. See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964). According to the majority in *Rodriguez*, the answer to the question of whether a particular right is "fundamental" depends upon whether it is explicitly or implicitly guaranteed by the Constitution. 93 S. Ct. at 1297-98. Justice Marshall, joined by Justice Douglas, strongly dissented from this "rigidified approach" to the case. *Id.* at 1330-33.

The position of Justice Marshall in *Rodriguez* and other equal protection cases [see, e.g., *Dandridge v. Williams*, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting)] closely parallels what commentators have termed the "sliding-scale" approach to equal protection. See Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966); *Developments—Equal Protection*, *supra* note 178, at 1120. Instead of identifying a few "fundamental" interests and "suspect" classifications and granting them maximum substantive protection (while affording interests and classes outside this area almost no protection), the "sliding-scale" approach visualizes all interests and classes on a gradient. As the individual rights of the individual become more important, and the character of the classification becomes more invidious, the standard of review becomes more demanding. In Justice Marshall's view:

[E]qual protection analysis . . . is not appreciably advanced by the a priori definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.

Dandridge v. Williams, 397 U.S. 471, 520-21 (1970).

The primary advantage of the "sliding-scale" approach is flexibility. Loosed from the strictures of "fundamental" rights and "suspect" classifications, the Court can tailor its review to the relative importance of the interests involved. To a certain extent, a majority of the Court engages sub rosa in the interest balancing advocated by Marshall. (See text accompanying notes 219-24 *infra*, a discussion of the "hybrid" standard suggested by a number of the Court's equal protection decisions in the last term.) Wealth classifications rank high on the invidiousness scale (see text accompanying notes 187-89 *supra*); the right to drive is of critical importance to the well-being of millions of Americans (see notes 26 & 27 *supra*); and the state's interest in enforcing financial responsibility laws is marginal at best [see text accompanying notes 158-70 *supra*]. To the extent the Court balances all these factors, rather than focusing on the ability of any one alone to overturn financial responsibility legislation, the possibility of a successful substantive attack on these laws is increased.

legal heritage; it is "basic to any guarantee of freedom of opportunity."²¹³ The Supreme Court has repeatedly asserted that the right to travel is an individual freedom protected against both state and federal action by the due process and privileges and immunities clauses of the Constitution.²¹⁴ Highways are the basic channels of movement in this society; and the primary agencies of movement are private motor vehicles. When an individual is deprived of the use of his automobile, his mobility is seriously impaired. This is not a negligible loss: "Travel . . . may be necessary for a livelihood."²¹⁵ In today's highly mobile society the individual who cannot drive is excluded from a wide variety of basic occupations, not only because the jobs themselves require driving skills but also because in many areas of the country it is impossible to travel from home to job by public transportation.²¹⁶ In this respect, a driver's license is akin to a passport.²¹⁷ The state need not provide every citizen an automobile, any more than it need pay the passage of an individual to another country; but given this country's constitutional commitment to freedom of movement, and given the basic importance of private transportation to gainful employment and day-to-day living,²¹⁸ the state should restrict a citizen's use of his motor vehicle only when it can show a strong reason for doing so.

Whether the state can show such an interest in the enforcement of financial responsibility laws will be discussed below. First, however, the possibility of another method of analysis must be considered.

c. *A Developing Trend in Equal Protection*

This discussion of equal protection has proceeded on the assumption that the only alternative to recognizing the fundamental nature of the right to drive and applying strict substantial analysis to financial responsibility laws is applying the "minimum rationality" test of traditional equal protection. Several cases decided by the Supreme Court in the last term,²¹⁹ however, suggests a third possibility—a "hybrid standard."²²⁰

213. *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring). See Vestal, *Freedom of Movement*, 41 IOWA L. REV. 6 (1955); CHAFFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, 171-81, 187 *et seq.* (1956).

214. See cases cited in *United States v. Guest*, 383 U.S. 745, 757-59 (1966).

215. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

216. See notes 26 & 27 *supra*.

217. Cf. *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

218. These factors distinguish financial responsibility laws from laws governing the licensing of individuals for specific occupations, where traditionally a "minimum rationality" standard of equal protection has been employed. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947). See also REESE, *supra* note 26, at 47.

219. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971); *Eisenstadt v. Baird*, 405

When considering legislation which deprived individuals of important, though not constitutionally "fundamental" personal rights, the Court repeatedly refused to defer to the state's judgment concerning the propriety of the method chosen to achieve a particular goal.²²¹ Rather than search for a rationale to support a discrimination between classes, the Court required the state to explain the relationship the means employed by a statute bore to its purpose. When the state's explanation was unconvincing, the Court struck down the statute.²²² Thus, outside the area of strictly fundamental interests, it is possible that the Supreme Court may no longer pay only lip service to the equal protection requirement that the classification created by a statute be properly suited to the state interest it is intended to further.²²³ Unlike substantive equal protection, this new approach eschews any judgment as to the importance of those ends; the sole issue is whether they are properly furthered by the differential treatment in question.²²⁴

The following section will consider first whether the interest of the state in enforcing financial responsibility laws is sufficiently great to satisfy the requirements of substantive equal protection. It will then question whether the means employed by these laws are sufficiently related to their purpose to meet the test of either substantive equal protection or the new "hybrid" standard.

U.S. 438 (1972); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *James v. Strange*, 407 U.S. 128 (1972).

220. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 181 (1972) (Rehnquist, J., dissenting).

