# DRIVING GOVERNMENTALITY: AUTOMOBILE ACCIDENTS, INSURANCE, AND THE CHALLENGE TO SOCIAL ORDER IN THE INTER-WAR YEARS, 1919 TO 1941

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## INTRODUCTION

After nearly two decades as a luxury curiosity, the automobile began in the 1920s to transform the fabric of urban life in the United States. Slowed briefly only by the onset of the Great Depression at the end of that decade and again by the conversion to a war economy for World War II, the explosive growth of automobile and truck[2] ownership and use posed a challenge to the governability of American society. This challenge did not manifest itself in the threat of political revolution (that remained concentrated in the tensions of the labor market), but in a general crisis of the ability of traditional hierarchical regulation to operate in a wide variety of public and private institutions. The formal state, as such, was only one of many forms of authority undermined by the spread of driving. If the automobile threatened to allow criminals to laugh in the face of the law as they sped out of the jurisdiction, family heads and employers also found their strategies and mechanisms of control slipping on the fast-paced new surface of a motorized life.

Naturally, the automobile and virtually every aspect of its ownership and operation became a potent subject for developing new strategies of governance at all levels in these decades. People struggled not only over the proper methods to use to restore control, but over the very nature of the subjects to be governed. Conduct long beneath the threshold of ordinary governmental ordering became a subject of power (not just operating a vehicle but walking). As happens in such circumstances, debates about policy become questions of the basic rationality of government, or

2. While trucks served particular kinds of users and posed particular kinds of problems, this essay does not develop that distinction. For convenience I refer to automobiles for both.

"governmentality."[3] Thus the automobile produced at least two new governable subjects, the driver and the pedestrian, and whole series of problems of how best to govern them. On occasions these discourses about automobiles and government reached the highest levels of the national state, as when Commerce Secretary Herbert Hoover convened a national conference on uniform traffic laws in 1925.[4] But much of this went on beneath the level of national politics, in courtrooms, city halls, and even in the popular discourse of newspapers and magazines.

In some respects the automobile's provocation to reflection and debate over governmentality has never ceased. In its own way, for example, Ralph Nader's book UNSAFE AT ANY SPEED (1965),[5] helped provoke a major rethinking of governance strategies for the 1960s and 1970s. But in the 1920s and 1930s, the first wave of efforts to really govern the automobile opened and closed a chapter in American governance. After World War II, the basic principles of automotive governance, especially the dominance of the individual driver and pedestrian over different ways of conceiving of the at risk population became fixed. Most of our public policy debates on the automobile since have accepted this as a basic template. In this sense the

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3. This neologism coined by the late Michel Foucault is a condensation of governmental rationalities. *See* MICHEL FOUCAULT, THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY, 87 (Graham Burchell, et al. eds., University of Chicago Press 1991). According to Foucault, the problem of state power was not always "governmental." It is a specific moment in the 16th century when a discourse about the problem of rule developed which takes state power as a problem unique to its own domain. Earlier reflections on power were either theological or legal and focused on the status of the sovereign. What marked the emergence of governmentality was the attempt, begun in response to Machiavelli's writings, to "articulate a kind of rationality which was intrinsic to the art of government, without subordinating it to the problematic of the prince and his relationship to the principality of which he is lord and master." *Id.* at 89. This governmental revolution continues in the 20th century, and has become more important as the state and other power centers have expanded with the addition of large ensembles of governmental officials and experts. A number of scholars have used the concept of governmentality to explore the growth of regulation in the 20th century and its anchors in various kinds of social knowledge. *See generally* [the other essays in] THE FOUCAULT EFFECT; JACQUES DONZELOT, THE POLICING OF FAMILIES (Pantheon 1979), NIKOLAS ROSE, GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF (Routledge 1989).

4. Second National Conference on Street and Highway Safety. *See* UMVCTA, Commissioner's Prefatory Note, 11 U.L.A. 421, 423 (1974).

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

automobile radically deepened the logic of individualism at a time when liberalism was generally being recast as a mode of governmentality.[6]

In the 1920s and 1930s, however, a more collectivist approach to addressing the automobile, influenced by the rise of worker's compensation in the previous decades, seemed possible. In the years immediately preceding World War I, workers' compensation systems rapidly replaced a dense web of employers' liability law regulating when injured workers would receive compensation from their employers.[7] This new compensation regime was based on the technology of insurance and the premise that an increase in both efficiency and fairness could be achieved by treating the risks of each industry as a collective cost to be dispersed through the "natural" mechanisms of the economy. To many observers it provided a blueprint for the government of maturing industrial society and its influence can be seen on such later developments as social security, unemployment insurance, and Medicare.[8]

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6. Liberalism as a governmental rationality is not exactly the same as liberalism as a political theory. Although the former no doubt feeds into the latter, the latter consists also of technical discourses that have as their object the problems of managing individual subjects. For a discussion of liberalism as governmentality, see Nikolas Rose & Peter Miller, *Advanced Liberalism, in* FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT (Andrew Barry, Thomas Osborne, and Nikolas Rose eds., University of Chicago Press 1996) and NIKOLAS ROSE, INVENTING OURSELVES: PSYCHOLOGY, POWER, AND PERSONHOOD 150 *et passim* (Cambridge 1996). For a very different but consistent effort to think through the significance of this strong form of individualism, see LAWRENCE M. FRIEDMAN, THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE (1990).

7. *See* Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); *see also* Jonathan Simon, *For the Government of its Servants: Law and Disciplinary Power in the Work Place, 1870-1906*, 13 STUD. L. POL. & SOC'Y 105 (1993); John F. Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998).

8. Workmens' compensation was exemplified the governmental strategies that James Gilbert labels "collectivist." *See* JAMES GILBERT, DESIGNING THE INDUSTRIAL STATE: THE INTELLECTUAL PURSUIT OF COLLECTIVISM IN AMERICA, 1880-1940 8 (Quadrangle Books 1972). As Gilbert himself emphasizes, collectivist intellectuals include a broad political spectrum from socialists through progressive conservatives. What joined them was:

> A general theory of society in which economic institutions were the key element. Possibilities for social interaction and political reform derived from the mass nature of these economic institutions. Although many collectivists wished to preserve such older values as individualism, they

While many aspects of driving raised basic questions of how to govern, the automobile accident emerged as a perhaps the single most volatile site for the whole range of concerns about the disruptive influence of motorization of social life.[9] During the 1920s, for the first time, the automobile accident began to replace industrial and railroad accidents as the largest source of civil lawsuits and the most visible symbol of the potential for horror and carnage in modern life. The numbers are dramatic. In 1930 more than 30,000 Americans died in automobile accidents.[10] More than a half century later the number is remarkably similar at around 41,800 in 1995.[11] As a function of population this is actually a slight decline. More relevantly, as a function of motor vehicles in operation or miles driven, today's rate is dramatically lower. We are used to recognizing motor vehicles as killers, but in the 1920s and 1930s the scale of this carnage was far more shocking against a recent past in which the whole category of such deaths did not exist. Americans in this period were used to associating carnage with World War I battlefields and industrial accidents. The automobile accident both superseded and incorporated the symbolic significance of the other two.

Unlike manufacturing or even railroads, the automobile, and its attendant carnage, were broadly distributed across the social landscape. Industrial accidents were largely limited to the closed sites of production, hidden behind the walls of factories or the fences of rail yards. Railroading accidents took place in rail yards and in the corridors of track cutting across towns and

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> were nonetheless forced by their understanding of the scale of social problems to consider as a solution pitting social organization against injustice, or translating such older economic ideas as laissez-faire competition into theories of competing groups. Pluralism, a variant of collectivist thought, is an example of one direction which these assumptions often took. But other concrete theories also expressed the same central assumptions about social organization; only the details varied.

*Id.*

9. A suggestive case for this has been made in an unpublished dissertation. *See generally*, Anedith Jo Bond Nash, Death on the Highway: The Automobile Wreck in American Culture, 1920-1940 (1983) (unpublished dissertation, University of Minnesota) (on file with author).

10. *See* REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, 17 (1932) [hereinafter Columbia Report, Columbia Committee, Columbia Plan].

11. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1997 94 (1997).

countryside. But, automobile accidents happened in the most public of places. Carnage and its relics could be witnessed routinely in this period, due in part to the growth of newspaper. Later, radio and television journalism wed to broadcast the ready-to-hand tragedy of an automobile wreck.[12]

Just as industrial accidents formed a natural locus for worker's grievances with the governance of work inside the factory,[13] the automobile accident formed an independent source of popular grievance against the government of urban life from the 1920s on. Indeed one reason that the horror of the Great Depression did not seem to relax popular interest in the automobile accident is that the automobile accident actually operated as an effective metaphor for the spectacle of the super-heated 1920s economy twisted into a terrible wreckage of steel, rubber, and human beings.[14]

The response to the automobile accident drew on a number of existing approaches to governance. One approach was the legal regulation of the motor vehicle. The automobile ownership explosion caught many states without basic requirements for registration of vehicles or the licensing of drivers. The 1920s also saw a scramble to set speed limits, establish rules of traffic interaction among and between motor vehicles, horse vehicles, and pedestrians, and create policing systems to enforce these rules. These efforts called forth a broad and often heated popular discussion about how to regulate driving. As Americans invested huge portions of their wealth (mostly borrowed) in automobiles they acquired an interest in governance unknown to most of them before.

Another approach was to build on the existing structure of civil liability. Faced with the extraordinary toll of the automobile on people with no real opportunity to self-insure, courts faced intense litigation pressure to expand liability. But the fast paced automobile market was placing many automobiles in the hands of people with virtually no assets (including the often unscathed automobile itself which would be owned by the bank).

As in so many areas of tort law even in the early 20th century, automobile

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12. No holiday weekend would be appropriate without some pile up and none was likely to pass without at least one being within somebody's camera range. By the middle of the 1920s, streetcars and railroads also brought spectacles of blood and pain into public spaces, but it occurred with much less frequency than violence associated with the automobile.

13. For convenience I will use the contemporary non-gendered term even though "workmen's" compensation was the term used during the period discussed.

14. *See* Nash, *supra* note 9, at 4.

liability turned out to be largely about a third source of regulatory power, that of insurance. Only one state in the nation, Massachusetts, required liability insurance as a condition for operating a motor vehicle in 1932. But the growing private assets of many Americans during this period provided their own incentives to insure. Indeed, a large private insurance market was already thriving in this period. Next to workers' compensation, automobile liability was the leading line of casualty insurance in 1931.[15] Over 250 million dollars worth of liability insurance, and another 100 million worth of property insurance on automobiles, was written in 1929.[16] But private insurers were reluctant to pursue the theme of insurance as a source of governance. Many rightly feared that any bold attempt to rewrite the rules of automobile accident compensation would include the need for regulation if not state take-over of the insurance industry.[17]

Yet such a bold attempt had already been undertaken in a nearby field – workers' compensation – which had an inexorable influence on the automotive governance debate. In the 1920s, legal scholars proposed a variety of ways to extend the logic of what was then considered the worker's compensation principal. The automobile accident represented a promising early frontier of expansion. Like work accidents, automobile accidents became a major source of practical concern about risk in the modern world. In both circumstances, the overwhelming power of mechanical instruments eclipsed the ability of individual care taking to make correlative differences in the degree of harm. Those who were even a little bit careless ended up just as injured or dead as those grossly so. Then there was the carnage itself. Like the factory machine, the automobile was capable of mutilating the human body in a way which soon captured the attention of a fascinated and horrified public. Finally, like the factory, the automobile was becoming a vector not only of investment but of economic growth, and thus offered an economic dynamic to which the distribution of costs could be attached.

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15. *See* Columbia Report, *supra* note 10, at 21.

16. *See* Columbia Report, *supra* note 10, at 50.

17. In 1938 an insurance industry leader criticized the industry for its paralyzing fear of state take over. "A short-sighted policy of blind opposition to compulsory insurance, in lieu of a whole-hearted effort to contribute toward a solution of one or our most serious social problems, has brought private insurance face to face with a grave danger." *Quoted in* Albert A. Ehrenzweig, *"Full Aid" Insurance for the Traffic Victim – A Voluntary Compensation Plan*, 43 CAL. L. REV. 1, 12 (1955) (quoting Sawyer, *Frontier of Liability Insurance*, 39 BEST'S INSURANCE NEWS (Fire & Cas. Ed.) 439 (1938)).

This Article examines this automobile driven struggle to reinvent governance in the 1920s and 1930s through an examination of the 1932 Report of the Committee to Study Compensation for Automobile Accidents, popularly known as the "Columbia Report" and its context. The Columbia Report was the first systematic effort to propose a response to the automobile accident through the use of insurance, building on the model of worker's compensation. Formed under the auspices of Columbia University's Council for Research in the Social Sciences in late 1928, the Committee was composed of prominent judges and lawyers involved in liability reform. Much of the intellectual force behind the Committee came from collaboration between a group of realist and reform oriented law professors and social scientists at both Columbia and Yale.[18] The Columbia Report combined a critique of compensation under a common law tort regime with one of the largest empirical studies of legal practices up to that point. The Committee's staff undertook an examination of almost 9,000 accident cases from several different states and types of communities. The database remained the most comprehensive statistical picture of automobile accident compensation available until the mid-1960s.

The Committee's legislative proposal (hereinafter referred to as the "Columbia Plan") mandated automobile owners to carry third-party insurance coverage for the benefit of anyone injured by the automobile.[19] Most controversially of all, it proposed to eliminate all fault considerations save for deliberate efforts at suicide or self-injury. Borrowing from worker's compensation plans, the Columbia Plan proposed to cover up to two-thirds of economic loss plus medical costs.[20] Only economic losses – medical and lost earnings – were recoverable, if only in part.

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18. On the context of the Columbia Committee in terms of the realist movement see JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 105-09 (University of North Carolina Press 1995). For its place in tort law scholarship see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 479 (1985).

19. The only exception was the driver who if not the owner might be an employee or a family member. The Columbia Plan assumed that where another automobile was involved, the driver of the first automobile would be covered by the liability of the owner of the second. Where no additional automobile was involved, *e.g.*, if the automobile strikes a stationary object, the driver would look to self insurance or workers' compensation (for employee drivers). *See* Columbia Report, *supra* note 10, at 246, n.3.

