

BOOK REVIEW

Nader's Failures?

THE STRUGGLE FOR AUTO SAFETY. By Jerry L. Mashaw† and David L. Harfst.‡ Cambridge, Massachusetts: Harvard University Press, 1990. Pp. xi, 285. \$29.95 cloth.

*Reviewed by Stephen D. Sugarman**

Jerry L. Mashaw and David L. Harfst's *The Struggle for Auto Safety* is a fascinating case study that seeks to demonstrate that the National Highway Traffic Safety Administration (NHTSA) has failed in its effort to promote motor vehicle safety, to explain why, and to offer reforms. Created out of the National Traffic and Motor Vehicle Safety Act of 1966 (pp. 4-6), the NHTSA was, many would say, Ralph Nader's "baby." Although the causal antecedents to the 1966 Act were many, Nader's book, *Unsafe at Any Speed*,¹ and his celebrated foul treatment by General Motors² played a prominent role in making auto safety a national issue. Moreover, Nader's sidekick, Joan Claybrook, a colleague since the early days of his battles with the auto industry, served in the late seventies as NHTSA's chief administrator.

The Struggle for Auto Safety, however, is hardly an homage to America's most celebrated consumer advocate. I do not mean that Mashaw and Harfst blame Nader and Claybrook for NHTSA's failures. Nor would this be particularly noteworthy, as Nader well documented his own dismay with NHTSA's early efforts in his 1972 edition of *Unsafe at Any Speed*.³ Nevertheless, according to Mashaw and Harfst, NHTSA is a dud when judged by the goals that Nader and its other architects initially set.⁴

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1. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (updated ed. 1972).

2. See *Nader v. General Motors Corp.*, 255 N.E.2d 765 (1970) (detailing Nader's charges against General Motors of invasion of privacy and intentional infliction of severe emotional distress).

3. NADER, *supra* note 1, at xvii-lxxxvii.

4. Claybrook has a different view regarding NHTSA's success in regulating the auto industry.

The Vision

The Struggle for Auto Safety is one of several substantial recent studies covering traffic safety.⁵ None dissent from this simple vision behind the Motor Vehicle Safety Act: that auto makers, who concentrate more on styling and performance, have the capacity to design and manufacture safer cars, and that the new NHTSA would force them to do so. The "technology forcing" strategy was meant to achieve much more than merely compelling all new vehicles to contain the best safety features currently available. Rather, under the spur of NHTSA, the Big Three auto manufacturers and their foreign competitors would work to bring to the showroom floor new technologies that would slash the highway death toll (p. 5).

As vividly portrayed by Mashaw and Harfst, auto accidents were seen as a public health sore thumb. While so many other public health problems were being licked, American motorists were continuing to maim and kill each other at alarming rates (p. 50). And, as with many other earlier and successful public health campaigns, the solution lay not in changing the behavior of ordinary people (p. 65). Driver education and efforts to discourage (and punish) reckless driving and driving under the influence had their place but were not solving the problem (pp. 1-2). From an epidemiological perspective, to concentrate on "the nut behind the wheel"⁶ was to overlook far more promising environmental design changes. These included highway design and, more importantly, vehicle design. If vehicles could be made more forgiving, then (1) crashes might be avoided in the first place and (2) the consequences of auto crashes might be far less lethal (pp. 63-64).

In the mid-sixties the greatest hope seemed to lie along the latter route. Scientists like William Haddon (who became NHTSA's first administrator) had emphasized that enormous safety gains were potentially realizable if more attention were given to the "second collision" (p. 4).⁷ If the tremendous force of the initial impact could be distributed

See Joan Claybrook & David Bollier, *The Hidden Benefits of Regulation: Disclosing the Auto Safety Payoff*, 3 YALE J. ON REG. 87 (1985). See generally JOAN CLAYBROOK ET AL., *Retreat from Safety* (1984).

5. See, e.g., ROBERT W. CRANDALL ET AL., *REGULATING THE AUTOMOBILE* (1986); LEONARD EVANS, *TRAFFIC SAFETY AND THE DRIVER* (1991); MARTIN FRIEDLAND ET AL., *REGULATING TRAFFIC SAFETY* (1990); JOHN D. GRAHAM, *AUTO SAFETY: ASSESSING AMERICA'S PERFORMANCE* (1989) [hereinafter *AUTO SAFETY*]; John D. Graham, *Product Liability and Motor Vehicle Safety*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 120 (Peter W. Huber & Robert E. Litan eds., 1991) [hereinafter *Product Liability and Motor Vehicle Safety*].

6. NADER, *supra* note 1, at xvi.

7. The "second collision" occurs in the instant after the vehicle crashes into an object—when passengers are flung from their seats into the dashboard, steering column, windows, etc., or out of the automobile altogether. See *Caiazza v. Volkswagenwerk A.G.*, 647 F.2d 241, 243 n.2 (1981).

away from, instead of into, the vehicle occupants, then the car could become considerably more "crashworthy." Padded dashboards, head rests, stronger windshields and side doors, and energy-absorbing steering columns are all part of the story. Undoubtedly, 1992 cars are improved on these fronts as compared with 1965 models.

Yet, from the outset Haddon and others believed that even more striking gains could be achieved through effective occupant restraints (pp. 65, 84). By 1964, auto lap belts were already standard equipment on all American cars. However, lap belts alone were not as useful as one would have liked (preventing user ejection more effectively than they did impact with the vehicle's interior) and, far more momentous, usage rates were exceedingly low—under 20% (p. 85). An alternative was needed. Consonant with the public health perspective, the focus turned to "passive" restraints in autos that could curtail the safety advocate's dependence upon millions of individual decisions to buckle up. From the beginning, Haddon's preferred solution was the air bag.

