Perspectives on current developments

The Chrysler Package

On June 24, 1980, federally guaranteed bonds bearing 10.35 percent interest were successfully offered to the public by an underwriting group headed by Salomon Brothers, and Chrysler Corporation subsequently received a check for $500 million. Two-and-a-half weeks later Chrysler was back asking for another $300 million. Whether these and subsequent cash transfusions, from an estimated $3.5 billion package of federal and other assistance, will cure the patient or just prolong its misery remains to be seen. Certainly both Chrysler and the U.S. Treasury underestimated the need.

Congress passed the Chrysler Corporation Loan Guarantee Act of 1979 last December, after months of often heated debate. The act authorizes up to $1.5 billion in federal loan guarantees and requires, as a condition of this aid, that Chrysler (1) match these funds by raising at least $1.43 billion in non-federally guaranteed financing (in excess of commitments or concessions outstanding as of October 17, 1979) and (2) submit financing and operating plans to the newly created Chrysler Corporation Loan Guarantee Board for approval prior to each issuance of loan guarantees. The Loan Board consists of the secretary of the treasury, the chairman of the Federal Reserve Board, and the comptroller general of the United States, plus, as ex officio nonvoting members, the secretary of labor and the secretary of transportation.

The Financing Plan. On July 10 Chrysler submitted its fourth financing plan to the Loan Board, projecting this time that a little over $2.2 billion will be available in non-federally guaranteed financing (down from $2.4 billion in the April plan). The Chrysler Loan Board concluded, however, that only about $2.1 billion in such financing would be forthcoming and modified the company's estimates of expected aid from various sources as shown in the accompanying table. Nevertheless, the board, even though its earnings projections are lower than Chrysler's, and even though the new car market has weakened, reported to Congress that Chrysler has a reasonable chance of continuing as a going concern in the automobile business. Only the outlines of the plan's various elements, as proposed by Chrysler and acted upon by the board, can be sketched here.

- In April 1980 Chrysler had an outstanding balance of $1.9 billion on long- and short-term loans from U.S., Canadian, Japanese, and European banks and other financial institutions. These lenders have agreed to extend maturities falling due before 1983, to forgive outright a part of the interest payable, and to defer payment of part of the rest. Both Chrysler and the Loan Board estimate that this will produce $665 million in cash over the 1980–83 period. In return, the lenders will receive warrants to purchase 12 million shares of Chrysler's common stock at $13 a share through 1990.
- In addition, Chrysler plans to sell a number of assets deemed unessential to its domestic automotive operations. These include auto plants in Australia and Argentina, 51 percent of Chrysler Financial Corp., some real estate, and an investment in Peugeot. The board, exercising its statutory mandate to evaluate Chrysler's projections, estimates that asset sales will bring in only $630 million.
- The corporation anticipates raising a total of $150 million by selling 12-percent ten-year debentures to dealers, suppliers, and others with an economic stake in Chrysler, and by arranging to defer payments to certain suppliers. The board cut this amount by about half.
- The financing plan also includes a total of $187 million in secured loans from the states of Michigan, Indiana, and Delaware, plus $170 million ($200 million Canadian) in loan guarantees from the government of Canada in 1982 and 1983. The Canadian government tied the

availability of its aid to progress on the renovation of Chrysler's van-wagon production facility in Windsor, Ontario, and required warrants to purchase about 2 million shares of Chrysler's common stock at $13 a share. Michigan's loan is to be secured by a first mortgage on Chrysler's Trenton (Michigan) engine plant. Indiana will purchase five-year Chrysler mortgage notes, secured by an addition to Chrysler's Kokomo (Indiana) plant and contingent upon the U.S. government's waiving its priority in the event of Chrysler's bankruptcy. Delaware's loan is to be secured by Chrysler's Delaware parts depot and is callable if Chrysler's assembly plant in Newark (Delaware) permanently closes down. The Loan Board found that all of the above should be counted toward Chrysler's obligation under the act to raise non-federally guaranteed funds.

- The act also requires that Chrysler raise $50 million in equity capital, but gives the Loan Board some discretion in the matter. Because of the company's condition and the act's prohibition of dividend payments as long as federal loan guarantees are outstanding, the board deemed the sale of equities to be impractical and waived the requirement.

