THE ROLES OF LAW IN THE AUTOMOTIVE AGE

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One might be tempted to say that the role of law in the automotive age is not conspicuously different from the role of law in any age. However, if by the automotive age we mean generally the era in which we live, it would appear that law has a significant and constructive part to play.

Let us look back for a moment to the origins of our Anglo-American legal system. Although this, like almost all generalizations, is subject to qualification, it is fair to say that the Common Law was essentially decisional rather than legislative in character and that it was little more than declared custom. It grew gradually through the expansion of precedent. It was made, or in the language of the period, "found" by judges.

With the coming of the industrial revolution and its attendant social and economic problems, the Common Law, although still useful in limited areas, proved to be an inadequate means of binding together a dynamic and rapidly changing society. As a consequence workmen's compensation laws replaced the archaic rules of master and servant. Later, social security statutes filled a void left vacant in a society which did not recognize an obligation to provide support for industrial and other workers after their productivity had ceased. Other examples will readily come to mind.

Now, in what is not only the automotive age but the atomic age and the space age, new problems beset society and offer new challenges to law and lawyers. Let me cite an example. Recently The George Washington University Law Review published a symposium on law, science and technology. In 456 pages various authors discussed such topics as "Anti-trust in Orbit," "Space Communications and Nuclear Energy" and, believe it or not, "Speculations on the Relation of the Computer to Individual Freedom and Right to Privacy." The general theme was that social, political and economic consequences must be considered and dealt with through legal devices

This conclusion is equally applicable to the automotive age as such. The arrogant chariots, as John Keats has called them, are being produced (fortunately, not as yet reproducing themselves) at a rate of over seven million a year. They clog our highways. They kill and maim our people. They pollute our atmosphere. They demand superhighways costing a million dollars a mile. They cause us to spend billions of dollars of public and private money. And yet we love, honor, and, I was about to say, obey them because they occupy a central position in our lives.

The automobile is far more than a status symbol, although in some of its manifestations it is clearly that It is a basic element of our society. It has changed the pattern of our cities, since it makes suburban dwelling possible and provides mobility for the entire population. It encourages the migration of vast masses of people to what to them are greener pastures. It opens up

recreational areas. It provides employment for millions, not only in manufacturing but also in the supporting service industries, in road building, oil production and the making of construction materials. It deeply affects the tax structure and to a considerable degree creates political controversy. Thus, the automobile must be viewed as a social phenomenon and source of problems which, as in the cases mentioned above, may require law making as a part of their solution.

Among the multitude of problems, only a few can be suggested for the purposes of this discussion. First, I would mention a basic matter which permeates all legal thinking This is a tyranny, not so much of words as of conceptions. Specifically, in this context, it is the dichotomy between "right" and "privilege." As you know, cases dealing with motor vehicle operation are apt to declare that certain types of regulation are constitutionally permissible because the operation of a motor vehicle is simply a privilege which can be withdrawn by public authority. Substituted service laws are one example, where it is said that in exchange for the "privilege" of using the highway a state may require a nonresident to accept service on some official such as the Secretary of State, coupled, usually, with attempted service by mail. This conception is an easy one for deciding cases, but I suggest that it is far from a realistic one. Actually, if by "privilege" one means something that can be taken away by arbitrary state action, the word is virtually meaningless. Even the substituted service laws provide for some reasonable attempt at actual service. If, on the other hand, we mean by "right" an interest that cannot be limited or extinguished by law we have an equally meaningless term, since no one has an unqualified "right" to operate a motor vehicle under all conceivable circumstances. Thus, this type of conceptualism is sterile and does not contribute to the wise solutions of problems.

If, on the other hand, we think, as did Roscoe Pound, of a "right" as a legally protected interest, the way is open for fruitful consideration. The question then becomes simply, what interests do we want to protect when the individual interest is contrasted with certain social interests such as public safety. Immediately definite individual interests appear. As examples, consider the man who makes his living as a truck driver or a traveling salesman; the suburbanite who has no public transportation which will get him to work; his wife who must visit the shopping center to buy groceries since no delivery service is available. Contrast these with the youngster who feels he must have a car to free him from the horrible necessity of walking half a mile to school or the hot rodder who enjoys drag racing on public highways Must we or should we treat all of these cases in the same way? Since I am asking questions and not giving answers, I shall leave it at that.

However, this does bring us into the whole area of licensing and sanctions. As to licensing, as far as I am aware the statutes generally require little more than a rudimentary knowledge of the law, which can be quickly forgotten once the test is passed, plus, in most states, some demonstration of driving ability. Testing of eyesight is also fairly common and in the District of Columbia in at least some cases this test is administered when one applies for license renewal.

It would seem to me that a fruitful area for investigation and possibly for legislation might be to discover what physical and mental requirements are really important in determining the fitness of a person to drive. Empirical research into driving habits, the causes of accidents and the extent to which such factors

as alcoholism enter into the situation would be rewarding. Indeed, to some extent, this research is now taking place.

However, I will offer the conjecture that these matters will affect the imposition of sanctions more than licensing since, as has been indicated, the motor vehicle is such an integral part of modern living that one can probably say that every person who possesses a minimum amount of skill and intelligence has a "right" to be licensed. As a practical matter the political turmoil which would ensue if truly rigorous licensing standards were enacted and applied would be virtually equivalent to revolution.

But what of the imposition of sanctions? Fines and imprisonment are usually provided for in the case of motor vehicle violations, but I doubt if we have sufficiently considered how effective they are in promoting safety on the highways which, after all, is the goal. Again, research projects could be constructed which might tell us a good deal about the way in which various sanctions operate and this, in turn, might bring about a reconsideration of the law.