Requiring auto manufacturers to install effective passive restraints would appear, it was felt, as the perfect example of an agency's ability to force technological innovations that ultimately benefitted society. Preliminary development of the air bag was already underway by the early sixties. Setting safety performance standards for occupant restraints would accelerate both that development and the incorporation of safety features into vehicle design far more than would have market pressures alone (pp. 84-85). Moreover, by setting performance standards rather than imposing detailed design requirements, NHTSA could unleash constructive competitiveness among the auto makers and their suppliers. The competitors would battle to produce the best air bag or perhaps a better alternative passive-restraint device such as an effective, automatic seat belt that occupants would not disengage (p. 84).

The Record

In various ways NHTSA tried to pursue this agenda. Two decades after Haddon took over as administrator, however, there was virtually nothing positive to show for the passive-restraint effort. This is the central failure on which Mashaw and Harfst rest their case.

In the early seventies NHTSA temporarily opted for a different solution—mandating that auto manufacturers install an interlock device by which a car supposedly could not be started if the seat belts were not fastened. This encountered enormous consumer resistance (and bypass strategies), however, and the NHTSA requirement was overturned by Congress.

As Mashaw and Harfst further explain, frustrated by a lack of support by the courts, Congress, and the public, NHTSA's focus in the sev-

entires began to shift away from technology forcing and towards the recall of defective vehicles (pp. 147-71). During Claybrook's tenure (1977-1980) NHTSA was especially active on this front. Yet, according to Mashaw and Harfst, recalling defective cars has little or no impact on safety. This is not only because so many owners of recalled vehicles fail to bring them in for refitting but more pivotally because such a small proportion of accidents are caused by vehicles with defects of the sort that the recall scheme reaches and corrects.⁸

In very recent years a growing proportion of new cars has been equipped with motorized shoulder belts that occupants generally do not or cannot detach. Moreover, starting with 1992 auto models, air bags are increasingly becoming standard equipment (and a selling point in ad campaigns). No one can really say whether we would have reached the same results by now (or sooner) without NHTSA. Unfortunately, we do know that what we have in 1992 is less than NHTSA had initially hoped for in 1972.

The Explanation

Other reviewers already have described and critiqued Mashaw and Harfst's theoretical explanation of NHTSA's performance.⁹ I will offer but a few comments along those lines. The authors assert that American "legal culture" accounts for both NHTSA's retreat from technology forcing and performance standards and its shift to the recall strategy (p. 19). To simplify, the courts were hostile to the former but supportive of the latter.

To be sure, several key judicial decisions in the early seventies were antagonistic to NHTSA's mandatory performance standards when the agency lacked data showing sensible targets that auto manufacturers could actually meet (pp. 87-104). Given its premises, it should not have been surprising that the technology-forcing approach failed to generate in advance the information the courts were demanding. Mashaw and Harfst are right that this created a mismatch between what the courts would permit and what Congress' attempt to delegate the implementation of this strategy for auto safety to NHTSA required.

The "legal culture" explanation is a highly complex one to prove,

8. Indeed, given that a large portion of the cars recalled do not actually have a defective part but must be worked on anyway, that some repair efforts made in response to recalls are faulty, and that motorists face accident risks when bringing their cars in for the recall, it is "not implausible to believe that the recall program is decreasing motor vehicle safety" (p. 168).

9. See Joseph A. Page, *The Struggle for Auto Safety*, TRIAL, May 1991, at 88; Michael J. Trebilcock, *Requiem for Regulators: The Passing of a Counter-Culture?*, 8 YALE J. ON REG. 497 (1991) (book review); Jorge L. Contreras, Book Note, *The Struggle for Auto Safety*, 4 HARV. J.L. & TECH. 307 (1991); Alexandra A. Shapiro, Book Note, *The Struggle for Auto Safety*, 91 COLUM. L. REV. 710 (1991). Trebilcock's is by far the most elegant review.

however. As one reviewer explained, the courts in recent years appear as deferential to agency decisions as NHTSA could now reasonably ask.¹⁰ Another pointed out that during the same period reviewed by Mashaw and Harfst, the courts were increasingly supportive of product-liability suits that attacked the automobile and its crashworthiness.¹¹ Finally, as Professor Michael Trebilcock suggested, perhaps NHTSA's record is better understood as the result of its creators having expected too much from the public health orientation they embraced.¹² Put a bit differently, maybe America's general social and political culture provides a better explanation for NHTSA's record than does its legal culture. In the next few paragraphs I will explore this theme further.

Another Explanation

By 1968, perhaps somewhat influenced by early NHTSA requirements, new cars contained lap belts and shoulder belts. The latter were uncomfortable, and to put both in place motorists were required to buckle twice. Nevertheless, if everyone had used these devices, occupants would have been protected almost as well as they are by a combination of air bags and lap belts in 1992 models. The question is: Why did so many American drivers refuse to buckle up?

One answer is that even though nearly everyone knows someone who has been seriously harmed or killed in an auto accident, many people are just unwilling to believe that it will happen to them. Devaluing their own risk of injury or death to almost nothing (far below the true risk), they are loath to impose on themselves even very minor burdens in terms of comfort and convenience. This is the attitude that the passive-restraint solution sought to defeat (p. 3).

