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Automobile Safety: A Diagnosis Of An Epidemic

NOTE

AUTOMOBILE SAFETY: A DIAGNOSIS OF AN EPIDEMIC

Our country is currently faced with a major epidemic on its highways. The severity and magnitude of this problem are such that it demands intensive and immediate action, yet our current efforts in curtailing the number of deaths and injuries caused by automobiles have been ineffective and misdirected. The problem has reached such grave proportions and poses such a serious threat to the safety of every individual in our society that there is an immediate need for the formulation of a national policy on automobile safety.[1] From 1900 through 1964 motor vehicles have accounted for 1,510,000 deaths in the United States, while war deaths from 1775 through 1964 totaled only 605,000.[2] We have well-established military and foreign policies, yet there has been no manifestation of a national policy on automobile safety. We must act now to launch an effective attack against this carnage on our highways. This action should be directed primarily toward producing safer automobiles, for *it is the vehicle not the driver* that is the major factor in producing injury and death in automobile accidents.[3]

To realize the danger and magnitude of this threat to our national safety, it is perhaps best to examine some statistics concerning automobile accidents. In 1965 49,000 Americans died in automobile accidents.[4] The annual death toll remained at about 37,500 for over a generation[5] until 1962 when deaths from automobile accidents exceeded 40,000 for the first time.[6] Despite the increase in fatalities caused by automobile accidents, the number of deaths per miles of travel had been constantly decreasing[7] until 1962 when that figure

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[1]In a recent message to a meeting of the American Trial Lawyers Association, President Johnson said, "'You and I know . . . that the gravest problem before this nation—next to the war in Vietnam—is the death and destruction, the shocking and senseless carnage, that strikes daily on our highways and that takes a higher and more terrible toll each year.'" The National Observer, Feb. 7, 1966, p. 15, col. 1.

[2]112 Cong. Rec. 1841 (daily ed. Feb. 2, 1966).

[3]*Infra* note 39.

[4]The National Observer, Feb. 7, 1966, p. 1, col.

[5]Moynihan, Public Health and Traffic Safety, 51 J. Crim. L., C. & P.S. 93 (1960).

[6]O'Connell, *Taming the Automobile*, 58 Nw. U.L. Rev. 299 (1963).

[7]Moynihan, *supra* note 5.

also started to rise.[8] As grim as these figures may be, they do not tell the entire story. They are somewhat misleading because the majority of accidents result in injuries rather than death. "For every fatal injury there are upwards of 125 non-fatal injuries." [9] Thus a better measure of the magnitude of the problem is the number of non-fatal injuries, yet these statistics are much harder to ascertain and are much less reliable than the death figures.[10] According to the National Health Survey, there are about 4,500,000 people injured in vehicular accidents annually, and of these, approximately 200,000 suffer some permanent disability.[11] In addition to the tremendous loss of health and life, traffic accidents result in great economic loss. They result in "wage losses of $1,550,000,000, property damage of $1,850,000,000, medical expenses of $150,000,000, and overhead insurance costs of $1,750,000,000," [12] a total of $5.3 billion.

These figures indicate the enormity of the problem and the threat it poses to our health and economy; yet the problem continues to grow, and there has been little effective effort directed at its correction. When we consider how long the problem has existed and contrast it with the progress made in other fields of public health,[13] "it has become something of a national scandal, one of the series of problems that seem to defy solution by a democratic free-enterprise society." [14]

There are several reasons why the problem continues to grow. The indifference of the automobile manufacturers to the problem and their refusal to initiate effective voluntary improvements is certainly one of the reasons.

> Automobile manufacturers utilize their tremendous resources and their brilliant array of engineering talent to enhance the appear-

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[8]Deaths per 100,000,000 miles: Total Fatalities

1961	5.2	38,091
1962	5.3	40,804
1963	5.5	43,564
1964	5.7	47,700

Kennedy, "*Why Can't We Make Cars Safer?*," Popular Science, Nov. 1965, pp. 63, 64.

[9]Moynihan, *supra* note 5, at 94.

[10]*Hearings on S. Res. 56 Before the Subcommittee on Executive Reorganization of the Senate Committee on Government Operations*, 89th Cong., 1st Sess., pt. 1, at 260-61 (1965) [hereafter cited as 1965 Hearings pt. 1].

[11]O'Connell, *supra* note 6, at 302.

[12]*Id.* at 303.

[13]Moynihan, *supra* note 5, at 93.

[14]Moynihan, *The Legal Regulation of Automobile Design, Passenger Car Design and Highway Safety*, 265, 276 (1961).