20. *See* Columbia Report, *supra* note 10, at 146.

Supporters of the Columbia Plan viewed this as a natural extension of the worker's compensation principal.[21] Like industrial accidents, automobile accidents were the product of machine dynamics not readily addressed by legal concepts such as fault. Likewise their consequences, deaths and horrible injuries, outstripped by a great degree the level of human folly that triggered those consequences. In short, both presented compelling cases for reducing the focus on individual blame in favor of the rational management of collective risks. Opponents of the Columbia Plan rejected the analogy. If worker's compensation made sense (which not all critics were ready to concede) it was because the range of injuries and the parties involved in work accidents were structured by the nexus of power relationships. In contrast, automobile accidents cast a much broader net over a much more diverse set of human interactions. Those injured often had no prior relationship with their injurers and no determinate structure of enterprise or contract provided an overarching frame.

In some respects, the debate turned out to be irrelevant. With the country soon in the grips of the Great Depression there were more pressing social problems and compelling sites for grand struggles over the shape of social policy. The main features of the Columbia Plan were widely debated, but the only jurisdiction ever to adopt a major portion of it was the Canadian province of Saskatchewan in 1947.[22] Nonetheless, the Columbia Plan remains important, as a window into the rationalities of governance available in the early 20th century. The logic of worker's compensation as a general schema for governance seemed compelling to many observers in that period.[23] Although it appears today to have little influence outside the workplace setting, a richer analysis of the cultural and legal context in which the Columbia Report was deployed can ultimately help clarify the anchors of our own governmentalities.

Part I provides a more detailed analysis of the way driving and automobile accidents in particular, challenged the governability of American

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21. *See id.* at 134.

22. *See* J. Green, *The Automobile Accident Insurance Act of Saskatchewan*, 31 J. COMP. LEG. & INT. L. 39 (1949). The plan was also discussed by legislative committees in New York, Wisconsin, Virginia and Connecticut. *See* Note, *Automobile Accident Compensation Insurance Reconsidered*, 1953 ILL. L. FORUM 263, 269 n.37 (1953).

23. *See* Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1913).

institutions. Part II looks at the three major models of governance that informed debate, legal regulation, civil liability, and insurance. Part III focuses on the Columbia Report and the debate it engendered.

## I. THE AUTOMOBILE AS A CHALLENGE TO GOVERNANCE IN THE 1920S AND 1930S

The significance of the Columbia Plan is clearer when it is seen in its social context. Research began in 1929 and the final report was issued in 1932. Viewed with hindsight we can see this as a much more significant period in the social history of the automobile than its participants probably did. In 1919 the automobile was still largely seen as a luxury item. By 1929, however, it was visibly transforming American life.[24] The scale of carnage of the automobile accident in the 1920s, by whatever measure, would never be matched. The Great Depression which was reaching its deepest levels by the time the Columbia Plan was published in 1932, would cripple the expansion of automobile ownership. World War II would hold it back for another five years. Thus, the Columbia Report arrived at the beginning of what would be a generation long plateau in the growth of driving in the United States.

When prosperity and civilian production revived in the late 1940s, the automobile burst forth as unchallengeable, remaking the landscape and economic structure of the United States. While automobile accidents and the problem of compensation remained, they had less urgency. Further efforts were made to reform liability, but the issue was no longer a singular pivot for the larger problem of governing the automobile or even automobile accidents. Increasingly it would share that with issues like highway construction, air pollution, passenger safety and fuel efficiency.

### *A. The Growth of Automobile Ownership and Use*

Table 1 provides some measures of the remarkable growth of the automobile and the practices of motoring in the United States. Seen from the present, the history of motoring has two phases. The first phase lasts from the initial marketing of automobiles at the turn of the century until the Great Depression. The second begins at the end of World War II and continues at

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24. *See* MORTON KELLER, REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933 73 (Harvard University Press 1990).

least through the early 1970s. Automobile manufacturers produced around 4,000 cars in 1900, while by 1910 they were producing nearly 200,000 units a year.[25] The 1920s were the peak of the first phase. By the end of the 1920s more than half of American families owned a automobile.[26] This rapid growth completely outpaced the growth of legal and highway infrastructures.

Table 1: New Automobile Sales and Total Registrations (in thousands)

| YEAR | SALES (thousands) | REGISTRATIONS (thousands) |
|---|---|---|
| 1910 | 181.0 | 458.3 |
| 1915 | 895.9 | 2,332.4 |
| 1920 | 1,905.5 | 8,131.5 |
| 1925 | 3,735.1 | 17,481.0 |
| 1930 | 2,787.4 | 23,034.7 |
| 1935 | 3,273.8 | 22,567.8 |
| 1940 | 3,717.3 | 27,465.8 |
| 1945 | 69.5 | 25,796.9 |
| 1950 | 6,665.8 | 40,339.0 |
| 1955 | 7,920.1 | 52,144.7 |
| 1960 | 6,674.7 | 61,682.3 |
| 1965 | 9,305.5 | 75,257.5 |
| 1970 | 6,546.8 | 89,279.8 |

*Source: U.S. Department of Commerce, Historical Statistics of the United States, Colonial Times to 1970, Part 2 at 13 (Washington, D.C. U.S. Bureau of Census).*

25. *See* CHRISTOPHER FINCH, HIGHWAYS TO HEAVEN: THE AUTO BIOGRAPHY OF AMERICA 64 (1992).

26. *See* JAMES FLINK, THE AUTOMOBILE AGE 132 (1988).

Table 1 also shows that the market stalled after the start of the Depression and did not grow vigorously again until after World War II. This is not surprising given the ferocity of the economic crisis, particularly in its early years. More remarkable, in a way, is that new automobile sales fell by only a third, and recovered all their lost ground by 1940, while registrations declined only slightly. Apparently many of the millions who had entered the automobile age in the 1920s now found it impossible to go back.[27] The slack economy made any improvement in the affordability of the automobile highly unlikely and thus the expansion of the motoring public difficult.

After the war, growth in both income and public investment in infrastructure fueled a rapid rise in the size of the automobile market which continued through the early 1970s. Having hovered just under 30 million from the mid-1930s until the mid-1950s, registrations then climbed steadily to 90 million by the 1970.

### *B. Motoring and the Institutions Governing Everyday Life*

During the 1920s the tremendous growth in the automobile market made it a dominant force shaping the economy.[28] Indeed, the automobile industry's methods of production placed a new stamp on a whole phase of industrial development.[29] The industry also encouraged the development of new distribution networks, the dealerships, and new financing techniques, like the installment loan, that reshaped the world of consumption.[30]

The urban landscape was also being transformed. By the early 1920s, the fastest growing portion of the metropolitan population was a large suburban population that had become totally dependent on the automobile for transportation.[31] By the mid-20s the diner, the motel, and the billboard were already ubiquitous. The first limited access highway designed with the automobile in mind, the Bronx Parkway, was fully open.[32] In Los Angeles

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27. *See* James Interrante, *The Road to Autopia: The Automobile and the Spatial Transformation of American Culture*, 19-20 MICH. Q. 502, 514 (1980-81).

28. *See* ANTHONY CAMPAGNA, AN ECONOMIC HISTORY OF THE UNITED STATES 31 (1987).

29. *See* Flink, *supra* note 26, at 40.

30. *See* Flink, *supra* note 26, at 190.

31. *See* Interrante, *supra* note 27, at 506.

32. *See* Finch, *supra* note 25, at 77. The Willow-Run freeway near Detroit, thoroughly contemporary in sensibilities, and lacking the stylized decorativeness of the Bronx Parkway, was done in 1938. *See id.* at 156. Finch points out that these projects were initiated before

and other cities the new real estate development of linear shopping centers along a broad automobile road was already becoming a significant site for retailing.

These transformations have earned the automobile considerable attention on the part of historians of the U.S. economy and society. Less attention has been paid by those interested in law and governance. As a corollary to its tremendous growth and the institutional accommodations made to produce and consume it, the automobile placed tremendous pressures on strategies of governance that had only themselves been rather recently established against hard fought resistance in the factory and public square. The mobility and consequent freedom engendered by the automobile introduced into the very midst of social life a new form of social space wholly unmapped by the prevailing forms of disciplinary management and largely ungraspable by the strategies of control developed to administer persons in fixed locations. This can be seen in the disciplinary strategies of governance within families, the workplace, the class system, and the criminal law.

1. The Family

The significance of the automobile as a moveable but private space perfect for unregulated intimacies was appreciated from the beginning. One of the most striking contemporary observations of the cultural effects of motorization was the sociological classic by Robert and Helen Lynd, *Middletown* first published in 1929, and based on a survey of social life in Muncie Indiana in the mid-1920s.[33] The authors found that automobile was transforming family life by creating new opportunities for family members to slip out of constraints of the household. At the same time, the automobile began to shape a whole new space for the family as a unit, separated from the informal regulation of neighborhood institutions and merchants. The first stage of this was the automobile itself as a site for "Sunday" drives in the country and visits to distant commercial establishments.

> When auto riding tends to replace the traditional call in the family parlor as a way of approach between the unmarried, "the home is endangered," and all-day Sunday motor trips

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Mussolini's *autostrada* and Hitler's *autobahn*. *See id.* at 77.

33. *See* ROBERT S. LYND & HELEN M. LYND, MIDDLETOWN (Harcourt Brace, 1929).

> are a "threat against the church"; it is in the activities concerned with the home and religion that the automobile occasions the greatest emotional conflicts.[34]

If the automobile undermined the regime of domestic surveillance, it also threatened that great of middle class construction, the internalized will to discipline. The Lynds' worried that the automobile was undermining the mechanisms of thrift and self-restraint in Muncie's growing middle and working classes.

> The automobile has apparently unsettled the habit of careful saving for some families. "Part of the money we spend on the car would go to the bank I suppose," said more than one working class wife. A business man explained his recent invitation of social oblivion by selling his car by saying: "My car, counting depreciation and everything, was costing might [sic] nearly $100.00 a month, and my wife and I sat down together the other night and just figured that we're getting along, and if we're to have anything later on, we've just got to begin to save." The "moral" aspect of the competition between the automobile and the certain accepted expenditures appears in the remark of another business man, "An automobile is a luxury, and no one has a right to one if he can't afford it. I haven't the slightest sympathy for any one who is out of work if he owns a car."[35]

The second stage of the automobile's reconfiguration of domestic governance, which began remarkably quickly, was the isolation of the family in new single family suburban housing. As early as 1922 a noticeable class of residence had grown up around the large cities which was totally dependent on the automobile for access to work and shopping.[36] It would take the rapid suburbanization of the post-World War II years to manifest the consequences for political and cultural life of this mass privatization of family life. The difficulties of sustaining household social control is evident

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34. *Id.* at 254.
35. *Id.* at 255.
36. *See* Interrante, *supra* note 31, at 506.

in the now nearly half century long crisis of "youth culture" in the United States.

2. The Business Firm

The 19th century witnessed revolutionary changes in workplace control. By the beginning of the 20th century management in the most advanced corporations was in a position to govern work comprehensively and to do so with organizational rather than physical power.[37] These technologies of control were largely rooted in fixed locations. The spread of the automobile and its collateral economic effects displaced workers from these grids of control and sent them careening around the erratic road system of the metropolis.

As soon as workers left the warehouse or factory, they left a grid of spatially fixed systems of management that functioned through surveillance. Once in the automobile or truck making a delivery the employee was free not only to day dream but to interact with others, take care of personal needs, and appropriate company time and goods for personal use. Indeed, a whole legal problem grew up in the 1920s concerning the vicarious liability of employers for automobile and truck accidents by their employees while on the job but off the immediate business of the employer. Courts distinguished between mere "detours," e.g., a truck driver stopping for lunch in a restaurant a block or two from their route, and "frolics," when an employee seemed to have more substantially abandoned the employer's business, e.g., when truck driver goes many miles off course to deliver some pilfered coal to his sisters.[38] Even for those whose employment kept them largely inside a fixed workplace, the automobile in the parking lot remains into our own time a dangerously autonomous zone in which substance abuse may take place and stolen or contraband material secreted.

3. The Class System

The system of social class has always provided its own background social control. The markers of class, money, dress, language, provide real and

37. *See generally* ALFRED CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION (Harvard University Press 1975); and RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORK PLACE IN THE 20TH CENTURY (Basic 1979).

38. *See* Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444 (1923).

imagined opportunities for surveillance and exclusion. The popularization of the automobile introduced new ways of demonstrating class status, but also the opportunity to slip across boundaries. In his famous novel, *The Great Gatsby* (1925), F. Scott Fitzgerald captured this blurring of American class lines around the automobile.[39] Nick, Fitzgerald's protagonist, first glimpses the Great Gatsby's class status through the "Rolls Royce"[40] that ferrys his guests around. Nick takes Gatsby and his companions are society's elites, a circle widened to include those "selling something: bonds or insurance or automobiles."[41] But the meaning of class markers becomes progressively destabilized throughout the novel. "Who is he?" Nick asks his friend Jordan Baker after his first surprise encounter with Gatsby.[42]

> "He's just a man named Gatsby."
>
> "Where is he from, I mean? And what does he do?"
>
> "Now *you*'re started on the subject," she answered with a wan smile. "Well, - he told me once he was an Oxford man."
>
> A dim background started to take shape behind him but at her next remark it faded away.
>
> "However, I don't believe it."
>
> "Why not?"
>
> "I don't know," she insisted. "I just don't think he went there."
>
> Something in her tone reminded me of other girls "I think he killed a man," and had the effect of stimulating my curiosity. I would have accepted without question the information that Gatsby sprang from the swamps of Louisiana or from the lower East Side of New York. That was comprehensible. But young men didn't – at least in my provincial inexperience I believed they didn't – drift cooly

39. F. SCOTT FITZGERALD, THE GREAT GATSBY 70 (1925). The Great Gatsby may be among the first novels in which much of the crucial action takes place in and around automobiles.

40. *See id.* at 43.

41. *Id.* at 46.

42. *Id.* at 53.