A quite different answer to why people do not voluntarily buckle up is that they are aware of the risk of not wearing seat belts and they like it. This perspective has prompted a substantial and controversial literature about risk-taking that is sharply at odds with the public health approach to auto safety.¹³ The idea is that while antilock brakes (the current rage) are much safer in principle, in predicting the overall impact on safety you must also take human reactions into account. With better brakes, the theory runs, people will drive faster, take turns more sharply, follow

10. Shapiro, *supra* note 9, at 716.

11. Page, *supra* note 9, at 90. It should be underscored, however, that courts handling torts cases have resisted liability claims premised on the lack of air bags. For more on the role of product-liability law in promoting the installation of air bags, see *Product Liability and Motor Vehicle Safety*, *supra* note 5, at 156-60.

12. Trebilcock, *supra* note 9, at 504-06.

13. At its extreme, the argument is that if motoring were made unavoidably safe, then young men, for example, would find some other activity in which to indulge their taste for danger. See FRIEDLAND ET AL., *supra* note 5, at 123.

more closely, and so on. As a result, it may turn out that apparently safer vehicles do not translate into increased road safety after all. Some empirical studies claim to have found just this result.¹⁴

The concept that because of offsetting risk-taking, safer cars do not reduce auto accidents has not gone unchallenged. In a very sophisticated study, Robert Crandall and his colleagues at the Brookings Institution found that auto safety improvements since 1966 have had a substantial positive impact on reducing the occupant death rate.¹⁵ Although the study found that nonoccupant deaths were higher than predicted, owing perhaps to somewhat increased risk-taking by drivers of safer cars, the net effect was decidedly favorable. In view of earlier studies with less positive outcomes, Crandall's group was rather surprised to find that death rates were 30% lower in 1981 than would have been estimated had there been no auto safety improvements after 1965.¹⁶ Even using conservative estimates for the value of a life saved, they determined that auto safety improvements ordered during the period under review were well worth their costs.¹⁷

One intuitively appealing explanation for the Brookings findings is that while drivers might substantially reduce the effects of brake and steering improvements by driving more dangerously, they are less likely to minimize the effects of vehicle improvements with respect to second-collision risks.¹⁸ Drivers probably respond to the risk of an accident rather than the harm they might suffer in an accident (the second collision). Possibly drivers do not realize the degree of risk reduction achieved by measures aimed at the second collision.¹⁹ Whatever the underlying explanation, I endorse the view supported by the Brookings study that safer vehicles are indeed responsible for a share of reduced highway fatalities and serious injuries.

Mashaw and Harfst are not necessarily wrong about NHTSA's accomplishments despite its failures in court and before Congress. The Brookings study did not prove either that safer cars are attributable to NHTSA's actions or that NHTSA is really capable (the legal culture

14. Among the most prominent work is that by University of Chicago economist Sam Peltzman, who vigorously promoted this type of analysis. See Sam Peltzman, *The Effects of Automobile Safety Regulation*, 83 J. POL. ECON. 677 (1975).

15. CRANDALL ET AL., *supra* note 5, at 66, 68.

16. *Id.* at 69.

17. *Id.* at 74-79.

18. FRIEDLAND ET AL., *supra* note 5, at 122.

19. Evans makes an extremely convincing case against the so-called "risk homeostasis" theory, showing that although drivers do respond to changes in vehicle and road conditions, it is implausible to conclude that they always seek a constant level of risk that inevitably wipes out any advances in safety. Rather, different interventions lead to differing sorts of responses, some of which achieve the safety effects intended, some more than expected, some less than expected, and some increased risk. See EVANS, *supra* note 5, at 282-309.

aside) of imposing costly passive restraints on American society before it is otherwise ready to accept them.

Consider first how many of the safety improvements ordered by NHTSA the market would have achieved anyway. This is very difficult to determine. Crandall and his colleagues estimated that all the safety improvements mandated from 1966 through 1984 increased the cost of a 1984 car about \$500 in terms of equipment and about \$100 more in higher fuel costs over the lifetime of the car.²⁰ But the analysis does not address whether these changes (or any single one of them) would have been made absent NHTSA regulation because of, say, increased safety-consciousness in the public at large.

Auto makers in the mid-sixties apparently thought that safety did not sell. Still, by 1984 they might well have put \$100 per car into head rests, padded dashboards, stronger windshields and side doors, and safer steering columns, the approximate cost of NHTSA-ordered improvements in those areas.²¹ Who is to say?

Air bags, however, are another matter, and, by contrast, I find it not surprising that they did not quickly come into the market during NHTSA's early years. Air bags were talked about as costing perhaps \$200 in 1972,²² a very substantial expense as compared with all of the other safety features NHTSA has ordered.²³ But if the primary reason people have not voluntarily buckled up has been their refusal to believe they are at risk, it would have been difficult to get them voluntarily to spend a significant extra sum for protection they have not believed is needed (even though it is). As for those who are well aware of the second collision risk and who routinely buckle up, why should they have wanted to purchase air bags that probably would not have given them a great deal of additional protection?

The key point is that given this double-barreled market resistance to air bags, it is unclear that NHTSA could have imposed air bags on the public early on even absent the judicial hurdles that Mashaw and Harfst emphasize. Would most safety-oriented motorists really have supported a requirement that would have forced them to pay considerably more in order, primarily, to assure the protection of others who are foolhardy? The public might well have forced Congress to overturn the paternalism of mandatory air bags, as it did in the case of the interlock solution.

As noted above, by the mid-nineties a substantial portion of newer cars on the road will have air bags. More than a result of NHTSA's

20. CRANDALL ET AL., *supra* note 5, at 37 (Table 3-4). Crandall's analysis assumes that over time manufacturers learn how to meet earlier mandated changes at lower cost.