> ance of their product, to boost the horsepower and improve the compression ratio of the engines, and to make driving effortless by power equipment. They do everything except apply the intelligence of the average school boy to protecting the lives of the peoples who ride in their automobiles.[15]

Another major factor in the continuing epidemic is the futility of the present approaches to traffic safety.[16]

The present approaches to correcting the automobile safety problem are constantly directed toward the human element—the driver. This is due primarily to the fact that the overwhelming number of automobile *accidents* are the result of human error.[17] Thus the tendency has been to direct all efforts at reducing death and injury toward the cause of the *accident* rather than toward the design of the vehicle which is the main factor in causing *injury*.[18] Drivers have generally been regarded as law observers who follow legal regulations regardless of any tendency that might arise from the design of their vehicles.[19] The current approaches to the problem are directed toward *accident prevention* and can be divided into 3 main groups: (1) exhortation, (2) civil liability, and (3) criminal punishment.[20]

(1) The most striking example of exhortation directed toward the driver is the ever-present highway sign proclaiming "speed kills" and warning "slow down and live." These signs are designed to frighten the motorist into safe driving, but probably they are completely disregarded. The average American motorist considers himself a superior driver, and refuses to associate himself with the death and destruction portrayed in such grizzly advertising. His basic optimism makes him unable to comprehend that such terrible things will happen to him.[21]

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[15]Katz, *The Liability in Tort or Warranty of Automobile Manufacturers for the Inherently Dangerous Design of Passenger Automobiles*, 37 Chi. B. Record 363, 364 (1955).

[16]A general lack of knowledge in the field has also been an important factor in our lack of success with the problem. 1965 Hearings pt. 1, at 282.

[17]O'Connell, *supra* note 6, at 318.

[18]*Id.* at 334.

[19]Moynihan, *supra* note 14, at 273.

[20]O'Connell, *supra* note 6, at 306.

[21]The National Safety Council's much-publicized predictions of holiday death tolls reflect the unreal aspect of such campaigns. "Over the years these pre-holiday pronouncements have lost their necromantic quality and become rather like the posting of odds before a big race: a sure sign that exciting moments and good times are on the way. The deaths, when they come, seem no more real than the weekly television toll of the hired guns." Moynihan, "Epidemic on the Highways," The Reporter, Apr. 30, 1959, p. 16.

In fact, the odds that he will escape death are in his favor: there are only 5.7 fatalities for every 100,000,000 miles traveled.[22]

In addition to providing no specific advice except "slow down" and "speed kills," the signs–advocating a lesser rate of speed–even if they are heeded–are of no practical value in reducing the number of accidents, for speed is *not* a major factor in causing accidents.[23] A survey conducted by the Bureau of Public Roads revealed "that for speeds from 35 mph to 65 mph the faster you drive, the fewer accidents you have."[24] Although higher speed is not a factor in causing accidents, it would seem that higher speeds should increase the risk of injury to the driver, but it appears that greater speed does not correlate with more serious injury or death.[25] These risks are influenced more by the design of the vehicle than by raw speed.[26]

(2) Imposing civil liability on the errant driver is no more effective in improving the traffic safety problem than exhortation. It is generally agreed that the 3 basic purposes of tort law are compensation, prophylaxis, and punishment for fault. How effective are these principles in improving automobile safety? In the first place, the compensatory purpose of tort law is directed toward repaying the loss *after* the harm has resulted and is of no value in preventing the accident from occurring. The second purpose, prophylaxis, seldom enters into the problem because few accidents are intentional, and most occur without forethought of any legal consequences.[27] Certainly, since the development time of the average accident is less than 10 seconds, the average driver is probably not thinking of his insurance coverage during that period. It is also true that those at fault in automobile accidents seldom pay, because of the availability, and in some jurisdictions the mandatory nature, of at least marginally adequate insurance coverage.[28]

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[22]Kennedy, *supra* note 8.

[23]An attempt to solve the problem by cracking down on speeders was undertaken by Senator Abraham Ribicoff when he was governor of Connecticut. The result was that the number of deaths decreased slightly but the *rate* of accidents and injuries increased. After 4 years of intensive enforcement of speeding laws and suspension of licenses the chance of injury increased 8% for every mile traveled. Moynihan, *supra* note 5, at 94.

[24]Moynihan, *supra* note 5, at 94.

[25]The increase in fatal injuries is relatively small in the range from 0-60 mph, but in speeds over 60 the danger of serious or fatal injuries increases 3 times. O'Connell, *supra* note 6, at 309.

[26]*Id.* at 309.

[27]See Conrad, *Automobile Accident Costs and Payments*, 88-90 (Mich. Legal Studies).

[28]Only New York, Massachusetts, and North Carolina have compulsory

(3) In addition to involvement with civil law, the automobile safety problem is necessarily related to criminal law. In fact, the American people probably have more contact with their government through the legal regulation of their automobiles than through any other source.[29] Naturally, the application of criminal law to automobile accidents involves no element of compensation for its primary purpose is the *deterrence* of offenses.

The threat of fines and loss of licenses may act as a more effective deterrent to the average motorist than the threat of death or injury, primarily because the threat of criminal punishment is not so remote as the threat of death. However, here again too much emphasis is placed on the driver's ability to prevent accidents rather than on the inherent shortcomings of the vehicle.[30] The result of the criminal law regulation of traffic has been to make us a nation of law violators,[31] and there is not much evidence indicating that such regulation has been effective in reducing accidents. Even more important is the effect criminal regulation has had on the individual's regard for the law and the legal process. The criminal law should have the support of society and should be premised upon having a reasonable opportunity to conform one's conduct to the standard required by the law. "Manifestly, a good criminal law should be clear and comprehensible; else how is the citizen to conform and thereby be deterred?" [32] Most traffic laws are in direct conflict with this basic principle of criminal law because they are essentially vague and uncertain.[33]

Another obvious fault with the criminal law regulating traffic violations is that sanctions are imposed without regard to whether the driver's conduct was conscious or unconscious, voluntary or involun-

automobile liability insurance. Statement by State Senator Simon J. Liebowitz (N.Y)., Chairman of the Joint Legislative Committee on Motor Vehicles, Traffic and Highway Safety, before the Senate Subcommittee on Executive Reorganization, Feb. 3, 1966, p. 4. It has been estimated that 85% of automobile drivers have liability insurance. *Supra* note 27, at 90.

