

LITIGATING THE INVOLUNTARY DISMOUNT—*NUNEZ V. SCHNEIDER NATIONAL CARRIERS* AND THE VIABILITY OF A BICYCLE HELMET DEFENSE

by
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Bicycling is increasingly becoming a focus of urban transportation policy, with cities across the United States looking to emulate the success of European cities and (to a lesser extent) American cities like Portland, Oregon, in encouraging commuting and urban trips by bicycle. An increase in mixed-traffic cycling makes likely an increase in serious-injury collisions between cyclists and automobiles, pedestrians, or other urban users. This Note explores the viability of a “bicycle helmet defense,” patterned after the “seatbelt defense,” whereby a defendant asserts that some or all of a plaintiff bicyclist’s injuries are the result of the cyclist’s failure to exercise reasonable care by wearing a helmet. This Note uses the successful assertion of a bicycle helmet defense in New Jersey as a lens for considering the defense and its viability in other jurisdictions.

*Part I of this Note introduces the relevant tort concepts and briefly considers the policy rationale for a bicycle helmet defense. Part II explores the development of the seatbelt defense in New Jersey, which is important to understanding the successful assertion of the bicycle helmet defense there. Part III analyzes an unsuccessful attempt to assert the bicycle helmet defense in 1997 and then explains how the court in *Nunez v. Schneider National Carriers* built the bicycle helmet defense on the foundation of New Jersey seatbelt defense jurisprudence. Part IV explores the jurisprudential landscape across the country and identifies a group of “target states” where advocates have the highest likelihood of success in asserting a bicycle helmet defense. It also briefly examines what arguments advocates should consider in asserting the defense. This Note concludes that while the number of target states in which a bicycle helmet defense could be asserted is limited, the defense is viable in a number of jurisdictions, including the populous states of California, New York, and Michigan.*

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INTRODUCTION

On August 30, 1991, Sterling Cordy was riding his bicycle near Lindenwold, New Jersey.¹ When he attempted to ride his bicycle over a set of railroad tracks running perpendicular to the road, the elevation of the tracks relative to the roadway stopped the forward motion of Cordy's bicycle and Cordy was launched over his handlebars.² Not wearing a helmet, he suffered severe head injuries.³ The Sherwin Williams Company owned the railroad tracks, which led to their nearby production facility.⁴ Six years later, Julie Nunez was riding her bicycle with a friend on the roads of Edgewater, New Jersey.⁵ After being struck in the arm by a passing truck driven for Schneider National Carriers, Nunez fell from her bicycle and, not wearing a helmet, suffered fatal head injuries.⁶

Both crashes resulted in lawsuits in New Jersey courts and were removed to the United States District Court for the District of New Jersey in its diversity jurisdiction.⁷ In both cases, federal judges weighed whether or not evidence that the plaintiff or deceased had not been wearing a bicycle helmet could be admitted into evidence to argue that the plaintiffs' potential damage award should be reduced. In both cases, the courts ap-

¹ Cordy v. Sherwin Williams Co., 975 F. Supp. 639, 641 (D.N.J. 1997).

² *Id.*

³ *See id.*

⁴ *Id.*

⁵ Nunez v. Schneider Nat'l Carriers, 217 F. Supp. 2d 562, 564 (D.N.J. 2002).

⁶ *Id.*

⁷ *Id.*; Cordy, 975 F. Supp. at 641.

plied New Jersey law and, finding no case law or statutes directly addressing the question, ventured to predict how the New Jersey Supreme Court would rule if presented with the issue.⁸ While the District Court rejected Sherwin Williams's attempt to assert a "bicycle helmet defense" in 1997, Schneider National was successful in asserting it in 2002.⁹

This Note examines the prospect of a bicycle helmet defense, using New Jersey and the *Cordy v. Sherwin Williams Company* and *Nunez v. Schneider National Carriers* cases as its foundation. Bicycling is increasingly a focus of urban transportation policy, with cities across the United States looking to emulate the success of European cities and (to a lesser extent) American cities like Portland, Oregon, in encouraging commuting and urban trips by bicycle.¹⁰ An increase in mixed-traffic cycling makes inevitable a net increase in serious-injury collisions between cyclists and automobiles, pedestrians, or other urban users. This Note explores the viability of a bicycle helmet defense, patterned after and based on the jurisprudence underpinning the common law "seatbelt defense," whereby a defendant asserts some or all of a plaintiff bicyclist's injuries are the result of the cyclist's failure to follow the course of conduct of a reasonably prudent person by not wearing a helmet.

This Note is structured in four parts. Part I refreshes key tort concepts needed to examine the history and application of safety-device defenses.¹¹ It also offers the policy of encouraging helmet use to decrease social costs as the underpinning rationale for application of these defenses. The second explores New Jersey's development of the seatbelt defense. That history is significant because most states have jurisprudence regarding the seatbelt defense (either recognizing or rejecting it). Where a seatbelt defense has been recognized under the common law, that jurisprudence can serve as the foundation of a bicycle helmet defense (even though, in many of those states, the seatbelt defense has subsequently been abolished or restricted by legislative action). Therefore, New Jersey's particular approach to the seatbelt defense is important to understanding the *Nunez* decision, because it prescribes how New Jersey courts should approach the common law issues surrounding these defenses: issues of reasonableness of the plaintiff's action, evidence, and the calculation of reductions in damages awarded to plaintiffs.

Part III directly explores the *Cordy* and *Nunez* decisions. The *Cordy* holding refusing to recognize a bicycle helmet defense is considered in part to be the result of a litigation error wherein Sherwin Williams con-

⁸ *Cordy*, 975 F. Supp. at 647; *Nunez*, 217 F. Supp. 2d at 564–65.

⁹ *Cordy*, 975 F. Supp. at 648; *Nunez*, 217 F. Supp. 2d at 570.

¹⁰ See, e.g., Katrin Bennhold, *A New French Revolution's Creed: Let Them Ride Bikes*, N.Y. TIMES, July 16, 2007, at A4; J. David Goodman, *For Bike Advocates, Delayed Gratification*, N.Y. TIMES, Aug. 12, 2012, at MB1, MB7 (detailing the development of bicycle advocacy and policy in New York City).

¹¹ In this Note, the term "safety-device defense" will collectively encompass the seatbelt, motorcycle helmet, and bicycle helmet defenses.

ceded it was not asserting a comparative negligence approach. This provided the court an opportunity to downplay New Jersey's seatbelt defense precedents. Then, the *Nunez* decision is examined as a successful application of New Jersey's existing seatbelt defense jurisprudence to the bicycle helmet context. Of particular interest is the court's use of New Jersey's legislative promotion of helmet use and bicycle helmet effectiveness studies as a foundation for finding that helmet use should be the course of conduct of a "reasonably prudent person."

Part IV considers the potential for asserting a bicycle defense in other jurisdictions. It identifies "target states," judging the likelihood of successfully mounting the defense based on a state's jurisprudential history as well as the bicycle-helmet-specific legislation adopted there. Finally, it reviews the arguments and information required to advocate for the defense in the target states.

The Note concludes that the bicycle helmet defense is a viable strategy for reducing a defendant's damages when an un-helmeted cyclist has incurred head injuries that could have been prevented through helmet use. In the 10 jurisdictions whose jurisprudential and legislative environments make them "target states," the defense should be a natural extension of the seatbelt defense, even where the seatbelt defense itself has been statutorily curtailed.

I. PREPARING FOR THE TRIP—KEY TORT CONCEPTS AND THE POLICY RATIONALE FOR SAFETY-DEVICE DEFENSES

A. *Comparative Negligence and the Failure to Mitigate Damages*

Application of a bicycle helmet defense in a tort action generally takes the form of allowing a defendant to present evidence to the jury asserting that the injured plaintiff was (a) comparatively negligent or at fault or (b) failed to mitigate damages "after" the commission of the tort. The courts applying these concepts have a tendency to muddy the waters terminologically, and a brief reminder of how each applies in the context of a bicycle helmet defense will be helpful in considering the *Nunez* decision and advocacy of a bicycle helmet defense in other jurisdictions.

Theories of comparative negligence or comparative fault examine the proportional responsibility of the involved parties for the injuries of a plaintiff. In comparative negligence systems a "[p]laintiff's negligence . . . that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff."¹² Under this approach, a plaintiff found negligent for not wearing a bicycle helmet could share some responsibility for the overall injuries he sustains in a bicycle accident. In states with a "modified comparative negligence" system, a plaintiff found more than 50% responsible for her injuries is barred from recovering damages from

¹² RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 7 (2000).

defendants.¹³ Where injuries are divisible (by causal event), the factfinder must divide the injuries and then apportion responsibility for each part individually.¹⁴ This could come into play if a bicyclist without a helmet were negligently hit by a vehicle (and sustained injury from the impact with the vehicle) and then sustained additional injuries when hitting the ground (sometimes called a “secondary impact”).¹⁵ In such a scenario, the driver might be found to be fully responsible and liable for the injuries sustained from the initial collision, but only partly at fault for the injuries sustained from the cyclist hitting the ground because of the cyclist’s failure to wear a helmet. The damages the cyclist ultimately would receive would be dependent on the division of the injuries and apportionment of responsibility for each set of damages.

One stumbling block often faced in asserting the negligence of a plaintiff in an attempt to reduce a plaintiff’s damages is the reluctance of courts to find that a plaintiff violated a cognizable duty or standard of care. It is understandable that courts take pause before labeling injured plaintiffs as negligent and therefore partly responsible for the injuries which have befallen them. In the safety device context, courts may be particularly uncomfortable imposing a blanket standard of conduct in favor of the use of safety devices as a matter of law.¹⁶ This discomfort may derive from a lack of statutory support for a broad rule, a concern about judicial overreach, or a concern over the equities of requiring plaintiffs to anticipate the negligence of a tortfeasor. However, a comparative negligence defense can still be asserted by finding a “duty” on an individualized basis through the doctrine of failure to take advance precautions (also known as the doctrine of avoidable consequences).¹⁷ The appeal of this approach is that it follows conceptually from the comparative negligence model of individualized responsibility but avoids declaring a blanket standard of conduct. In applying this approach, a balance is struck weighing the plaintiff’s burden in taking the advanced precaution (wearing a helmet or buckling a seatbelt) against the probability and extent of injuries that could occur through failure to take such a precaution.¹⁸ This

¹³ *Id.* § 7 cmt. a.