221. In *James v. Strange*, 407 U.S. 128 (1972), the Court considered a Kansas statute which provided for recoupment of legal fees paid by the state to defend indigent defendants but which denied those defendants certain protective exemptions afforded civil judgment debtors. Though it recognized "that state recoupment statutes may betoken legitimate state interests," the Court refused to search for a rationale for the discrimination between debtors. *Id.* at 11. Because the state had not come forward with a satisfactory explanation, the Court found the statute failed the "minimum rationality" test. *Id.* at 140.

222. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Supreme Court rejected two of the explanations Massachusetts advanced in support of its law banning the distribution of contraceptives to single persons: the deterrence of premarital sex and the protection of health through the regulation of the sale and distribution of potentially harmful articles. In *Reed v. Reed*, 404 U.S. 71 (1971), the Court considered an Idaho statute which gave males preference over females in determining who should administer estates. The Court found "some legitimacy" in the state's objective of simplifying probate proceedings but held nevertheless that the sex classification was "arbitrary" and unjustified by administrative savings or the possibility of avoiding intra-family controversy. *Id.* at 76-77.

223. See *Gunther*, *supra* note 176, at 29-37 (1972); *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278, 1333-36 (1973) (Marshall, J., dissenting).

224. *Gunther*, *supra* note 176, at 42-43. "We do not question the importance of [the state's] interest; what we do question is how the challenged statute will promote it." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972).

d. *The Importance of Ends and the Reasonableness of Means*

Financial responsibility laws purport to provide a private fund for the individual accident victim from which he may recover judgments against the defendant. In applying substantive equal protection analysis to these laws, the first question is how important this objective is to the state. In a fault-oriented system, the answer necessarily depends on the evidence of the defendant's culpability.²²⁵ Since payment of damages is contingent upon recovery of a judgment, the state's interest in providing a fund for the accident victim is minimal when it is clear that the uninsured motorist was not at fault.²²⁶ A finding of a "reasonable possibility" of culpability enhances the state's interest in requiring the motorist to show his ability to pay a potential judgment; and, if a judgment is rendered against the defendant, the state's interest in seeing that the plaintiff recovers becomes very strong. In terms of importance of objective, then, it is more difficult for the state to justify the prejudgment operation of financial responsibility laws than to justify their postjudgment operation. Still, given the hardship to which the accident victim is exposed, if the state finds a "reasonable possibility" that the uninsured motorist is culpable, its interest in ensuring his financial responsibility might fulfill the compelling state interest test—if the means adopted are appropriate to the objective of compensation.

"Minimum rationality" is not enough. Substantive equal protection demands that the method chosen to accomplish the law's purpose be that which is least intrusive on the fundamental interest of the individual.²²⁷ Thus, if it is possible substantially to accomplish the goal of providing a private fund for the benefit of the accident victim without infringing upon the uninsured motorist's interest in his driver's license, financial responsibility laws should fail the constitutional test. After judgment, attachment statutes largely fulfill the function of squeezing from the defendant all but his most essential belongings. As was

225. The state, of course, has an interest in minimizing the suffering of the accident victim regardless of the culpability of his injurer. This is the theoretical basis upon which no-fault laws rest. Under a fault system, however, that interest is counterbalanced by a competing state interest in allowing its citizens freedom of enterprise and mobility. See note 2 *supra*. Only if the defendant was negligent does the balance tip in favor of the accident victim. Financial responsibility laws are only designed to enhance the likelihood that the accident victim will recover from such a defendant. But see text accompanying notes 232-60 *infra*.

226. Given the delay and administrative cost of making a preliminary determination of culpability, however, under traditional equal protection analysis the state probably has sufficient interest in placing all uninsured motorists who are involved in accidents in the same class to satisfy the "minimum rationality" test. See note 183 *supra*.

227. See *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

noted earlier,²²⁸ the additional sanction of license suspension might force a few motorists to reveal hidden assets, but this possibility hardly warrants taking away the licenses of all motorists who fail to respond in damages. Attachment is not now available as a remedy for the accident victim before judgment, but it is certainly a viable alternative to the prejudgment operation of financial responsibility laws. Attachment would much more effectively reach the assets of those uninsured motorists who were able to pay, without unnecessarily infringing the driving interest of those who could not.²²⁹

It is doubtful, then, that the states could prove a "compelling interest" in the enforcement of their financial responsibility laws. If the Supreme Court chooses to restrict substantive equal protection analysis to its current limits, however, and if state courts elect to place a similarly narrow gloss on their state constitutions, a showing of importance of ends and necessity of means will not be required of these laws. Nevertheless, some showing of reasonableness of means may still be required under the theory of "hybrid" equal protection. The states may have to demonstrate that the particular method they have chosen to ensure recovery of judgments by accident victims is indeed conducive to that end. Given that the vast majority of uninsured motorists who are required to post bond before judgment either cannot or will not; given that license suspension makes it more, rather than less, difficult for these defendants to raise the funds to meet their obligation; and given that whatever nonexempt assets these defendants have can be reached after judgment by attachment and execution, the Court might find "at best a marginal relation [of means] to the proffered objective."²³⁰ Even if the Court were to uphold these laws, however, requiring the states to give some justification for financial responsibility laws would expose their weak rationale to public inspection and hopefully speed their legislative demise.²³¹

B. Financial Responsibility Laws as Safety Devices

This Comment has proceeded thus far on the theory that the primary purpose of financial responsibility laws is to provide the individual accident victim with a creditor remedy, a collection device to use against his uninsured injurer. If this construction is correct, the hardship suffered by the motorist who loses his right to drive seems grossly disproportionate to the benefit the laws bestow on the plaintiff

228. See text accompanying notes 162-64 *supra*.

229. See text accompanying notes 165-70 *supra*.

230. Eisenstadt v. Baird, 405 U.S. 438, 448 (1972).

231. See the discussion of alternatives to financial responsibility laws in Part IV *infra*.

and the public. Certainly, it is difficult to claim that the state has a "compelling interest" in the enforcement of such a remedy.