[29]Moynihan, *supra* note 14, at 271.

[30]This is not to suggest that driver error is not an important factor in traffic accidents for it *is* a significant factor in causing accidents. O'Connell, *supra* note 6, at 322-31. It is suggested, however, that this overemphasis on driver responsibility has thus far done little to reduce effectively the great number of automobile accidents.

[31]Moynihan, *supra* note 14, at 272.

[32]O'Connell, *supra* note 6, at 314.

[33]*Id.* at 315. A recent study by the American Trial Lawyers Association, *Stop Murder by Motor*, indicates that even when the law is a clear one, such as a speed-limit law, the "driver puts too much faith in the protective power of traffic regulations. He feels that if he obeys the traffic regulations he is safe." 112 Cong. Rec. 1841 (daily ed. Feb. 2, 1966).

tary.[34] Motor vehicle laws are governed by the principle of malum prohibitum, which may mean that the defendant is convicted regardless of any knowledge that his act was wrongful.[35] Thus a driver who checks his tail lights before leaving home and finds them to be functioning properly is guilty of a violation if they later go out through no fault of his own. His guilt thus depends upon chance and not upon his own carelessness. How effective are such laws in promoting safety if the driver is found guilty regardless of the fact that he has made every effort to comply with such laws?

The punishments established for traffic violations are seldom arrived at rationally or scientifically, and if the sanctions are designed to serve a specific purpose, it is usually to provide revenue rather than to deter improper driving and accidents.[36] The average citizen knows this and it is certainly not conducive to respect for the law; in fact, this arbitrary application of law may encourage drivers to do all they can to escape punishment rather than convincing them to observe traffic laws.

No doubt there are valid arguments for the present approaches to the automobile accident problem, but the fact remains that "the number of violations and accidents continue to rise." [37]

Rather than allowing the increasing number of deaths and injuries on our highways to continue to mock our futile approaches to the curtailment of traffic accidents, should we not seek some new approach to the problem? The logical answer would appear to be to approach the problem at its crux, the vehicle itself. Rather than continuing to direct our effort toward the driver and the multitude of human factors involved, it seems more probable that the real progress will be made by improving the crash-resistant features of the vehicle.[38] For

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[34]Mueller, *How To Increase Traffic Fatalities: A Useful Guide for Modern Legislators and Traffic Courts*, 60 Colum. L. Rev. 944, 957 (1960).

[35]*Ibid.*

[36]O'Connell, *supra* note 6, at 316.

[37]Moynihan, *supra* note 14, at 272.

[38]Moynihan, *"Epidemic on the Highways,"* The Reporter, Apr. 30, 1959, p. 16. Moynihan has suggested that efforts directed toward emphasis on driver responsibility are a "most serious disservice to traffic safety" and that it "seems a little bit like trying to stop a typhoid epidemic by urging each family to boil its own drinking water and not eat oysters. . . ." *Id.* at p. 17. Our attention should be directed toward factors we can reasonably hope to control rather than "to factors such as the temperament and behavior of 80 million drivers, which are not susceptible to any form of consistent, over-all control. . . ." *Ibid.* "Individuals are not perfect, and individuals will make mistakes, and individuals will drive carelessly. We should do everything we can to have good drivers and good roads. . . . However, we must take into account that since millions of people drive automobiles, and many of them are careless, at least the car they

it is the vehicle—not the driver—that is the major factor in producing injury and death.[39] "[T]raffic accidents should come to be looked upon as the *inevitable* result of putting the power of hundreds of herses [sic] into frail human hands for use in a crowded and intractable world of snow or darkness or glare." [40] By concentrating on the vehicle one can ignore the enormous number of variables inevitable in dealing with individual drivers. In addition, the improvements can be effected by a handful of automobile manufacturers rather than by the 110 million drivers expected by 1970.[41]

For the purpose of this discussion we will assume that there do exist adequate changes that can be made in the vehicle which will effectively reduce the deaths and injuries resulting from automobile accidents.[42] The General Services Administration, purchasing agent for the federal government, regards the following design improvements as important enough to require them on all 1967 automobiles the Government will buy:

> [P]added dash and vents, recessed instruments and controls on the instrument panel, impact-absorbing steering wheel and steering column, safety door latches and hinges, anchorage for seat belt assemblies, anchorage of seats, dual-brake system, standard gear quadrant (P-R-N-D-L), safety glass, glare reduction surfaces on the instrument panel and windshield wipers, tires and safety rims, exhaust emission control system to limit the amount of air-polluting elements from the tailpipe, windshield wipers and washers, standard bumper heights, four-way flasher that will flash all signal

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drive should give them as much protection as they [sic] possibly can, not only the careless driver but the innocent victim of a careless driver." *Hearings on S. Res. 56 Before the Subcommittee on Executive Reorganization of the Senate Committee on Governmental Operations*, 89th Cong., 1st Sess., pt. 2, at 849 (1965) [hereafter cited as *1965 Hearings* pt. 2].