- Finally, Chrysler expects to defer all of its employee pension fund contributions by one year (as allowed in its contract with the United Auto Workers). Both the company and the board estimate that this will provide a cash benefit of $342 million over the 1980–83 period.

NEW FUNDS AND ASSISTANCE
FROM NON-FEDERALLY GUARANTEED SOURCES
($ millions)

Sources	Statutory Target	Projections as of July 10: Chrysler Plan	Projections as of July 10: Loan Board	Board Projections— Over (Under) Target
Lenders				
Interest concessions	100	100	100	
Extended maturities	n/a	154	154	
Deferrals of interest	n/a	320	320	
Deferral of deferred interest	n/a	81	81	5
	650	655	655	5
Assets Sales				
Chrysler Argentina		36	36	
Chrysler Australia		58	56	
Brazilian notes		14	14	
Real estate		196	171	
Peugeot		100	100	
Chrys. Financial Corp. (51%)		320	250	
Chrysler Boat		2	—	
Surplus equipment		4	3	
	300	730	630	330
Suppliers and Dealers				
Debentures		78	52	
Deferred payables		72	20	
	180	150	72	(108)
Other Governments				
Michigan		150	150	
Delaware		5	5	
Indiana		32	32	
Canada		170	170	
Province of Ontario		4	—	
	250	361	357	107
Equity Sales	50	—	—	(50)
Pension Deferrals	—	342	342	342
TOTAL	1,430	2,238	2,056	626

Note: Does not include pre-existing commitments of $227 million and employee wage concessions of $462.5 million.
Source: Office of Chrysler Finance, U.S. Treasury Department.

In accordance with another requirement of the act, Chrysler's employees have agreed to wage "concessions" of $462.5 million over the life of the company's three-year contract signed with the UAW in October 1979. In return, the act requires Chrysler to set up an employee stock ownership plan, to which it will contribute at least $162.5 million in common stock over the four years starting July 4, 1980.

The Operating Plan. Chrysler submitted its first operating plan to the Loan Board in December, its second in February and, after further suggestions by the board, yet another revision on April 29 (before the first $500 million of guarantees were issued). Each successive plan, which is the product of Chrysler management's efforts to anticipate the desires of the board, has trimmed operations, costs, and revenues.

The recent modifications in the April plan, submitted along with the July 10 request for $300 million more in guarantees, provide for a two-week advance in the already accelerated

introduction of Chrysler's small, fuel-efficient K-car. This car—now crucial because, according to most experts, Chrysler's prospects for survival depend on its success—is to be marketed in the fall of 1980. Beginning with the 1984 model year, Chrysler will produce mostly front-wheel-drive cars and trucks, powered predominantly by four-cylinder engines; and the number of distinct vehicle lines will drop from five to three, with the K-car as the linchpin of the recovery plan. Even in Chrysler's front-wheel-drive large-car program, the number of parts that are interchangeable with the K-car will be increased, yielding a hoped-for reduction in expenditures on that program of about $1 billion. Along with the K-car–oriented programs, the April plan also provides for introduction of a small fuel-efficient van and bus one year earlier than previously proposed.

Chrysler is also trying to cut costs directly. It reduced its fixed costs by $122 million last year as a result of plant closings and layoffs alone, and various other cost reductions are expected, especially in connection with the K-car program. Projected capital expenditures for the 1979–85 period have been pared down by about $2.5 billion from the plan submitted in December, and are now expected to total $11.2 billion.

The Principle of the Thing. In an earlier issue of *Regulation* (November/December 1979), Associate Attorney General John Shenefield called attention to the trend "toward the marketplace presence of the government as businessman." "It is only a short step," he warned, "from the government as guarantor to the government as businessman in the marketplace." The Chrysler experience is bearing that out. It is politically unrealistic to expect the government to share a company's hard times without demanding a slice of its subsequent prosperity as well. Thus the Chrysler Loan Act requires Chrysler to issue warrants permitting the board to purchase up to 18 million shares of Chrysler stock at $13 a share.