There is, however, another purpose which has been ascribed to these laws by some legislators, courts, and commentators: to protect the driving public generally by removing negligent, financially irresponsible drivers from the road.²³² If license suspension does in fact achieve this goal without infringing constitutional guarantees, the argument in favor of retaining financial responsibility laws becomes much stronger.

1. *The Highway Safety Argument*

Under the highway safety argument license suspension has two purposes.²³³ The first is protecting the public from the financial irresponsibility of the uninsured motorist. Unquestionably, removing the uninsured motorist from the road has the effect of sheltering other motorists from his inability to pay possible future judgments against him. This cannot, however, be the purpose of the sanction since potential accident victims are fully protected by another provision of financial responsibility laws: any motorist who is involved in an accident and fails to prove his financial responsibility vis-à-vis other parties must show proof of ability to respond in damages in the future in order to regain his license.²³⁴ This requirement is independent of the motorist's obligation to the immediate accident victim; he must comply even when no suit is brought against him.²³⁵ Given this "future proof" provision, it is impossible to accept the argument that license suspension for failure to compensate the individual accident victim has the purpose of protecting the public in general from financially irresponsible drivers.

The second purpose ascribed to license suspension under the highway safety argument is protecting the driving public from the carelessness of the uninsured motorist. There is no evidence, however, that uninsured motorists drive more carefully under the threat of license suspension than under the threat of tort penalties.²³⁶ Indeed,

232. See Grad, *supra* note 7, at 305-06; Braun, *supra* note 7, at 518. The fact that in many states financial responsibility laws are called "safety" responsibility laws is significant in this respect. See note 52 *supra*.

233. See Feinsinger, *supra* note 8, at 522 n.16.

234. See note 23 *supra*.

235. *Id.*

236. See Feinsinger, *supra* note 8, at 523; Netherton, *Highway Safety Under Differing Types of Liability Legislation*, 15 OHIO STATE L.J. 110, 121 (1954); U.S. DEP'T OF TRANSPORTATION, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES 137 (1970) [hereinafter cited as CAUSATION, CULPABILITY AND DETERRENCE].

"[A]ny driver knows that [financial responsibility laws bear no] meaningful relationship to his driving habits or the protection of life and limb." Miller v. Anckaitis, 436 F.2d 115, 118 (3d Cir. 1970). But see the dissent of four justices in Perez v.

it appears that "much of the process of driving is beyond the range of the deterrent effect of statutory rules,"²³⁷ especially when the sanction is triggered by so seemingly remote a possibility as an accident.²³⁸ Moreover, the interest of the state cannot be to keep careless drivers off the road, since, before trial, the negligent licensee can avoid suspension either by posting the required bond or by agreeing to a settlement of the claim against him.²³⁹ After trial, he may continue driving either by responding in damages or by obtaining the consent of his judgment creditor.²⁴⁰ Furthermore, if both parties are adjudged negligent, each may retain his license even though both have been found to have driven carelessly.²⁴¹ Most important, if the purpose of financial responsibility laws is to remove bad drivers from the highways there is no rational reason why *all* negligent motorists—not just those who failed to post bond or pay a judgment against them—should not suffer license suspension.²⁴² As a matter of equal protection, it is difficult to justify a highway safety scheme which sanctions indigent unsafe drivers while allowing their equally unsafe, but wealthier, counterparts to return to the road.²⁴³

2. *Perez v. Campbell*

Despite its basic inconsistencies, the highway safety argument was long considered the primary rationale for financial responsibility laws. So far were the courts from accepting the view of these laws as creditor remedies that, until recently, even a discharge in bankruptcy of a judg-

Campbell, 402 U.S. 637, 664 (1970) (arguing that a state's use of a financial responsibility law "to assure driving competence and care on the part of its licensees, as well as to protect others, is appropriate state legislation").

237. Netherton, *supra* note 236, at 115; U.S. DEP'T OF TRANSPORTATION, DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 113-90 (1970) [hereinafter cited as DRIVER BEHAVIOR].

238. CAUSATION, CULPABILITY AND DETERRENCE, *supra* note 236, at 139.

239. See text accompanying notes 18-19 *supra*.

240. For a state-by-state breakdown of which state laws provide that unpaid judgments are to be reported to departments of motor vehicles only on request of the judgment creditor, which laws provide that unpaid judgments be reported automatically, and which do and do not provide for the restoration of privileges on the consent of the judgment creditor, see *Kesler v. Dep't of Pub. Safety*, 369 U.S. 153, 165-67 (1962).

241. Contributory negligence is a bar to recovery in most states. A few states have comparative negligence laws which allow the plaintiff to recover a portion of his damages even though his negligence contributed to the accident. See Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 ORE. L. REV. 38 (1969).

242. See Note, *Bankruptcy—Financial Responsibility Laws—Effect of Discharge of Automobile Judgment Upon Driver's License Suspensions—Perez v. Campbell*, 402 U.S. 637 (1971), 47 WASH. L. REV. 343, 349 (1972).