[39]O'Connell, *supra* note 6, at 334. Moynihan quotes Dr. C. Hunter Shelden writing in 159 A.M.A.J. 981 (1955): "'The accidents may occur as the result of speed, inadequate highways, poor judgment, or mechanical failure, but none of these actually causes the passenger injury. The injury occurs primarily as a result of faulty interior design of the automobile.'" Moynihan, *supra* note 38, at 20.

[40]O'Connell, *supra* note 6, at 323.

[41]*1965 Hearings* pt. 1, at 434.

[42]Elmer Paul of the United States Public Health Service Accident Prevention Bureau estimates that if our cars were built differently and certain safety devices were used, 43% of those killed in autos might be alive today." Kennedy, *supra* note 8. Ralph Nader in his book, *Unsafe at Any Speed*, has said that 42% of those killed in automobile accidents have died under survivable conditions. 112 Cong. Rec. 1986 (daily ed. Feb. 3, 1966).

lights together to warn of hazard, backup lights, outside rear-view mirror.[43]

An example of the value of incorporating new safety devices in automobiles and of what can be done to improve the safety of the vehicle is a feasibility study prepared by Republic Aviation Division of Fairchild-Hiller Corporation under the auspices of the New York State Motor Vehicle Department. This study shows that it is feasible to build a prototype safety car that will result in the virtual elimination of injuries and deaths up to impact speeds of 50 mph even in head-on collisions with another vehicle traveling at the same speed.[44] Assuming that automobiles can be made safer, how should these changes be made? There seem to be 2 ways to achieve the desired result: voluntary reform by the manufacturers or mandatory reform through government regulation.

In the past, it has been the general opinion of the American people that the automobile manufacturers are responsible firms which are producing the safest product possible.[45] However, in the light of recent publicity and the moderate concern over traffic safety, it appears that the manufacturers are not using their resources to improve effectively the safety of their product, and that a safer vehicle *can* be manufactured.[46] Senator Abraham A. Ribicoff has said, "I think

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[43]*1965 Hearings* pt. 1, at 242. The General Services Administration has just recently added 9 new safety devices to this list and will require them on all 1968 models purchased: window and door controls placed either in out-of-the-way locations or of types that would break away upon impact, recessed or break away ashtrays, arm rests without sharp corners, padding on backs of the front seats, electric or reflective side markers that show the outline of stopped cars at night, rear window defrosters, roll bars for soft-top vehicles, and fuel tanks and lines that will not burst upon impact. Richmond Times-Dispatch, Feb. 17, 1966, p. 22.

[44]Statement of State Senator Edward J. Speno (N.Y.) before Senate Sub-Committee on Executive Reorganization, Feb. 3, 1966, p. 4.

[45]Moynihan, *supra* note 14, at 273.

[46]This view has been expounded by Ralph Nader in *Unsafe at Any Speed*, a book that has been described as "likely to be the *Silent Spring* of traffic safety." 150 Science 1136 (1965). Mr. Nader sums up the attitude of the automobile industry towards the proposition that their cars could be made safer with this quotation from a 1961 statement of General Motors President John F. Gordon: "'The traffic safety field . . . has in recent years been particularly beset by self-styled experts with radical and ill-conceived proposals. . . . The general thesis of these amateur engineers is that cars could be made virtually foolproof and crashproof, that this is the only practical route to greater safety and that federal regulation of vehicle design is needed. This thesis is, of course, wholly unrealistic. . . . The suggestion that we abandon hope of teaching drivers to avoid traffic accidents and concentrate on designing cars that will make col-

the automobile industry is dragging its feet. I think the automobile industry has a big responsibility to the American people that they are not fulfilling." [47] Why the relative indifference of the autmobile manufacturers?

The highly competitive nature of the automobile industry is perhaps the largest single factor in the reluctance of the manufacturers to emphasize safety in their product. "No feature of our economy, other than defense, so dominates the national economy." [48] These safety innovations would necessarily increase production costs because they would necessitate rechanneling of resources into extensive research programs, but a company like General Motors which had a *profit* of $1.7 billion last year[49] could certainly absorb the initial rechanneling cost. The production cost would then decrease as features were engineered into the vehicle.

Because of the tremendous race for sale, consumer demand is all-important to the manufacturers; and to the consumer, styling and appearance, not safety, are the most important factors in the choice of a new car.[50] The automobile industry spends millions of dollars every year in advertising its product. If this advertising is a valid projection of consumer demand, a random sampling of the medium shows that the consumer is *not* interested in safety:

> A howitzer with windshield wipers. The new Buick Skylark Gran Sport . . . is almost like having your own, personal-type nuclear deterrent.[51]

> New package of instant action: Olds 442 . . . the sweetest piece of live action on wheels![52]

> The Riviera with muscles on its muscles. New Riviera Gran Sport. We have discovered . . . a cluster of hotbloods . . . yearning for a little more heat.[53]

> What sets Pontiac apart? . . . a tigerish 389-cubic inch V-8 engine . . . and a look that others can't seem to capture . . . .[54]

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lisions harmless is a perplexing combination of defeatism and wishful thinking.'" *Id.* at 1136-37. See book review of *Unsafe at Any Speed*, this issue Wash. and Lee L. Rev. at 445.