At the time of Shenefield's alarm, the existing loan and guarantee programs were at least limited to a "defense firm" (Lockheed) and traditional "public utility" enterprises (Amtrak and Conrail). Chrysler is a step further. Some seek to distinguish the company from the rest of the economy and defend this bailout scheme on the ground that, after all, its ills are uniquely attributable to government action—the national and international policies that caused a sudden change in the artificially maintained availability of cheap fuel and the burden of new environmental and fuel-economy requirements. But, realistically, the prediction of future government policies is no less a requirement for the free-market entrepreneur than is the prediction of public tastes; indeed in a democracy the two kinds of predictions sometimes overlap considerably. To rationalize this plan by pointing to adverse government policies is to provide a universal pretext for government intervention.

A more persuasive rationale for distinguishing Chrysler's situation is more pragmatic: the company's distress, it is said, is an unusually short-term phenomenon, largely attributable to the temporary relative popularity of foreign imports that can be expected to disappear as soon as U.S. manufacturers have had time to retool for the production of small, fuel-efficient cars. We need only help Chrysler "over the hump" to avoid the senseless dismantling of what will become a valuable capital plant. Perhaps that is true (though if so, one would expect investors to realize it, in which case the guarantees would have been unnecessary); and perhaps it is distinctive (though the common refrain of the failed business is "we could have turned the corner in six months"). But whatever the arguments for bailing out Chrysler at this time, there is desperate need for some barrier of principle that will render the next step into government enterprise more difficult than it now appears.

Of course the argument that "it won't work" has a much firmer grip on the political conscience than the argument that "it is wrong." And this may still be what will prevent the example of the Chrysler Loan Act from being followed for other ailing firms. There remains a substantial possibility that the bail out will not work, or will prove inordinately expensive. In its April financing and operating plans, Chrysler made assumptions about car sales and the economy from which it concluded that the maximum amount of federally guaranteed loans outstanding at any one time would be $700 million, to be reached in the third quarter of 1980; the Treasury, however, put the maximum at $1.1 billion. Only two-and-a-half months later, these forecasts had to be revised.

Drawing by Ray Osrin, reprinted from The Plaindealer.

Now both Chrysler and the Loan Board assume a 10 percent decline in car sales for 1980 (actual sales for the first two weeks of July dropped 19 percent over the year earlier period) and predict that the full $1.5 billion will be needed. The board, while noting that Chrysler's position has become more "marginal," nonetheless approved the additional $300 million in guarantees ahead of the original schedule.

But even if Congress should go beyond the $1.5 billion in guarantees already committed, the declining prospects for auto sales and uncertainties about debt-ridden Chrysler's ability to attract the additional matching funds that would then be required raise questions about the company's continued viability. Of course, the matching requirement could also be eliminated. But one begins to have the feeling that if the company cannot make it under the loan act's current terms, the country should cut its losses and let Chrysler go the way of Studebaker—confident that the private resources now being artificially diverted by this scheme will find their way back into self-sustaining enterprises.

Liability by Association

The insurance industry is concerned these days about a new theory of tort liability adopted by the California Supreme Court in the case of *Sindell* v. *Abbott Laboratories,* decided in March. The case was a suit against several drug companies that had manufactured and sold diethylstilbestrol (DES), a drug once widely administered to pregnant women for the purpose of preventing miscarriage. After the drug had been used here and in Europe for a number of years, it was discovered to produce carcinogenic and tissue-altering effects in some of

the female children whose mothers had taken it. The *Sindell* case is one of many resulting lawsuits in several states.

The establishment of fault was of course one obstacle to the DES victims' suits. The federal Food and Drug Administration had authorized the marketing of DES as a miscarriage preventative on an experimental basis, and it was generally believed to be safe. But particularly in cases dealing with subsequently discovered medical or scientific errors, the concept of negligence in recent years has been considerably broadened. Indeed, in some areas the necessity of proving negligence has been entirely eliminated, through the creation of implied warranties of safety or the imposition of "strict liability"—that is, a rule rendering the manufacturers of certain products absolutely liable for the injuries they cause, regardless of warranty or fault.