¹⁴ *Id.* § 26.

¹⁵ This is, with some modification, the system used for seatbelt defenses in New Jersey and applied in *Nunez* to the bicycle helmet defense. See *Nunez v. Schneider Nat’l Carriers*, 217 F. Supp. 2d 562, 567 (D.N.J. 2002).

¹⁶ See, e.g., *Dare v. Sobule*, 674 P.2d 960, 963 (Colo. 1984) (declining to impose a standard of conduct based on equitable concerns about the proper apportionment of responsibility for motorcyclist’s injuries).

¹⁷ See, e.g., *Lynch v. Scheininger*, 744 A.2d 113, 125 (N.J. 2000).

¹⁸ An example of this type of calculus in a seatbelt context can be seen in *Hutchins v. Schwartz*, 724 P.2d 1194, 1196–99 (Alaska 1986). As will be seen, this type of approach also underpins the development of the seatbelt defense in New Jersey and underpins the *Nunez* decision. This approach to determining whether taking advanced precautions against risk constitutes a duty cognizable by the law is most commonly known from Judge Learned Hand’s “Hand Formula,” as stated in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

conceptualization of the duty of a party to take reasonable steps to prevent foreseeable injury is very much in line with the idea that comparative negligence “contemplates the inclusion of all relevant factors in arriving at the appropriate damage award.”¹⁹

A less common approach to safety-device defenses is for courts to apply the doctrine of failure to mitigate damages, also known as the doctrine of avoidable consequences. This approach bars a plaintiff from recovering damages “for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of [a] tort.”²⁰ While the traditional statement of this doctrine has applied only to mitigation that could occur “after the commission of [a] tort,” courts have softened the temporal element in adapting the doctrine to apply it to seatbelt defenses.²¹ Since the post-accident element has been weakened, the key difference between the application of the comparative negligence and failure-to-mitigate approaches is the latter’s avoidance of labeling the injured plaintiffs “negligent” or “at fault,” because doing so might threaten their ability to recover meaningful (or any) damages under a contributory negligence or modified comparative negligence system.²² Instead, it removes certain injuries from inclusion in a plaintiff’s damages at all. The change from contributory to comparative negligence systems has obviated the need for the logical gymnastics this approach requires, but it still may be found in the safety-device defense precedents of particular states.

B. *The Policy Rationale for Safety-Device Defenses*

Before delving into the question of how and where a bicycle helmet defense could find success, brief consideration should be given to the purposes of these types of defenses. By no means is the intent of such defenses to grant a “pro-defendant” slant to tort proceedings; indeed, the current state of the law in most jurisdictions is decidedly pro-plaintiff.²³

¹⁹ *Hutchins*, 724 P.2d at 1199.

²⁰ RESTATEMENT (SECOND) OF TORTS § 918 (1979).

²¹ *Id.*; see Comment, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94, 100–01 (1969) (explaining that courts have adapted the doctrine either by adopting the legal fiction that the failure to “buckle up” occurred in the time between the initial collision and a secondary impact between the person and their surroundings, or by applying prior expansions of the doctrine which prevent recovery for injuries caused by unreasonable behavior). For an example in context see *Spier v. Barker*, 323 N.E.2d 164, 168 (N.Y. 1974) (“the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages prior to the accident”).

²² See, e.g., *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 370 (N.J. 1988) (noting that “a straight comparative negligence approach [under New Jersey’s modified negligence system] precludes recovery for a plaintiff if a jury finds nonuse of the seat belt to be over fifty percent of the total negligence”).

²³ See Walter Hill Levie, III, *Buckling Down to Buckle Up: A Jurisdictional Survey of the Admissibility of Seat Belt Evidence and the Need for a Model Seat Belt Act*, 41 CUMB. L. REV.

Tort law has traditionally recognized the “egg-shell skull” rule—that a tortfeasor is liable for all injuries caused by his negligence, regardless of the susceptibility to injury of the plaintiff.²⁴ However, that rule is less convincing in the context of safety-device defenses, where that susceptibility is caused by a failure to take a reasonable affirmative precaution. It is affirmative action that safety-device defenses aim to encourage. More precisely, the primary policy rationale underpinning safety-device defenses is the desire to shift the cost of failing to take basic precautions against injury onto the parties most able to take those precautions (drivers and riders) and, consequently, increase the use of safety devices and lower the overall costs to society incurred through injuries and fatalities.

The second of these propositions, that the use of safety devices lowers overall injuries and fatalities, is both intuitive and statistically supported. For example, in 2004 the National Highway Traffic Safety Administration (NHTSA) released a report concluding that changes in safety technologies and driver behaviors (most notably the steady growth in the use of seatbelts) resulted in 329,000 fewer fatalities than would otherwise have resulted in the period of 1960–2002.²⁵ In 2006, the NHTSA Administrator estimated that an increase of 1% in the use of seatbelts corresponds to 277 fewer automobile collision fatalities annually and an \$800 million cost savings to society.²⁶ Analyses of this type make it reasonable to conclude that increasing the use of safety devices does reduce costs to society from injuries and fatalities.

It is clear that achieving these savings through increased voluntary use of safety devices underpins the reasoning for both statutory and judicial adoptions of safety-device defenses.²⁷ The prevalence of discussions of the social benefits of safety devices in cases recognizing a safety-device defense indicates that increasing use is a prime motivator for courts to

333, 333 (2011) (noting that the combination of minor enforcement consequences for failure to wear seatbelts and limited admissibility of seatbelt evidence results in a “win-win situation” for seatbelt scofflaws).

²⁴ See, e.g., *Brown v. Chicago, Milwaukee & St. Paul Ry. Co.*, 11 N.W. 356, 358–61 (Wis. 1882) (stating where plaintiff alleged that railway’s negligence had caused her miscarriage that cases “clearly establish the doctrine that one who commits [a tort] is liable for all the damage which legitimately flows directly from [it], whether such damages might have been foreseen by the wrong-doer or not”).

²⁵ NAT’L. HIGHWAY TRAFFIC SAFETY ADMIN., *LIVES SAVED BY THE FEDERAL MOTOR VEHICLE SAFETY STANDARDS AND OTHER VEHICLE SAFETY TECHNOLOGIES, 1960–2002*, xi–xxi (2004).

²⁶ NAT’L. HIGHWAY TRAFFIC SAFETY ADMIN., *NHTSA BUDGET OVERVIEW, STATEMENT FROM THE ADMINISTRATOR* (2006).

²⁷ See, e.g., *Leonard v. Parrish*, 420 N.W.2d 629, 632–33 (Minn. Ct. App. 1988) (noting that legislative history of statutory motorcycle helmet defense indicated goal was to encourage continued use of helmets after statutory mandate was repealed); *Bentzler v. Braun*, 149 N.W.2d 626, 639–41 (Wis. 1967) (discussing the benefits of seatbelt use in societal terms and concluding that in the face of that information, factoring nonuse of seatbelts into damage calculations accounted for a person’s “negligence in using ordinary care to protect [themselves] from injuries”).

overcome the traditional tort-law objections to adopting these defenses.²⁸ Whether or not safety-device defenses appreciably influence the behavior of drivers and riders toward use of safety devices is another matter.²⁹ It is unclear whether reducing post-injury damages or the downstream effects of tort rules (such as adjustment to insurance policies and premiums) significantly influence the behavior of individuals.³⁰ However, a basic assumption of the tort system is that damages deter undesirable behavior,³¹ and there is no reason to believe that courts will not continue to attempt to deter risky behavior by requiring tortfeasors (or in the case of safety-device defenses, plaintiffs) to take responsibility for their choices through financial penalties.³² As such, advocates asserting a bicycle helmet defense should take care to both address the unreasonable risk of the behavior of the individual plaintiff and emphasize to the court the broader deterrent effect (or, more accurately, encouragement effect) of a safety-device defense. Doing both presents the question of a safety-device defense as within the traditional role and function of the tort system.

II. READING THE MAP—THE DEVELOPMENT OF THE SEATBELT DEFENSE IN NEW JERSEY

Seatbelt defenses, which can serve as the foundation of a bicycle helmet defense, are primarily creations of the common law. As a result, there is significant variation in the particulars of the underlying case law between jurisdictions. Because of this, it is important to understand the development of the seatbelt defense in the particular jurisdiction in which a bicycle helmet defense is being asserted. Therefore, to under-

²⁸ See Tori R. A. Kricken, *The Viability of "The Seatbelt Defense" in Wyoming—Implications of and Issues Surrounding Wyoming Statute § 31-5-1402(F)*, 5 WYO. L. REV. 133, 135–36 (2005) (asserting that courts reject seatbelt defenses because “(1) nonuse of the seatbelt was not the proximate cause of the accident that caused the plaintiff’s injuries; (2) the effectiveness of seatbelts in certain situations is questionable and, therefore, nonuse should not be deemed *prima facie* unreasonable; (3) there is no common law or statutory duty to wear a seatbelt; (4) the jury might speculate as to what injuries would have been prevented by the use of a seatbelt”); see also *infra* note 59.

²⁹ See Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1113–17 (2000) (suggesting that habitual behaviors (such as not fastening a seatbelt) are difficult to overcome, but that the seatbelt defense could have a “prodding” effect to change those habits over time).

³⁰ Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 130, 151–56 (1993) (noting that insurance does not cover some types of liability and that premiums adjust as a result of changes in the types of claims and that the insurance system does not clearly link negative (or positive) behaviors to negative (or positive) reinforcement).

³¹ *Id.* at 115.

³² See, e.g., *Halvorson v. Voeller*, 336 N.W.2d 118, 122–23 (N.D. 1983) (“There is a difference between saying, ‘It is up to you to decide whether or not to wear a safety helmet,’ and saying, ‘You will never, under any circumstances, have to suffer legal consequences for not wearing a helmet.’”).

stand the *Cordy* and *Nunez* decisions on the bicycle helmet defense it is necessary to understand the development of the seatbelt defense in New Jersey.