[47] *1965 Hearings* pt. 1, at 242.

[48] O'Connell, *supra* note 6, at 357.

[49] *1965 Hearings* pt. 2, at 780.

[50] O'Connell, *supra* note 6, at 357.

[51] *Time*, Feb. 12, 1965, p. 56.

[52] *Time*, Jan. 5, 1965, p. 1.

[53] *Time*, Apr. 23, 1965, p. 5.

[54] *Esquire*, Apr. 1965, p. 41.

> If you're in search of . . . size and luxury in your next car, you should drive a 1965 Cadillac soon.[55]

> Buick Electra 225: . . . eloquent, long, graceful, infinitely luxurious. Make the merest turn . . . like a cruise to Nassau.[56]

But there is no doubt that in addition to measuring public tastes, advertising is also instrumental in creating them.[57] Speed, styling, and luxury are preeminent in the public mind. As a result the industry, forever fearful of its future prosperity, continues to meet the buying public's demands which the industry itself has probably created.

There are instances which illustrate the manufacturer's willingness to undertake safety innovations voluntarily, but the ineffectiveness of such isolated instances is further evidence of the public's lack of concern over safety and the industry's desire to preserve its solvency. In 1956 Ford introduced various safety devices (padded dash, "deep dished" steering wheel, safety door latches, and seat belts) and stressed them in its advertising, while other manufacturers continued their frenzied preoccupation with speed and power.[58] The result of such advertising and features was that Ford's sales dropped sharply and that by August no further mention of the newly introduced safety features was to be found in its advertising. Sales increased almost immediately, but nevertheless 1956 was a poor year for Ford, and the safety advertising was blamed.[59] Ford had learned its lesson—the public was not interested in safety.

Since the Ford fiasco of 1956, the industry has remained firm in its stand against safety.[60] It was not until the New York legislature threatened compulsory installation that the manufacturers voluntarily installed seat belts in their automobiles.[61] Congress, in spite of quiet

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[55]*Time*, Feb. 12, 1965, p. 33.

[56]*Esquire*, Apr. 1965, p. 57.

[57]O'Connell, *supra* note 6, at 358. Mr. Roy Abernathy, President of American Motors recognizes the effect of advertising on buyers: "I think there may be some indication, Senator, that there are some people, particularly young people, who are romanced by it [emphasis on speed and power] and might purchase cars on that account. We are not against horsepower. We are against the glamorizing of it." *1965 Hearings* pt. 2, at 874.

[58]Moynihan, *supra* note 38, p. 20.

[59]*Ibid.*

[60]"We have found that obsolete concepts of salability based on styling still reign in Detroit, despite recent assurances to the contrary. As an indication, there is no one in the automobile industry in charge of safety design who has vice-presidential status, but each of the Big Three has a vice-president for styling." Statement of Assemblyman Alexander Chanavau (N.Y.) before the Senate Subcommittee on Executive Reorganization, Feb. 3, 1966.

[61]O'Connell, *supra* note 6, at 365.

lobbying by the automobile manufacturers, recently passed a bill requiring 17 additional safety devices in the automobiles purchased by the General Services Administration for federal use.[62] The federal government purchases 10,000 cars a year, and the manufacturers have recently announced that they are voluntarily including these devices (for example, safety door latches, anchorage of seats, dual brake system, impact absorbing steering wheel and column) on all 1967 models produced.[63] Thus it appears that manufacturers have been less than anxious to place the much-needed safety devices on their automobiles; when they eventually do, it has been after considerable pressure from the state and federal governments.

There are those who feel that the best method of encouraging the manufacturers to undertake the task of reforming the design of their vehicles voluntarily is fear of tort liability,[64] but the present application of the law of products liability seems sadly unable to provide the needed impetus. Prior obstacles to placing liability on manufacturers for harm caused by defective products, such as privity of contract, have been steadily reduced in recent years,[65] and the expansion of the principles of products liability to include liability for negligent design has provided a basis for imposing liability on automobile manufacturers for the unsafe design of their vehicle.[66] The Restatement of Torts provides relatively adequate substantive law for holding a manufacturer liable:

> A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattle or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.[67]

This enabling principle makes it clear that a manufacturer may be held liable for unsafe design as well as for unsafe construction of a vehicle, and 3 relatively recent cases have imposed liability for unsafe

[62]Washington Post, Apr. 1, 1965, § A, p. 39. See generally note 43 *supra* and accompanying text.

[63]The National Observer, Feb. 14, 1966, p. , col. .

[64]Katz, *supra* note 15, at 366.

[65]The landmark cases are MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (negligence); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358 161 A.2d 69 (1960) (implied warranty); Greenman v. Yuba Power Prods., Inc., 59 Cal.2d 57, 377 P.2d 897 (1962) (strict liability).

[66]Katz, *Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 Harv. L. Rev. 863 (1956).