But while the courts have modified the doctrine of fault, they have not abandoned the requirement of causality. And in the DES litigation, that was the rub. DES was in the public domain and had been manufactured and marketed in this country during the relevant period by about 200 separate companies. The DES victims had, by and large, no idea which brand of DES their mothers had ingested many years ago—and therefore could not point a finger at any particular company as the cause of their grief. The California plaintiff tried to run a "common enterprise" theory, which would implicate all the manufacturers, but it was patently weak on the facts and was rejected.

There was on the books, however, a 1948 California case—known to all law students—called *Summers* v. *Tice*. There two hunters had negligently shot in the direction of the plaintiff and one of the shots had hit him. Although neither the plaintiff nor the defendants could establish which shot caused the injury, the two hunters were held jointly and severally liable for all of the damages. Both hunters were wrongdoers, the court declared, and it would be unfair to burden the plaintiff with the task of isolating the responsible defendant. In these circumstances, the court held, the burden shifted to the hunters for each to "absolve himself if he can."

The California Supreme Court acknowledged the differences between *Summers* v. *Tice* and the DES case before it. There all of the potential wrongdoers had been joined as defendants, whereas Sindell was suing only five of approximately 200 possibly responsible manufacturers. Further, while in *Summers* there was a 50 percent chance that each hunter had caused the plaintiff's injuries, the likelihood that any one of the drug companies sued by Sindell had produced the DES that caused her ailments was significantly more remote.

Nonetheless, the California court fashioned a theory of liability that sustained Sindell's complaint. The plaintiff had alleged that Eli Lilly and five or six other companies produced 90 percent of the DES marketed. Assuming the truth of that allegation, there was a corresponding likelihood that one among this group manufactured the DES ingested by Sindell's mother. When, the court said, the defendants include a "substantial share of the appropriate market," the injustice of shifting the burden of proof to them "is diminished." The court decreed that each defendant could be held liable for that proportion of the total judgment represented by its proportion of the total market share of all the defendants—unless it could show that its product was not responsible. As for the fact that this lets other manufacturers off the hook, the court said that the named defendants may cross-complain against other manufacturers in order to compel them to contribute to the recovery in proportion to their market share. "Under this approach," the court concluded, "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products."

There is some doubt whether this last statement is accurate, at least when all the manufacturers are not (perhaps because of jurisdictional impediments) joined in the same suit. Separate cross-suits seeking contribution from the absent manufacturers may not be worth the expense; or may produce findings inconsistent with the original verdict as to the cause and extent of the plantiff's injuries or as to relative market share; or, for that matter, may fail because the jurisdiction in which those defendants can be sued does not adopt the same novel theory of recovery as California. Moreover, even when all manufacturers are joined in the same suit, all plaintiffs will not be —and different cases will be unlikely to pro-

duce the same determinations of relevant market share.

It is also difficult to agree entirely with what the California court describes as "the most persuasive reason for finding that the plaintiff's complaint stated a cause of action" —that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." That is a strongly appealing principle where the concept of negligence has a necessary blameworthy content—but even then, once one departs from the notion that the guilty conduct must have *caused* the injury, the Calvinists among us might perceive an overabundance of civil liability. But, as discussed above, in the area of product liability a finding of negligence no longer necessarily entails any real, honest-to-goodness fault. Indeed, the California court seems to have forgotten that one of the plaintiff's causes of action was explicitly based upon strict liability (that is, avowed absence of any negligence). In the present posture of the case—which reached the Supreme Court of California only for resolution of certain threshold issues, including this issue of causality—it is not clear whether a doctrine of strict liability will be adopted for DES, or whether the degree of negligence that will suffice for liability will be nominal.