243. See note 34 *supra*; In re Lindley, 108 Cal. App. 258, 291 P. 638 (2d Dist. 1930). But see Note, *Personal Rights as An Emerging Approach to Equal Protection: Automobile Financial Responsibility Laws and the Right to Drive*, 24 CASE W. RES. L. REV. 163, 197-98 (1972).

ment against an uninsured motorist did not relieve him of the requirement of paying the discharged debt in order to regain his license. This provision, contained in virtually every financial responsibility law, was thought to induce safe driving by making the consequences of negligence unavoidable for the uninsured motorist. Although challenged in the lower courts and twice in the United States Supreme Court as incompatible with the Bankruptcy Act,²⁴⁴ these provisions were repeatedly upheld. In *Reitz v. Mealey*²⁴⁵ and *Kesler v. Department of Public Safety*,²⁴⁶ the Supreme Court found that financial responsibility laws were not designed to aid collection of debts but to enforce a policy against irresponsible driving.²⁴⁷ "The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provision by the simple expedient of voluntary bankruptcy."²⁴⁸

One week after deciding *Bell v. Burson*, however, the Supreme Court reconsidered the constitutionality of the bankruptcy provision in *Perez v. Campbell*.²⁴⁹ According to the Arizona Supreme Court, the principal purpose of Arizona's financial responsibility law was "the protection of the public using the highways from financial hardship which may result from the use of automobiles by financially irresponsible persons."²⁵⁰ The United States Supreme Court found this characterization of the act "not only logical but persuasive," since "[t]he sole emphasis of the Act is one of providing leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent."²⁵¹ Reversing its earlier decisions, the Court held that no state could lawfully pressure a bankrupt motorist into paying a discharged judgment by suspending his driver's license.²⁵² *Perez* dealt a fatal blow to the argument that license suspension for failure to respond in damages is designed to protect the public from careless,

244. 11 U.S.C. § 1 *et seq.* (1966).

245. 314 U.S. 33 (1941).

246. 369 U.S. 153 (1962).

247. *Id.* at 169.

248. 314 U.S. at 37.

249. 402 U.S. 637 (1971).

250. *Schechter v. Killingsworth*, 93 Ariz. 273, 280, 380 P.2d 136, 140 (1963).

251. *Perez v. Campbell*, 402 U.S. 637, 646-47 (1971).

252. *Id.* at 648-52. According to the opinion, the *purpose* of the sanction was irrelevant, so long as its *effect* was to deny the debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Id.*, quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). The Court thus foreclosed the possibility that another state could salvage the bankruptcy provision in its financial responsibility law by claiming the purpose of the law was highway safety rather than creditor protection. *Id.* at 652. The Court made it clear that it considered the creditor remedy view the only logical characterization of the postjudgment operation of these laws. *Id.* at 644-48. The dissent took issue with the majority's view on this point. *Id.* at 667. See note 236 *supra*.

financially irresponsible drivers. The uninsured motorist who declares bankruptcy can now regain his license regardless of his negligence so long as he shows proof of ability to pay judgments against him in the future.²⁵³

C. *Financial Responsibility Laws as Sanctioning Devices*

A third purpose which has been advanced in support of financial responsibility laws is "to assure compensation for victims generally by inducing the voluntary purchase of insurance"²⁵⁴ That the state has the interest and, therefore, the police power to make insurance coverage a mandatory condition of licensing has long been an accepted proposition.²⁵⁵ From this premise it is argued that the state also has a compelling interest in inducing drivers voluntarily to carry insurance by providing sanctions for those who are involved in accidents and are not so covered.²⁵⁶

253. As applied to bankrupt motorists, however, the validity of the "future proof" requirement may be in doubt. Although the purpose of the provision is to protect the driving public generally from the financial irresponsibility of the uninsured motorist, the effect is to undermine the intent of the Bankruptcy Act that the debtor should not be handicapped in the future by his inability to satisfy a past private obligation. A good argument can be made that under *Perez* the state cannot attach any collateral consequences to the past financial status of an individual once the slate has been wiped clean by his discharge in bankruptcy. Regardless of its purpose, "any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Id.* at 652 (emphasis added). But see Comment, *Supremacy of the Bankruptcy Act: The New Standard of Perez v. Campbell*, 40 GEO. WASH. L. REV. 764, 776 (1972) (arguing that "[a] state law attaching consequences to bankruptcy that does not coerce payment of discharged debts is not proscribed by *Perez*"; therefore, requiring the bankrupt motorist to show proof of future ability to respond in damages does not conflict with the Bankruptcy Act). See also text accompanying notes 261-67 *infra*.

254. Note, *Compensation Problems Created by Financially Irresponsible Motorists*, 66 HARV. L. REV. 1300, 1303 (1953). See *Polion v. Lewis*, 320 F. Supp. 1343 (N.D. Ill. 1970), *vacated*, 403 U.S. 902 (1971); *Perez v. Tynan*, 307 F. Supp. 1235 (D. Conn. 1969).

The percentage of insured to uninsured motorists rose markedly in many states after the widespread adoption of modern financial responsibility laws. See Wagner, *Safety Responsibility Laws—A Review of Recent Developments*, 9 GA. B.J. 160, 168 (1946). Though the correlation is unproven (see Grad, *supra* note 7, at 311), it is not unreasonable to suppose that a factor in this increase in general insurance coverage was motorists' fear of mandatory license suspension for mere involvement in an accident. Under this view, the more immediate and certain is the sanction for non-compliance with the law, the more likely is the law to be effective; therefore, the state has a subsidiary interest in cutting to the bone the procedural due process protection afforded the uninsured motorist. See Comment, *Constitutional Law—Due Process: Hearing on Issue of Fault Required Prior to Driver's License Suspension Under Financial Responsibility Law*, 56 MINN. L. REV. 264 (1971).

255. See Opinion of the Justices, 81 N.H. 566, 129 A. 117 (1925); *State ex rel. Stephenson v. Dillon*, 82 Fla. 276, 89 So. 558 (1921).