> out of nowhere and buy a palace on Long Island Sound.[43]

The automobile, with its ability to either carry one across class boundaries becomes a general symbol of this, especially when, late in the book, it becomes an instrument of carnage. Nick, a young stock broker on a limited income, buys a used Dodge[44] which increases his ability to negotiate the sometimes conflicting economic and social demands as he seeks to move up the class hierarchy from his small town middle class roots. We also visit the garage of the cuckolded mechanic and gas station owner George B. Wilson in which is set "the dust-covered wreck of a Ford which crouched in a dim corner"[45] symbolizing the accessibility of the automobile even to those near the bottom of the class hierarchy and in which no prestige inheres.

The same year as Fitzgerald's novel was published, Herbert Ladd Towle, writing in the *Atlantic Monthly* inveighed against the crisis created by inexpensive automobiles whose massive destructive power was untempered by the maturity or wealth of their owners.

> A dozen years ago, when motorists were few, ownership implied both skill and earning power, usually with the responsibility that those qualities bring. It was not hard, then, to avoid one's neighbors on the road. To-day cars are priced anywhere to 50 per cent below 1913 figures. The skill they require is negligible. Used cars are a drug on the market. Any young fellow may purchase an old high-powered car for a few weeks' earnings, and 'burn up the road'. And the traffic congestion in and near all our large cities is almost beyond belief. Instead of money and a taste for mechanics, the greatest need of the owner today is for the social feeling that accords courtesy and fair play to one's neighbors on the road. It is the lack of this quality, among a minority of the newer class of motorists, that accounts for most of the avoidable accidents.[46]

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43. *Id.* at 53-54.

44. *See id.* at 8.

45. *Id.* at 36.

46. Herbert Ladd Towle, *Motor Menace*, 137 THE ATLANTIC MONTHLY 98, 98-99, July-Dec. 1925.

This threat against social order was far from mainly mechanical. It was who could drive that posed as much of a problem as the sheer number of automobiles on the road (although the two problems ran together).

> [T]he solid business or professional man is seldom a trouble-maker. As his time is valuable, he is likely to drive fast when the way is open; but his sense of responsibility keeps him from knowingly taking chances. As he has property, he can be sued; and even with liability insurance he hates the thought of appearing in court. As for jail or suspension, he tries to avoid giving even a pretext for such penalties. The new-rich owner, made arrogant by success, and the spoiled sons and daughters of rich parents, are another matter. They have property, but without responsibility... Instead of money and a taste for mechanics, the greatest need of the owner today is for the social feeling that accords courtesy and fair play to one's neighbors on the road. It is the lack of this quality, among a minority of the newer class of motorists, that accounts for most of the avoidable accidents.[47]

> It is the happy-go-lucky chap with no property except his car – itself perhaps not yet paid for – who is our main problem. His car means a lot to him and his wife and children, – fresh air and sunshine and green fields, – most of the things that make life worth living. Nobody has ever taught him to feel very much obligation toward strangers. What wonder that he goes out for a good time, and lets the other fellow shift for himself![48]

The automobile then, became a central locus of anxiety about the whole rapidly shifting surface of the class structure going on in the 1920s caused by real economic mobility and the opportunities the automobile offered to make it or fake it.

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47. *Id.* at 98-99.
48. *Id.* at 101.

4. Criminal Law

Perhaps the most obvious threat to institutional order for observers in the 1920s was the association of the automobile with crime. The automobile generated new crimes simply by creating a new class of valuable assets with unprecedented access for thieves, i.e., cars themselves. The automobile also greatly enhanced the opportunity for criminals of all sorts to evade capture. The "get away car" did not take long to be discovered. Until police themselves became motorized, an automobile virtually assured escape. The automobile also made it possible for criminals to occupy new spaces on the margins of cities where police jurisdiction was questionable or non-existent. The roadhouse became a perfect site for criminals to gather and plan crimes or regroup afterwards. By the 1930s the combination of robberies with automobile touring had fashioned a new kind of national criminal like John Dillinger and Bonnie and Clyde. Worst yet, the automobile as a vector of violent, albeit accidental, death, invited a kind of dispersal of criminality that was itself destabilizing of criminal stigma. Writer Edward Weeks wondered if every family in the 1920s was not a potential refuge for criminals.

> My brother and I have each been arrested once. My father has been arrested twice – for speeding. Now this, I submit, is not an extraordinary record for an American family whose four older members have been driving steadily over a period of eight years. We were responsible for no injuries; we received the state's reprimand, paid our fines, and there the matter dropped. But I am not sure that the matter would have dropped so quickly if we had received the same number of convictions, say, for bootlegging or petty larceny.[49]

*C. The Carnage*

> *Formerly, when horse drawn vehicles, slow in movement and few in number, were the principal means of transportation, there was comparatively little danger in the use of the streets. But the increasing use and speed of automobiles*

49. Edward Weeks, *A Criminal in Every Family*, 140 ATLANTIC MONTHLY 445, 448 (1927).

*have made our streets more dangerous than our factories and are causing a greater loss of life and a greater number of casualties or losses than in the World War.*[50]
*Judge Robert Marx (1925)*

Of all of the ways in which the automobile destabilized the governance of the American people, none was more profound than the automobile accident. The rapid growth of motoring coupled with unimproved roads and a population with no historical experience driving such machines, combined to generate a hellish carnage that is difficult to appreciate in our era of air bags, engineered highways, and automobile conscious people. The Columbia Committee reported that the automobile fatality rate in 1931 had increased 500 percent since 1913.[51] The annual death toll reached 33,000 in 1930. The Twenties would see nearly a quarter of a million Americans, the majority pedestrians, killed in automobile accidents. It was as if the explosive force and potential for violence of the great industrial manufactories had exploded out touching thousands whose class position or status gave them little real protection.

Table 2 provides some measure of the relative significance of automobile accidents at the time of the Columbia report. Factory accidents had, to be sure, often provided graphic violence, but they were contained in the walls of the factory. The railroads, particularly at grade crossings, also took lives. But none of these could compare with the visibility and the numbers of humans injured by automobiles that brought the mutilations and corpses right into the center of American public life.

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50. Robert S. Marx, *Compulsory Compensation Insurance*, 25 COLUM. L. REV. 164, 167 (1925).

51. *See* Columbia Report, *supra* note 10, at 17.

| Table 2: Causes of Accidental Death 1929 (percentage of total) | |
|---|---|
| Motor Vehicles | 29 |
| Falls | 18 |
| Drowning | 8 |
| Railroad | 7 |
| Burns | 6 |
| All Others | 32 |

Source: Bureau of the Census, Division of Vital Statistics, Number of Deaths and Death Rates per 100,000 Estimated Population, 1929.[52]

The experience of carnage is more difficult to gauge then the scale and growth of automobile related deaths in the 20s and 30s. Relative to population, automobile accidents rose steadily from under 5 per 100,000 in 1910 to 27.2 per 100,000 in 1931, the year before the Columbia Plan was published.[53] The Depression suppressed driving and therefore accidents, but the number of accidents per 100,000 nevertheless rose by the mid 1930s to 30.8. Fatalities fell during World War II with the removal of large numbers of young males from civilian life. While the growth of accidents resumed after the war, it never again achieved the same levels witnessed during the 1930s.

But it may be accidents by population understates their relevance as a social problem. To the population of drivers, these events were far from rare. Consider that the actual number of automobiles in use the 1920s and 1930s was only a small fraction of the number in recent decades and yet the fatality figures are fairly close. An author in *The Atlantic Monthly* estimated that in three years during the mid 1920s one in every thousand automobiles in the country had been involved in a fatal accident and nearly one in twenty had

52. Columbia Report, *supra* note 10, at 24.

53. *See* GARY W. SHANNON & GERALD F. PYLE, DISEASE AND MEDICAL CARE IN THE UNITED STATES: A MEDICAL ATLAS OF THE TWENTIETH CENTURY 23 (1993).

been involved in an injury causing accident.[54] Thus among the automobile owning population, the experience of causing grave violence to other people, who were often an exposed pedestrian rather than the fellow motorist, was far from rare. As a function of the number of automobiles on the road, fatalities fluctuated wildly in the 1920s, first dropping as the rapid surge of sales widened the base, but then going up in the mid-1920s as many of these new drivers began to accumulate victims.[55] It was at this moment, significantly, that the Columbia Committee was first planned.

From a different perspective altogether, that of America's practical commitment to the automobile, the lethality of the automobile had already peaked and begun a downward trend in this period. As a function of miles driven, the automotive fatality rate was already in an impressive descent that has lasted until the present. When the post World War II automobile boom began, the death rate had fallen to only a third of its 1920s peak. At present, it is only a tenth of what it was in 1923.[56] Americans, both drivers and those exposed to them, have adjusted to motor vehicles. Some of this improvement probably came from greater skills in managing both cars and pedestrians around cars. Another part of the story is the gradual improvement of road conditions during this period.

The most difficult conclusion one can draw from statistical rates is the social experience of the automobile accident as part of one's lived world. The mutilation of human bodies by machines creates effects more disturbing then the numbers alone. The linking of technology and all its promise of productivity and order with the grotesque destruction of human life has produced a lasting and powerful counter-symbol to the progressive self-image of modernity. As contemporary novels and movies repeatedly demonstrate, the carnage of the automobile accident remains a subject of both horror and fascination.[57] But for urban populations in the 1920s and 1930s, these experiences were not yet iconographic. Instead, they were fresh and raw.

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54. *See* Weeks, *supra* note 49.

55. A possible cause of this upsurge was the increasing speed of automobiles in the 1920s. While cars going fifteen or twenty miles an hour were already lethal for pedestrians they struck, the new range of fifty, sixty, or even eighty miles per hour exposed the occupants to the threat of death.

56. *See* Shannon & Pyle, *supra* note 53.

57. *See, e.g.*, J.G. BALLARD, CRASH (Henry Holt 1973), produced as a major motion picture in 1997.

The possibility of coming around the corner to see a fellow human being in some state of shock or worst after being struck by an automobile was very real. This was by no means simply the fault of automobile drivers. Pedestrians were reluctant to give up their old prerogatives of walking when and where convenient, and were often reckless in making their way across thoroughfares crowded with all manner of vehicle both motorized and hitched to animals.[58]

The automobile was surely not the only source of carnage in the imagination of Americans during the second and third decade of the 20th century. Two other competitors were the industrial accident and war, especially the great slaughter of World War I. Clearly the spectacle of bodies mangled by automobiles was far more widely available to the ordinary citizen then that of war or industrial accidents. There was no television to bring home the full measure of gore from World War I. Work accidents happened behind the doors of the factory or the boundaries of the rail yard. No doubt word spread in working class neighborhoods, but direct observation was likely limited to fellow workers. The automobile reproduced the industrial accident but on the front porch of American urban life.

The images of automotive carnage and its random tragedies also merged with the horrors of the World War I battlefield in which unprecedented numbers of young men had been cut down by ruthlessly efficient new armaments.[59] Indeed, the war was from the start the first to be bound up with the figure of the automobile. Archduke Ferdinand was assassinated in his open touring automobile while his motorcade wound through Vienna.[60] For Europeans the automobile turned the war into a commuter affair with reserves being driven to the front in Taxi-cabs to cut off the nearly fatal German

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58. *See generally* A TRIP DOWN MARKET STREET (1905), an early life in action film shot from a cable car going down Market street in San Francisco in 1905. For more on the film as evidence about street conduct, see Thomas Russell, Blood on the Tracks: Turn of the Century Streetcar Injuries, Claims, and Litigation in Alameda County, California (unpublished manuscript on file with the author), at n.150 and accompanying text.

59. *See generally* PAUL FUSSELL, THE GREAT WAR AND MODERN MEMORY (Oxford University Press 1975).

60. This political gesture would be repeated a number of times during the remainder of the century, including the 1933 assassination attempt on Franklin Roosevelt (which resulted in the death of Chicago Mayor Anton Cermack), and the 1963 assassination of John F. Kennedy while his motorcade slowly moved through downtown Dallas.

advance of 1914.[61]

The war linked the automobile and violence inextricably. Throughout the 20s and 30s the automobile death toll was inevitably compared with that of the World War I.

> War was never like this. You can add together the American death toll of every war in which this nation has engaged, including the Civil War, and the automobile in ten years is still the greatest man-made killer we have ever known.[62]

An early reflection of the intertwining of war and automobile accident themes comes in F. Scott Fitzgerald's 1925 novel *The Great Gatsby* (1925). Gatsby is himself someone whose mysterious identity traces back to his war service. He tells Nick, his unassuming young neighbor:

> [T]hen came the war, old sport. It was a great relief and I tried very hard to die but I seemed to bear an enchanted life. I accepted a commission as first lieutenant when it began. In the Argonne Forest I took two machine gun-detachments so far forward that there was a half-mile on either side of us where the infantry couldn't advance. We stayed there two days and two nights, a hundred and thirty men with sixteen Lewis guns, and when the infantry came up at last they found the insignia of three German divisions among the piles of dead. I was promoted to be a major and every Allied government gave me a decoration – even Montenegro, little Montenegro down on the Adriatic Sea.[63]

The emotional climax of the novel places Gatsby in a much different kind of killing machine. Gatsby, as close as he will ever come to having his long lost love Daisy, is riding as a passenger with her at the wheel, in a car belonging to Tom, Daisy's husband. They are returning to Long Island from the dramatic confrontation at the Plaza hotel with Daisy's husband Tom. As the automobile passes a service station a woman suddenly rushes into the road

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61. *See* Finch, *supra* note 24, at 100.

62. Russell Holt Peters, *Death on the Highway*, 93 FORUM 179, 180 (1935).

63. *See* Fitzgerald, *supra* note 39, at 70.

and is struck by the automobile. The victim, Myrtle, unknown to either Daisy or Gatsby, is Tom's mistress. Daisy and Gatsby had been drinking heavily at the Plaza and were engaged in the most serious possible discussion involving both of their lives. Myrtle saw the automobile and assumed that Tom was driving by. Having just had a big fight with her own husband, Myrtle ran toward the automobile and into a fatal embrace with the machine itself.