Still, for all its practical defects and theoretical shortcomings, the decision does seem to produce a result closer to rough justice than would the denial of relief to all plaintiffs simply because the correct pairing of manufacturer to victim cannot be achieved. If you doubt that, imagine (what there is no reason to believe) that all the manufacturers knew the stuff was dangerous but went ahead with the marketing precisely because they knew it could not be traced to the particular producer. At least, if one is to criticize the decision vehemently, one should be prepared to suggest a better solution—which is not easy to do. Some have proposed a federal law creating a general liability fund, to which all drug manufacturers would be compelled to contribute and which would be the sole source of recovery. This would eliminate the need for repeated market-share computations and would avoid the difficulty of inconsistent findings in separate cases. Moreover, if it established an exclusive federal liability standard, it would eliminate the difficulty of inconsistent state laws—though it is hard to see why the drug field justifies such federal preemption any more than many others. It should not be imagined, however, that such a solution would achieve much more than a greater precision in the allocation of total liability among all manufacturers. It would assuredly not eliminate what is the main problem with all of this—and indeed with our entire modern system for victim compensation: the staggering transaction costs of litigation. Adequate testimony to that is the Swine Flu Immunization Program of 1976 which, in order to ensure that drug manufacturers participated in the production and distribution of the new vaccine, eliminated participants' liability to private parties, substituted a cause of action (based on applicable state law) against the United States, and permitted the United States to recoup against the participants only for their negligence or breach of contract. It has been a bottomless well of litigation.

There may be some federal constitutional problems with the *Sindell* decision, and the insurance industry is sure to test them. Even without resurrecting the discredited notion of substantive due process (discredited, that is, in fields other than individual rights, where it has continued to flourish), it might offend procedural due process to assign a defendant the burden of establishing *noncausality* in order to avoid a judgment based upon the degree of statistical possibility of causality. It is difficult to imagine, for example, that a victim injured by a red Ford with an Illinois license plate can be permitted to recover a proportionate amount of his damages from each owner of such a car who cannot establish his innocence. The distinction in *Sindell*, of course, is that it is statistically quite certain that (to trace the analogy) every other red Ford with an Illinois plate hit *somebody*. Is that enough to overcome the apparent procedural unfairness? Perhaps. Though it does remind one of the stern father who punishes his children with minimal evidence of guilt, on the theory that if they did not do what he got them for they surely did something else.

In any event, the effect of the *Sindell* case should not be exaggerated. Presumably, its novel principle only applies when, through no fault of the plaintiff, the specific manufacturer of the damaging product cannot be identified—which excludes the vast majority of situations.

It also only applies when the precise defect that causes the injury is common to all items of the product in the market. Thus if—implausibly—one is injured by a design defect in a lawnmower whose manufacturer cannot be identified, the entire industry would not be liable under the *Sindell* principle unless all mowers contained precisely the same defect. The principle would also, presumably, be inapplicable in the case of a manufacturing defect that all brands in the market possess, but possess in varying degree because of varying quality control standards. The distinctive features of the DES litigation will not often recur: an absolutely standard product (there a chemical compound) that is in the public domain (so cannot be traced to a particular manufacturer or licensor) and that causes injury not because of some variable manufacturing defect but because of its very nature. Asbestos may be another example—but there are not many more. For this reason, it is not likely that *Sindell* will have substantial adverse impact upon drug or chemical innovation—which is, after all, conducted with the very objective of obtaining exclusive manufacturing and licensing rights.

Constitutional Litigation for Fun and Profit

According to a UPI dispatch of July 25, two Cuban sealift refugee families who had been in Westchester County, New York, for just over a month filed a class-action suit seeking $15,000 each in actual damages and $10,000 each in punitive damages because welfare assistance was withheld for nearly a month as a result of doubt as to whether they were legal or illegal aliens. The bill for all seventy refugee families in the county who are members of the class would come to $1.75 million. In a recent CBS Special dealing with the litigation boom in America, one of the most poignant scenes showed the old fire engine of a little town in Oregon being towed away. The town had decided to unincorporate because of the risk of high damage judgments.

There is now even more reason for municipalities not imbued with the gambling spirit to pack it in. Last April, in the case of *Owen* v. *City of Independence, Missouri,* the Supreme Court held that the Ku Klux Klan Act of 1871 (now 42 U.S.C., section 1983) renders a municipality liable in damages for action taken by its governing officers which violates an individual's constitutional rights, whether or not the violation was intentional or negligent—and indeed whether *or* not the constitutional right in question was even known to exist at the time. The case involved the city's failure to give a discharged employee a so-called name-clearing hearing—which requirement of the Constitution was enunciated by the Supreme Court in the *Roth* case, handed down eight weeks after the city's denial of a hearing.