256. The fact that the state has the power to require insurance coverage of all motorists as a condition of licensing does not mean, if it elects *not* to require such

Viewing license suspension as punishment imposed on the motorist for the combined offense of negligence and financial irresponsibility, however, raises a host of equal protection questions. As long as license suspension is viewed strictly as a creditor remedy designed to provide a private fund from which the individual accident victim can recover a judgment in his favor, it is proper to condition license retention on payment of an amount equal to the damage sustained by the plaintiff. If, however, the purpose of the law is not so much to compensate the individual accident victim as to punish the uninsured motorist for his financial irresponsibility, then the amount posted as bond or paid out in damages is in the nature of a penalty. License suspension is the alternative for those who are unable to pay that penalty.

A differential penalty cannot be justified in this setting on the ground that it discriminates among drivers on the basis of their negligence. There is little correlation between the degree of carelessness exhibited by motorists and the amount of physical and bodily injury sustained by the other party to an accident.²⁵⁷ If the state elects to penalize the inability to post bond or respond in damages, the sanction must apply equally to all motorists in the class of those found either potentially negligent or actually negligent. Thus, if the state has chosen \$35,000 as the amount of cash or insurance which the financially responsible motorist will keep in readiness to cover his possible liability,²⁵⁸ and if two motorists are involved in separate accidents, and if neither can show liability insurance coverage or produce \$35,000 cash, then both should suffer the sanction of license suspension, regardless of the amount of damage sustained in their separate accidents. The state cannot require \$200 of one motorist and \$20,000 of another when both have shown themselves to be negligent (or potentially negligent) and "financially irresponsible" motorists.

By the same token, the state cannot allow the negligent, financially irresponsible motorist who is able to pay \$200 (but not \$35,000) for a bond or a judgment to escape punishment while sanctioning his

coverage, that it is empowered arbitrarily to suspend certain motorists' licenses for failure to carry liability insurance. The United States Supreme Court has made it clear that a driver's license is a valuable property right and not simply a conditional privilege; the state must meet all the requirements of the fourteenth amendment before it can deprive a licensee of that right. See note 139 *supra*. For a discussion of compulsory insurance laws in relation to the "future proof" provisions of financial responsibility laws, see text accompanying note 268 *infra*.

257. See Tunc, *Analysis of the French Auto Accident Compensation System* in *COMPARATIVE STUDIES IN AUTOMOBILE ACCIDENT COMPENSATION* 18-19 (1970) (U.S. DEP'T OF TRANSPORTATION); Lawton, *Psychological Aspects of the Fault System as Compared With the No-Fault System of Automobile Insurance*, 20 KAN. L. REV. 57, 67-71 (1971).

258. See note 23 *supra*.

completely indigent counterpart. If the sanction for financial irresponsibility is license suspension, the poor uninsured motorist has no choice but to suffer that sanction. His wealthier counterpart, on the other hand, is given a choice between license suspension and payment of a penalty. Recent United States and California Supreme Court cases have held such discrimination between rich and poor to be a denial of equal protection, when an indigent misdemeanor had no choice but to go to jail while a solvent misdemeanor could choose between paying a fine or going to jail.²⁵⁹

Viewing license suspension as a sanction, rather than a creditor remedy, exposes financial responsibility laws not only to charges that the sanction itself is arbitrary and discriminatory but also that the state employs it in an extremely capricious manner. The accident victim has complete control over the application of the penalty. If he chooses to waive liability, his injurer goes unpunished. If he brings suit, he still has the power after judgment to waive the sanction. Finally, if the accident victim was contributorily negligent, the uninsured motorist again goes unpunished, regardless of his culpability and inability to pay. If the purpose of these laws is to impress motorists with the severity and certainty of their punishment for financial irresponsibility, it is difficult to conceive of a reason for sanctioning only those whom the accident victim is desirous, or capable, of punishing.

While increased insurance coverage may well be a by-product of financial responsibility laws, it cannot be the purpose of these laws;²⁶⁰ otherwise, *every* uninsured, "financially irresponsible" motorist involved in an accident would have his license suspended. As it stands, only those who fail to pay an arbitrary penalty suffer the sanction. The tort system of compensatory justice is too personalized and capricious a method of applying an essentially punitive sanction. Not only is its efficacy as a deterrent questionable, but, more important, its validity with respect to the constitutional requirement of equal protection of the laws is doubtful.

IV.

ALTERNATIVES TO FINANCIAL RESPONSIBILITY LAWS

A. The "Future Proof" Requirement

The core of the problem with financial responsibility laws is that they attempt to maintain the integrity of a system of tort liability

259. *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

260. See *Schecter v. Killingsworth*, 93 Ariz. 273, 280-81, 285, 380 P.2d 136, 140-41, 144 (1963).

based solely on fault. That system is essentially inimical to the compensatory needs of the accident victim. If the plaintiff cannot prove that the defendant was at fault, or if the defendant can show that the plaintiff was contributorily negligent, the plaintiff cannot recover his loss. Given the central role culpability plays in a tort reparations scheme, the states have been reluctant to burden a motorist with the requirement that he prove his ability to respond in damages until his negligence in an accident reveals its necessity. At that point, however, the requirement affords comparatively little protection to the party injured by the uninsured motorist's negligence and imposes great hardship on the defendant. This Comment has argued that the loss of driving privileges is such a significant deprivation that the uninsured motorist is deserving of a maximum of procedural and substantive protection. The state's interest in suspending his license must be more than rational; it must be compelling. Aiding the individual accident victim to recover a judgment by withdrawing from the defendant an item which may be critical to his ability to respond in damages is barely a rational—let alone compelling—reason for the deprivation.