> The "death car," as the newspapers called it, didn't stop; it came out of the gathering darkness, wavered tragically for a moment and then disappeared around the next bend. Michaelis wasn't even sure of its color – he told the first policeman that it was light green. The other car, the one going toward New York, came to a rest a hundred yards beyond, and its driver hurried back to where Myrtle Wilson, her life violently extinguished, knelt in the road and mingled her thick, dark blood with the dust.
>
> Michaelis and this man reached her first but when they had torn open her shirtwaist still damp with perspiration they saw that her left breast was swinging loose like a flap and there was no need to listen for the heart beneath. The mouth was wide open and ripped at the corners as though she had choked a little in giving up the tremendous vitality she had stored for so long.[64]

The second victim of the accident, of course, turns out to be Gatsby himself, who is murdered by Myrtle's husband George Wilson, who has been wrongly told that Gatsby was at the wheel.

These images of horror and carnage caused by automobile accidents were even more prominent in newspapers and mass-market magazines. The latter published numerous articles in the late 20s and through the 30s with titles like: "A Criminal in Every Family,"[65] "Death on the Highway,"[66] "The Motor Menace"[67] and "The Nut that Holds the Wheel."[68] Perhaps the culmination

64. *Id.* at 144-45.
65. Weeks, *supra* note 49.
66. Peters, *supra* note 62.
67. Towle, *supra* note 46.
68. Curtis Billings, *The Nut That Holds The Wheel*, 150 ATLANTIC MONTHLY 439 (1930).

of this genre was J.C. Furnas' article, "And Sudden Death" first printed in *The Reader's Digest* in 1935 and reprinted numerous times.[69] Furnas' article was a deliberate effort to bring the horrible facts of an accident into the consciousness of the driver. His prose was undoubtedly shared with generations of drivers' education students. At the outset he imagined putting the dead to work teaching the living:

> If ghosts could be put to a useful purpose, every bad stretch of road in the United States would greet the oncoming motorist with groans and screams and the educational spectacle of ten or a dozen corpses, all sizes, sexes and ages, lying horribly still on the bloody grass.[70]

In light of that spectral haunting, Furnas' article attempted to create memorable images of horror. Much of the article, like the genre generally, expressed a fascination with the inevitable physics of accidents.

> Collision, turnover or sideswipe, each type of accident produces either a shattering dead stop or a crashing change of direction – and, since the occupant – meaning you – continues in the old direction at the original speed, every surface and angle of the car's interior immediately becomes a battering, tearing projectile, aimed squarely at you – inescapable. There is no bracing yourself against these imperative laws of momentum.[71]

The article combined its description of carnage with reminders that these events are repeated thousands of times in each year. Thus the automobile, ostensibly a means of establishing individuality, offered a similar end to many.

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69. J.C. Furnas, *And Sudden Death*, READER'S DIG., Aug. 1935, at 21. Magazine articles on automobile accidents became increasingly popular and increasingly sensationalist in the late 1920s and 1930s. Furnas' six page article generated a huge response and helped establish a style of reporting on accidents that came to quickly dominate ordinary newspaper reporting as well. *See* Nash, *supra* note 9, at 37.

70. Furnas, *supra* note 69, at 22.

71. *Id.* at 22-23.

> To be remembered individually by doctors and policemen, you have to do something as grotesque as the lady who burst the windshield with her head, splashing splinters all over the other occupants of the car, and then, as the car rolled over, rolled with it down the edge of the windshield frame and cut her throat from ear to ear.[72]

The Reader's Digest proclaimed itself "bombarded" by responses to Furnas' article. The magazine published many of them including the almost poetic little reminiscences of a small town embalmer located near an interstate highway.

> Just three happy boys on their way across the country to Detroit. Constant driving, day and night, with a change at the wheel every four hours, but endurance lost and we pick them up on the side of the road where they have crashed a telephone pole and overturned. Not an easy thing to telephone the poor father out on the Coast and inform him that the body of his boy lies in our mortuary. A wig that matches his hair, plastic art and dermasurgery restore the body to almost lifelike appearance, but we cannot bring back that youthful smile or happy laugh which he carried when he left home. These are only memories to his loved ones.[73]

*D. A New Locus for Governance*

The automobile literally drove holes through the webs of control imposed by institutions on the behavior and beliefs of individuals. The carnage the automobile created of twisted bodies and metal defied the picture of orderliness emerging from a technological society. But at the very same time, these destabilizing events were provocations to rethink strategies of governance at every level, including some never before made explicit targets of governance. Likewise accidents constituted a new set of subjects and objects through which that governance could operate. The growing sense that the automobile accident represented a dark side to modernity's embrace of

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72. *Id.* at 25.

73. A. J. Bracken, *The Aftermath of Sudden Death*, 27 READER'S DIG., 1935, at 53.

technology carried with it a demand for a new rationality of governance.

We do not often focus on the 1930s as a period of governmental invention at this level. First, because the Great Depression led to a revolution of governmental strategy at the highest levels of national government. Second, and partially as a result of the first, post-New Deal students of government have been less interested in governance at the state and local level, and through private actors.[74] These historic developments, however, did not stop contemporary observers from seeing the automobile accident as a critical issue of governance. Indeed, the capacity of the automobile to shift suddenly from facilitator of individual choice and economic opportunity to a nightmarish death machine made it a palpable symbol for the crisis of the Depression itself.[75]

Ironically, while we remember the New Deal for establishing important collectivist features to American government, such as Social Security, national economic regulation, and government borrowing as a counter-cyclical measure, the automotive revolution in governance that began to take shape in the same decade placed the individual at its center. The automobile had made it possible for the ordinary individual to assume direct control of powerful and lethal machinery of the sort previously limited to businesses and governments. Its financing gave the same individual a direct stake and role in the economy. How could this greatly expanded self be managed safely?

Fitzgerald, offered one picture of this problem. In *The Great Gatsby*, driving, with its potential for utter destruction, is a master metaphor for love and ultimately life itself. In an evocative passage the narrator Nick is complaining about the careless driving of his companion Jordan Baker. At one point she passes so close to "some workmen that our fender flicked a button on one man's coat."

> "You're a rotten driver," I protested. "Either you ought to be more careful or you oughtn't to drive at all."
>
> "I am careful."
>
> "No, you're not."
>
> "Well, other people are," she said lightly.
>
> "What's that got to do with it?"
>
> "They'll keep out of my way," she insisted. "It takes two

74. *See* KELLER, *supra* note 24.

75. *See* NASH, *supra* note 9, at 37.

> to make an accident."
>
> "Suppose you met somebody just as careless as yourself."
>
> "I hope I never will," she answered. "I hate careless people. That's why I like you."
>
> Her grey sun-strained eyes stared straight ahead, but she had deliberately shifted our relations, and for a moment I thought I loved her. But I am slow thinking and full of interior rules that act as brakes on my desires, and I knew that first I had to get myself definitely out of that tangle back home.[76]

But not everybody in the novel seemed to have maintained the strong internal rules and brakes of Nick's solid Midwestern upbringing. How to rebuild such rules is a question that Fitzgerald understandably did not try to answer.

## II. STRATEGIES FOR RESPONDING TO THE UNGOVERNABILITY OF THE AUTOMOBILE

The fact that millions of ordinary Americans now controlled machines capable of incredible destruction meant that the behavior of individuals scattered over a vast range of landscapes and activities became a potential subject of regulation. The increasing carnage caused by the automobile produced mounting pressure during the 1920s to achieve better regulation over driving, and government at all levels responded with a variety of rules and measures. But in a deeper sense the destabilization worked by the automobile called into question the very nature of governance at all levels. Russell Holt Peters, writing in *Forum* magazine, saw the weakness of controls over reckless driving as rooted in a corrupted judiciary:

> Your traffic laws may be of the best, your streets may be adequately lighted and marked, your officers may be alert. But they aren't worth a tinker's dam if your judges don't toe the mark. Show me a court where the fixer can work, where "a friend who knows the judge" can influence decisions, and

76. FITZGERALD, *supra* note 39, at 63-64.

> I can show you a city of abnormal traffic accidents and deaths.[77]

*The Nation*, in a 1922 editorial titled "The Automobile Death Toll," began by asking "how shall we control the modern Juggernaut?"[78] The editorial cited a recent study by the New York legislature decrying the absence of effective regulations over who could operate motor vehicles.

> Outside of the city of New York there is "practically no limitation as to who may drive a motor vehicle" and the committee found "the child, the aged person, the lame, the blind, and the deaf dealing out death to those who use the roads."[79]

The same editorial, however, recognized that even great improvements in controls over who could drive and stiff punishments for violators would leave an unacceptable amount of hazard involved in driving.

> There will always be some fatalities, all the more so because we develop unsuspected and often undiscoverable defects such as the sudden collapse of the steering-gear or the breaking of an axle which outwardly shows no flaw. Again the undermining of a road, not visible on the surface, has sent many a motorist to his grave.[80]

The editors warned against over-reliance on the criminal law. Far too many deaths were blamed by coroners on the recklessness of pedestrians or on minor dereliction of care. New strategies had to be developed. *The Nation* looked to "the State and public opinion" to evolve new ways of controlling "so deadly a contrivance."[81]

The most basic efforts at regulating traffic did not begin until the Teens. Michigan introduced the first painted dividing line on a road in 1911, and

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77. Peters, *supra* note 62, at 179.
78. *Editorial: The Automobile's Death Toll*, 114 THE NATION, Mar. 1922, at 279.
79. *Id.* at 279.
80. *Id.* at 280.
81. *Id.*

Cleveland installed the nation's first electric traffic signal in 1914.[82] Although New York introduced the first traffic code in 1903, large gaps remained into the 1930s especially in the absence of interstate standardization. By 1927, 42 states had some statutory regulations over motor vehicles, typically supervised by pre-existing state structures intended to regulate railroads or public utilities.[83] At the time of the Columbia Report only 21 states and the District of Columbia required drivers' licenses (and four of them required no test of physical or mental ability).[84]

Seth Humphrey contrasted the absence of any real regulation of who can drive an automobile with the web of rules governing who could drive a trolley car.

> The trolley car is as easily and as quickly controlled as any good automobile; it is run usually at lower speeds, and its clearly defined rails make it a safer driving proposition. Yet because nobody wants to drive a trolley car except for pay, careful selection of its operators is assumed as a public necessity. None but mature men of proved judgment and caution are permitted at the controls. How scared we should be at seeing chatty high-school girls, or Antonio the fruit peddler, running a trolley car up the street as a holiday diversion! And nobody thinks of taking in the motorman as one of a gay party aboard; we are not allowed to speak to the motorman, much less pet him while he is running the car.
>
> Mass Psychology born of the universal will to drive has made impossible a proper conception of the motor car as a locomotive running intimately among frail human beings.[85]

A sign of the interest that automobile carnage was creating in the art of government was a remarkable series of articles in *Scientific American* given over to the topic of uniformity of laws. Throughout the 20s and 30s that

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82. *See* FINCH, *supra* note 25, at 112.

83. *See* KELLER, *supra* note 24, at 66.

84. *See* Columbia Report, *supra* note 10, at 19.

85. Seth Humphreys, *Our Delightful Man-Killer*, 148 ATLANTIC MONTHLY 724, 729 (1931).

magazine devoted extensive coverage to every aspect of automotive and road engineering, driver education, and general safety, but they gave early priority to the law.

> In the present article, we shall have very little to say of the physical problems of making the road safe and making them swift, beyond this merely pointing out of the existence of the problem and its place in the general scheme of automotive philosophy. For, important as it is to have the physical characteristics of the roads correct, very many of the existing roads are wrong in numerous fundamentals. Very many existing laws are wrong too; but the changing of a law is, on the whole, a somewhat simpler, and certainly a less expensive process than the changing of a much used highway. So in this initial attack upon the problem, we shall devote ourselves to the discussion of automobile laws.[86]

The staff suggested that the nature of the automobile problem called for fundamentally rethinking the relationship between law and citizen.

> Fundamental in our jurisprudence is the principle that the ignorance of the law is no excuse for its violation. The principle is a wise one, and in general it must prevail. But when the circumstances are such that your ignorance of the law may damage you, it is time for the law to ask whether some degree of responsibility for general knowledge of the statutes does not devolve upon the community as a whole. In the case of the traffic laws the answer to this is an emphatic "Yes."[87]

The staff wrote each state asking for their traffic laws and received printed pamphlets from 38 states. The very fact of a printed pamphlet suggested that states recognized the need for a form of popular legal

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86. Scientific American Staff, TRAFFIC AND THE LAW: THE UNNECESSARY DIVERGENCE BETWEEN THE MOTOR LAWS AND CUSTOMS OF THE SEVERAL STATES, 130 SCI. AM. 18 (Jan. 1924).

87. *Id.*

education with regard to traffic laws. But the existence of a pamphlet was only a start. Most lacked a logical organization or an index. Many simply listed traffic laws in the order in which they were enacted.

> Is it rational to ask the man who wants to know whether he may pass a standing street car to read through the equivalent of five to eight solid pages of the Scientific American in search of the information?[88]

Even more troubling was the lack of uniformity among the states. On the issue of licensing, for example, of 38 states reporting, fully 26 had no regulation at all at the time of the Scientific American survey. Of the rest, only six required a skills test for licensing with regular renewals. Most of the others used licensing merely as an opportunity to tax the driver. With regard to age, fully ten states had no regulation at all on the age at which a person could drive and five others permitted a child of any age to drive if an adult was in the car. Of the rest, 3 prohibited drivers younger than fourteen, four prohibited drivers younger than fifteen, nine prohibited drivers younger than sixteen, and two required drivers to be at least seventeen or eighteen.[89]

When it came to the speed at which automobiles could lawfully operate, there was similar diversity. Some states set an absolute limit. Others set a limit, and driving above it constituted prima facie evidence of recklessness. In the latter category the most frequent limit was thirty miles per hour but some states set it as low as twenty and others as high as forty, while still others simply required drivers to operate at "reasonable and proper" speeds. This situation was further complicated by the authorization in twenty-one of the states for municipalities to set their own speeds.[90]

Thus, even if traffic laws were easily accessible, the ordinary driver would have to become a veritable attorney to keep track of which rules where in effect in the jurisdiction in which she found herself.

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88. Scientific American Staff, *One Law Versus Forty-Eight: The Practicality and the Necessity of Uniform Motor-Vehicle Legislation in all the States*, 130 SCI. AM. 96 (Feb. 1924).

89. *See* Scientific American Staff, *Traffic and the Law: The Unnecessary Divergence Between the Motor Laws and Customs of the Several States*, 130 SCI. AM. 18, 18-19 (Jan. 1924).