At this point, however, I am going to assume that suspension and revocation of licenses are the ultimate weapons Here is a whole field for research and possible legislation. What is the actual practice in dealing with violators causing injury to person or property? Do considerations of economic necessity enter into the picture? What part, if any, does individual or political influence play? Do courts in various areas differ markedly in revoking or suspending licenses? If so, why? I do not believe we have the answers. If we do not, how can we devise a rational and coherent system for dealing with the problem?

Another area worthy of consideration involves the place of the highway in the automotive age. Here, a massive amount of work has been done by the Highway Research Board and others. But again I venture to suggest that some fundamental reconsiderations are in order. What, for example, is the *function* of the highway in the automotive age? The older cases, I understand, considered the highway as a service to land, and of course, it still is in many cases. But this led to the development of some rules with regard to access to highways and the "right to see and be seen" which probably can no longer be regarded as of universal application. The modern freeway is not really a service to abutting land. It is a people mover. Its function is to allow rapid travel from place to place, and in these circumstances, access to and from abutting lands is a nuisance rather than an advantage I think many of the legal problems regarding limited-access highways have been solved, but there remain certain fringes which may require further study.

One of these, certainly, is the problem of land acquisition and condemnation value. When a man's farm is bisected by a superhighway and he is forced to travel miles in order to cross it, his situation is far different from what it would be if a one- or two-lane road with unlimited crossing areas were constructed. Problems of diminished value of the whole farm as distinguished from the value of the actual land taken immediately emerge. My impression is that the case law on this topic is far from consistent and that the plight of the landowner is not fully appreciated. Studies of this topic and the suggestion of solutions should be well worthwhile.

A somewhat related area of investigation has to do with the control of abutting land not actually a part of the highway. This involves consideration, for example, of the control of billboards and signs within view of the road. I shall not attempt

to trace the history of anti-billboard legislation, but it may be appropriate to remark that, in addition to the traditional considerations of public safety, matters of esthetics seem to be receiving increasing attention. The scope of the police power and the extent to which the use of property may be prohibited or controlled for esthetic reasons are involved here. Also present is the question of standards if regulation is involved. In another place I have asked the question: "Can taste be codified?" I doubt it in this context, but in at least some cases zoning ordinances embodying esthetic requirements have been sustained.

Parenthetically, it may be noted that the power of the Federal dollar is involved here. By using the technique referred to by the opposition as bribery and by its proponents as incentive payment or reward, the Federal Government has caused some states to pass anti-billboard legislation in order to obtain a greater proportion of Federal funds for interstate highways. This is a common device when the government wishes to impose standards which would be difficult to require directly, and it seems to be impervious to constitutional attack.

A final series of problems—and these are of greatest interest to the practicing lawyer—concerns liability and litigation. Here we find varying emphases, in some cases limiting and in some cases increasing the scope of liability without fault. Although scholars did and some still do argue the question of what principle applies, if we take as a beginning point the mid-Nineteenth Century, I suppose we would find general agreement with the proposition that liability for personal injury or property damage depended on a showing of negligence on the part of the defendant. Of course, the rule was modified in some situations, but it was accepted for the most part. But negligence was in itself a slippery concept. And there were instances in which liability was imposed on persons who, by any ordinary lay standard, should not have been subject to the payment of damages. A classic example involved the "good Samaritan." At Common Law, one had no duty to come to the aid of a person in trouble, but if he did so, and was negligent in his assistance, he was liable. This has caused fear on the part of physicians who, it is said. might refuse to stop and give aid to a person injured as a result of an automobile accident for fear that they might subsequently face an action for malpractice. Although I am informed that there have been no cases in which recovery has been allowed, the fear even of accusation has caused the enactment in a number of states of "good Samaritan" statutes limiting recovery in such situations to what is called "gross negligence." In a somewhat similar situation, "guest statutes" have been adopted, restricting the liability of a driver for injuries suffered by a guest riding in his automobile.

Whether or not laws of this type make sense in terms of actual situations has not, as far as I know, been determined. But a much more important question is whether the principle of no liability without fault makes sense in terms of the problems of present day society. It has frequently been noted that jury verdicts in personal injury actions are quite unpredictable and have no real relation to the actual injuries involved. They may depend on the skill of the lawyers, the apparent economic status of the parties, the character of the witnesses or any number of other factors Many scholars have been concerned about this situation, and it has been suggested that, as in the case of workmen's compensation, the cost of injury should be borne by society through the device of insurance, that recovery should be limited to scheduled rates of compensation, and that the element of negligence or fault should be disregarded. Naturally enough this idea

has been received with modified rapture by plaintiff's attorneys who are generally compensated on a percentage of recovery basis. However, this is one field in which serious investigation is taking place, and before long we should have some data which will enable us to provide a sensible solution to the problem.

I cannot end this discussion without referring to one of my favorite themes. It is simply this. A primary task of the lawyer in modern society, whether missiles or motor cars are involved, is to contribute in a constructive way to the solution of social problems. Legal research must get out of the library stacks and into the market place. It must involve knowledge of other professions and disciplines. Although lawyers must always, to a degree, be client caretakers, there is a field for them which traditional legal education has tended to ignore. This is the field of research and legislative drafting. If I may be permitted to quote myself:

> Lawyers are experts in at least three things, apart from the substantive law The first is assimilating and explaining the technical knowledge of other professions; the second is the adjustment of human relations; the third is the use of language to convey rather than obscure meaning (Lawyers and Legislative Process, 54 W Va L Rev 278, 195 (1952).)

A lawyer then, can serve as a catalyst, bringing together different points of view, relating the importance of various things discussed and couching the whole result in appropriate language.

It is in this light that I see the roles of law in the automotive age.