21. *Id.* at 34 (Table 3-2).

22. AUTO SAFETY, *supra* note 5, at 42.

23. This is especially so when the large cost of required bumper improvements is taken out; they reduce vehicular damage in a crash but do little for occupants.

recent efforts, however, this development might be the product of a changed public outlook, a different social culture. These days Americans appear to be more risk averse than in the past. Indeed, many seem eager that enterprises be forced to take precautions that are not cost justified even when large values are assigned to a life saved.²⁴ Maybe this caution comes with the aging of the baby-boom generation. Possibly it arises out of broad concerns about runaway health-care costs that "we" have to pay when "they" foolishly injure themselves, or, more narrowly, from an increased vulnerability that people might feel in today's smaller and lighter cars. Perhaps cautious people now overestimate how much additional protection air bags will provide those using seat belts; and maybe they do not realize how much reduced protection occupants have by relying on air bags instead of seat belts.²⁵

American states have never achieved the level of seat-belt usage attained in several other countries (reportedly as high as 90% in some places in Australia as compared with an overall average of something over 40% in the U.S.).²⁶ Nevertheless, after a slow start as compared with the rest of the world, most states have, since 1984, formally mandated seat-belt use and many seriously enforce the law. Roughly speaking, adopting a law mandating seat-belt use appears to increase usage about 20% and effective enforcement of the law another approximately 20%.²⁷ Increased usage clearly seems to have a significant positive safety effect.²⁸

That more than 80% of Americans live in jurisdictions with mandatory use laws suggests a change in the political culture.²⁹ In the sixties when seat belts were first generally available, no states adopted laws requiring their use. Given the lessened urgency for air bags as seat-belt use escalates, the irony may just be that the way was finally cleared for air bags, both politically and in the market, only after more and more people were already using seat belts.³⁰

24. See, e.g., W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 120 (Table 6.1) (1991).

25. Evans estimated that the fatality-reducing effectiveness of lap/shoulder belts for drivers and right-front passengers is about 41% and that the addition of front-seat air bags raises the effectiveness percentage to about 46%. Reliance on air bags alone (that is, not using a lap belt as well), according to Evans, should have a fatality-reducing effectiveness of about 17%. These percentages are as compared with no occupant-protection devices. EVANS, *supra* note 5, at 244 (Table 9-6). Other estimates show a somewhat greater effectiveness for air bags alone (for example, 20% or more). *Id.* at 245 (Table 9-7).

26. *Id.* at 252.

27. *Id.* at 252-55.

28. *Id.* at 254-69.

29. *Id.* at 252.

30. The role of NHTSA, starting in the 1980s, in prompting states to adopt laws mandating seat-belt use is a complex one. For a discussion of this issue, see AUTO SAFETY, *supra* note 5, at 120-23.

The Reform(s)

Mashaw and Harfst nearly advocate NHTSA's abolition. Instead, they withdraw that proposal and suggest, without real enthusiasm, that auto makers be required to wait until later in the standard-setting and enforcement process before being allowed to attack NHTSA requirements in court (pp. 245-47).³¹ Mashaw and Harfst then consider the role that product-liability lawsuits play or might play and, wisely I believe, reject that avenue as the panacea (pp. 235-41).³²

Amid this general gloom about effective governmental promotion of auto safety, Mashaw and Harfst more enthusiastically suggest auto no-fault insurance as an alluring, alternate solution. They point out that under the conventional tort/liability insurance system, gains in occupant safety would be primarily captured in reduced third-party liability insurance because tortfeasors would do less harm and hence be liable for lower damages awards (pp. 241-45). But it is not logical to expect insurers to lower the costs of an individual motorist's liability insurance if he or she drives a car with air bags, for example, because the premium charged is based upon the risk of injuring others, not yourself.³³ In other words, auto insurance generally fails to work as an institutional mechanism that can demonstrate effective passive restraints pay for themselves in losses avoided.

It is true that in states with the traditional fault system, insurers routinely offer motorists the opportunity to buy, in addition to third-party liability coverage, first-party protection against the risk of incurring medical expenses as a result of an auto accident. Moreover, major insurance carriers today commonly offer premium discounts on the medical-payments coverage if the car is equipped with air bags or automatic seat belts. But medical-payments coverage is typically a trivial portion of the total auto-policy cost, so the discount in turn is exceedingly small.³⁴

By contrast, in no-fault states the financial benefit of having effective passive restraints can be significant. Currently, the major insurers in such states appear to offer 10-30% discounts on first-party personal-injury-protection (PIP) coverage for cars with air bags or automatic seat

31. For a criticism of this solution, see Trebilcock, *supra* note 9, at 502.

32. See also *Product Liability and Motor Vehicle Safety*, *supra* note 5 (analyzing the role of product-liability law in promoting safer cars).

33. Some carriers are now offering small reductions in liability-insurance premiums for those motorists who have cars with antilock brakes, presumably on the theory that such motorists will cause fewer accidents. Telephone Interview with Stephen Oesch, General Counsel to the Insurance Institute for Highway Safety (Oct. 30, 1991). These discounts can also apply to collision coverage but apparently not to other first-party coverages.