90. *See* Scientific American Staff, *One Law Versus Forty-Eight: The Practicality and the Necessity of Uniform Motor-Vehicle Legislation in All the States*, 130 SCI. AM. 96 (Feb. 1924).

> The root of the difficulty, then lies not in the ignorance of the motorist, not in the difficult of informing him, but entirely in the fact that, within the territory covered by the average motorist, there exists a plurality of motor codes. If, confining our attention to this angle, we ask why such plurality should exist, there is but one answer - there is no reason why it should.[91]

In the last of the four articles, the *Scientific American* staff looked at the problem of gathering data on automobile accidents. Any real improvement in accident prevention would require accumulating data on the great variety of circumstances that led to accidents. The *Scientific American* staff pointed out that data collection is first a function of law.

> Hence it is obvious that we can get at the facts only under the authority of the law, through agencies established by the law, and with the distinct backing of the law.[92]

The leading state in addressing the problem of data collection was Connecticut, whose Commissioner of Motor Vehicles was an early proponent of aggressive accident prevention measures.[93] The Connecticut system required any driver involved in an accident to fill out a form on which a large number of circumstances had been coded. The listing of the relevant items provides a kind of portrait of automobile carnage as it played out in the 1920s and the way in which it was objectifying the world around it in a new light.

During the 1920s three important centers of regulatory activity emerged around the problem of the automobile in general and the automobile accident in particular. First, laws governing the operation of vehicles, especially speeding laws, aimed at influencing the judgment of the driver through the disciplines of law enforcement, punishment, and public education. Second, civil liability, the general rules of care taking in public life, promised to discipline the same subject. Here, the law was outstripped by the epistemological and economic complexity of the automobile accident.

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91. *Id.* at 141.

92. Scientific American Staff, *When, Where, Why? How Connecticut Gathers the Data of Her Automobile Accidents and the Use She Makes Thereof*, 130 SCI. AM. 312 (Apr. 1924).

93. *See id.*

Obtaining agreement on what constituted careless behavior, proving what had happened, and finding a source of capital for compensation stood as profound problems for making civil liability an effective way to govern driving. Third, insurance offered the possibility of providing compensation for victims while maintaining a subtle force for care taking that lacked the vulnerabilities and liabilities of coercive policing. While only one state made liability insurance a requirement for automobile owners, and although the provision of insurance remained a wholly private enterprise, insurance was intertwined with legal measures of governance. The owner's liability policy was typically the only available source of assets to pay any judgment, and thus the real cause of interest in litigation. These legal measures competed to some degree with a scientific discourse on accidents as a consequence of dynamics in a system of traffic which included not only cars, drivers, and pedestrians, but roads, weather conditions, and a universe of hard objects.

### *A. Speed Laws*

New York, the very first state to introduce a law on speed in 1901, only forbade speeds greater than were "reasonable and proper."[94] Soon, however, the approach shifted to specific speed limits. The first generation of such statutes laid down an absolute limit generally applicable in the jurisdiction. This took no account of road conditions and traffic densities and was a source of considerable popular dissatisfaction.[95] Later statutes began to set speeds but only as prima facie evidence of reasonableness.[96]

By the 1920s a veritable politics of speed laws was in full swing. Pressure from drivers led many states to increase speed limits or eliminate them altogether in favor of reasonableness standards.[97] To some extent this controversy involved the practice of fining violators and the growing apparatus of police organized specifically to apprehend speeders. But its most significant context was in litigation over accidents, in which a rule on speeding might act to tip the scales to plaintiff or defendant. Popular anger over speeding restrictions led to efforts to rethink the measure of responsibility in driving. Writing in *Scientific American* in 1925, a

94. Note, *Development of Standards in Speed Legislation*, 38 HARV. L. REV. 838 (1934).
95. *See id.* at 840.
96. *See id.*
97. *See id.*

mechanical engineer proposed that speed laws be replaced altogether with rules establishing the number of feet in which an automobile had to be able to come to a complete stop. Operating the vehicle so as to bring it to a stop within such a distance would replace speed as the hallmark of reasonableness.[98]

> Now a law which employs speed as the sole criterion of careless driving and which makes no differentiation between good and bad brakes, between smooth and non-skid tires, and between dry or wet or icy pavements, evidently fails in its purposes of promoting maximum safety of driving. If the cure were impossible or were worse than the disease, we would have no criticism to make, but the remedy is so simple and can take into consideration so easily and automatically the various conditions which we have mentioned as affecting the safety of car operation, that we marvel that seventeen million cars are still governed in their activities by such antiquated laws.[99]

Peter O'Shea, writing in the *North American Review* pointed to the inevitable contradictions between speed laws and the tendency of manufacturers to build and sell cars based on their power and speed.

> Slow laws for a speedy people! Who is responsible for the paradox? How can we induce these authors of trouble to become mathematicians and write an equation between speed laws and present day people? What changes could we ask? Which are right: laws or people? We know the people must be right, for among them are many saintly characters who, in consistently obeying other laws, could not be wrong.[100]

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98. *See* H.W. Slauson, *A New Plan for Traffic Laws: It is Stops, Not Speeds, That Matter*, 131 SCI. AM. 296, 297 (1925). Several states experimented with this approach by abolishing speed limits and defining reckless driving by speed in relationship to stopping distance. *See* Bond, *supra* note 9, at 43.

99. Slauson, *supra* note 98, at 297.

100. Peter O'Shea, *Speeding Up Speed Laws*, 230 NORTH AM. REV. 561, 562 (1930).

In a tradition which continues today, automobile advertising emphasized speed capacities that inevitably exceeded legal limitations. The automobile was already linked to crime in the minds of many because of its association with criminals, but as O'Shea suggested, the marketing of automobiles invited a kind of criminality among even the most law abiding.

Not only were speed laws in tensions with the capacities of automobiles, they also varied so much from state to state that drivers crossing state lines might be challenged to comply with the law, especially in an era of limited signage along roads. O'Shea attributed the emphasis on command style speed limit laws to the political influence of lawyers who "as a class live in the past."[101] Better to spend time and treasure improving the skills of the population, who would drive fast in any event and on widening and straitening the roads to facilitate safer driving at high speeds.[102]

Others disagreed. A writer in the *Atlantic Monthly* noted that speed had a clear correlation with accidents, even if it did not in a literal sense cause them.

> While it may not be wholly accurate to say that speed causes accidents, no one can deny that high speed makes an accident a great deal more deadly.[103]

While "old fashioned" speed laws might not be the answer, the author argued, that drivers had to be taught that speed was a significant risk factor along with others.

> It will be apparent then that the positive work of correcting the present shocking conditions, which are a result of the American public's misuse of the automobile, will have to deal with five fundamentals. (1) It must be impressed upon motorists that speed is dangerous. (2) They must be made to realize what their blunders are costing in life and happiness. (3) It must be brought home to them by the proper enforcement of laws that they cannot 'get away with' criminal carelessness. (4) They must learn to maintain their

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101. *Id.*

102. *See id.* at 566.

103. Billings, *supra* note 68, at 440.

> cars in a safe condition. (5) They must be taught how to drive.[104]

*The Nation* opined that the call for relaxing speeding laws was troubling.

> If we kill 30,000 persons a year with automobiles in the United States – as last year we did – which is at the rate of about one person to every thousand cars, we are nevertheless determined to drive faster and ever faster. The old days of driving at twenty to thirty miles an hour are vanishing, even in cities. In New York to drive at the legal rate of fifteen miles an hour would invite a rebuke for obstructing traffic. Forty is the speed now, or fifty. At the same time that our cars are equipped with more powerful engines and stronger brakes, our roads are smoother, better graded, freer of dangerous curves. They invite the swift, long rush of the motor. And the motor is eager to respond.[105]

Many of the writers of the popular discourse on speeding laws were troubled by the failure to treat traffic violations as real crimes. In a 1927 article in the *Atlantic Monthly*, titled, "A Criminal in Every Family", Edward Weeks called for recognition of the moral significance of law breaking in the automobile context and for carrying discipline to lower thresholds of misbehavior.

> My brother and I have each been arrested once. My father has been arrested twice – for speeding. Now this, I submit, is not an extraordinary record for an American family whose four older members have been driving steadily over a period of eight years. We were responsible for no injuries; we received the state's reprimand, paid our fines, and there the matter dropped. But I am not sure that the matter would have dropped so quickly if we had received the same number of convictions, say, for bootlegging or petty larceny.[106]

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104. *Id.* at 444.

105. *Editorial: More Speed!*, 131 THE NATION 287 (1930).

106. Weeks, *supra* note 49, at 448.

Weeks called for a combined effort of police and public opinion to transform the whimsical attitude of the public toward motor carnage.

> To open the public's eyes we must have men who are once martinets[107] and skilled propagandists. As state officials in charge of motor vehicles they must undertake to 'popularize' the idea of safety and to drub it into those who won't listen.[108]

Other writers decried the aggressive use of proactive policing techniques against the fast but careful driver, like speed traps operating to enforce archaic 15 mile per hour limits on good suburban highways capable of being normally traversed at 25 miles per hour. The author related his own arrest on a similarly safe road, which cost him thirty six dollars. "For pure extortion the court scene was a page from Dickens."[109] What was needed, the author argued, was to take the matter out of the hands of self interested local politicians and police and instead to develop a national speed limit defining distinct speeds for business districts, suburbs, and thinly settled areas.

These journalistic discourses suggest that the problem of speed and of fatal accidents was generating a considerable consciousness about the problem of government. On one level, this was a problem of where to locate a government of automobiles and driving. Curtis Billings noted that every level of formal government must be involved, but he would also include the schools, insurance companies, journalists and ultimately individuals themselves.

> We are at once the perpetrators and the victims of traffic accidents and we should be the principal gainers by reducing their number. It is time for us to learn that the automobile is no longer a novel toy, that it is a tremendous social force, mainly for good, but certainly for terrific evil if not sanely used.[110]

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107. A martinet is a strict disciplinarian, after General Jean Martinet the French promoter of drilling.

108. Weeks, *supra* note 49, at 449.

109. *Id.* at 450.

110. Billings, *supra* note 68, at 445.

The automobile was driving two very different and equally troubling tendencies in society with commensurate difficulties for governance. Personal conduct had never been so routinely intertwined with death and carnage. As a consequence, micro-level details of daily life were coming in for unprecedented attention and formal control. At the same time, however, the automobile had turned consumer choice, and through it manufacturers' profit, into an unprecedented force regulating much else in daily life. One writer suggested the underlying tensions by imagining the formal merging of corporate and municipal powers over the automobile.

> Let us suppose for a moment that manufacturers and lawmakers were identical. What a dilemma Henry Ford would be in if he were elected Mayor of Dearborn, and the city council passed over Mayor Ford's head an ordinance limiting motor car speed to thirty miles an hour! Would he resign as Mayor, or would he conscientiously telephone his factory: "Cease production on sixty-mile motors. Retool the plant for a legal thirty-mile motor."[111]

In one sense, of course, developing new criminal laws for the automobile age was a simple application of traditional police powers of the state. But precisely because the automobile was transforming the very nature of the subject to be governed, these rules became flash points of controversy for the whole effort to govern the unprecedented and dynamic society that seemed to be emerging from the 1920s.

*B. Civil Liability*

While states had to scramble to produce new law regulating the automobile, a regime of legality already existed to govern automotive conduct, i.e., the tort system. A person injured by an automobile accident in the 1920s could bring a civil suit for damages. Such plaintiffs faced the standard burdens of tort doctrine. First, they had to establish that their injury (or death in a case where decedents' survivors sued) was caused by the defendant's operation of the automobile.[112] Second, they had to establish that

111. O'Shea, *supra* note 100, at 561.

112. *See* Columbia Report, *supra* note 10, at 25-26.

this operation was negligent, i.e., lacking in the care that a reasonable person would have provided.[113] Where traffic regulations existed and the driver violated them, this inevitably formed an important issue in establishing negligence. In some states a violation of a traffic law was per se negligence.[114] In this sense civil liability reinforced criminal traffic regulations.

But many observers noted that civil liability could police driving only if defendants had substantial reasons to fear accountability. Negligence, even if established could be defeated if the injured party was also negligent, unless that is, the defendant could be shown to have had the "last clear chance" to avoid injury.[115] A few states in the 1920s statutorily exempted from such civil suits, people who were injured while gratuitous guests in the automobile that caused the injury.[116] Vicarious liability could also be sought against the owner if that party was different than the operator of the automobile.[117] By 1931 courts in about half the states recognized some version of the so-called "family automobile" doctrine by which the owner was held liable for damage negligently done by a family member using the automobile with the owner's consent.[118]

As a practical matter, unless the defendant had significant assets, settlement was likely to be extremely low if any was offered at all.[119] Where assets made the case worthwhile, and where a negotiated settlement could not be reached, delays of up to three years to trial were already common in the larger cities.[120] The delay often meant that the social dislocation effects of injury would hit the family and the community regardless of any eventual tort recovery.[121] The burdens posed by the civil justice model as it existed in the

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113. *See id.* at 26.

114. *See* Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476, 478 (1936).

115. *Id.* (citing Kansas City S. R.R. Co. v. Ellzey, 275 U.S. 236 (1927)).

116. But only if the defendant was not "grossly negligent." Columbia Report, *supra* note 10, at 27 (citing relevant statues and court cases).

117. *See id.*

118. *See id.* at 28; *see also* Edward E. Hope, *The Doctrine of the Family Automobile*, A.B.A.J. 359 (1922); Norman D. Lattin, *The Family Automobile*, 26 MICH. L. REV. 846 (1928); Ashley Cockril, *The Family Automobile*, 2 VA. L. REV. 189 (1914).

119. *See* Columbia Report, *supra* note 10, at 28.

120. *See id.* at 29.

121. *See id.* at 35.

1920s could be expected to prevent many losses from being shifted or perhaps even adjudicated, but they were particularly difficult in the context of automobile accidents.