Financial responsibility laws, however, are not designed solely to protect past victims of a motorist's negligence and financial irresponsibility. The defendant's failure to comply with either the prejudgment suspension provision or the postjudgment damages provision becomes the basis for an assumption that he is likely to be negligent and financially irresponsible in future accidents; therefore, the state is warranted in requiring him to carry insurance to protect possible future victims.²⁶¹ From the viewpoint of a potential plaintiff, the state's interest in enforcing this "future proof" requirement is stronger than its interest in coercing payment of damages arising out of a past accident. Not only does the provision assure the potential accident victim some compensation for his injury, but it also holds promise of more substantial benefits than postaccident pressure on the defendant will normally provide. Thus, it can be argued that, within the context of a fault-oriented system, the "future proof" provision, standing alone, would constitute a viable alternative to present financial responsibility laws.

Unfortunately, the efficacy of the provision is dependent on the ability of the uninsured motorist to take out liability insurance, which is extremely costly for the rural and urban poor.²⁶² The prohibitive effect of suspending the indigent motorist's license for failure to insure himself for future accidents may be equal to that of suspending his license for his inability to post bond or pay a judgment arising out of a

261. See note 23 *supra*.

262. See Comment, *A Social Insurance Scheme for Automobile Accident Compensation*, 57 VA. L. REV. 409, 425-29 (1971) [hereinafter cited as *Social Insurance*].

past accident.²⁶³ If, for the purposes of equal protection analysis, an individual has a "fundamental interest" in his right to drive, the state cannot deprive him of that right under a "future proof" statute unless it can show a compelling reason for requiring him to carry insurance.

So long as the state takes the position that its interest in compensating accident victims is not strong enough to justify the societal costs of forcing all motorists to carry insurance, it can require some motorists to cover themselves only if those motorists are significantly more careless or financially irresponsible than other uninsured motorists. Though there is unquestionably some correlation between repeated accident involvement, the likelihood of future accidents,²⁶⁴ and the likelihood of financial irresponsibility,²⁶⁵ a recent Department of Transportation study concluded that the vast majority of collisions do not involve accident-prone "repeaters," but rather average motorists who will suffer only a few accidents in a lifetime.²⁶⁶ It is impossible, after only one accident, to tell into which category a particular uninsured motorist falls.²⁶⁷ Equally important, there is no evidence that, as a group, uninsured motorists who are involved in one accident and fail to post bond or respond in damages are any more financially irresponsible than those who happen to be accident-free. Thus, it is questionable whether the state has a significantly greater interest in requiring the motorist who has suffered one accident to take out insurance than in forcing the same requirement on the motorist who has been involved in none. The marginal correlation between involvement in one accident and the likelihood of involvement in future accidents might be sufficient under the traditional equal protection test of "minimum rationality" to justify a "future proof" requirement. That it is strong enough to pass the stricter test of substantive equal protection is, however, doubtful.

B. *Compulsory Liability Insurance*

Compulsory liability insurance laws stand on firmer constitutional ground than "future proof" provisions for one reason: the state which has enacted the former has vindicated its interest in aiding accident victims by requiring *all* motorists to prove their financial responsibility as a pre-condition of driving. "Future proof" provisions attempt to

263. See note 25 *supra*.

264. See DRIVER BEHAVIOR, *supra* note 237, at 75.

265. See FINANCIAL RESPONSIBILITY—CALIFORNIA, *supra* note 25, at 58.

266. See DRIVER BEHAVIOR, *supra* note 237, at 95-99. "Deviant drivers, in the sense of deviating from the average, do exist, but they are few in number in comparison with the average drivers who commit most of the errors and become involved in most of the crashes." *Id.* at 182.

267. *Id.*

conform more closely to fault theory by providing that only those motorists who show a propensity for negligence by their involvement in an accident be required to prove their financial responsibility.²⁶⁸ As was discussed above, however, the correlation between involvement in one accident and the likelihood of negligence in future accidents is extremely weak. It is difficult to credit a state's assertion that it has a compelling interest in requiring financial responsibility of only one class of uninsured motorists when those outside the class are almost equally likely to be financially irresponsible after an accident. As a matter of substantive equal protection, the state with a compulsory insurance system is in a much better position to claim that the welfare of the driving public requires that potentially negligent, uninsured motorists be denied access to the highways than is a state with a financial responsibility law. If a state truly feels that the hardship suffered by uncompensated accident victims justifies burdening potentially negligent motorists with a "future proof" requirement, it will make proof of insurance coverage for the future a condition of vehicle registration rather than accident involvement.

As a policy matter, however, it is self-defeating to advance compulsory insurance as an alternative to financial responsibility laws.²⁶⁹ One of the strongest arguments in favor of the latter is that they give the economically marginal motorist a limited opportunity to exercise his right of free mobility without incurring the often prohibitive cost of liability insurance coverage. A compulsory insurance system denies him that chance. In effect, it subordinates the state's strong interest in minimizing the restraints placed on a motorist's driving privileges to an overriding public interest in maximizing the accident victim's chances of recovering a judgment.