34. In principle an insured with air bags might be thought entitled to a reduced premium for uninsured-motorist coverage because that covers the motorist's own tort loss when injured by someone else with either no insurance or too little insurance. But, according to Oesch, this does not appear to be the practice. *Id.*

belts.³⁵ The more comprehensive the no-fault plan, the more the PIP premium and, hence, the greater the dollar value of the discount. A nationwide comprehensive substitute of auto no-fault for the current fault system, Mashaw and Harfst argue, could maximize this advantage (p. 253). Car buyers would be able to see, in a vivid way, how much better-off financially they are with such self-protection devices. Indeed, the present value of the insurance discounts they will eventually receive could well more than pay for the cost of their air bags.³⁶

Under the no-fault solution Mashaw and Harfst envision, not only would a much larger proportion of motorists voluntarily buy air bags and other occupant safety features as they are introduced but also economic justice would result. Those who choose to put themselves at risk and later, as a result, need medical care, income replacement, and the like would pay for those benefits in higher auto insurance premiums. Today, by contrast, people who have employment-based health insurance and temporary disability insurance, as well as Social Security and other broad public and private insurance protection, plainly do not pay for the greater likelihood that they will need to use those benefits if they drive cars that are less safe for occupants. Although Mashaw and Harfst see certain technical problems with the no-fault solution, the biggest obstacle they anticipate is political (pp. 244-45).

Politics aside, not all will agree with Mashaw and Harfst's analysis and proposal. For example, although Professor Trebilcock decidedly favors public policies that employ charges to promote socially efficient conduct,³⁷ he objects to the switch to auto no-fault. Acknowledging that this might helpfully promote investment in self-protection, he fears that it risks undercutting the existing stimulus to exercise care toward others.³⁸ A common belief is that once motorists have acted upon self-preservation instincts, felt moral obligations to others, and feared criminal prosecution, there is little room left for tort law to further promote careful driving.³⁹ Others, however, believe that the fear of higher liability-insurance rates is still effective at the margin.⁴⁰ Empirical studies on the question are terribly difficult to carry out, and those that have been

35. *Id.* The discounts vary both by insurer and by the type of protective device (for example, air bags for the driver only or for the front passenger as well).

36. One cannot, however, assume this will be the case even if air bags really do pay their way from the social-cost perspective. This is because the transaction costs of insurance always make the actual premium larger than the pure premium calculated solely on the basis of risk.

37. See, e.g., Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929 (1987).

38. Trebilcock, *supra* note 9, at 502.

39. STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* 4-6 (1989).

40. *Id.* at 13-15, 21-23.

published are contradictory in their findings.⁴¹ Nonetheless, at least one study of Quebec's no-fault plan (charging all drivers a flat premium regardless of their age or driving record) found that, holding other factors constant, the shift away from the fault system was actually correlated with worse driving.⁴² It is this outcome that accounts for Trebilcock's qualms about Mashaw and Harfst's proposal. I believe that both Trebilcock's and Mashaw and Harfst's objectives can be served through the adoption of a plan I have previously described elsewhere.⁴³

A Better Reform

I favor the creation at the state level of an Auto Accident Compensation Corporation (AACC). The AACC would pay generous no-fault benefits to all auto-accident victims. I have preliminarily estimated that in California the AACC would be able to fund the following package: (1) 85% of otherwise unreimbursed lost earnings up to \$50,000 a year (twice California's average wage); (2) otherwise unreimbursed medical expenses up to \$500,000; (3) other reasonably incurred expenses up to \$75 a day in the short term, \$35 a day later on; and (4) moderate amounts for pain and suffering for those who either are fully disabled for longer than six months or suffer a permanent and serious impairment or disfigurement. In return, auto-accident victims could not sue their injurers in court.

I will not concentrate now on the benefit side of the program because funding of the AACC is the primary concern here. There would be three sources of funding. The most important in terms of money raised would be a surcharge on fuel consumption in the range of \$0.30 a gallon. This, incidentally, should have a socially desirable impact in reducing the amount of driving people do.⁴⁴

41. These studies are discussed in FRIEDLAND ET AL., *supra* note 5, at 68-74.

42. FRIEDLAND ET AL., *supra* note 5, at 70 (citing R.A. Devlin, *Liability versus No-Fault Automobile Insurance Regimes: An Analysis of Quebec's Experience* (paper presented at the Canadian Economics Association Meeting, Windsor, Ontario, Canada, June 3, 1988)).

43. Stephen D. Sugarman, *California's Insurance Regulation Revolution: The First Two Years of Proposition 103*, 27 SAN DIEGO L. REV. 683, 711-14 (1990) [hereinafter Sugarman, *California's Insurance Regulation Revolution*]; Stephen D. Sugarman, *Foreword: Choosing Among Systems of Auto Insurance for Personal Injury*, 26 SAN DIEGO L. REV. 977, 988-92 (1989); Stephen D. Sugarman, *The Case for Pay-at-the-Pump Car Insurance*, SACRAMENTO BEE, June 9, 1991, Forum, at 1; Stephen D. Sugarman, *How to Slash Car Insurance Costs*, SACRAMENTO BEE, Apr. 1, 1990, Forum, at 1.

44. In the short run, given the current price of gasoline, the results of other studies seem to predict a reduction in driving of about 5%. Over time, fuel consumption would be expected to drop by up to 15% as people made more permanent adjustments. Those would include, on the one hand, a shift to more fuel-efficient cars and, on the other, a shift to public transportation and living closer to work. Mohamed M. El-Gasseir, State of California Energy Resources Conservation and Development Commission, *The Potential Benefits and Workability of Pay-As-You-Drive Automobile Insurance* (June 8, 1990) (unpublished report) (on file with author).