The Ku Klux Klan Act is one of several post–Civil War statutes whose interpretation has been broadly expanded by the Court in recent years, and which now provide the vehicle for the making of much new constitutional law. Until a Supreme Court decision handed down in 1978, overruling an earlier case, it was not even believed that municipalities could be sued for *willful* constitutional violations under section 1983. As the four dissenters in *Owen* noted, "municipalities . . . have gone in two short years from absolute immunity under § 1983 to strict liability."

The Court's decision, which is expressly based upon the law's "evolution" to "the principle of equitable loss-spreading," will have consequences beyond the further impairment of municipal solvency. Since the new "no-fault" liability is applicable only to action approved by the municipality's governing officials, it creates an honorable incentive for elected officials to delegate responsibility to the bureaucracy. It will also increase, at least marginally, the number of novel constitutional obligations sought to be imposed upon city governments. For by eliminating the requirement of fault, it also eliminates the judicially pronounced limitation of section 1983 to rights that are "settled, indisputable law." Thus, novel rights that could previously be asserted only through injunction actions (which generally lack the lawyerly attraction of a monetary award) can now be asserted in a claim for damages—which means that it will be somewhat easier to get a contingent-fee lawyer to press them.

The reason it will only be *somewhat* easier is that, in 1976, Congress provided that, in civil rights litigation, "the court, in its discretion,

may allow the prevailing party . . . a reasonable attorney's fee" (42 U.S.C., section 1988). The Supreme Court has found this language to mean that "a prevailing *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances" (though it has also found that a prevailing defendant cannot obtain them unless the plaintiff's claim was "frivolous, unreasonable, or groundless"). Still, under this provision the plaintiff's attorney—unless the client has money "up front"—must rely upon the court's assessment of a "reasonable" fee. The *Owen* case establishes for constitutional innovation in the municipal-law field a shot at a big cash prize that can (within broad limits) be contractually divided. Of course, we also provide more direct subsidy for constitutional litigation through the funding of public legal services organizations—and, indeed, Westchester Legal Services, Inc., was reported to have assisted in filing the Cuban refugee suit.

That litigation, by the way, came to an unexpectedly abrupt end. On July 27, UPI said that the plaintiffs had dismissed their suit, an attorney for one of them explaining that they may have misunderstood the meaning of the word "lawsuit," and that they had come to this country to "seek asylum, not to make trouble." They obviously have a lot to learn about this country—and less about its language than its mores. If litigation for the vindication of potential constitutional rights could possibly be considered to be "making trouble," we would certainly not subsidize it as indiscriminately as we do.

It is unclear whether the *Owen* opinion—or, for that matter even the earlier *Monell* opinion, which established municipal liability when there was fault—extends to county governments. Some of the language and reasoning of *Monell* would seem to. The *Owen* majority opinion places great stress upon the corporate nature of municipalities, but it is hard to believe that for the purposes of this issue the City of New York will somehow be considered less "governmental" and therefore more immune than Sullivan County.

The burden of the CBS Special alluded to earlier was that rapacious, dispute-inciting lawyers are responsible for the litigation explosion and for the disappearance of the little Oregon town, fire engine and all. One wonders whether legislative and judicial policies that foster litigation—and foster with special solicitude hyperactive constitutional innovation—are not at least equally to blame.

Motorcycles, Safety, and Freedom

In 1966 Congress authorized the withholding of 10 percent of federal highway construction funds, and 100 percent of highway safety funds, from states failing to comply with federal standards for highway safety programs. A year later a federal standard requiring mandatory motorcycle helmet use laws was issued. The states were quick to respond. The number having such laws went from zero in 1965 to forty in 1969 and forty-seven in 1975. During this same period, annual motorcycle fatalities fell by nearly 50 percent. While the drop was part of a trend that had begun in 1960, the trend accelerated significantly with the passage of motorcycle helmet laws.

In 1975 the National Highway Traffic Safety Administration began administrative proceedings against the three states that had not passed the laws. In March 1976, partially as a result of lobbying by those states and, perhaps more important, by the American Motorcyclists Association, Congress revoked the authority to cut off highway funds to states not complying with the federal motorcycle safety standards. Repeal of the mandatory helmet laws proceeded as rapidly as had their passage ten years earlier. By the end of 1979, twenty-seven states had repealed their laws or made them applicable only to persons under eighteen years of age.