States began adopting laws mandating the installation of seatbelts in automobiles sold in their states in the early 1960s,³³ and the federal government followed suit in 1966.³⁴ With seatbelts becoming standard equipment in automobiles, defendants began to assert that plaintiffs who did not use them were negligent or, less frequently, that plaintiffs had failed to (preemptively) mitigate the damages that would result from collisions.³⁵

New Jersey first considered the seatbelt defense in 1967 in *Barry v. Coca Cola Company*.³⁶ Barry was a passenger in a car who suffered “severe facial scars” when the car he was riding in drove into the rear of a police car stopped at a traffic light.³⁷ Seatbelts were available in the car, but Barry was not using one.³⁸ New Jersey was a contributory negligence jurisdiction at that time, so the defendant asserted that Barry’s failure to use a seatbelt was contributorily negligent and a bar to any recovery.³⁹ The *Barry* court swiftly rejected the notion that a seatbelt defense could be plead-

³³ *E.g.*, 1961 Wis. Sess. Laws c. 521; *see also State First to Require Safety Belts in Autos*, Wis. St. J., Sept. 27, 1961 at 3.

³⁴ Nat’l Traffic & Motor Vehicle Safety Act of 1966, Pub. L. No. 89–563, 80 Stat. 718; 49 C.F.R. § 571.208 (2012).

³⁵ *See, e.g.*, *Spier v. Barker*, 323 N.E.2d 164, 167 (N.Y. 1974) (holding that “nonuse of an available seat belt . . . is a factor which the jury may consider However, as the trial court observed in its charge, the plaintiff’s nonuse of an available seat belt should be strictly limited to the jury’s determination of the plaintiff’s damages”); *Sams v. Sams*, 148 S.E.2d 154, 155 (S.C. 1966) (stating that “the ultimate question[] [of whether failure to use a seatbelt was contributory negligence] raised by the alleged defense should be decided in the light of all of the facts and circumstances adduced upon the trial, rather than being decided simply on the pleadings”).

³⁶ 239 A.2d 273, 274 (N.J. Super. Ct. Law Div. 1967).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* The doctrine of contributory negligence bars a plaintiff from recovering damages if the plaintiff’s negligence contributed to the cause of his injury. This principle was established in *Butterfield v. Forrester*, (1809) 11 East 60, 103 Eng. Rep. 926, 926–27 (K.B.) (holding that plaintiff, who rode his horse violently through the night by candlelight, thereby failing to use ordinary care in detecting an obstruction placed in the road by defendant, was unable to recover against defendant) and was recognized in New Jersey common law as early as 1854 in *Moore v. Cent. R.R. Co.*, 24 N.J.L. 268 (N.J. 1854). New Jersey’s Legislature overturned the doctrine and established New Jersey as a modified comparative negligence jurisdiction in 1973. 1973 N.J. Laws c. 146 § 1 (amended by 1982 N.J. Laws c. 191 § 1, codified as N.J. Stat. Ann. § 2A:15–51 (West 2012)). Although not treated here in detail, advocates should be aware (and surely are in the states listed) that four states and the District of Columbia continue to apply contributory negligence. *See Ridgeway v. CSX Transp., Inc.*, 723 So. 2d 600, 606 (Ala. 1998); *Wash. Metro. Area Transit Auth. v. Young*, 731 A.2d 389, 394 (D.C. 1999); *Woodridge v. Price*, 966 A.2d 955, 961 (Md. Ct. Spec. App. 2009); *Duval v. OM Hospitality, LLC*, 651 S.E.2d 261, 264 (N.C. Ct. App. 2007); *City of Bedford v. Zimmerman*, 547 S.E.2d 211, 216 (Va. 2001) (Koontz, J., dissenting).

ed as a matter of contributory negligence. "The fact that plaintiff failed to use the seat belts had nothing to do with the happening of the accident The failure to use seat belts was not a proximate cause or substantial factor in producing an accident from which 'some' injuries flowed."⁴⁰ In short, the harshness of the penalty for a plaintiff's negligence made a seatbelt defense under a contributory negligence scheme untenable.

However, the court considered whether Barry's damages should be mitigated by his failure to use the available seatbelts. Here, the court took as a guide section 465 of Restatement (Second) of Torts, which instructed that if a plaintiff's negligence did not cause the plaintiff's injury but was a substantial contributing factor in increasing the harm that befell him by the defendant's negligence, the plaintiff's recovery should be adjusted.⁴¹ The court therefore analyzed whether or not there was sufficient evidence to find that Barry's failure to use seatbelts was "a substantial contributing factor" to his injuries.⁴² The court found that there was not.

[H]ere, there is no evidence in this case as to whether (a) the use of seat belts by plaintiff here would have prevented any particular movement of his body or impact of his face with the windshield or other part of the car, or (b) seat belts would, or would not have, produced more serious injuries.⁴³

However, the court acknowledged that under a particular set of facts apportionment could occur, stating that it was "not now deciding how [it] would rule if there were here expert evidence to the effect that, if seat belts had been used by plaintiff, he would not have suffered the injuries which have been revealed in this testimony."⁴⁴ The door was open for a seatbelt defense in New Jersey, if only a crack.

Two years later, the New Jersey Supreme Court was asked to determine whether a trial court erred in striking the defense of contributory negligence in the case of a woman injured when the laundry truck she was standing in struck another vehicle.⁴⁵ The court found no error and underlined the importance of a defendant proving the causal relationship between failure to use a seatbelt and the injuries of a plaintiff as a precondition to a jury apportioning responsibility to a plaintiff, saying:

⁴⁰ *Barry*, 239 A.2d at 275.

⁴¹ *Id.* at 275-76. The Restatement's relevant comment to the rule reads "apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues. There must of course be satisfactory evidence to support such a finding, and the court may properly refuse to permit the apportionment on the basis of mere speculation." RESTATEMENT (SECOND) OF TORTS § 465 cmt. c (1965).

⁴² *Barry*, 239 A.2d at 276.

⁴³ *Id.* at 279.

⁴⁴ *Id.* at 276.

⁴⁵ *Dziedzic v. St. John's Cleaners & Shirt Launderers, Inc.*, 249 A.2d 382, 383-84 (N.J. 1969).

Even if we assume . . . that a reasonable man would fasten an available seat belt, nevertheless those cases which make the same assumption hold that the only way the seat belt defense can go to the jury is if the defendant comes forward with specific evidence demonstrating the causal link; i.e., the relationship between failure to fasten the belt and the plaintiff's injuries.⁴⁶

However, the court was warming to the notion of a seatbelt defense, noting "it is obvious that, on the average, persons using seat belts are less likely to sustain injury and, if injured, the injuries are likely to be less serious."⁴⁷

In 1973, the New Jersey Legislature abrogated the contributory negligence doctrine and statutorily established New Jersey as a comparative negligence state.⁴⁸ Consequently, when the New Jersey Supreme Court again took up the seatbelt defense in 1988 it did so in a comparative negligence environment, requiring it to reconsider for what purposes seatbelt evidence would be allowed. It did so in *Waterson v. General Motors Corporation*.⁴⁹

Driving on a rainy April afternoon in 1980 with only her two cats as passengers, Waterson lost control of her vehicle while coming out of a bend in the road.⁵⁰ Her car, traveling between 25 and 30 miles per hour, crashed into a telephone pole along the roadside.⁵¹ Waterson suffered injuries to her face, hips, knee, and collarbone.⁵² It was only after five months and several hospitalizations that she returned to work.⁵³ A witness to the accident described that "there was a drastic move of the rear end of the car towards the curb" and Waterson sued General Motors alleging defects to the car's rear axle, a claim that General Motors ultimately conceded.⁵⁴ At trial, Waterson's damages were determined to be \$28,000, but the jury further found that "[Waterson's] failure to wear her seat belt proximately contributed forty percent (40%) to her injuries."⁵⁵ The trial court therefore reduced Waterson's damages to \$16,800 plus interest and costs "to reflect her negligence."⁵⁶ Upon reviewing the Appellate Division's affirmance of the trial court, the New Jersey Supreme Court addressed the threshold matter of the sufficiency of the defendant's seatbelt evidence and the procedures at trial. The Court found them

⁴⁶ *Id.* at 385.

⁴⁷ *Id.* (quoting *Bentzler v. Braun*, 149 N.W.2d 626, 640 (Wis. 1967)) (internal quotation marks omitted).

⁴⁸ 1973 N.J. Laws c. 146 § 1 (amended by 1982 N.J. Laws c. 191 § 1, codified as N.J. Stat. Ann. § 2A:15-51 (West 2012)).

⁴⁹ 544 A.2d 357 (N.J. 1988).

⁵⁰ *Id.* at 359.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 359-60. The fate of the cats was not reported.

⁵⁴ *Id.*

⁵⁵ *Id.* at 360.

⁵⁶ *Id.*

sufficient, requiring it to evaluate the function and operation of the seatbelt defense for the first time.⁵⁷

The Court began by reviewing the history of the seatbelt defense in New Jersey courts, noting the *Barry* and *Dziedzic* decisions, among others, as underscoring the need for sufficient evidence of causation before adjusting damages. It considered a 1986 New Jersey appellate case in which a court, applying the state's modified comparative negligence statute, had adopted the methodology of the Wisconsin courts in applying a seatbelt defense (New Jersey's comparative negligence statute was modeled after Wisconsin's).⁵⁸ It considered the approaches of states that had adopted a mitigation of damages approach to the seatbelt defense instead of implementing the defense through contributory negligence.⁵⁹ The Court also considered a variety of state decisions denying the use of seatbelt evidence on various grounds.⁶⁰ Finally, it noted that some states had barred or capped the amount of reductions allowed for evidence of seatbelt nonuse by statute.⁶¹ In short, the Court had a clear picture of the approaches taken to the seatbelt defense across the nation.

⁵⁷ *Id.* at 361–63.

⁵⁸ *Id.* at 365–67. The Court recounts the Law Division's exploration of the new statute in *Dunn v. Durso*, 530 A.2d 387, 391–92 (N.J. Super. Ct. Law Div. 1986), which the *Dunn* court, in turn, modeled after *Foley v. City of West Allis*, 335 N.W.2d 824 (Wis. 1983).