The next funding source for the AACC would be a charge imposed on drivers based upon (a) their driving record and (b) their experience. As for the driving-record charges, three categories of drivers would be established. Those with the best records—no more than one moving violation in the past three years—would pay a modest surcharge when renewing their driving license after three years. This might be \$60, or \$20 per year. In California this would probably cover 80% of drivers.⁴⁵ Drivers without such good records would fall in the second category, paying approximately \$120 a year along with being required to renew their license annually. This might cover another 15-18% of drivers. Finally, in the third category would be drivers with the worst records, fewer than 5% of motorists, who might have to pay into the AACC \$500 annually. These charges would respond to Trebilcock's concern that eliminating the need to purchase experience-rated liability insurance might tempt some people to drive carelessly.⁴⁶

To respond to Trebilcock's additional concern that elimination of the fault system (and its higher insurance premiums for teenagers) would bring too many novices onto the roads,⁴⁷ drivers would also face surcharges based upon their experience. The surcharge might be \$600 for sixteen- and seventeen-year-olds and \$300 for both eighteen- and nineteen-year-olds and other new adult drivers.

The AACC's third source of funds would be a charge connected to the ownership of a vehicle. On the annual registration of an auto the owner would pay a sum based upon the model's safety record. Given currently available data and competing methods of analysis, there is sure to be controversy over how to measure a car's safety, so that some politically acceptable compromise over the calculation of these charges will be required.

One approach is to create a rating system blending the results of federal-government crash tests and data gathered by the AACC from actual on-road experience. One shortcoming of the crash-test data is that they are based upon experiments and not real-world situations. Another is that they only attempt to measure the danger of a head-on collision for vehicles in the same weight class.⁴⁸ Crash-test results are based upon crashing the car into a fixed barrier, which is equivalent to crashing it into an identical vehicle at the same speed. But, of course, a large proportion of real crashes occur through rollovers, through a single vehicle crashing into an object that at least partially gives way, and through the crash of two vehicles other than head-on and/or of sharply differing

45. See Sugarman, *California's Insurance Regulation Revolution*, *supra* note 43, at 703.

46. Trebilcock, *supra* note 9, at 502.

47. *Id.* at 508-10.

48. See, e.g., JACK GILLIS, *THE CAR BOOK* 18 (1990).

weights.⁴⁹

Other things being equal, lighter cars are more dangerous to their occupants in a crash than are heavier cars. It makes good sense to appreciate that you are more at risk in a well-rated light car than in an equally well-rated heavy one. On the other hand, from the overall societal safety viewpoint, other things being equal, heavier cars are more dangerous to nonoccupants than are lighter ones. Work by Leonard Evans showed that the danger to others caused by vehicles being heavier is more than offset by safety gains to the driver and occupants of heavier vehicles and that this holds true even taking into account that drivers of heavier cars are more likely to be involved in crashes than are drivers of lighter cars.⁵⁰ Perhaps this is because high-performance vehicles tend to be heavier and are driven more carelessly. In any case, from this perspective it would not be fair to ask owners of heavier cars to pay as much as owners of lighter cars with the same crash-test rating. Indeed, my conversation with Evans suggests that he would probably object to safety charges that are not solely, or at least largely, based upon the vehicle's mass.⁵¹

Unlike crash tests, on-road experience tells us about the actual performance of vehicles. Currently, widely disseminated data of this sort are compiled and analyzed by the Highway Loss Data Institute (HLDI), an affiliate of the Insurance Institute for Highway Safety.⁵² But as just noted, those results are typically confounded by the fact that drivers of different types of cars might drive more carelessly. As an example, not long ago GM was advertising to a "new generation of Olds" drivers, emphasizing the sportiness of the new cars in this line. Assuming that Oldsmobiles have been traditionally driven by older and statistically safer drivers, and if the ad campaign were successful in attracting younger and statistically careless drivers, quite possibly Oldsmobile will show up as a more dangerous car on the HLDI statistics than it has in the past. The changes in the data would arise not because of any change in the car but because of its owners.⁵³

At this point let me simply assume that the AACC would use the available data in a sensible manner and create, probably, three categories of vehicles. The first, or safest, category would include 15-20% of cars. Their owners might pay a charge of \$40 a year. The second band would contain 60-70% of cars, and their owners would pay \$80 a year. The

49. See EVANS, *supra* note 5, at 47 (Figure 3-3), 66-71.

50. *Id.* at 291.

51. Telephone Interview with Leonard Evans, Principal Research Scientist, General Motors Research Laboratories (Jan. 3, 1992).

52. See, e.g., HIGHWAY LOSS DATA INSTITUTE, INJURY AND COLLISION LOSS EXPERIENCE BY MAKE AND MODEL (Sept. 1990) (pamphlet).

53. HLDI statistics are adjusted to take into account the age of the driver but not other characteristics. See *id.*

remaining 10-20% of cars—the most dangerous ones—would be in the third band, and their owners would pay \$120 (or possibly up to \$200) a year.

New-car and commercial used-car sellers would have to post on the car's "sticker" the band in which the car falls. So long as insufficient data are available, a new model that is largely a continuation of a prior model would be placed in the same band as the prior year's model. If the new model were really a new design for which there is no experience or data, the model would simply be placed in the middle category.

In addition, a one-time safety fee, payable to the AACC, would be imposed on the purchase of a new car, against which credits would be allowed if the car has certain safety features. This information also would be posted on the "sticker." For example, the safety fee might start at \$200, with a credit of \$100 for air bags or automatic, motorized seat belts, and \$50 for antilock brakes. These credits would be adjusted by the AACC for technology changes as new safety features come into the marketplace (side air bags, for example) and older features become more widespread.

This third AACC revenue source is intended to accomplish what Mashaw and Harfst seek through their advocacy of the no-fault solution. In addition to the actual financial incentives, putting the information on the "sticker" should help make safety more of a "talking point" in car sales.