[67]RESTATEMENT (Second), TORTS § 398, at 336 (1965).

vehicle design.[68] However, while courts are willing to hold the manufacturer liable for injuries caused by various defects in construction,[69] they are usually reluctant to impose liability when the defect is one of design.[70] As long as the vehicle is properly constructed and it or its components function properly and do not break down due to some defect in construction, there is generally no liability.[71]

An excellent example of the willingness of courts to impose liability on manufacturers for defects in construction and their reluctance to hold them liable for defects in design is *Zahn v. Ford Motor Co.*[72] There the passenger in the automobile was thrown against the dashboard when the driver was forced to come to a sudden stop. His head struck the jagged edge of a defectively made ashtray and his eye was put out. He was allowed recovery from the manufacturer *only* because of the defective construction of the ashtray, not because of its negligent location or design. In so holding the court said: "If the ashtray was properly prepared for anticipated use by owner or guest there could be no liability on the part of Ford." [73]

Thomas v. Jerominek[74] is another example of the lengths to which courts will go in refusing to impose liability for defective design. In a suit for personal injuries the plaintiff alleged that her automobile was constructed in an unsafe manner in that the door and window knobs were indistinguishable. The court held that as a matter of law the plaintiff had failed to state a claim upon which relief could be granted because she complained "of nothing which relates to the

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[68]Carpini v. Pittsburgh & Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954); Hyatt v. Hyster Co., 106 F. Supp. 676 (S.D.N.Y. 1952), *rev'd on stipulation of the parties;* 205 F.2d 521 (2d Cir. 1953); Clark v. Zuzich Truck Lines, 344 S.W.2d 304 (Mo. Kans. City Ct. App. 1961).

[69]See *e.g.,* Kanatser v. Chrysler Corp., 199 F.2d 610 (10th Cir. 1952), *cert. denied,* 344 U. S. 921 (1953); Hupp Motor Car Corp. v. Wadsworth, 113 F.2d 827 (6th Cir. 1940); Goullon v. Ford Motor Co., 44 F.2d 310 (6th Cir. 1930) (tractor); Zahn v. Ford Motor Co., 164 F. Supp. 936 (D. Minn. 1958); Bird v. Ford Motor Co., 15 F. Supp. 590 (W.D.N.Y. 1936).

[70]See *e.g.,* Amason v. Ford Motor Co., 80 F.2d 265 (5th Cir. 1935); Ford Motor Co. v. Wolber, 32 F.2d 18 (7th Cir. 1929) (tractor); Davlin v. Henry Ford & Son, Inc., 20 F.2d 317 (6th Cir. 1927) (tractor); Thomas v. Jerominek, 8 Misc. 2d 517, 170 N.Y.S.2d 388 (Sup. Ct. 1957); Reusch v. Ford Motor Co., 196 Wash. 213, 82 P.2d 556 (1938); Foster v. Ford Motor Co., 139 Wash. 341, 246 Pac. 945 (1926) (tractor).

[71]Zahn v. Ford Motor Co., *supra* note 65; Reusch v. Ford Motor Co., *supra* note 70. *Contra* Carpini v. Pittsburgh & Weirton Bus Co., *supra* note 67; Hyatt v. Hyster, *supra* note 67.

[72]164 F. Supp. 936 (D.Minn. 1958).

[73]*Id.* at 941.

[74]8 Misc. 2d 517, 170 N.Y.S. 2d 388 (Sup. Ct. 1957).

existence of a latent defect . . . ." [75] It would certainly seem that a jury of reasonable men might have found that the manufacturer had failed to "exercise reasonable care in the adoption of a safe plan or design," [76] but the court did not allow the case to progress beyond the pleading stage.[77]

Thus it is clear that the current attitude of the courts toward the liability of automobile manufacturers for unsafe design of their product is far from adequate. It has been suggested that

> nothing in law or fact insulates the automobile manufacturer from liability not only for defects in construction, which we have long recognized, but . . . [also] for the creation of unnecessary risk by the marketing of an automobile not reasonably designed to protect the safety of its occupants.[78]

The idea of imposing liability on a manufacturer for a negligently designed vehicle is simply an application of the existing law of products liability to include, as it properly should, all aspects of the manufacturing process from the drawing board through the actual construction and sale of the vehicle or component part. A negligently *designed* vehicle can create just as great a risk of harm as can one which is negligently *constructed*. The test of liability should be not only whether the manufacturer installed faulty door latches or ashtrays, but also whether he has created an unreasonable risk to others by placing a negligently designed vehicle on the market. The factors which should determine the manufacturer's liability are those stated in *United States v. Carroll Towing Co.*[79] by Judge Learned Hand: the probability and magnitude of the risk weighed against the burden of taking adequate precautions. Thus viewed it seems obvious that by placing millions of automobiles on the road without using their tremendous engineering potential to increase the safety of their products, the manufacturers have created perhaps the greatest risk and have effected the most extensive neglect of duty in modern times.[80]

There is little doubt that the courts have failed to provide the necessary incentive to force the manufacturers into voluntary reform of

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[75] *Id.* at 389-90.

[76] RESTATEMENT (Second), TORTS § 398, at 336 (1965).

[77] Accord, Amason v. Ford Motor Co., *supra* note 70. This case also involved a suit based upon defective design of rear-hinged doors. The court emphasized that plaintiff had "not charged that any defective material was used in constructing the car or that any part of it broke." *Id.* at 266.

[78] Katz, *supra* note 15, at 365.

[79] 159 F.2d 169 (2d Cir. 1947).