If a system of compulsory liability insurance guaranteed compensation to every accident victim, perhaps the sacrifice it demands of indigent motorists would be justified on policy grounds. Unfortunately, however, liability insurance is part of a plan of tort reparations which denies recovery to plaintiffs who are themselves negligent, or who are unable to prove the negligence of their injurers. Not only do many victims whose injurers are fully insured go uncompensated,

268. See note 8 *supra*.

269. In this regard, note that California farm workers are among those for whom liability insurance costs are often prohibitive. See *Hearings Pursuant to S. Res. 233*, *supra* note 26, p. 14, at 8,303-20 (testimony of R.Y. Bell, California Rural Legal Assistance League). In *Rivas v. Cozens* (see the discussion of the case accompanying notes 63-78 *supra*) the California Rural Legal Assistance League represented a farm worker in his efforts to avoid license suspension under California's financial responsibility law. It would little avail such an individual to argue the unconstitutionality of financial responsibility legislation, if the only alternative were a system of compulsory and prohibitively expensive liability insurance.

but the high transactional costs of adjudicating tort claims raises the price of liability insurance beyond the reach of many motorists. Thus, "[t]he present system of reparation produces two kinds of victims—those who are inadequately compensated for their injuries, and those who are charged the high premiums required by a wasteful system."²⁷⁰

Both "future proof" provisions and compulsory insurance laws are intended to ameliorate the harsh consequences for the accident victim of a system of tort liability based solely on fault. Not only do these laws fail to compensate adequately a high percentage of victims,²⁷¹ but "the soaring costs of liability insurance are making automobile ownership impossible for many poor Americans."²⁷² Unless some justification can be found for retaining the present system, a plan should be instituted which better serves both society's interest in compensating all accident victims and its interest in minimizing interference with the indigent motorist's right to drive. The following section considers, and rejects, the argument that tort law plays an indispensable highway safety role as a deterrent to automobile accidents. The concluding section of the Comment notes some alternative accident reparations schemes which would eliminate many of the defects of the fault liability system.

C. Tort Law as an Accident Deterrent

A tort reparations system rests on two premises: (1) negligent individuals are responsible for accidents; (2) only those responsible should bear the cost of accidents. Both premises are of questionable validity when applied to automobile injuries. In the first place, driver error is not the only cause of traffic accidents. Vehicle design and driving environment also play a significant role in most collisions;²⁷³ indeed, they are the primary determinants of the amount of damage that will be sustained.²⁷⁴ In addition, the term "negligence," denoting wrongful behavior, is an unrealistic description of driver error, which in many cases cannot be avoided by the average motorist exercising

270. *Hearings Pursuant to H.J. Res. 958 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess., ser. 90-30, at 83 (1968) (testimony of A. Conard).

271. For the \$5,126,595,000 of aggregate losses suffered by automobile accident victims in 1967, the tort liability system provided only \$813,105,000 in benefits, and all available compensation sources provided only \$2,493,815,000. In short, less than 50 percent of losses were compensated from any source. U.S. DEP'T OF TRANSPORTATION, 1 ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 89, 155 (1970).

272. *Hearings Pursuant to H.J. Res. 958*, *supra* note 270, ser. 90-30, at 83.

273. See DRIVER BEHAVIOR, *supra* note 237, at 123-50; CAUSATION, CULPABILITY AND DETERRENCE, *supra* note 236, at 103-16. "[D]river responsibility for crashes is rarely unilateral and is often impossible to isolate from the multiplicity of causes involved in almost every crash." *Id.* at 209.

274. See note 257 *supra*.

reasonable care.²⁷⁵ Thus, to speak in terms of personal responsibility for automobile injuries is inappropriate. It is more fitting to view traffic accidents as a social problem created by motorists' inability always to respond correctly to the demands placed upon them by the driving environment than as a question of individual culpability.²⁷⁶

Secondly, even in those cases where one driver's negligence is clear-cut, it is misleading to assert that under a fault system of accident reparations the burden of compensating non-negligent parties falls on the motorist who was "responsible" for an accident. Most motorists carry liability insurance. They are able to shift the consequences of their negligence to their insurance companies, which in turn spread the cost of an accident among all policyholders.²⁷⁷ Accident involvement may, of course, have an effect on the size of the premiums the insured motorist pays. It is doubtful, however, that the possibility of having to pay a larger insurance premium after an accident has a significant deterrent effect on driver behavior.²⁷⁸ Indeed, it is questionable whether even the threat of full responsibility for damages changes the driving habits of motorists, since the penalty is contingent on so seemingly remote a possibility (to the driver) as an accident.²⁷⁹

D. *Alternative Plans for Automobile Accident Reparations*

The present reparations combination of tort law and liability insurance has questionable value as a deterrent to traffic accidents, fails adequately to compensate all accident victims, and places an inordinate burden on the driving activity of the indigent motorist. The recent passage of the no fault laws in a number of states is an encouraging sign that legislators are becoming aware of the inadequacies of the prevailing system.²⁸⁰ The majority of these laws, however, are

275. See DRIVER BEHAVIOR, *supra* note 237, at 151-69.

The limitations of human beings in coping with the increasingly complex driving task even under the most rigid law enforcement or the most ambitious education programs, make it unrealistic to expect all drivers to control their vehicles perfectly at all times.

Id. at 168, quoting R. NADER, UNSAFE AT ANY SPEED 292 (1965).

276. The problem of traffic safety was not dealt with effectively because it was not defined effectively; for over half a century traffic safety was seen primarily as a problem of individual behavior when in fact it should have been considered as a problem of public health.

U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S ADVISORY COMMITTEE ON TRAFFIC SAFETY 7 (1968), quoted in DRIVER BEHAVIOR, *supra* note 237, at 149.

277. See generally James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

278. See CAUSATION, CULPABILITY AND DETERRENCE, *supra* note 236, at 136-37.

279. *Id.* See also A. CONARD, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS 88-92 (1964).