⁵⁹ *Waterson*, 544 A.2d at 367. The Court highlighted two states. First was New York. *Spier v. Barker*, 323 N.E.2d 164, 167–69 (N.Y. 1974) (holding that because seatbelts “afford . . . an unusual and ordinarily unavailable means . . . [of minimizing] damages [p]rior to [an] accident,” applying a doctrine normally reserved for pre-injury mitigation is more appropriate than a contributory negligence approach which should be reserved for determining fault in the accident itself). The use of a mitigation of damages theory in New York was not surprising, as when *Spier* was decided New York was still a contributory negligence jurisdiction and a finding of any fault of the plaintiff would have barred any recovery. See *Costanza v. City of New York*, 553 N.Y.S.2d 616, 617–18 (N.Y. Civ. Ct. 1990). Second was Florida. *Ins. Co. of N. Am. v. Pasakarnis*, 451 So. 2d 447, 454 (Fla. 1984) (endorsing mitigation of damages as the proper approach when a seatbelt went unreasonably unused and disallowing a liability calculation unless a party has alleged and proved the failure to use the belt as a cause of the accident), *abrogated by Ridley v. Safety Kleen Corp.*, 693 So. 2d 934, 943 (Fla. 1996).

⁶⁰ The Court found a panoply of reasons why seatbelt evidence had been disallowed by state courts. These same concerns would certainly color a court's consideration of whether or not to allow a helmet defense. See, e.g., *Petersen v. Klos*, 426 F.2d 199, 204–05 (5th Cir. 1970) (duty to use seatbelts is a question for the legislature), *amended on other grounds*, 433 F.2d 911, 912 (5th Cir. 1970) (per curiam); *Britton v. Doehring*, 242 So. 2d 666, 675 (Ala. 1970) (the benefits of seatbelts in any particular case would be too speculative); *Fischer v. Moore*, 517 P.2d 458, 459 (Colo. 1973) (defendants must accept plaintiffs as they find them); *Kopischke v. First Cont'l Corp.*, 610 P.2d 668, 682 (Mont. 1980) (use of seatbelts by the public too low to justify use as “due care”); *Amend v. Bell*, 570 P.2d 138, 143 (Wash. 1977) (plaintiff should not be penalized for not anticipating a defendant's negligence).

⁶¹ *Waterson*, 544 A.2d at 368; see, e.g., MICH. COMP. LAWS § 257.710 (2010) (indicating that failure to use seatbelt may be considered evidence of negligence, but damages may not be reduced by more than 5% as a result of that negligence).

Before moving forward with its inquiry as to the appropriate approach to the seatbelt defense under New Jersey common law, the Court considered whether or not New Jersey's legislature had addressed the issue of using seatbelt evidence in tort claims. The Court found that the New Jersey Legislature had mandated seatbelt use by vehicle drivers and front-seat passengers.⁶² Furthermore, the Court found that although a pre-enactment version of the mandate included the consideration of a prohibition on the use of seatbelt evidence in determining negligence or diminishing damages,⁶³ as enacted no such prohibition was included, implying to the Court that the Legislature had "left to the judiciary the resolution of the seat-belt issue."⁶⁴

The Court then examined its common law options in dealing with the case before it. First, it determined that although the legislature had enacted a mandatory seatbelt use rule, the low penalties for violation of the seatbelt law indicated that the Legislature did not intend for "failure to use a seat belt [to] constitute negligence *per se*."⁶⁵ However, this conclusion did not preclude a defendant from introducing evidence of seatbelt nonuse to the jury for its consideration in apportioning fault or awarding damages.

After weighing whether to adopt a comparative negligence or mitigation of damages approach, the Court rejected both in their pure form.

Each approach, we believe, has its disadvantages. The doctrines of mitigation of damages and avoidable consequences usually involve post-accident conduct. On the other hand, a straight comparative negligence approach [under New Jersey's modified comparative negligence system] precludes recovery for a plaintiff if a jury finds nonuse of the seat belt to be over fifty percent of the total negligence. Therefore, we reject both these approaches.⁶⁶

Instead, the Court chose to adopt a combined approach, "consistent with [New Jersey's] prior decisional law, [New Jersey's] comparative negligence law, and public policy."⁶⁷ The adopted approach required the jury

⁶² *Waterson*, 544 A.2d at 368; see 1984 N.J. Laws c. 179 § 2, last amended by 2009 N.J. Laws c. 318 § 1 (amended to encompass all vehicle passengers).

⁶³ *Waterson*, 544 A.2d at 369. The Court quoted the relevant passage as providing "Failure to wear a safety belt system, in violation of this act, shall not be considered evidence of negligence nor limit liability of an insurer nor diminish recovery for damages arising out of the ownership, maintenance, or operation of a passenger automobile. In no event shall failure to wear a safety seat belt system be considered as contributory negligence, nor shall the failure to wear a safety belt system be admissible as evidence in the trial of any other civil action." *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 370. The doctrine of "negligence per se" proposes that "[t]he unexcused violation of a legislative enactment . . . which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself." RESTATEMENT (SECOND) OF TORTS § 288B (1965). The doctrine had been recognized in New Jersey as early as 1902. See *Fielders v. N. Jersey St. Ry. Co.*, 53 A. 404, 406 (N.J. 1902).

⁶⁶ *Waterson*, 544 A.2d at 370.

⁶⁷ *Id.*

to distinguish between the initial accident and the “second collision” where injuries were partially the consequence of nonuse of seatbelts, and further emphasized that the nonuse of a seatbelt would only reduce damages if it were a factor that increased the extent or severity of injuries.⁶⁸ By separating the “primary” collision from the “secondary” collision in this way, the Court addressed the weaknesses in both approaches. It ensured that plaintiffs would not be barred from recovery under New Jersey’s modified comparative negligence statute,⁶⁹ while avoiding the temporal doctrinal problems of theories of failure to mitigate damages by utilizing a comparative negligence approach to apportion fault in the secondary collision.⁷⁰ Furthermore, the jury was required to determine whether or not the failure to use a seatbelt was reasonable under the particular circumstances—if it was reasonable, damages would not be adjusted.⁷¹

Waterson’s essential holding, that the seatbelt defense was a reasonable approach to accounting for the risks and safety measures available on the public highways, was the logical endpoint of the transition from a contributory to a comparative negligence regime and the widespread

⁶⁸ *Id.*

⁶⁹ This could be the result if, for example, the court determined that an accident should be analyzed in one comprehensive apportionment of fault, and the overwhelming majority of the injuries were the result of a failure to use a seatbelt. In the *Waterson* approach, the fault for injuries stemming from the primary collision being apportioned separately from those of the secondary collision results in no possibility that an otherwise non-negligent plaintiff would be barred from recovery based on failure to wear a seatbelt.

⁷⁰ *Waterson* requires at least seven discrete steps in determining whether a seatbelt defense will result in reduced damages being levied against a defendant. First, the jury determines the total damages without taking account of any division. *Id.* at 374. Second, the jury determines each party’s percentage of fault in causing the primary accident. *Id.* Third, the jury determines whether or not failure to use a seatbelt constituted negligence, under the standard of a reasonably prudent person. *Id.* Fourth, if the jury found that failure to use a seatbelt constituted negligence, the jury determines whether or not that failure increased the nature and severity of the plaintiff’s injury. *Id.* at 374–75. Fifth, if it finds that failure to use a seatbelt had increased the nature and severity of the plaintiff’s injuries, the jury isolates the second collision damages by determining what damages would have been incurred with seatbelts and subtracting that from the total damages determined in the first step. *Id.* at 375. Sixth, the jury determines the plaintiff’s percentage of fault for damages resulting from a failure to wear a seatbelt. *Id.* Finally, the court incorporates both the calculation of fault for the overall accident and the calculation of fault for the additional seatbelt injuries into a reduction of the seatbelt-related damages. *Id.* This “*Waterson* formula” is complex in its construction and subject to criticism in its execution, particularly the mathematics used by the court. See generally Paul A. LeBel, *Reducing the Recovery of Avoidable “Seat-Belt Damages”: A Cure for the Defects of Waterson v. General Motors Corporation*, 22 SETON HALL L. REV. 4 (1991).

⁷¹ *Waterson*, 544 A.2d at 369. This reasonableness inquiry is in essence the “advance precautions” or “Hand Formula” approach. The plaintiff is required to demonstrate that, under the circumstances, the burden of using the safety device outweighed the potential benefits (combining the probability and potential scale of injury in an accident), rendering the choice not to use the device reasonable.

availability of seatbelts as a standard safety measure. Unlike in many jurisdictions, *Waterson's* allowance of seatbelt evidence was not immediately superseded by statute.⁷² *Waterson* set the stage for a bicycle helmet defense, providing an approach by which courts could determine whether the use of a safety device was the conduct of a reasonable person and a means of translating nonuse of that device into a damages reduction. With the stage set, all that was required was the proper set of facts to be presented to the courts.

III. BLAZING A TRAIL—*CORDY*, *NUNEZ*, AND THE APPLICATION OF THE SEATBELT DEFENSE TO BICYCLE HELMETS

The *Cordy*⁷³ and *Nunez*⁷⁴ decisions respectively illustrate the potential stumbling blocks and proper approach to arguing a bicycle helmet defense as an expansion of a jurisdiction's seatbelt defense jurisprudence. In *Cordy*, Sherwin Williams did not tailor their argument for a bicycle helmet defense to match the *Waterson* case law, allowing the district court to downplay that precedent in rejecting the defense. By contrast, the *Nunez* decision reveals a court willing and able to apply the logic of *Waterson* to the bicycle helmet question, presumably because it had been provided the necessary arguments and information to reach that result.

Sherwin Williams's bicycle helmet defense in *Cordy* may have been doomed by a strategic misstep. In its response brief, Sherwin Williams "concede[d] that plaintiff's failure to wear a helmet [was] not relevant to the issue of plaintiff's comparative fault."⁷⁵ This allowed the district court to focus solely on whether or not *Cordy's* failure to wear a bicycle helmet was relevant to a defense of a failure to mitigate damages. *Waterson* is at its heart a comparative negligence approach, and by ceding that ground Sherwin Williams lost the ability to argue by analogy to the seminal seatbelt defense case in its jurisdiction. As a result, the *Cordy* court felt unbound by the *Waterson* precedent and rejected Sherwin Williams's analo-

⁷² See, e.g., *Dahl v. BMW*, 748 P.2d 77, 81 (Or. 1987) (holding that seatbelt evidence could be factored into the *overall* fault calculation between the parties in Oregon's pure comparative negligence environment). The decision was superseded by statute in the next legislative session. 1989 Or. Laws c. 1074 § 1 (codified as OR. REV. STAT. § 18.500 (1990), subsequently renumbered OR. REV. STAT. § 31.760 (2003)) (seatbelt evidence "may be admitted only to mitigate the injured party's damages" and that "mitigation shall not exceed five percent of the amount to which the injured party would otherwise be entitled").