I have made a preliminary estimate for California of the aggregate revenue that the AACC could expect to collect. It amounts to approximately \$7.5 billion a year as shown below. This is roughly comparable to the amount of revenue now collected by California insurers on personal and commercial auto-insurance policies for liability insurance for bodily injury, medical payments, and uninsured-motorist protection for bodily injury.

ESTIMATED AACC REVENUES IN CALIFORNIA
(1991 DATA AND DOLLARS)

Fuel surcharge:

\$0.30 a gallon on 15 billion gallons	\$4.500 billion
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Driving-license surcharge on just over 19 million drivers:

\$ 20 on 15 million drivers	.300 billion
\$120 on 4 million drivers	.480 billion
\$500 on 200,000 drivers	.100 billion

.880 billion

Annual vehicle registration surcharge on about 25 million vehicles:

\$ 40 on 5 million vehicles	.200 billion
\$ 80 on 15 million vehicles	1.200 billion
\$120 on 5 million vehicles	.600 billion

2.000 billion

New-car safety fees plus special surcharge on teen and other novice drivers:

Preliminary estimate	.120 billion
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Grand total \$7.500 billion

A "typical" California motorist with a good driving record and a car of average safety who drives 13,000 miles a year and uses a gallon of gas for every twenty miles driven would pay just under \$300 a year to the AACC from the three funding sources. This is certainly less than the typical California driver now pays for the insurance protection that would no longer be needed under the new plan.

I appreciate that there will be some objections to the idea of a government-run plan, even an independent AACC, on the ground that a public insurance monopoly is a recipe for trouble. Critics will point to possible administrative inefficiencies in implementing the program and the potential political inability of the AACC to differentiate among drivers and vehicles in the way that insurers do. But I believe that there are more than offsetting efficiency gains to justify these risks. The fee-collection process should assure that nearly all motorists contribute (as compared with current uninsured motorist rates of about 25% in California), and the considerable marketing and commission expenses that accompany the selling of auto insurance would be eliminated.⁵⁴

I have several responses to those who ask about the impact of my proposal on the poor. Considering first those motorists who currently purchase auto insurance, I should emphasize that my plan promises many poor people sharply lower costs than they face under existing arrangements. A poor person with a good driving record could commute twenty-four miles a day even in an older, reasonably safe "gas guzzler" getting but twelve miles to the gallon and would have to pay about \$250 annually to the AACC from all sources. By comparison, in Los Angeles today, for example, because of "redlining" and other reasons, many poor people are forced into the state's assigned-risk plan regardless of their past driving records and face annual liability-insurance premiums in the range of \$1000 for the minimum required protection. Even poor motorists living in less urban counties, buying in the standard insurance market

54. Moreover, I think it would be wise for the AACC to employ the claims-processing expertise of the existing insurance industry by contracting out that function in the way, for example, that Medicare contracts out its claim processing to the private sector.

and eligible for good-driver discounts, are now likely to pay at least \$300 a year for minimum liability and uninsured-motorist protection. Moreover, poor people will be gaining more useful protection under my plan. Today, if they are truly judgment proof, buying liability insurance amounts to morally proper, but financially wasteful, behavior.

Poor people who do not insure today will face increased costs (and will gain new benefits). Although a disproportionate share of our society's uninsured motorists is poor, it is by no means clear that their scoff-law behavior is widely approved. In California, for example, advocates for the poor have been searching for ways to provide them with affordable auto insurance that they could be expected to buy. I believe that my plan meets that standard.

If, in the end, the poor were thought too burdened by my plan, surely their plight should not block its adoption altogether. If necessary they could be provided with increased cash transfer payments or, if politically expedient, with transportation vouchers good for either public transportation or gasoline.

As for political resistance, the plan could well run into the opposition of the insurance and oil industries, trial lawyers, the "highway lobby,"⁵⁵ independent insurance agents and brokers, and truckers and travelling salespeople (who would perhaps pay more to the AACC than they now pay in insurance). But because of the plan's likely behavioral effects it should win the support of environmentalists, public-transport supporters, and fans of energy efficiency and independence. Most importantly, it should have the support of individual motorists and both consumer and traffic-safety groups.⁵⁶

The figures provided earlier would produce for most California motorists a substantial reduction in their overall cost of driving. This is because their total contribution to the AACC would be less than currently incurred auto-insurance expenses that would no longer be necessary. Beyond overall public savings, the AACC system of charges is better designed than our current system to influence drivers, car buyers, and carmakers to act in more socially desirable ways or at least to reward them for doing so.

It is an open question, however, whether Nader would support the AACC proposal. Despite the attractiveness of the basic auto no-fault idea on many grounds—including the auto-safety ground to which Mashaw and Harfst appeal—Nader has long opposed auto no-fault.

55. The "highway lobby" includes concrete manufacturers, road builders, owners of motels, fast-food outlets, and gasoline stations.

56. Whether auto makers back or oppose the plan will turn on whether the introduction of the AACC and especially the charge on new cars are seen as a proper *quid pro quo* for the elimination of auto-manufacturer product liability, manufacturing, and design and warning defects.

Many insurers and consumer groups that back no-fault find this opposition bizarre. Some are inclined to credit recently published attacks on Nader that portray him as in bed with the plaintiff's bar.⁵⁷ I am more willing to accept his assertion that he simply opposes the idea of victims losing their right to sue.⁵⁸ After all, Nader himself has made successful use of the tort system, and shortly after he published *Unsafe at Any Speed* he teamed up with Professor Joseph Page to advocate product-liability litigation as a route to safer cars.⁵⁹ Whether he was right or wrong, I can well understand Nader's hostility to doing away with individual tort rights against large corporations.