> The very injury for which compensation is sought has often hindered or prevented the gathering of evidence. Some days or even weeks will ordinarily elapse before the plaintiff or his attorney begins to prepare his case. Meanwhile the defendant, unless he is also injured, has often been able to gather the names of witnesses at the scene of the accident and to notify his insurance company or employ his attorney immediately. The considerations apply peculiarly to motor vehicle accidents. The suddenness with which such accidents occur and the fact that the participants are usually unknown to each other and to all the bystanders, make the plaintiff's task harder than in the case of many other accidents.[122]

Other critics suggested that courts were too ready to facilitate compensation for the victim at the cost of eroding the requirements of fault. A student note by Richard M. Nixon,[123] in a symposium on automobile accident compensation in *Law & Contemporary Problems*, argued that the drive for compensation had left the field doctrinally confused. Despite rejecting the view that autos should be treated as dangerous instrumentalities (and thus be subjected to strict liability), courts were accomplishing much the same thing by letting cases get to the jury despite the requirement that the plaintiff demonstrate the negligence of the driver, and in many states an absence of negligence by the plaintiff.[124] The effort, made famous by Justice Holmes, to create presumptive rules for typical fact patterns, like the "stop, look, listen" rule for when an automobile came to a railroad crossing, had

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122. *Id.* at 33.

123. *See* Nixon, *supra* note 114, at 481. While this is not the occasion for a fuller treatment of the automobile accident as a problem of national government, it is extremely interesting that both President Herbert Hoover, *see supra* note 4 ( regarding Hoover's uniform traffic law), and President Richard Nixon, took a keen interest in the automobile accident problem prior to their presidencies (several decades prior, for the young Nixon).

124. *See* Nixon, *supra* note 114, at 481.

been abandoned by the mid-1930s.[125]

Courts were also moving to expand the possibility of finding assets sufficient to satisfy judgments by holding automobile owners liable for the negligence of a driver if the driver had a reputation for incompetence, if the driver could be construed as working for the owner, or if the driver was a member of the owner's family.[126] Nixon saw this as arising out of the normalization of driving:

> In the days when an automobile driver was looked upon with somewhat that same degree of awe and respect which the airplane pilot inspires in the ordinary ground dweller of today, the owner did not often entrust his car to others. He either drove it himself or, since he was usually a man of wealth, employed an experienced chauffeur. There were few cases, therefore, in which the owner's liability for injuries caused by the negligent operation of his automobile could not be predicated either on his own fault or on that of his regularly employed servants.[127]

With driving becoming ordinary, the lines between employment relationships and others was being blurred both by the casualness with which owners lent their cars, and the striving of courts to expand the judgment pool. A good example was the "family purpose" doctrine which held that family members were, in effect, serving the business of the family when they took the automobile to the grocery store or even on a pleasure outing.

### *C. Insurance as Government*

Insurance was a potentially significant source of government over the automobile. Although expensive, liability insurance was already becoming widespread. If statutory mandate or fear of civil damages was effective at requiring coverage, accessibility would be substantially expanded, especially for those with incomes and predictably some assets. This would also achieve

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125. Justice Holmes held that the driver had a duty to "stop, look, and listen" before attempting to cross. *See* Baltimore & Ohio R. R. v. Goodman, 275 U.S. 66 (1927). Justice Cardozo declined to apply the rule in Pakora v. Wabash Ry., 202 U.S. 98 (1934).

126. *See* Nixon, *supra* note 114, 483-86.

127. *Id.* at 484.

compensation for at least those victims with a colorable negligence claim against the driver. By charging based on experience, insurance companies could create an incentive for improving driving behavior.

The Columbia Committee found, however, that the potential for insurance to influence behavior was largely untapped. Nationally twenty-seven percent of motor vehicles registered in 1929 were covered by a liability insurance policy.[128] While the numbers of motorists who purchased liability insurance varied enormously, in only twelve states were more than a quarter of all motorists insured.[129] Only Massachusetts made liability coverage a condition for registration,[130] and insurance companies strongly disliked the Massachusetts' plan which set premiums and created an administrative board with the power to compel companies to accept risks at the set premium.[131]

More common were financial responsibility laws that required a motorist, once involved in an accident,[132] to get insurance or post a bond prior to renewing registration after the accident. In 1932, financial responsibility laws were in force in eighteen states and four Canadian provinces, but the Committee's analysis suggested that the enactment of such laws had only produced marginal increases in insurance coverage.[133] The late 1920s also saw states creating motor vehicle or insurance commissioners in charge of enforcing financial responsibility. Where the law limited its mandate to careless drivers, the insurance commissioner was made responsible for evaluating whether or not insurance coverage would be required for individual drivers. In Connecticut, the law required the commissioner to sort those subject to insurance requirements into four risk groups for which insurance companies offered separate premiums.[134] In Massachusetts, insurance companies set up a joint bureau for rating drivers under the oversight of the insurance or motor vehicle commissioner.[135] Another

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128. *See* Nixon, *supra* note 114, 483-86.

129. The Columbia Report acknowledged that the percentage was higher in the cities where it was most needed. *See id.* at 46.

130. *See id.* at 113. All states, however, required insurance for public carriers.

131. *See id.* at 114.

132. Statutes varied as to whether financial responsibility applied only where the driver was at fault or simply on being involved in an accident. *See id.* at 98.

133. The Committee acknowledged that most of these laws had only been in force for one or two years at the time of the analysis. *See id.* at 99.

134. *See id.* at 98.

135. *See id.* at 123.

function of the motor vehicle or insurance commissioner was to monitor satisfaction of judgments and to withhold driving privileges from parties failing to pay their judgments.[136] To enforce these mandates, commissioners were typically invested with significant power to revoke licenses of drivers with records of carelessness, as well as financially irresponsible or judgment shirking drivers. In practice, however, the Committee's study suggested that enforcement was largely non-existent. Those who chose to ignore an order to surrender their license had little to fear from continuing to operate their automobile.

Proposals to make insurance mandatory emerged following World War I. The first law review articles calling for mandatory automobile insurance along the lines of worker's compensation appeared before the expansion of the automobile to the middle and working classes. They reflected the image of the motoring public as a small and determinate class. Earnest Carman, for instance, denounced motoring as the excess of a distinct minority.

> Due care on the public highways today is much more burdensome to all classes than it was before the appearance of motor vehicles, or would now be in their absence. The motoring class has placed this added burden of care upon the public without bestowing any corresponding benefits. Would the expense of accident compensation insurance, placed upon the motoring class for the benefit of the public, be any more than a fair offset?[137]

Weld Rollins had an even more sinister view of the motoring class.

> The automobilists who do the most harm, I learn at the Highway Commission, are not the tyros or those under the influence of liquor, but the skillful, confident drivers who take chances. The most numerous class of victims is children.[138]

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136. *See id.* at 102.

137. Weld A. Rollins, *A Proposal to Extend the Compensation Principle to Accidents in the Streets*, 4 MASS. L. Q. 392. (1919).

138. *Id.*

Rollins proposed a compensation system limited to pedestrian victims and paid for by motorists. In Rollins' view these were two apparently implacable classes.

> In an impact between an automobile and a pedestrian, the automobile can injure the pedestrian; the pedestrian cannot injure the automobile. The chances are all one way. Moreover, it is the automobilist who gets the pleasure of profit from the machine; the pedestrian gets none.[139]

An indemnity company would set a price based on the driver's record that would price out the most reckless drivers. Rollins criticized regular liability insurance as practically an incitement to carelessness:

> The business of the accident insurance companies in insuring automobilists is in some respects very objectionable. In the first place, what they offer to sell to automobilists are policies of insurance which are in effect licenses to do harm with impunity. These cost the automobilist only a trivial sum, $25–$90, and in consideration of that amount the automobilist is privileged to be reckless.[140]

Shippen Lewis was ready to support a gradual extension of protection to victims. His proposal reflects his vision of a social body segmented by motoring classes.

Any plan would necessarily provide compensation to pedestrians. In fact, I believe that it would be reasonable to begin with pedestrians only and to extend coverage to others after a few years of experience as to cost and method of operation. Next come bicyclists, horsemen and occupants of horse drawn vehicles, all of whom appear to be really in the same class as pedestrians. Occupants of motor vehicles present the most difficult problem.[141]

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139. *Id.* at 394.

140. *Id.* at 393.

141. *See* Shippen Lewis, *The Merits of the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROBS. 583, 592 (1936).

At the end of the 1920s, then, efforts were underway to develop both criminal and civil law strategies for regulating the risks of driving. Both of these were undercut in important ways by the ways in which automobiles were changing the nature of the governed subject. Insurance beckoned as a resource that could not only provide its own forms of control, but could make the insured subject more amenable to regulation through the criminal and civil laws.

## III. THE COLUMBIA PLAN

Perhaps the most significant effort during this period to think through the implications of insurance as a way of governing automotive life was the *Report of the Committee to Study Compensation for Automobile Accidents* and the debate over its proposals (the Columbia Plan). While it never became law, the Columbia Plan nevertheless was influential, for three reasons. First, the Committee was one of the most powerful groups of lawyers brought together under the leadership of academic legal realists. Second, the empirical component provided the best statistical data on automobile accident liability available until the mid-1960s. In both these senses it was anticipatory of the kind of public policy role that legal academics have played since the end of World War II. Third, the Report had influenced legal scholars through the 1960s when many of our current orthodoxy's on accident law were set.[142]

The Committee itself was formed on November 15, 1928, by what it describes as "voluntary association." Its membership was composed largely of leading judges and lawyers long active on the issue of liability reform.[143] The Director of the study was Shippen A. Lewis, a member of the

142. *See* Priest, *supra* note 18, at 479.

143. The Committee included: Arthur Ballantine: then Assistant Secretary of the United States Treasury, Victor Dowling: the ex-presiding Justice of the Appellate Division of the Supreme Court of New York, First Department, William Draper: the Director of the American Law Institute, Robert S. Marx: a former Cincinnati Judge who had published an article calling for a no-fault system in the mid-1920s, Ogden L. Mills: Undersecretary of the Treasury of the United States, William A. Schnader: Attorney General of Pennsylvania, Bernard L. Sheintag: Justice of the Supreme Court of New York and formerly the Commissioner of Labor of New York, Horace Stern: President Judge of the Court of Common Pleas No. 2 of Philadelphia, Howard W. Taft: a member of the New York City Bar, and Miles M. Dawson: a lawyer, actuary, and leading author on insurance issues. *See* Columbia Report, *supra* note 10, at 15, n.2.

Philadelphia bar and leading advocate of liability reform. The analysis of liability rules and the drafting of the model legislation was overseen by a number of law professors at Yale and Columbia, including Dean Charles Clark, Prof. Walter F. Dodd of Yale, Prof. Noel T. Dowling, and Professor Francis Deak of Columbia (Clark and Dodd were also members of the Committee). Two professional sociologists, Dorothy Swaine Thomas of Yale and Frank A. Ross of Columbia oversaw the collection and analysis of statistical data.

The study consisted of a number of distinct parts, and was carried out by cooperating scholars working in a dozen different towns and cities. One part of the study was a descriptive legal survey of current automobile compensation law, the product of recent legislation, and the approaches of European legal systems.[144] A second element was a study of records of courts and insurance companies for data on damage awards and payments. The most innovative segment of the research was the collection of nearly 9,000 case studies from ten different field sites.[145] Research teams in six urban and four rural counties aimed to collect a representative pool of injury cases.[146] Victims were identified mainly by examining court records. In a few cities, an effort was made to look beyond the formal legal system by advertising for persons injured. In each case the field researchers conducted personal interviews with the injured party or family member in their home as to aspects of their health, family, income, medical and legal treatment.[147]

The Columbia Committee spent three years collecting by far the largest database available on cases of personal injury resulting from an automobile accident. Although state of the art for social science methodology in the Twenties, the Committee's statistics would be problematic by contemporary standards. The Committee's database was not a representative sample of American automobile accidents.[148] As with other pioneering efforts to use social scientific methods to study problems that had been addressed legal

144. *See id.* at 5.

145. *See id.* at 9.

146. *See id.*

147. *See id.* at 11.

148. *See id.* at 9. The nearly 9,000 accident cases investigated were collected from six medium to large cities (Boston, New Haven, New York, Philadelphia, San Francisco, Worcester) and four suburban, small town, or rural areas (Muncie, Indiana; Terre Haute, Indiana; Rural Connecticut; San Mateo County, California). These were combined in many tables to provide a total sum of cases with no effort at weighting.

institutions and arguments, much of the Committee's task involved defining a new object of study in the social effects of accidents. This shift in orientation was significant enough that the report addressed it explicitly.

> The studies have been made by interviewing the persons injured and their families and the investigators have made no effort to procure data bearing on fault. . . The ensuing discussion therefore makes no attempt to separate cases in which the defendants were negligent from those in which they were not negligent. It is concerned not with anyone's legal responsibility for the accident, with what happens to the injured person as a consequence of the accident. We are dealing here not at all with responsibility or with liability, but only with results.[149]

### *A. The Columbia Report's Critique of Current Governance Strategies*

The Committee contrasted the situation of victims of automobile accidents with victims of industrial accidents and found the automobile accident victims disadvantaged. While the automobile accident compensation system worked for some of those with minor injuries, those with longer term disabilities, and those surviving the death of a wage earner found themselves with inadequate compensation if any. Even where victims faced insured defendants, settlements or judgments averaged out to significantly less than the workers' compensation payments for comparable injuries. In Massachusetts, for example, survivors of a wage earner covered by workers compensation received nearly twice as much as survivors of a wage earner killed in an automobile accident, despite the mandatory insurance law in that state.[150]

The Report's main finding was that injuries caused by *insured* automobiles were far more likely to be compensated than those caused by uninsured automobiles.[151] This proved true for each category of injury. Those temporarily disabled were three times more likely to be compensated

149. *Id.* at 54-55.
150. *See id.* at 116.
151. *See id.* at 76-91.

if injured by an insured automobile.[152] Those permanently disabled were four times more likely, and in fatal cases plaintiffs were five times more likely to get some compensation.[153] The data also showed, that even where insurance was available, the adequacy of compensation varied systematically by type of injury. Those with the most minor injuries received overcompensation. For the most seriously injured, awards covered only a fraction of real loss over a lifetime.[154] Fatal cases received full compensation for medical and funeral expenses in most cases, but because lost earnings were often not available, the awards were far less than comparable awards under workmen's compensation rules.[155] Those with small losses were considerably overpaid, while those with larger losses were considerably underpaid.[156]

In addition to collecting statistical data, the Committee's investigators undertook fuller descriptions of particular cases. Each chapter of the report included brief descriptions of actual accidents, and their consequences for the individuals and families effected. Most depicted a family on the margins of economic security being pushed under by the blind hand of fate in the form of an uninsured motorist running them down.