The issue did not end with the 1976 revocation, however. Two years later, when it became evident that the rate of motorcycle deaths was again on the rise, Congress asked NHTSA to report on the effects of helmet law repeal. That report, issued in April 1979, concluded (1) that helmet laws encourage motorcyclists to wear helmets (nearly 100 percent of motorcyclists wear helmets in states having the laws, compared with only 50 to 60 percent in other states); (2) that helmets are effective in reducing deaths and lessening the severity of injuries, and do not significantly limit visibility or otherwise contribute to accidents; and (3) that motorcyclists and the general public favor

helmet use, though the former do not favor mandatory laws.

NHTSA's analysis is not entirely conclusive. While the data indicate that fatalities per motorcycle fell with helmet laws and rose with their repeal, the connection may not be as close as it might seem. For example, since (as NHTSA acknowledges) helmets do not so much prevent fatalities in general as they do fatalities caused by head injuries, total fatalities are an inappropriate measure of helmet effectiveness. More important, since NHTSA has no data on the number of miles ridden per motorcycle, the possibility cannot be excluded that the increased fatalities resulted simply from increased motorcycle use in response to rising gas prices. But such refinements aside, common sense would seem to support the claim that a helmeted rider who collides with an automobile is substantially less likely to die than a rider without a helmet.

The question now before Congress is whether, as NHTSA has recommended, it is appropriate for Congress to reimpose federal sanctions on states failing to have an approved helmet law. In the fashion of debate that is customary for such matters, NHTSA justifies the governmental restriction by reference to the "burden upon society" that unnecessary motorcycle deaths and injuries impose. It mentions in passing the lost labor output of the victims, but relies principally upon the substantial medical expenses involved. A study quoted in the NHTSA report estimates the medical expenses that are avoided by helmet use at $1 million a year per 1,000 registered motorcycles—which works out to $50 million a year nationwide. (This assumes that, without laws, 50 percent of motorcyclists wear helmets.)

All of this, of course, is interesting but essentially irrelevant. No one really believes that the main impetus for helmet laws is the desire to avoid waste of labor services that belong to society—or the desire to save medical expenses, many of which are paid by the victims (through insurance or otherwise) in any event. The incantation of such factors is merely a means of avoiding the admission that these laws simply seek to protect some of our fellow citizens from their own improvidence. For some—the intellectual heirs of Henry David Thoreau—to make such an admission is to acknowledge that the law is unconstitutional. Thus, the Supreme Court of Illinois, the only state supreme court to strike down a helmet statute (out of the twenty-six having ruled on the matter), found that "the manifest purpose of the headgear requirement is to safeguard the person wearing it." Few courts upholding the laws have been as candid as the Florida Supreme Court: "We ought to admit frankly that the purpose of the helmet is to preserve the life and health of the cyclist, and for some more divinely ordained and humanly explicable purpose than the service of the state." The other courts upholding the laws have recited the litany of risk to other motorists, unnecessary medical costs, and the loss of labor resources. All of these justifications are disingenuous: the first strains credulity, and the last two rest upon a philosophy that merely substitutes for a benign altruism (some would say meddlesome paternalism) a sort of anthill materialism which is at least as threatening to human freedom. Where society chooses to be paternalistic, it might be better, as the Florida court did, to acknowledge its motive.

With the controversy focused on paternalism, the issue of federalism has perhaps been lost. It is the *federal* imposition of helmet protection that is at issue, and there is no apparent reason why such protection requires federal involvement. Unlike such measures as drug control laws, which—it can reasonably be argued—are substantially undermined by the absence of similar legislation in neighboring states, helmet laws can be entirely effective within each state that chooses to adopt them. And that is precisely the situation which obtains at present. About half of the states have opted for, and half against, the mandated protection—which produces (assuming a representative process that accurately reflects popular sentiments) a greater number of persons whose paternalistic or anti-paternalistic proclivities are satisfied. But then, it is very difficult to be tolerant of paternalism while insisting upon strict adherence to principles of federalism. The disregard of federalism is, one might say, merely paternalism writ large. The person who believes—and is prepared to act upon—the proposition that motorcyclists do not know what is good for themselves, is likely to believe that states do not always know what is good for themselves either.