⁷³ *Cordy v. Sherwin Williams Co.*, 975 F. Supp. 639 (D.N.J. 1997) (denying admission of bicycle helmet evidence where a cyclist sustained head injuries after falling from his bicycle).

⁷⁴ *Nunez v. Schneider Nat'l Carriers*, 217 F. Supp. 2d 562 (D.N.J. 2002) (allowing admission of bicycle helmet evidence where a cyclist sustained head injuries after being knocked from her bicycle by a passing truck).

⁷⁵ *Cordy*, 975 F. Supp. at 647.

gizing to seatbelt defense concepts, either with New Jersey's approach or generally.⁷⁶

Cordy's rejection of the bicycle helmet defense was by no means an indication that the analysis and procedure of *Waterson* was not logically extendable to Sherwin Williams's proposed bicycle helmet defense. On the contrary, it was directly applicable. In rejecting an analogy to the seatbelt defense, the *Cordy* court focused on the fact that the adoption of the seatbelt defense in New Jersey occurred after the adoption of a mandatory seatbelt-use law and that cars were required to be equipped with seatbelts. It found the analogy to *Waterson* inapposite because no helmet laws covering *Cordy* (an adult rider) were in force in New Jersey and bicycles were not required to be sold with helmets.⁷⁷ The *Cordy* court found no duty for cyclists to wear helmets, ignoring the New Jersey Supreme Court's similar unwillingness to adopt a duty to wear a seatbelt and instruction that juries instead weigh a number of factors to determine "whether an injured party acted as a reasonably prudent person."⁷⁸ Had Sherwin Williams not ceded ground on a comparative negligence theory and advocated more zealously for the extension of the *Waterson* approach, it would have been able to make its case that *Cordy's* choice not to wear a bicycle helmet was unreasonable. Having conceded the issue of comparative negligence from the outset, the court was not required to allow such an examination.

As a result, the district court was left to consider only the question of whether failure to wear a bicycle helmet should be considered a failure to mitigate damages.⁷⁹ The district court looked across the country and found that "[d]efendant has not cited, and the court's research has not uncovered, even one case that holds that failure to wear a bicycle helmet is relevant to the determination of an injured bicyclist's damages."⁸⁰ The only treatment of the issue the court could find was a Montana case rejecting the bicycle helmet defense for lack of statutory support.⁸¹ The court investigated whether the New Jersey Legislature had made any pronouncements relevant to the issue—it found only a mandatory-helmet-use law applying to persons under 14 and enacted after *Cordy's* accident.⁸² The court ruminated that the lack of legislative action on the question "perhaps represent[ed] a recognition that, in general, riding a

⁷⁶ *Id.* at 648.

⁷⁷ *Id.* at 647.

⁷⁸ *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 372 (N.J. 1988).

⁷⁹ *Cordy*, 975 F. Supp. at 647.

⁸⁰ *Id.*

⁸¹ *Id.*; see *Walden v. State*, 818 P.2d 1190, 1196 (Mont. 1991) (holding that "Montana law does not require bicyclists to wear helmets; thus, the failure to wear a helmet ordinarily does not constitute negligence"). An immediately apparent problem with the *Cordy* court viewing this as persuasive is that the Montana court addressed the question as a matter of comparative negligence, not failure to mitigate damages as was being requested by Sherwin Williams.

⁸² *Cordy*, 975 F. Supp. at 647; see 1991 N.J. Laws c. 465 § 1C.39:4-10.1.

bicycle is not as dangerous as driving in a car.”⁸³ Finding no legislative support for the notion that helmet use was the reasonable course of conduct for mitigating crash injuries, the court held that:

Under such circumstances, this court declines to permit defendant to argue to the jury that plaintiff’s failure to wear a bicycle helmet should affect any damage award received by plaintiff in this case. There is nothing in either federal or state law that would have alerted a reasonable person in plaintiff’s position that his legal rights could be prejudiced by his decision not to wear a bicycle helmet. Nothing in the law provided notice to plaintiff that he was legally expected to wear a helmet or that failure to wear a helmet could be considered legally unreasonable. The court will therefore not contravene fundamental notions of fairness by announcing defendant’s proposed new rule of law at the expense of this severely injured plaintiff who had no reason to predict the promulgation of such a new rule.⁸⁴

Unlike Sherwin Williams, Schneider National Carriers made no concession on the question of comparative negligence while asserting a bicycle helmet defense in *Nunez*. As a result, the *Nunez* court fully examined the question of whether a bicycle helmet defense was appropriate under New Jersey law as an extension of *Waterson*.⁸⁵

Still presented with a dearth of legislative acts or judicial decisions from New Jersey on the bicycle helmet defense, the court examined the holding in *Cordy* for guidance.⁸⁶ The court succinctly stated its opinion of the *Cordy* analysis: “This Court does not find the rationale of the *Cordy* court persuasive.”⁸⁷ It found *Cordy*’s “suggestion that riding a bicycle without a helmet is any less dangerous than driving a car without a seat belt” to be unconvincing.⁸⁸ Furthermore, the court rejected the *Cordy* court’s reliance on the absence of a mandatory helmet law.⁸⁹ Finally, the court took judicial notice of the “well documented efficacy of helmets in reducing or preventing death or injury from bicycle accidents,” concluding that “[a]t this juncture [their] effectiveness . . . cannot reasonably be disputed.”⁹⁰

Having disposed of *Cordy*’s rationales for rejecting a bicycle helmet defense, the court looked to the New Jersey Supreme Court’s approach in *Waterson* as guidance on whether bicycle helmet evidence should be

⁸³ *Cordy*, 975 F. Supp. at 648.

⁸⁴ *Id.* at 647–48.

⁸⁵ *Nunez v. Schneider Nat’l Carriers*, 217 F. Supp. 2d 562, 564–70 (D.N.J. 2002).

⁸⁶ *Id.* at 565.

⁸⁷ *Id.*

⁸⁸ *Id.* The court went on to say “[a] bicyclist sharing a road with motorized vehicles is often exposed to greater danger than the driver of a car on that same road. In the event of an accident, the driver of a car is at least shielded from direct impact by the outer shell of the car, whereas a bicycle offers no such protection.” *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 565–66.

admissible and treated analogously to evidence of seatbelt nonuse.⁹¹ In deciding *Waterson*, the New Jersey Supreme Court had examined whether and for what reason other foreign jurisdictions had accepted or rejected the seatbelt defense.⁹² The *Nunez* court did the same for the helmet defense, and found numerous cases on the question of a motorcycle helmet defense, but none on the bicycle helmet question.⁹³ The court noted that some of the motorcycle helmet cases “rested their rejection of the helmet defense on the ground that neither Congress nor their state legislatures had passed a law requiring the use of helmets.”⁹⁴ However, the court found this line of reasoning “subject to considerable criticism.”⁹⁵ Quoting the Supreme Court of North Dakota, the court stated:

Although there is good authority for the proposition that a court may adopt as a standard of care the requirements of a legislative enactment designed to protect a specified class of persons, it never has been suggested that a standard of care may be inferred from a statute which does not require the use of safety devices by a certain segment of society.⁹⁶

The *Nunez* court adopted this point of view in rejecting the notion that the New Jersey Legislature’s failure to make use of a bicycle helmet mandatory implied that bicyclists were under no obligation to wear helmets as a matter of ordinary care. The court summed up its thoughts by noting that “there is a difference between [the Legislature] saying, ‘it is up to you to decide whether or not to wear a safety helmet,’ and saying, ‘You will never, under any circumstances, have to suffer legal consequences for not wearing a helmet.’”⁹⁷

Although New Jersey had no requirement that adults wear bicycle helmets, the court found the New Jersey Legislature had “obviously recognize[ed the] fact” that helmets demonstrably reduced injuries and had adopted this as public policy by passing statutes requiring helmet use by youth and promoting helmet sales with bicycles.⁹⁸ Given the legislative

⁹¹ *Id.* at 566.

⁹² *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 367–68 (N.J. 1988).

⁹³ *Nunez*, 217 F. Supp. 2d at 567–68. The “motorcycle helmet defense” has its own history, treated here only briefly. *Infra*, Part IV.A. On the whole, the state cases aligned their rulings on helmet defenses to their existing jurisprudence on the seatbelt defense, either accepting or rejecting it. *See, e.g.*, *Hukill v. DiGregorio*, 484 N.E.2d 795 (Ill. App. Ct. 1985).

⁹⁴ *Nunez*, 217 F. Supp. 2d at 568.

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Halvorson v. Voeller*, 336 N.W.2d 118, 122 (N.D. 1983)) (allowing the helmet defense in motorcycle crash cases to mitigate damages) (internal citation omitted).

⁹⁷ *Nunez*, 217 F. Supp. 2d at 568 (quoting *Halvorson*, 336 N.W.2d at 122).

⁹⁸ *Id.* The court referred to three statutes it had identified earlier in the opinion. New Jersey law at the time of the accident required persons under 14 to wear helmets while riding bicycles. N.J. STAT. ANN. § 39:4–10.1 (West 2012). The law further required that all bicycles sold have an affixed statement “promoting the use of helmets by bicycle riders.” N.J. STAT. ANN. § 39:4–14.4a (West 2012). Going even

support for helmet use, the court concluded “the absence of legislation requiring adults to wear helmets serves not as a basis for precluding but for *admitting* evidence of their nonuse at trial to reduce damages.”⁹⁹ As further support for finding the Legislature neutral-to-supportive of the admission of helmet evidence, the court noted that *Waterson* had established that the absence of a statute requiring the use of a seatbelt had implied that the Legislature had left the issue for resolution by the courts, and found no reason to apply a different logic to bicycle helmets.¹⁰⁰ The court reaffirmed that, under *Waterson*, the jury could consider the full range of factors that might make nonuse of a helmet reasonable or unreasonable, and that courts should apply the multi-step process outlined in *Waterson* to properly adjust damages as a result of unreasonable nonuse.¹⁰¹ Ultimately, no such process happened in *Nunez*—the case settled after two days of trial.¹⁰²

The *Cordy* and *Nunez* decisions underscore the importance of understanding the relevant precedents and arguments necessary to advocate for expansion of the common law seatbelt defense to bicycle helmets in a particular jurisdiction. Because seatbelt defense jurisprudence generally arose before the adoption of mandatory seatbelt laws, obstacles such as the lack of a legislative mandate for helmet use should not be controlling. Instead, advocates must convince the court of the applicability of the reasoning that underpins the seatbelt defense. Doing so effectively requires properly understanding the themes at play in a jurisdiction’s seatbelt defense cases and not inadvertently being swept away in the riptides of the terminology and reasoning of torts. There were no substantive changes to the legal environment considered by the *Cordy* and *Nunez* courts—the only change which accounts for their contrasting conclusions is the change in the arguments and strategies.¹⁰³

further, the Legislature had explicitly adopted a campaign developed by state government and advocacy groups featuring the slogan “This Bike Is Missing One Part.” N.J. STAT. ANN. § 39:4–14.7a (West 2012).