> A truck driver, 30 years old, earning $24 a week, collided with another machine. He died after one week, leaving a wife aged 23, and two children, aged 4 and 6. The family were already in debt to the extent of $800. The driver of the other car was not insured and was financially irresponsible so that he paid nothing. The deceased was driving his own truck and was therefore not covered by workmen's compensation. The wife went to work at $18 per week, living with her mother to whom she paid $15 a week for board for herself and the children.[157]

The Report's depiction of the fate of many accident victims, and their statistical portrait of systematically inadequate compensation for automobile

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152. *See id.* at 78.
153. *See id.* at 81.
154. *See id.* at 92.
155. *See id.* at 89.
156. *See id.* at 92.
157. *Id.* at 60.

accident victims, had an implicit comparative referent, the fate of industrial workers injured in accidents on the job. In both cases machines of awesome power injured victims with little apparent ability to avoid injury. In both cases the injured parties often passed losses onto families confronted with great expenses and a sudden loss of income, and ultimately to whole communities faced with providing relief and confronting the consequences of neighbors torn from the lives that they had built. But as was well known to most contemporary observers of automobile accident compensation, many workers were protected by the recent spread of worker's compensation laws across the nation.[158] To the authors of the Columbia Report worker's compensation provided a model for how to reconstruct the governmentality of automobile accident.[159]

### *B. The Columbia Plan*

The lessons of the Report were crystallized in a plan for reforming automobile accident compensation. The Plan consisted of four elements suitable for adaptation and adoption by state legislation. First, a state would make liability insurance a requirement for the lawful registration of the vehicle. Second, it abolished the common-law right of action for negligence for automobile accident victims against the owner and or driver of the automobile. In its place the Plan established a near absolute right to compensation to any person injured by an automobile regardless of the negligence of the driver or the contributory negligence of the injured party. Third, the Plan replaced jury set compensation, available at common law, and imposed instead a fixed schedule of benefits according to type and degree of injury. Fourth, it replaced adjudication in a court of general jurisdiction with a limited administrative inquiry focused predominantly or establishing that the injuries complained of did indeed arise from "the operation of an automobile."

#### 1. Mandatory Insurance

The Columbia Plan required that security against potential personal

158. *See supra* notes 6-7 and accompanying text.

159. *See* Columbia Report, *supra* note 10, at 134-35.

injuries[160] be provided in advance through the procurement of an insurance policy for the benefit of parties injured by the operation of the automobile, what we would today call third party insurance coverage. The Committee took no stand on whether this insurance should be provided by the state or by private enterprise. They did acknowledge that, as in Massachusetts where insurance was mandatory, the state was likely to at least set maximum rates and thereby circumscribe, if not drive out, private insurers.

2. The Abolition of Fault

The complete abolition of fault was perceived by the plan's supporters as its most vulnerable point. Academic conservatives ardently defended negligence as the logical modern form of liability, one premised on the image of liberty and equality among individuals. Any form of liability without fault invoked the image of paternalism rooted in monarchical power.[161] To turn a motor vehicle owner into an insurer for all those injured by his vehicle regardless of the efforts taken to provide security, smelled of expropriation and redistribution. Despite the fact that a very conservative Supreme Court had upheld the worker's compensation plans against a similar challenge,[162] proponents of expanding absolute liability to other forms of injury such as automobile accidents worried extensively about whether abolishing negligence might still run afoul of substantive due process.[163]

On the merits, the proponents argued the transformations associated with the automobile had rendered a compensation system based on the fault standard unworkable. The power and speed of motorized machinery, whether in the factory or on the street, simply outstripped the capacity of even careful persons to guard against mishap, and magnified the consequences of lapses of care beyond moral recognition.

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160. As is the case with many current no-fault plans as well, property damage was left out. The justification for this was that it would make the plan too expensive and that property damages were less socially threatening than personal injuries.

161. Much of the conservative response to the worker's compensation model of reform generally was to invoke this traditional democratic critique of paternalistic government. *See, e.g.*, Smith, *supra* note 23, at 239.

162. *See* New York Central R.R. Co. v. White, 243 U.S. 188 (1917).

163. The Columbia Report contained an entire chapter on constitutionality, which dealt extensively with the due process argument. *See* Columbia Report, *supra* note 10, at 162-97.

> The present traffic situation furnishes an omnipresent danger of injury; every individual who operates a motor vehicle or steps upon the streets runs a risk of doing or receiving serious injury. Even superhuman vigilance would not free the traffic situation of all danger.[164]

Proponents acknowledged that difficult line drawing questions might arise regarding which injuries actually arose from the operation of an automobile, but they assumed that in most cases there would be rather little dispute. One available defense was if at the time of the accident, the automobile was being operated without the consent of the owner. Thus, where a car was stolen, the owner would not be responsible. Instead, the plan called for a fund to pay victims of such drivers as well as uninsured out of state motorists. The Plan also left potential victims unprotected against out-of-state vehicles. The injured party would still have the benefit of a right to compensation regardless of fault, but without the mandatory insurance to back it up.[165]

3. Standardization of Benefits

One of the most significant features of typical worker's compensation laws that the Plan adopted was a predetermined schedule of benefits. In a personal injury lawsuit that made it to trial, the jury had the authority to award damages sufficient to make the plaintiff "whole". A typical package would include medical costs, lost wages (if any), diminished or destroyed earning capacity, and finally, compensation for "pain and suffering" endured as a result of injuries. Dependents of victims of fatal accidents might receive the costs of the funeral, as well as some lump sum for loss of support. In many states, however, death terminated any right of action. Reformers had criticized this damage award process for reasons that are still given today. The Columbia study was cited to show that the awards overcompensated the losses of the lightly injured and under compensated the losses of the more seriously injured. In any event, specific awards were considered hard to predict which made both settlement and insurance more difficult.

The Columbia Plan proposed to establish a predetermined schedule of

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164. PATTERSON H. FRENCH, THE AUTOMOBILE COMPENSATION PLAN: A SOLUTION FOR SOME PROBLEMS OF COURT CONGESTION AND ACCIDENT LITIGATION IN NEW YORK STATE 45 (Columbia University Press 1933).

165. Columbia Report, *supra* note 10, at 138.

benefits that differed from traditional tort recovery in three ways. First, the benefits represented only a portion of recovery. No compensation was provided for the first week of lost wages, for instance, and disability compensation was set at 2/3 of actual estimated loss.[166] Second, benefit payments, were to be spread out from shortly after the accident itself rather than in a lump sum at the end of all legal proceedings.[167] Third, pain and suffering were excluded.[168] The benefit levels, however, were based on the New York workmen's compensation schedule, the most generous in the country at the time.[169]

The reformers' arguments for standardized benefits borrowed from the worker's compensation debates. Reduced recovery was necessary to discourage malingering. It was also the rough equivalent of the more generous tort benefits discounted by the chance of recovery. Continuous payments from the start were thought to be essential to prevent individuals and families from falling into immediate deprivation, or being forced into uneconomic arrangements to provide for immediate needs. Finally, the exclusion of pain and suffering was seen as a trade off for the elimination of the whole issue of the negligence of the injured party and the need to prove the injurers' negligence. The academic supporters of the Columbia Plan were most uncomfortable with the maximum caps on economic loss recoveries. The caps might appear to deprive wealthier individuals of equitable treatment.[170]

4. Administrative Justice

The Committee took an extremely cautious tone in discussing how the plan would be administered. It clearly preferred a "commission or board" because in the workmen's compensation field courts had "proved not at all satisfactory."[171] The Board's primary duty would be adjudication of claims and awards with a right of appeal from the body to courts. Other promoters of the compensation plan, like Patterson French, saw the Board in more

166. *See id.* at 140-41.
167. *See id.* at 152.
168. *See id.* at 143.
169. *See id.* at 142.
170. *See* FRENCH, *supra* note 164, at 167-68.
171. *Id.* at 153.

activist terms.[172] A mandatory insurance law would require state regulation even if left to the private market to fill. Some oversight of medical care provided for automobile injuries would be expected, as well, in order to control award costs.[173] Inevitably statistics on accidents would be generated simply by the regular reporting that of injured parties seeking compensation under the plan.

> The Board may become a body of experts in determining and alleviating loss in accordance with wise policy and the terms of the statute. This is the true function of an administrative body and it is this which is designed to make a direct attack on the social problems presented by the motor accident situation.[174]

If all these functions were to rest with a central state Commission or Board, it might well become a vital locus of government over the new but rapidly expanding field of motorized behavior.

### *C. The Case for the Columbia Plan*

The most important academic defense of the Columbia Plan was the lead article in a Columbia Law Review symposium on the Plan, written by Columbia Dean Young B. Smith.[175] He praised the Report effusively for its empirical data and rigorous analysis.

> It sweeps aside legal theories about rights and duties, causes and damages, and endeavors to reveal what actually happens when an accident occurs. It neither approves nor

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172. *See* FRENCH, *supra* note 164. French's book was not officially connected to the Committee but it was published just afterwards by Columbia University Press and takes a strong adversarial posture in favor of the Columbia Plan.

173. French considers whether it would not be the most efficient of all to have the Board control its own state provided medical services which would permit it complete direction of treatment. He acknowledged, however, that "one disadvantage wold be the violent opposition which such a scheme might engender among members of the medical profession." *Id.* at 64.

174. *Id.* at 50.

175. Symposium, *Compensation for Automobile Accidents*, 32 COLUM. L. REV. 785 (1932).

> disapproves the ethical postulates which underlie existing rules of tort law, or the political theories which account for existing administrative devices. It is concerned only with their effects and with ways and means for achieving results more satisfactory.[176]

His account of its strengths provided a summary of the two major arguments that had accumulated behind the worker's compensation principal. First, that the nature of automobile accident risk was collective. The law of liability could best recognize that collective character by replacing fault principals with those of insurance. Second, the common law system could not address the social dislocations produced by automobile accidents and thus solve the crisis of governability.

1. Collective Risk

Smith saw the link to workmen's compensation, both in subject matter and in the work of reform, as clear. In both cases good research was revealing a collective distribution of risk that the law had treated as a simple aggregation of individual failures to engage in appropriate personal risk management.

> In many respects the report reminds of the report of the Wainwright Commission in 1910 which led to the adoption in New York of a workmen's compensation act. The striking similarities with respect to the natures of the problems, the inadequacies of existing laws, the social results thereby produced, and the solutions proposed, cause one to wonder whether this report, as did that of the Wainwright Commission, foreshadows an impending development in the law looking towards a more scientific distribution of inevitable risks which are incident to an important and necessary activity in modern society.[177]

For the Committee and for Smith, automobile casualties were the

176. *Id.* at 786.
177. *Id.*

equivalent of industrial accident casualties. Just as it made sense to spread the impact of industrial accidents over a broad population through insurance, it made sense to do the same with automobile accidents.

> It is with the *consequences* of these accidents that the Committee is concerned – whether death or disability with its train of distress and suffering and want be caused by the operation of a machine in a factory or a motor vehicle on the road. This, in truth, was what the workmen's compensation statutes were concerned with, namely, the social situation resulting from the inadequacies of the then existing legal system.[178]

To Smith, and other proponents, it seemed obvious that the two forms of casualty were equivalent. Once you admitted that loss spreading through the collectivist strategy of social insurance was a desirable solution to one, you had to admit that it was a desirable solution in the other. Both involved machines whose great force and speed diminished the role of human agency. Both involved the dark side of what were otherwise highly beneficial advances in technology. Finally, both involved horrific and largely unavoidable damage to individuals and to the networks of dependents, creditors, and others that economically relied on the injured individual.

2. Governability

As Shippen Lewis, study director for the Columbia Committee, put it in an article written several years later, compensation was simply a more "realistic" approach to the problem.

> The problem is how to distribute the losses caused by automobile accidents in a way best suited to public welfare. Conceivably, the losses may be allowed to rest where they first fall, that is on the victim of the accident and often on his family, his landlord, his physician and his grocer; or they may be partly shifted to the shoulders of the motorist or of his insurance carrier under a scheme of liability for

178. *See id.* at 792, n.5., quoting the Columbia Report, *supra* note 10, at 136.

> negligence; or they may be shifted, under a compensation scheme, the motorists as a class or to all taxpayers.[179]

As to the elimination of fault, Lewis argued that fault was being abandoned in practice anyway, as judges blurred the boundaries around negligence and contributory negligence and thus let cases go to sympathetic juries (a tendency confirmed by Nixon's article in the same issue of *Law & Contemporary Problems*).[180] If that was the case, then the only real issue was whether people should be mandated to carry insurance. Lewis argued that the damages caused by the automobile were just too extensive to permit individual drivers to determine whether they should be financially responsible or not.

> I believe that no one should be allowed to drive a death-dealing machine on the highways unless he can answer for the damage he does. I believe that in this regard automobiles should be treated differently from shot-guns, bicycles, horses and other things which can cause injuries, because the huge number of automobile accidents puts automobiles in a class by themselves, and because the present regulation of them facilitates further regulation.[181]

The last sentence hints that since the automobile has already become the occasion for the most extensive regulation of private life ever undertaken by government, it made great sense to pursue this further and more significant goal of compensation.

The supporters of compensation also emphasized the efficiencies to be achieved on the legal side.[182] By the 1920s automobile accident claims had replaced industrial and rail road accidents as the major source of personal injury law suits (and in at least some jurisdictions the majority of all lawsuits added to the docket in a typical year).[183] In part, this was due to the fact that workmen's compensation took industrial accident cases out of court, but it

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179. Lewis, *supra* note 141, at 588.
180. *See id.* at 589.
181. *Id.* at 586.
182. *See id.* at 596.
183. *See* FRENCH, *supra* note 164, at 27.

also reflected the massive increase in automobile ownership and use in the 1920s. As we saw above, the incredibly explosive growth of the automobile industry in these years and the consequent sharp rise in casualties and lethal casualties, meant that the public must have been well aware of the problem with many people actually witnessing or hearing about incidents.