280. See note 13 *supra*.

simply stop-gap measures. None eliminates tort liability altogether; most either make no-fault coverage optional or set a relatively low threshold of damages above which the accident victim must sue for recovery in tort.²⁸¹ Because insurance companies save the expense of litigating small claims, these laws promise some reduction in the high cost of insurance,²⁸² but the decrease will not be sufficient to bring insurance coverage within the reach of every individual who can afford an automobile.²⁸³ In brief, though some states have made piecemeal steps in the right direction, none has instituted legislation which eliminates the shortcomings of the tort liability system.

Comprehensive state no-fault laws which completely abandoned the tort liability system, reimbursed all medical expenses and property damage, and compensated wage losses at a minimum rate per month for as long as the accident victim remained incapacitated would constitute a substantial improvement over present legislation.²⁸⁴ If a multitude of no-fault laws administered by private insurance companies in the various states is the only politically feasible alternative to the current system, such comprehensive laws should be encouraged as a means of significantly decreasing the overall cost of insurance coverage. Not all states, however, can be expected to pass such laws. In some states motorists would continue to be saddled with the high cost of the tort liability system. Moreover, a variety of state fault, stop-gap no-fault, and comprehensive no-fault plans existing side by side would create substantial administrative costs for insurance companies attempting to comply with varying state regulations. These costs would be passed on to all insured motorists. A comprehensive no-fault plan administered on a national level would eliminate these cost factors. From an economic standpoint, therefore, a national first-party system of automobile accident reparations is preferable to a patchwork of state laws.²⁸⁵

281. *Id.*

282. See Keeton, *No-Fault Insurance: A Status Report*, 51 NEB. L. REV. 183, 187-89 (1971).

283. See Williams, *Will No-Fault Insurance Cost More Or Less?*, 21 CATH. U.L. REV. 405 (1972).

284. Presently, only Michigan's no-fault law approaches this standard. See Ghiardi & Kircher, *Uniform Act*, *supra* note 13, Appendix B. In New York, a comprehensive no-fault proposal by that state's insurance department has received strong executive support, but thus far has failed to pass the legislature. See Rockefeller, *A Better Approach to Compensation of Automobile Accident Victims*, 21 CATH. U.L. REV. 351 (1972).

285. The most well-known national automobile accident reparations plan is Senator Hart's Federal Uniform Motor Vehicle Insurance Act (S. 945, 92d Cong., 1st Sess. (1971)). This is a no-fault plan which would be administered by private insurance companies. See Hart, *National No-Fault Insurance: The People Need It Now*, 21 CATH. U.L. REV. 259 (1972). Another national plan which has been suggested would be administered by the government and would set first-party insurance rates in accordance with the income of the individual motorist and the type of vehicle he drives.

Conclusion

For the past fifty years legislators, judges, and commentators have struggled with the problem of assuring reimbursement to automobile accident victims while maintaining the integrity of a system of reparations based solely upon fault. Financial responsibility laws were an outgrowth of the desire to avoid compulsory insurance laws, and, concomitantly, to preserve the values of accident deterrence and free mobility which were ascribed to fault liability. A reparations scheme which requires an individual to show financial responsibility before he has been adjudged negligent in an accident, however, necessarily impinges on his interest, under fault theory, in being held responsible for the harm caused by his activity only when his culpability has been proven. The procedural controversy surrounding these laws stems from the difficulty of determining how extensive an inquiry into fault is required before license suspension is justified. The Supreme Court's holding in *Bell v. Burson* that a presuspension finding of a "reasonable possibility" of culpability will satisfy the dictates of due process in this context is only a partial solution to the problem. The constitutional question whether the defendant uninsured motorist should, at a minimum, have the opportunity to present his case orally, know the evidence against him, and confront and cross-examine adverse witnesses remains unanswered. A strong argument can be made that, under *Goldberg v. Kelly*, these safeguards are fundamental to due process and essential ingredients of any proceeding where third-party information exposes the defendant to a significant deprivation. In California, under *Randone v. Appellate Department*, it is possible to argue further that nothing less than a full trial of the question of liability will justify the hardship of license suspension.

Judicial preoccupation with ensuring proper procedural protection of the uninsured motorist, however, obscures the deeper, substantive weaknesses of financial responsibility laws. It is difficult to justify a prejudgment security provision which deprives the uninsured motorist of a vital asset in order to coerce him to reveal other assets which he is unlikely to have. Even if the defendant has been found liable in a full-scale trial, the rationale for suspending his license in order to pressure him to respond in damages is weak at best. Certainly, if a more stringent equal protection standard than that of "minimum rationality" is applied

The advantage of this plan is that it would more equitably apportion the code of compensating accident victims to those who could bear it without hardship. For a detailed description and analysis of such a reparations system, see *Social Insurance*, *supra* note 262. Cf. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279 (1964). One of the strongest objections to social insurance plans is their failure to deal with the problem of accident deterrence. See G. CALABRESI,

to these laws, they will fail the constitutional test. Their substantive infirmity extends even to the "future proof" provisions. The state cannot claim a "compelling interest" in requiring financial responsibility of one class of uninsured motorists when those outside the class are almost equally likely to be negligent and financially irresponsible in the future.

Compulsory insurance is not the answer to the accident reparations dilemma. Not only does it fail to ensure compensation to all injured parties, but the high cost of insurance coverage forces many indigent motorists off the road. Comprehensive state no-fault laws would afford a vast improvement over the present system. The optimal solution, however, is a national no-fault or social insurance plan for automobile accident compensation.

Robert M. Jenkins, III

THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 6-7 (1970). As was discussed above, it is unclear that the fault system deals with the problem of deterrence any more effectively than would social insurance. Some deterrence could be achieved, however, by adding a penalty surcharge to a motorist's social insurance tax, prorated in accordance with income, for every traffic violation. See *Social Insurance*, *supra* note 262, at 462-65.