But when the American tort law/liability insurance system is so obviously failing the public, his dogged objection to a sensible substitution for the right to sue other motorists mystifies me. I appreciate that American courts acknowledge the dignity of the individual by awarding pain and suffering damages that are far in excess of what other nations do, and the AACC would, award and that Nader might find this quite attractive. But the reality is that a huge proportion of those seriously injured in auto accidents have no chance of benefitting from that generosity. Perhaps two-thirds of auto accidents are caused by drivers who are either altogether uninsured or have coverage of \$50,000 or less.⁶⁰ Those with small injuries might be able to extract a fair amount from the system, particularly given the nuisance value of their claims; but even they wind up turning much or all of their compensation for pain and suffering over to pay their lawyers. The AACC would change all that, far better compensating victims, especially the seriously injured—and at a lower overall cost.

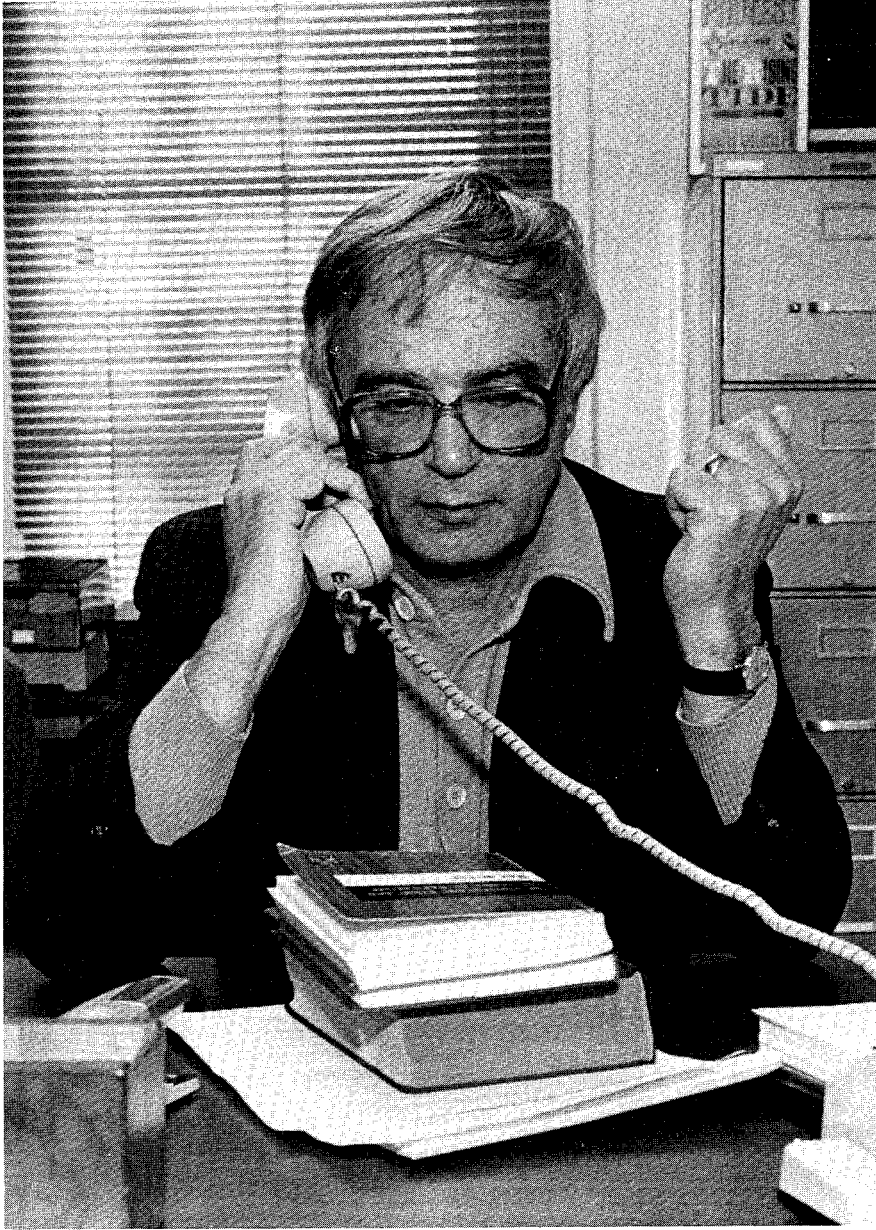
Assume I am right that the AACC represents either a better public approach to car safety than NHTSA has provided or at least a desirable supplement to NHTSA. If so, it would be ironic indeed if its adoption were blocked because of the quixotic opposition of the one public citizen most identified with auto safety in the first place.

57. See, e.g., Peter Brimelow & Leslie Spencer, *Ralph Nader, Inc.*, FORBES, Sept. 17, 1990, at 117; L. Gordon Crovitz, *Ralph Nader Is a Bargain for Trial Lawyers at \$1,000 a Table*, WALL ST. J., Nov. 14, 1990, at 15.

58. See, e.g., Ralph Nader, *The Assault on Injured Victims' Rights*, 64 DENV. U. L. REV. 625 (1988).

59. See Ralph Nader & Joseph A. Page, *Automobile Design and the Judicial Process*, 55 CALIF. L. REV. 645 (1967).

60. See Jeffrey O'Connell, *No-Fault Auto Insurance: Back By Popular (Market) Demand?*, 26 SAN DIEGO L. REV. 993, 1000 n.18 (1989).



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