[80] Katz, *supra* note 15, at 365-66.

their vehicle designs. Even though the manufacturers could be held liable under present concepts of products liability, the real question is whether the courts are equipped to obtain the necessary expert knowledge to be sufficiently familiar with what in fact constitutes a dangerous design. They would necessarily rely more upon expert testimony than independent research, but this may be inadequately presented or misunderstood. Moreover the necessary reforms dependent upon individual lawsuits could result in episodic reform.[81]

One writer has suggested that the problem of the court's inadequate research machinery and knowledge in the field of design has been caused in part by trial attorneys who have failed to realize the role played by the automobile in accidents and injuries.[82] Attorneys should direct their attention to vehicle design as a primary cause of many of the injuries stemming from automobile accidents. It is fundamental to our adversary system that courts generally act only upon issues raised by the litigants through their attorneys, thus issues of negligent design will not be considered unless the attorney takes this initial step. By effective investigation at the site of the accident and by making use of available external engineering information,[83] attorneys will be able to impart to the court the necessary knowledge in the field of automobile design. As more scientific knowledge of what constitutes safe design becomes available and as the leading instrumentalities of injury in a vehicle are made known, the manufacturer's liability for faulty design will develop with more precision;[84] and as courts develop a sense of confidence in their knowledge of the field perhaps their reluctance to impose liability will gradually disappear. *This* solution to the problem might be sound if the problem were not one that demanded *immediate* action. The traffic safety problem has reached such proportions that it is imperative that the fastest possible and most effective measures be instituted to bring about the needed reforms. The solution can most probably "be achieved better by a consistent application of regulatory standards drawn up by experts and kept current by research, rather than by *ad hoc* decisions of inexpert judges and juries." [85]

It is apparent that the manufacturers have been reluctant to make safer automobiles without some compulsion, and the courts have been

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[81]O'Connell, *supra* note 6, at 375.

[82]Nader, *Automobile Design: Evidence Catching Up With the Law*, 42 Den. Law Cent. Jour. 32 (1965).

[83]*Id.* at 33.

[84]*Id.* at 39.

[85]O'Connell, *supra* note 6, at 375.

reluctant to compel design improvements by imposing liability for unsafe design features. Even if the courts were to begin to impose such liability on the manufacturers, this approach is not adequate to achieve automotive safety in the near future or under a uniform plan.

Moreover, the law of products liability probably will refuse to compel a manufacturer "to so design a product that it can be used carelessly with impunity," [86] thus the aim of preventing deaths and injuries which occur as a result of driver negligence and frailties would not be achieved. In addition, the judicial process is necessarily slow, and it would be some time before the results of liability for negligent design would be manifested in the vehicle itself.

The preceding discussion has demonstrated that the only realistic approach to the automobile safety problem is some sort of government regulation of vehicle design. But should this regulation be on the state or federal level?

The effectiveness of state regulation would be impeded by several important factors. Any regulation would be far from uniform[87] unless the states enacted some type of uniform act, but such legislation is seldom accepted by every state, and if and when it is, it is only after years of debate and trial and error.[88] The lack of uniformity would hardly be advantageous to the manufacturer who could conceivably be placed in a position of manufacturing over 50 different varieties of automobiles.[89] Also, the effect such regulation might have on interstate commerce is significant. A state would probably be constitutionally unable to prohibit out-of-state vehicles which did

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[86]Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 874 (1962).

[87]Moynihan, *supra* note 14, at 274.

[88]"[T]he passing of motor vehicle equipment safety laws by individual States is the long way toward reaching our ultimate goal of safer automobiles . . . . Motor vehicle equipment safety laws have become effective by the "trickle down" method. After one State passes a law it is picked up by another and another until finally the manufacturers capitulate . . . ." Statement by State Senator Simon J. Liebowitz (N.Y.), Chairman of the Joint Legislative Committee on Motor Vehicles, Traffic and Highway Safety before the Senate Subcommittee on Executive Reorganization, Feb. 3, 1966, p. 1.

[89]An exchange between Senator Ribicoff and Frederick G. Donner, Chairman of the Board of General Motors indicates the effect this would have on the automobile industry:

> "Senator Ribicoff. Well, can the automobile industry really produce on a mass-production basis the manufacture and sale of automobiles if you have a different standard in 50 different states?
>
> Mr. Donner. No, we recognize that problem."

1965 Hearings pt. 2, at 792.

not comply with its design standards from traveling on its highways.[90] Thus the states would have to exclude such interstate vehicles from its regulations, and the regulations would become that much less effective in promoting safety on the highways.[91] Another obstacle would be the cost of each state's establishing the various research facilities needed to arrive at its own minimum standards.[92] Of course, state cooperation in research could reduce this cost.

Even if these obstacles could be overcome, the process of establishing effective state regulation of vehicle design would take considerable time, and time is of the essence in solving a problem of this magnitude.

Everything involved in the traffic safety problem seems to point to the advisability of federal regulation. The problem is unquestionably a national one and can best be handled by a central government rather than by over fifty separate governments.[93] The automobile industry is the only major element of our transportation system that is not required to conform to federal safety standards,[94] and the fact that automobiles are necessarily involved in interstate commerce certainly permits active federal involvement.[95]

There is no question that the federal government is already involved in the automobile safety problem;[96] however, there is a question as to the effectiveness of this involvement. Sixteen separate federal agencies have some role in the federal automobile safety program.[97] The

[90]Any state regulation that prohibited the use of its highways to interstate vehicles which did not comply with its design would probably be held unconstitutional if it imposed a substantial burden on interstate commerce. Brenner, *Legal Requirements for the Equipment and Design of Private Motor Vehicles: State Action and National Problems*, 23 GEO. WASH. L. REV. 429, 448 (1955).