### *D. The Case Against the Columbia Plan*

The analogy with workmen's compensation was the main point of contestation for the opponents of the Columbia Plan. For the most part, opponents of the plan conceded that worker's compensation was an appropriate solution to the problem of industrial accidents. But they rightly saw that the automobile, the uses made of it, and the accidents arising out of it, presented some important differences. The analogy was closest, to be sure, when the automobile in question was used in a business. But the private automobile used for family and pleasure opened up a potentially very different issue and pointed, if vaguely, toward a much different organization of the modern social body than the world of factory and train had suggested.

#### 1. Heterogeneity

Critics pointed out, repeatedly, that the structural relationship between automobile owners, who were made absolutely liable under the Columbia Plan, and victims, was totally different than that between employers and employees. Writing the negative piece in the *Columbia Law Review* symposium, Austin J. Lilly argued that the automobile accident did not involve the meeting of opposed but interdependent interests as those that existed in the work accident situation.

> [motorists and motor vehicle accident victims] are not divided into two great, interdependent classes, able, respectively to treat each with other, having a mutual zone of interest bottomed on contractual and economic relationship. They are divided into many classes. The pedestrian today is the automobilist tomorrow. Automobilists are claiming each-against the other. Every distinct party to the classes

> may be at any time a party to any other class.[184]

One consequence of this role fluctuation is that losses were presumably difficult to standardize within a narrow range.

> Payments under workmen's compensation can be made proportionate to earnings and to loss, so that the compensation scale, the wage scale and the loss scale have a direct ratio, each to the other. This condition does not exist, and cannot exist, in compulsory automobile compensation as it affects a majority of the victims.[185]

Lilly noted that workmen only compose about half of automobile accident victims and even there the absence of an employer link to liability means less of a "salutary effect". Once this is recognized, according to Lilly, the analogy between workmen's compensation and automobile compensation breaks down:

> One of the soundest economic principles of workmen's compensation is found in its approximate equality of application to those affected by it. There is of course some variation, but on the whole, the graded, limited scale of payments serves roughly the purposes of equalization and is not essentially unfair. Such a scale, however, when applied to the whole body of our people, in disregard of every difference in condition, age, financial standing and responsibility, in disregard of the ordinary pertinent standards of right and wrong, develops the vices of both inadequacy and of excessiveness.[186]

Writing the negative article in the *Law & Contemporary Problems* symposium, P. Tecumseh Sherman noted that, unlike factories where a standard range of wages could be approximated in a schedule, automobile

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184. Symposium, *Compensation for Automobile Accidents*, 32 COLUM. L. REV. 785, 805 (1932).

185. *Id.*

186. *Id.* at 809.

accidents befall people of greatly varying fortunes.

> Where a successful business executive, artist or professional man is killed or permanently incapacitated, the compensation might amount to less than 10 or 20 per cent of the economic loss.[187]

The idea that the automobile nexus was inherently less stable than the work nexus was carried all the way through to the effects of machines on bodies. Ray A. Brown, in a review of compensation for automobile accidents in the *Wisconsin Law Review* criticized the Columbia Plan approach for ignoring the difficulty of categorizing automobile injuries.[188] In Brown's view, industrial accidents lent themselves to a categoric schedule of injuries, e.g., missing limbs, lost sight, etc. But Brown believed that "a large majority of automobile accident injuries are of a type not placeable within any definite compensation schedule."[189]

2. The Market for Risk

The diffuse nature of motoring behavior led to another distinction critics drew between the workmen's compensation case and the automobile compensation proposal. Lilly argued that automobile accidents did not arise, as did industrial accidents, from a "natural economic process".

> Employers who do the paying under workmen's compensation, in theory at least, have the money with which to pay, - money produced by the operations which caused the accident and the resulting loss to the victim; and thus the cost of payment an be readily absorbed by industry and its products or service, including the recipients of the payments. This *natural economic process* does not apply to the greater

187. P. Techumseh Sherman, *Grounds for Opposing the Automobile Accident Compensation Plan*, 3 LAW & CONTEMP. PROBS. 598, 606 (1936).

188. Ray A. Brown, *Automobile Accident Litigation in Wisconsin: A Factual Study*, 10 WIS. L. REV. 170, 189-90 (1935).

189. *Id.*

part of the field of motor vehicle operation.[190]

To some extent Lilly was talking about what we would now call loss spreading. Legal theorists like William O. Douglas and Young B. Smith had written influential articles in the 1920s arguing about how to link compensation most effectively with the economic units in the best position to pass on the costs to broad groups of consumers.[191] Lilly was surely correct that most automobile owners did not regularly earn a profit from the operation of their vehicle, especially not one which related to the victim. But he also seemed to be articulating a widely shared sense that the automobile was not really a part of the productive economy. It was still possible to see it largely as a high risk luxury like skiing rather than an engine of economic growth.

This point was actually raised some years earlier in the *American Law Review* which criticized a New York statute imposing liability on the owner of an automobile for accidents caused by the driver of that automobile:

> If the statute is interpreted broadly as its terms would warrant, however, it constitutes a very interesting and somewhat startling extension of the doctrine of liability without fault and will probably be attacked as going over the border of constitutionality. While the propriety of making a business liable for all probable consequences of its operation without consideration of fault, whether on the theory that the owners can spread the cost, to the users of the service or buyers of the goods, or that he who takes the profit must pay the losses traceable to the business, is easily arguable, it is different with private owners loaning cars without charge. The conditional vendor or the lessor may be considered as operating a business, so it is reasonable to ask them to include this added element in the cost of business, but not the

190. Symposium, *Compensation for Automobile Accidents*, 32 COLUM. L. REV. 803, 805 (1932).

191. *See* William O. Douglas, *Vicarious Liability and Administration of Risk I, II*, 38 YALE L.J. 585-606, 720-45 (1929); Smith, *supra* note 23.

private citizen who accommodates a friend.[192]

This economic assumption was linked by some to a moral distinction between industrial accidents and automobile accidents. Work was virtuous activity. It might generate accidents but only as a necessary consequence of its productive contribution to society. Such accidents ought to be compensated as a way of completing the virtuous cycle. The automobile was less clearly virtuous. While some uses of the automobile were positive and many neutral, other motorized behavior was hedonistic and reckless. As Austin Lilly put it:

> The automobile is the most fruitful and unholy source of such accidents. It is difficult to picture the equity of imposing upon law-abiding motorists a financial burden which is largely increased by the cost of compensation benefits and expenses in cases of this kind.[193]

P. Techumseh Sherman, the former Commissioner of Labor for New York, contrasted the trustworthiness of the work relationship with the capriciousness of the automobile relationship.

> Under the workmen's compensation laws the employer is liable "regardless of fault" only to his own employees and while they are acting within the scope of their employments, subject to his orders, whereas, under this plan a motorist would be liable to strangers whatever they might be doing.[194]

Other opponents took the opposite tack, arguing that the Columbia Plan singled out and taxed a particular class of citizens, automobile owners, for the benefit of the class of victims.[195] Columbia Plan champion Patterson French

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192. Note, *Automobiles and Vicarious Liability*, 59 AM. U. L. REV. 451, 455 (1925). Interestingly the author compared the new vicarious law to both workmen's compensation and the body of cases dealing with railroads and fires which so influenced the law and economics movement in the United States.

193. Symposium, *supra* note 190, at 809.

194. Sherman, *supra* note 187, at 600.

195. *See* French, *supra* note 164, at 158.

acknowledged that the plan amounted to a tax, and that pedestrians could just as well be seen as contributing to the risks of accidents and thus also be taxed.[196] He relied on pragmatic considerations to defend the selection of motorists. They were likely to be solvent and at any rate politically less difficult to deal with then the entire tax paying public.[197]

3. Power

In distinguishing workers' compensation in the work accident field, Austin Lilly touted the role of the employment relationship itself in providing a disciplinary nexus in which costs can be controlled, a nexus that was missing in many automobile accident situations.

> Fraud, collusion and malingering are the certain outcome of compulsory insurance and compensation as they already are in workmen's compensation.[198]

Work creates its own field of power which helps control costs:

> There is the influence of the job. This influence affects every victim of the work accident. It probably does not affect more than half the victims of motor vehicle accidents. It has a salutary effect upon the return to work. It has a salutary effect upon speed, accuracy and fairness of investigations. It has a salutary effect upon the promptitude and fairness of voluntary settlements. It has a salutary effect upon the development and establishment of proof. It has the salutary effect of reducing to a minimum the debatable issues which may lead to litigation, and thus of reducing litigation itself. It has the salutary effect of reducing to a minimum, fraud and collusion in the establishment of claims and in malingering. It has a salutary and constructive effect in the furtherance of accident prevention. For all these reasons and many others perhaps more obscure but similarly important to

196. *See id.* at 159.
197. *See id.*
198. Symposium, *supra* note 190, at 806-08.

> the proper functioning of the law, the relationship of employer and employee has a most wholesome effect upon the costs of operation and administration.[199]

Even French conceded that this was the greatest difference from worker's compensation:

> The nature of motor vehicle accidents as compared with industrial ones is such that in the former, evidence is likely to be more complicated, witnesses more heterogeneous and medical testimony less reliable. The inclusion of claimants in the higher income-brackets may furnish a class which is more willing to hire counsel, enlist any available technicalities in its aid and appeal from awards than is the workman who sorely needs the amount of the award and has a natural desire to avoid even the complications of compensation procedure.[200]

French noted only that these were "intangible" factors that should not be considered fatal to the overall plan, especially in light of the existing flaws.

## CONCLUSION: THE RISK SOCIETY ON THE EVE OF THE GREAT DEPRESSION

The legislative failure of the Columbia Plan was over determined to say the least. The Great Depression diminished the problem of automobile accidents literally (as the growth of motoring stalled and economic activity of all kinds fell off) and in comparison to unemployment, hunger and homelessness. As Patterson French put it (avoiding any mention of the Depression as did other participants in the debate):

> The evils which the compensation plan is designed to cure are not obvious in a way that excites sympathy or interest or that suggests the compensation plan is designed to cure are not obvious in a way that excites sympathy or interest or that

199. *Id.* at 806.

200. FRENCH, *supra* note 164, at 120.

suggests the compensation scheme as a remedy.[201]

Perhaps most importantly, no ready political identity or institutional expression existed for the victim class, largely pedestrians from all social classes. In contrast the success of worker's compensation had been greatly facilitated by its support from a broad array of organized groups. The specter of motor accidents must have been a very real one, but it discharged through a highly dispersed population who had few mechanisms to identify issues and mobilize concern. Indeed, as the opponents of the plan pointed out, victims lacked the qualities of a class, including the political power that comes from common bonds and shared needs. The plan did, however, have powerful opponents including the insurance companies and the automobile manufacturers.[202]

The Depression and World War II also affected the political volatility of the accident issue. The governmental challenge posed by the rapid rise of motoring during the Teens and Twenties now had twenty years to ease itself. This it did in a number of respects. Most importantly the generations that experienced the next really dramatic expansion of motoring in the 1950s, had lived with the automobile all their lives. They had a far more natural skill in responding to automotive demands on both drivers and pedestrians than those who faced its explosion from practically nothing in the 1920s. They were altogether less likely to act recklessly in front or inside of it. Road building made progress during the 1930s even while the volume of traffic dipped. Thanks to the post World War II economic boom, those generations would also have a good deal more affluence. They had more to spend on being respectable and more to lose by not being responsible. One clear result was to broaden the market for insurance. Anyone with a house, a status which rapidly expanded in over the next four decades, had reason to have automobile insurance.

The Columbia Report and Plan deserve attention from students of the history of insurance and in the history of the governmentalities at play in modern societies. The Report and the plan recognized insurance as a having a special role in contemporary governance. Just as the automobile itself had taken its drivers outside of the grids of control that operated in work and

201. Symposium, *supra* note 190, at 806.

202. Neither sector weighed into the debate directly but likely would have if the plan had come closer to legislative consideration.

family contexts, insurance placed the driver in new kind of grid. Not itself a target of power, but a kind of medium through which subjects would become more governable. The nature of that grid was not developed by the Columbia Plan, which left most questions of how to administer the Plan up to the future. Patterson French imagined that the mandatory insurance called for by the plan would become a site for developing evaluative norms and controls over all aspects of automobile accidents (including medical care itself).[203]

Insurance as a way to make subjects more responsible also applied to victims in the logic of the Columbia Plan. Just as worker's compensation advocates had emphasized the destabilizing effects of work accidents on workers and their families, the Columbia report was full of short case summaries profiling the effects of automobile accident deaths and injuries.[204] It is interesting in this regard that while the Columbia Plan seems strikingly collectivist in its assumptions that the world being shaped by the automobile was largely the same as that being shaped by industrial labor, its intended effects were to support the central role of the individual subject in the governance of automotive life.

Compared to contemporary plans, the Columbia Plan seems dated mainly with regard to its worker's compensation model. It is not surprising that the cultural assumptions and political sensibilities generated by industrial and railroad accidents would be changed in the automobile age. The architects of the Columbia Plan examined a social practice in the midst of astoundingly rapid change. Their implicit analogy between automobile accident victim (typically a pedestrian struck by someone else's automobile) and a worker would be rapidly transformed by the popularization of the automobile market. It is possible that the sort of activist insurance commissioners some supporters of the Plan envisioned might have raised the cost of automobile ownership high enough to slow its growth for a while. A flow of insurance data on accidents leading to fresh demands for regulation might have further slowed and even altered the character of motorization. But the critics of the plan also missed the historical significance of the automobile. In rejecting the analogy of automobile and factory they missed the emerging role of the automobile as source of wealth creation in consumption oriented economy. By the time the question of automobile accident compensation reform re-emerged in the

203. *See supra* notes 171-174 and accompanying text.

204. *See, e.g.*, Columbia Report, *supra* note 10, at 60-61.

1950s and 1960s the industrial virtues of uniformity and standardization clashed with the individually expressive ethos of a super charged consumer society. The political culture had shifted decisively in favor of individual choice and individual maximization. Significantly the automobile itself would become the chief symbol and one of the chief agents of that transformation.[205]

205. To be sure the automobile has always presented individuality at its most contradictory (mass production, conformity, utter and total dependence on the actions of others, etc.). Yet from quite early into its introduction into American life the automobile began to erode those features of American life that made the worker's compensation principal so influential in the first three decades of the 20th century.