⁹⁹ *Nunez*, 217 F. Supp. 2d at 568 (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 569–70. The court noted that “the jury should feel free to consider other factors, such as the availability of a helmet, where plaintiff was riding her bicycle at the time of the accident, the prevailing custom of helmet use at the time of the accident and any other factor relevant to whether plaintiff acted as a reasonably prudent person in not wearing a helmet.” *Id.* at 569.

¹⁰² See Civil Docket at 6, *Nunez v. Schneider Nat’l Carriers*, 217 F. Supp. 2d 562 (D.N.J. 2002) (No. 2:99-cv-04541-WGB).

¹⁰³ There was of course one other change—the change of judges considering the matter. Whether Judges Simandle (*Cordy*) and Bassler (*Nunez*) held from opposite ends of some common-law-tort-defense jurisprudential divide is unknowable. Subjectively, *Cordy*’s discussion of a bicycle helmet defense *feels* skeptical of the notion, while *Nunez* has a more enthusiastic tone.

IV. NAVIGATING THE OBSTACLES—WHERE AND HOW A BICYCLE HELMET DEFENSE COULD FIND SUCCESS

Successfully asserting a bicycle helmet defense has two essential parts. First, the jurisprudence of the jurisdiction where litigation is taking place must recognize the seatbelt defense under its common law. Furthermore, the jurisdiction must not have preemptively blocked the defense through legislation. Second, the factors considered by that jurisdiction's court in determining that seatbelt use was the expected conduct of a reasonably prudent person need to be addressed to justify a similar finding in favor of the use of bicycle helmets.

A. "Target States"—Jurisdictions Amenable to the Bicycle Helmet Defense

Two basic criteria are useful to determine whether a bicycle helmet defense might find success in a given state. First, a state's seatbelt defense jurisprudence must have a common law basis upon which a bicycle helmet defense can be built. Even in states whose legislatures have abrogated seatbelt defenses created at common law, the underlying jurisprudence may still provide the necessary reasoning to assert a bicycle helmet defense. Second, states must not have foreclosed the use of a bicycle helmet defense by statute.

At least the following jurisdictions have allowed a seatbelt defense:¹⁰⁴

Alaska¹⁰⁵

Georgia¹⁰⁶

New York¹⁰⁷

Arizona¹⁰⁸

Iowa¹⁰⁹

Oregon¹¹⁰

¹⁰⁴ Some of the jurisdictions not listed here may have entertained the idea of allowing such a defense in dicta. *See, e.g.*, *Baker v. Morrison*, 829 S.W.2d 421, 423 (Ark. 1992) (holding that, pre-statutory abrogation, nonuse of seatbelts may have been admissible as evidence of comparative fault if nonuse was a proximate cause of injuries). For clarity, only those jurisdictions that have affirmatively embraced the defense are included here.

¹⁰⁵ *Hutchins v. Schwartz*, 724 P.2d 1194, 1199 (Alaska 1986) (seatbelt evidence should be considered because "the concept of comparative negligence contemplates the inclusion of all relevant factors in arriving at the appropriate damage award").

¹⁰⁶ *Cannon v. Lardner*, 363 S.E.2d 574, 577 (Ga. Ct. App. 1987) (allowing evidence on matters of ordinary care, comparative negligence, and assumption of the risk), *superseded by statute*, GA. CODE ANN. § 40-8-76.1 (2012).

¹⁰⁷ *Spier v. Barker*, 323 N.E.2d 164, 167-69 (N.Y. 1974) (allowing seatbelt evidence to be used in a mitigation of damages approach).

¹⁰⁸ *Law v. Superior Court*, 755 P.2d 1135, 1144-45 (Ariz. 1988) (applying ARIZ. REV. STAT. ANN. § 12-2505 (2012) and allowing nonuse of a seatbelt to be included in the comparative fault determination under particular circumstances).

¹⁰⁹ *Meyer v. City of Des Moines*, 475 N.W.2d 181, 190 (Iowa 1991) (noting Iowa's statutory adoption allowing a 5% mitigation of damages in IOWA CODE ANN. § 321.445 (2010)). Like Colorado, Iowa is unlikely to be friendly to the bicycle helmet defense, having declined to allow a motorcycle helmet defense over concerns of a modified comparative negligence bar to recovery. *Id.* at 190-91.

California¹¹¹Michigan¹¹²Vermont¹¹³Colorado¹¹⁴Nebraska¹¹⁵U.S. Virgin Islands¹¹⁶Florida¹¹⁷New Jersey¹¹⁸Wisconsin¹¹⁹

Amongst these, Colorado, Iowa, and Nebraska are not strong candidates for a common law bicycle helmet defense, because their seatbelt defenses were established by statute and their prior jurisprudence was either silent or hostile toward adopting the seatbelt defense. The rest have a jurisprudential history that could be expanded to fit a bicycle helmet defense, even if their seatbelt defenses have been statutorily superseded.

An alternative foundation for a bicycle helmet defense would be common law recognition of a motorcycle helmet defense. However, a survey of the states yields only one additional state for the list on this basis: North Dakota.¹²⁰ This limited expansion is due in part to the motorcy-

¹¹⁰ *Dahl v. BMW*, 748 P.2d 77, 81 (Or. 1987) (holding that seatbelt evidence could be factored into the overall fault calculation between the parties in Oregon's pure comparative negligence environment).

¹¹¹ *Housley v. Godinez*, 6 Cal. Rptr. 2d 111, 115–16 (Cal. Ct. App. 1992) (interpreting CAL. VEH. & TRAF. CODE § 27315 in combination with prior caselaw as allowing evidence of seatbelt nonuse, while banning its use in establishing “negligence as a matter of law or negligence per se”) (internal quotation marks omitted).

¹¹² *Lowe v. Estate Motors Ltd.*, 410 N.W.2d 706, 716 (Mich. 1987) (“If competent evidence is proffered to establish that the failure to use an available and operational seat belt contributed to producing plaintiff’s damages, then the issue of comparative negligence, including the accompanying issue of causation, should be submitted to the jury.”).

¹¹³ *Smith v. Goodyear Tire & Rubber Co.*, 600 F. Supp. 1561, 1562, 1568 (D. Vt. 1985) (noting that Vermont law was silent on the issue and allowing evidence of nonuse of seatbelts in damage calculations under Vermont’s contributory negligence statute); *see* VT. STAT. ANN. tit. 12, § 1036 (2002).

¹¹⁴ *Anderson v. Watson*, 953 P.2d 1284, 1289–92 (Colo. 1998) (applying COLO. REV. STAT. § 42–4–237 (2012) which allows seatbelt evidence to mitigate pain and suffering damages). Colorado courts are not likely to be friendly to a common law helmet defense, as they have rejected the motorcycle helmet defense at common law. *See Dare v. Sobule*, 674 P.2d 960, 963 (Colo. 1984) (“[F]ailure to wear a [motorcycle] helmet is inadmissible to show negligence on the part of the injured party or to mitigate damages.”).

¹¹⁵ *Fickle v. State*, 735 N.W.2d 754, 768 (Neb. 2007) (noting NEB. REV. STAT. § 60-6,273 (2010) allows admission for purposes of mitigation of damages only and limiting to a 5% reduction).

¹¹⁶ *Meyers v. Cruzan Motors Ltd.*, Civ. No. 1985/118, 1986 WL 10123, at *5 (D.V.I. July 24, 1986) (finding that evidence can be used for apportionment of damages from secondary collision).

¹¹⁷ *Ridley v. Safety Kleen Corp.*, 693 So.2d 934, 943 (Fla. 1996) (stating that failure to use a seat belt “should ordinarily be raised by an affirmative defense of comparative negligence”).

¹¹⁸ *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 367–68 (N.J. 1988).

¹¹⁹ *Bentzler v. Braun*, 149 N.W.2d 626, 640 (Wis. 1967) (holding that there is a duty to use seatbelts and that nonuse of seatbelts can be considered in an overall fault calculation when nonuse contributed to a plaintiff’s injuries).

¹²⁰ *See Halvorson v. Voeller*, 336 N.W.2d 118, 119–23 (N.D. 1983).

cle helmet defense having faced a different statutory environment during its development than its seatbelt cousin, resulting in greater reliance on theories of negligence per se.¹²¹ Congress pushed states to enact helmet laws in the 1960s by tying enactment of helmet laws to federal highway funds.¹²² By 1975, 47 states and the District of Columbia had mandatory helmet laws, and the same number retain some form of helmet law today.¹²³ As a result, motorcycle helmet laws were widespread at the same time as the wholesale conversion of the states from contributory to comparative negligence jurisdictions, which impacted whether states approached the question as one of negligence per se or one of common law duty.¹²⁴ This contrasts with the seatbelt defense, where mandatory seatbelt laws only became widespread in the 1980s, leaving a larger window for development of a common law seatbelt defense before statutes (and statutory bars to the defense) took root.¹²⁵ Three of the states with common law seatbelt defenses (Arizona, Florida, and Wisconsin) have also recognized common law motorcycle helmet defenses,¹²⁶ increasing the likeli-

¹²¹ See, e.g., *Green v. Gaydon*, 331 S.E.2d 106, 108 (Ga. Ct. App. 1985) (finding that rider's violation of helmet, lighting, and horn laws constituted negligence per se and blocked recovery).