[91]O'Connell, *supra* note 6, at 378.

[92]*Id.* at 379.

[93]Brenner, *supra* note 90, at 448-49.

[94]Moynihan, *supra* note 14, at 276. "It should first be kept in mind that automobiles are but one of several common forms of transportation and that, although design regulation is somewhat the exception with specific regard to automobiles, it is the norm with regard to means of transportation in general. Furthermore, the regulation of other means of transportation is, on the whole, carried out at the federal level." *Id.* at 265.

[95]In 1915 the United States Supreme Court implied that federal control of motor vehicles for safety purposes was proper and that the states were enabled to exercise such authority only because of the absence of federal preemptive legislation. Henrick v. Maryland, 235 U.S. 610 (1915). Safety regulations have usually been looked upon with favor and "have but rarely raised either constitutional or philosophical issues . . . ." Moynihan, *supra* note 14, at 265.

[96]The most recent Federal involvement in the automobile safety problem has taken the form of the newly signed Federal Highway Safety Act which gives the Secretary of Commerce certain regulatory powers.

[97]*1965 Hearings* pt. 1, at 1.

Division of Accident Prevention of the United States Public Health Service, one of the agencies involved, administered a $2,700,000 study into why accidents occur, but only $134,000 was spent for research in vehicle safety design.[98] The most curious of the government programs is the President's Committee for Traffic Safety, which has an annual budget of $200,000, of which $150,000 comes from federal funds and $50,000 from insurance and automobile industry grants.[99] Although this Committee enjoys the prestige of the President's name, it seems to be controlled by an advisory council composed of representatives of private organizations.[100] In fact, "the Committee is Detroit's public relations annex at the White House." [101] There might be some advantage to this diversity if the findings of the various research programs could be coordinated and exchanged, but there is no single agency that has the responsibility for coordinating the findings of the various agencies or for prescribing policy.[102] Thus the present federal involvement in traffic safety consists of 16 separate agencies each working separately and lacking any single agency or individual vested with the responsibility of coordinating all of the efforts into a uniform system.[103]

There have been several proposals for bringing about efficient federal involvement in the automobile safety problem. Perhaps the most valid is the suggestion of former Assistant Secretary of Labor Daniel Moynihan that the proper means of formulating safety standards and enforcing regulations would be to establish a Federal Automobile Agency.[104] This agency would unite all intramural and extramural research activities of the federal government in the field of highway safety in one agency. Rather than concentrating only upon design research, it should also have responsibility for research and development of highway and driver safety programs. Such an agency would provide a centralizing element for all the independent research that is conducted by various organizations throughout the country and could eliminate considerable duplication of effort.

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[98]Ridgeway, "*Car Design and Public Safety*," The New Republic, Sept. 19, 1964, pp. 9, 11.

[99]*Ibid.*

[100]*Ibid.*

[101]*Ibid.*

[102]*1965 Hearings*, pt. 1, at 209, 233, 282.

[103]One agency has had an employee working for months gathering information to determine how much money the federal government spends for highway safety work and the head of that agency indicated that it would take another three months to get it. *1965 Hearings* pt. 1, at 231, 233.

[104]Moynihan, *supra* note 14, at 279.

Moynihan's proposal for a Federal Automobile Agency is certainly valid as far as it goes. Centrally controlled research is necessary in determining what can be done to prevent the growing slaughter on our highways, but research itself is of little value unless the agency has the *authority* to set minimum safety standards for the automobiles. The legislation which would establish a central research agency should also authorize that agency to set minimum standards and to impose sanctions on manufacturers for failure to meet those standards.

The success of any federal regulatory agency in the field of automobile safety will necessarily depend upon 2 things: (1) It is imperative that those who are chosen to serve in research capacities in this proposed agency be the most highly qualified men available, and those in administrative capacities should be capable of understanding the viewpoints of both government and industry. (2) The agency should not be looked upon as a means of forcing the manufacturers to submit to arbitrary government regulation.[105] Of course the purpose of the agency is some regulation, but the basic precepts of our private enterprise system should also be preserved. If the agency were founded upon the proposition of *mutual cooperation* between the automobile industry and the central government with the common goal of reducing the carnage on our highways, the results of such a program could be extremely rewarding.

Whatever form regulation may take, there will be opposition. It is a psychological fact that human beings would prefer not to think about the dangers of living, and this is particularly true of the eternally optimistic American public. As a result we tend to resent those who force us to face the unpleasant. This resentment would most certainly be quite intense when the public is forced to recognize the danger inherent in its most revered symbol of pleasure, status, and release. Notwithstanding our aversion to facing the unpleasant, we are capable of reasonable and practical reflection upon problems that endanger our society as a whole. The public will gradually accept the innovations and welcome the regulation when they become fully aware of the magnitude and severity of the problem, and when they realize how much good that regulation can produce.

There is no simple means of determining the proportions a problem must assume before a decision is made to impose preventive measures, but certainly if any contemporary problem deserves national publicity and national action, it is the epidemic rampant on our highways.

JON A. KERR

[105] *Id.* at 279-80.