¹²² Melissa Neiman, *Motorcycle Helmet Laws: The Facts, What Can Be Done to Jump-Start Helmet Use, and Ways to Cap Damages*, 11 J. HEALTH CARE L. & POL'Y 215, 216–17 (2008). Many states have restricted their helmet requirements to youth riders.

¹²³ *Id.* at 217, 220.

¹²⁴ Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41, 43 (2003) (discussing the conversion of contributory negligence jurisdictions to comparative negligence, and noting the sharp increase in conversions in the 1960s and 1970s). An interesting example of the result of that flux is Minnesota's history with the helmet law and motorcycle helmet defense. Minnesota enacted a mandatory helmet-use law in 1967, but repealed it after federal funding ceased to be tied to helmet laws in 1976. *Leonard v. Parish*, 420 N.W.2d 629, 632 (Minn. Ct. App. 1988). Included in the repeal was a statutory enactment of a motorcycle helmet defense allowing a reduction in damages for all injuries that could have been avoided by using an appropriate motorcycle helmet. *Id.* at 632–33. The defense was intended to promote the voluntary use of helmets after the repeal of mandatory use. *Id.* The statutory defense was repealed in 1999. MINN. STAT. ANN. § 169.974 (2012).

¹²⁵ See Alma Cohen & Liran Einav, *The Effects of Mandatory Seatbelt Laws on Driving Behavior and Traffic Fatalities*, 85 REV. ECON. & STAT. 828, 833 (2003) (displaying in a chart the expansion and type of seatbelt-use laws in the 1980s).

¹²⁶ *Warfel v. Cheney*, 758 P.2d 1326, 1328–33 (Ariz. Ct. App. 1988) (finding that helmet nonuse evidence would be permitted prospectively based on seatbelt defense jurisprudence); *Lenhart v. Basora*, 100 So. 3d 1177, 1179 (Fla. Dist. Ct. App. 2012); *Oldakowski v. Heyen*, 428 N.W.2d 644 (Wis. Ct. App. 1988). Most of the jurisdictions which have recognized a common law seatbelt defense have a statutory helmet requirement. E.g. California (CAL. VEH. CODE § 27803 (WEST 2012)); Georgia (GA. CODE ANN. § 40-6-315 (2010)); New York (N.Y. VEH. & TRAF. LAW § 381 (MCKINNEY 2012)); Vermont (VT. STAT. ANN. tit. 23 § 1256 (2012)). Michigan's motorcycle helmet requirement hinges on a rider's experience, training, and insurance status. MICH. COMP. LAWS § 257.658 (2012). Of these, only Georgia has considered a motorcycle helmet defense, and based it on a negligence per se approach. See *Green*,

hood that a bicycle helmet defense could find success there. Ultimately, the wider spread of the seatbelt defense and its roots in the common law make it the more likely foundation upon which a bicycle helmet defense can be built.

Asserting a bicycle helmet defense does not require a bicycle helmet law, but in some states statutory bars to the bicycle helmet defense must be taken into account. At least 22 states have adopted laws requiring children of varying ages to wear bicycle helmets on the public roadways.¹²⁷ Among the states listed above, California, Florida, Georgia, New York, and Oregon have done so.¹²⁸ Some states, like Georgia and New York, included a provision that violation of their youth helmet laws did not constitute negligence and could not be used as evidence of negligence.¹²⁹ While these types of provisions appear on their face to indicate legislative disapproval of a helmet defense, they should not be determinative on the issue for adults. Advocates should highlight to the courts both the omission of adult riders from these provisions and the specific policy reasons for protecting younger, less responsible riders from the hardship of a reduced or barred recovery as a result of not wearing (or not having been provided by their parents) a helmet. However, in Florida and Oregon adoption of helmet statutes for young riders included statutory language disallowing evidence of failure to wear a helmet in *all* cases of comparative negligence, regardless of whether the rider was covered by the law's age limits.¹³⁰ Legislation eliminating liability for all bicycle users was likely a compromise to gain passage of youth helmet legislation.¹³¹

331 S.E.2d at 108 (finding that rider's violation of helmet, lighting, and horn laws constituted negligence per se and blocked recovery).

¹²⁷ *Helmet Laws for Bicycle Riders*, BICYCLE HELMET SAFETY INST., <http://www.helmets.org/mandator.htm> (noting statewide youth helmet laws in Alabama, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Tennessee, and West Virginia).

¹²⁸ See CAL. VEH. CODE § 21212 (WEST 2012) (use of helmets by 18 and under); FLA. STAT. ANN. § 316.2065 (WEST 2013) (16 and under); GA. CODE ANN. § 40-6-296 (2012) (16 and under); N.Y. VEH. & TRAF. LAW § 1238 (McKINNEY 2012) (14 and under); OR. REV. STAT. § 814.485 (2012) (16 and under).

¹²⁹ See GA. CODE ANN. § 40-6-296; N.Y. VEH. & TRAF. LAW § 1238. Advocates should note that California is the only target state that has enacted a youth helmet law but no corresponding prohibition on use of its violation as evidence of negligence. See CAL. VEH. CODE § 21212. In California, advocates facing a youth plaintiff may enter nonuse evidence to demonstrate negligence per se in the face of that statute. CAL. EVID. CODE § 669 (WEST 2012). However, California law allows a means to rebut a finding of negligence per se by demonstrating the reasonableness of the statutory violation. *Id.* Therefore, facing a youth plaintiff in California, helmet use as the standard of conduct will be established, but the youth will have the same opportunities as any plaintiff to demonstrate that, in their particular circumstances, failure to wear a helmet was reasonable.

¹³⁰ OR. REV. STAT. § 814.489 (2012) (“[E]vidence of lack of protective headgear shall not be admissible . . . to reduce the amount of damages or to constitute a defense to an action for damages brought by or on behalf of an injured bicyclist . . . if the bicyclist . . .

Eliminating Oregon, Florida, and New Jersey (as the model state), the following are left as “target states”: Alaska, Arizona, California, Georgia, Michigan, New York, North Dakota, Vermont, the U.S. Virgin Islands, and Wisconsin. These are the jurisdictions in which an advocate could most likely succeed in asserting a bicycle helmet defense.

B. Arguments to Show that Helmet Use Is the Conduct of a Reasonably Prudent Person

The *Nunez* court’s examination of New Jersey’s seatbelt defense and its application to a bicycle helmet defense provides a blueprint for how an advocate could successfully persuade the courts (and ultimately a jury) that wearing a helmet is the conduct of a reasonably prudent person.¹³² *Nunez*’s analysis specifically considered two factors in determining whether helmet use was the course of conduct of a reasonably prudent person. First, the court examined and took judicial notice of the effectiveness of bicycle helmets in reducing head injuries associated with bicycling accidents. Second, the court examined the New Jersey’s Legislature’s actions to determine what, if any, guidance the Legislature had provided to citizens and the courts on the use of helmets. While each jurisdiction will have its own considerations based on the reasoning within its line of seatbelt defense cases, the considerations of the *Nunez* court are natural to the issue and will likely be considered in other jurisdictions. Indeed, the regularity with which courts examined the decisions of other jurisdictions in developing their seatbelt defense law¹³³ makes it likely that *Nunez*, as a pioneering case, will serve as a guide to courts considering bicycle helmet defenses.

1. Judicial Examination and Notice of the Safety Benefit of Helmets

The *Nunez* court examined evidence of the effectiveness of bicycle helmet use in preventing head injuries when it rejected the *Cordy* analysis.¹³⁴ A body of evidence and support for helmets sufficient to justify the

was injured or killed as a result in whole or in part of the fault of another.”); FLA. STAT. ANN. § 316.2065 (West 2013) (“The failure of a person to wear a bicycle helmet . . . may not be considered evidence of negligence or contributory negligence.”).

¹³¹ Bill Mackenzie, *Youths Believe New Bicycle Helmet Bill Is a Heads-Up Idea*, OREGONIAN, June 3, 1993, at C6 (noting opposition to an all-ages helmet law resulted in legislation being amended to only apply to youth).

¹³² This was the standard of conduct as phrased in *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 371 (N.J. 1988). Variants abound throughout the states. The Restatements phrase the standard as the conduct “of a reasonable man under like circumstances.” RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 3 (2000); RESTATEMENT (SECOND) OF TORTS § 238 (1965).

¹³³ *E.g.*, *Hutchins v. Schwartz*, 724 P.2d 1194, 1197–99 (Alaska 1966) (examining how other states have dealt with issues of duty to wear seatbelts and whether to consider mitigation of damages and comparative negligence theories); *Lowe v. Estate Motors Ltd.*, 410 N.W.2d 706, 711–12 (Mich. 1987) (examining the reasoning of states which allowed evidence of seatbelt nonuse).

¹³⁴ *Nunez v. Schneider Nat’l Carriers*, 217 F. Supp. 2d 562, 565–66 (D.N.J. 2002).

position that helmets effectively protect against head injuries is crucial, because an advocate asserting the defense will have to convince a court to accept evidence of helmet nonuse in order to place the issue before a jury and then have to convince a jury of the unreasonableness of the nonuse in order to be successful.

The evidence in support of helmet use as a reasonable safety measure is more than sufficient to meet the standard for judicial notice to be taken of it.¹³⁵ For example, a 1989 study in the *New England Journal of Medicine* found that use of a bicycle helmet reduced the risk of a head injury by 85% and of brain injury by 88%.¹³⁶ Helmet use is widely advocated for by organizations from government agencies like NHTSA¹³⁷ to private organizations like the Oregon Bicycle Transportation Alliance¹³⁸ and is mandatory under the rules of USA Cycling (the United States' professional cycling governing body)¹³⁹ and the Union Cycliste Internationale (the world governing body for cycling).¹⁴⁰ Given the research on helmet

¹³⁵ See, e.g., *Meier v. Bray*, 475 P.2d 587, 591 (Or. 1970) (“[A] trial court can take judicial notice of matters of common knowledge or general notoriety.”). The *Nunez* court did so as to bicycle helmets as a safety measure. *Nunez*, 217 F. Supp. 2d at 565–66.

¹³⁶ Robert S. Thompson et al., *A Case-Control Study of the Effectiveness of Bicycle Safety Helmets*, 320 *NEW ENG. J. MED.*, 1361, 1361–67 (1989); see also, e.g., Diane C. Thompson et al., *Effectiveness of Bicycle Safety Helmets in Preventing Head Injuries: A Case-Control Study*, 276 *JAMA* 1968, 1968–73 (1996) (reaffirming substantial decreases in head injuries among helmet users); Daniel W. Spaite et al., *A Prospective Analysis of Injury Severity Among Helmeted and Nonhelmeted Bicyclists Involved in Collisions with Motor Vehicles*, 31 *J. TRAUMA* 1510, 1510–16 (1991) (noting substantially higher severity of injury among non-helmet users, including severity of injury in patients without major head trauma when separately analyzed). It should be acknowledged that the issue of helmet effectiveness has generated and continues to generate substantial rhetoric from both advocates and opponents of compulsory helmet laws, including dueling science, critiques of various studies, and arguments of urban policy. See, e.g., Elisabeth Rosenthal, *To Encourage Biking, Cities Lose the Helmets*, *N.Y. TIMES*, Sept. 29, 2012, at SR6. This Article takes no position on the matter of whether helmets should be required for cyclists by law. For the purposes of this argument, it is sufficient that helmets are widely available, relatively inexpensive, and known throughout the cycling community as a standard, if legally optional, safety device. This is because in the event of a tort claim, the matters at issue will be limited in part to (1) whether or not wearing a helmet is the conduct of a reasonable person and (2) whether in *that case* the failure to wear a helmet resulted in greater injuries than would otherwise have occurred. Therefore, the generalized effectiveness of helmets will be less an issue than the expert testimony about the effect a helmet might have had in the particular case.

¹³⁷ NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *BICYCLE HELMET USE LAWS*, DOT HS 810886W (2008) (“Bicycle helmets offer bicyclists the best protection from head injuries resulting from bicycle crashes.”).

¹³⁸ RAY THOMAS, *PEDAL POWER: A LEGAL GUIDE FOR OREGON BICYCLISTS* 44 (6th ed. 2008) (“[O]ne of the few things we can do to improve our chances of avoiding serious injury in the event of an accident is to wear a good helmet.”).

¹³⁹ USA CYCLING RULE BOOK, App. 5, Policy I. Helmets (2012), <http://www.uci.ch/templates/BUILTIN-NOFRAMES/Template1/layout.asp?MenuId=MTY2NjU&LangId=1>.

¹⁴⁰ UCI CYCLING REGULATIONS, PART I: GENERAL ORGANISATION OF CYCLING AS A SPORT, § 1.3.031 (2012), <http://www.uci.ch/templates/BUILTIN-NOFRAMES/Template1/layout.asp?MenuId=MTY2NjU&LangId=1>.

effectiveness, widespread advocacy for the use of helmets, and the obvious protection that a helmet provides the skull, courts can reasonably take notice that the use of helmets is an accepted means of reducing head injuries during cycling accidents.

2. *Legislative Guidance to the Courts and Citizens on Helmet Use*

Along with the efficacy of helmets themselves and their promotion by the medical and cycling communities, a standard of conduct favorable to helmet use can be supported by guidance to citizens about helmet use through state legislative action (or, in some cases, city or county ordinances). The *Nunez* court surveyed the statutory landscape of New Jersey to determine whether the New Jersey Legislature had indicated a standard of conduct as to bicycle helmet use. The court determined that the Legislature had not acted directly on that issue, but was influenced by related legislative acts and policies requiring helmet use by minors as well as promoting helmet use by cyclists generally.¹⁴¹ Although no state has adopted an all-ages helmet law, advocates should pay close attention to the relevant laws in their states that touch on these issues. As in *Nunez*, courts may find state policies promoting helmet use persuasive on the question of whether helmet use is the standard of conduct against which a plaintiff's actions should be measured.

Of the target states listed above, California, Georgia, and New York require some subset of minors to wear helmets while riding a bicycle.¹⁴² In other cases, municipal ordinances require helmet use by minors,¹⁴³ or less frequently, all riders.¹⁴⁴ In some states, revenue generated through enforcement of these laws is funneled into government-supported helmet education and purchase programs.¹⁴⁵ When *Nunez* was decided, New Jersey had a separate, statutorily created helmet promotion program which required that bicycles be sold with a statement affixed to them "promoting the use of helmets by bicycle riders"¹⁴⁶ and had adopted a "This Bike Is Missing One Part" campaign.¹⁴⁷ Other states are less explicit in their support of helmet use, but may provide grants to groups that support

¹⁴¹ *Nunez v. Schneider Nat'l Carriers*, 217 F. Supp. 2d 562, 565 (D.N.J. 2002).

¹⁴² See CAL VEH. CODE § 21212 (West 2012) (use of helmets by 18 and under); GA. CODE ANN. § 40-6-296 (2012) (16 and under); N.Y. VEH. & TRAF. LAW § 1238 (McKinney 2012) (14 and under).

¹⁴³ See, e.g., SITKA, ALASKA, CODE § 11.70.010 (2013) (requiring helmet use for those under 18 on public land or premises open to the public).

¹⁴⁴ See, e.g., EL CERRITO, CA., MUNICIPAL CODE § 11.64.100 (2012), available at <http://library.municode.com/index.aspx?clientId=16333&stateId=5&stateName=California> (requiring helmet use for all riders). Interestingly, the city also requires a bicycle license before bicyclists may ride on any city street. *Id.* § 11.64.020.

¹⁴⁵ See, e.g., CAL VEH. CODE § 21212 (mandating that 72.5% of revenue collected from helmets must be placed into county health department accounts earmarked for helmet education and the provision of helmets to low-income youth).

¹⁴⁶ N.J. STAT. ANN. § 39:4-14.4a (West 2012).

¹⁴⁷ *Id.* § 39:4-14.7a.

helmet education and promotion.¹⁴⁸ Any combination of these policies can be used to illustrate the point—significant to the court in *Nunez*—that the Legislature, despite not having mandated the use of bicycle helmets by all citizens, views the use of helmets as desirable, beneficial, and prudent conduct.

3. *Custom As an Argument for Helmet Use as the Conduct of a Reasonably Prudent Person*

Custom was significant to the New Jersey Supreme Court in recognizing a place for a seatbelt defense in *Waterson*, and mentioned as a reasonableness factor in *Nunez*.¹⁴⁹ Whether behavior is customary has long influenced whether judges or juries find particular conduct to be reasonable,¹⁵⁰ and can reassure the court that their allowance of bicycle helmet defense does not deviate too far from the behavioral expectations of the community. The threshold at which use of a bicycle helmet can be considered customary is unclear—*Waterson* noted that in 1980, when the accident at issue in that case occurred, only 12–15% of drivers utilized seatbelts.¹⁵¹ A 1999 national survey indicated that helmet use amongst cyclists is closer to 50%,¹⁵² but local statistics and studies will certainly yield varying rates.¹⁵³ Argued in concert with legislative measures to encourage

¹⁴⁸ See, e.g., *Bicycle and Pedestrian Grantees in Georgia*, GEORGIA GOVERNOR'S OFFICE OF HIGHWAY SAFETY <http://www.gahighwaysafety.org/bikepedsafety/grantees.html>.

¹⁴⁹ *Waterson v. Gen. Motors Corp.*, 544 A.2d 357, 371–72 (N.J. 1988) (“We are convinced that the factfinder should determine whether an injured party’s nonuse of a seat belt should serve to reduce that party’s recovery and not simply whether the party’s conduct has met an established general standard of care. The jury also should be free to take into account the prevailing custom of seat belt use at the time of an accident. For example, there was testimony at the trial of this case that indicated that only twelve to fifteen percent of the population used seat belts in 1980, when this accident occurred. Such evidence is relevant to the jury’s determination of whether an injured party acted as a reasonably prudent person.”); *Nunez v. Schneider Nat’l Carriers*, 217 F. Supp. 2d 562, 569 (D.N.J. 2002). (“In addition, the jury should feel free to consider other factors, such as the availability of a helmet, where plaintiff was riding her bicycle at the time of the accident, the prevailing custom of helmet use at the time of the accident and any other factor relevant to whether plaintiff acted as a reasonably prudent person in not wearing a helmet.”).

¹⁵⁰ See Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784 (2009) (detailing the influence of custom in negligence law and suggesting that the role of custom evidence in determining negligence reflects a normative, “experiential” approach to determining what constitutes reasonable care).

¹⁵¹ *Waterson*, 544 A.2d at 371–72.

¹⁵² *National Bike Helmet Use Survey*, U.S. CONSUMER PRODUCT SAFETY COMM’N, (Apr. 1999), <http://www.cpsc.gov/Research-Statistics/Injury-Statistics/Topics/National-Bike-Helmet-Use-Survey/>.

¹⁵³ If advocates confront a low helmet-use rate in their area, they should recall the guidance of Judge Learned Hand, who wrote that “in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.” *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

helmet use and evidence that helmet use is mandatory in racing and competitive settings, a local custom of helmet use could be persuasive in establishing a standard for the prudent cyclist.

Ultimately, at one time all the target states accepted a common law seatbelt defense recognizing the use of seatbelts as the conduct of a reasonably prudent person. Advocates must be prepared to assert that the failure to wear a helmet constituted a violation of that standard of reasonable care in whatever way fits with the jurisdiction's seatbelt precedents. As demonstrated in *Cordy*, a failure to do so can result in nonuse evidence being barred, even in the face of favorable seatbelt precedents.

CONCLUSION

The bicycle helmet defense is a reasonable extension of the seatbelt defense. Where a seatbelt defense has been recognized in the common law, an advocate can credibly make the case that the seatbelt defense's reasoning and function should apply to the nonuse of bicycle helmets. The *Nunez* decision illustrates the applicability of seatbelt jurisprudence to bicycle helmets. The *Cordy* decision underscores the importance of adhering closely to the substantive and structural underpinnings of a state's seatbelt defense when arguing for its expansion. Although only 10 states and territories (and New Jersey) are ripe for the assertion of a bicycle helmet defense, these jurisdictions account for almost one-third of the population of the United States.¹⁵⁴ As mixed-traffic cycling increases in urban centers, the net number of bicycle accidents on the roadways will surely rise. If cyclists choose to forgo an accepted and pervasive safety device when on the road, they should bear the legal consequences of straying from that prudent conduct when seeking damages for their personal injury.

¹⁵⁴ *State & County Quick Facts*, US CENSUS BUREAU (2013), <http://quickfacts.census.gov/qfd/index.html>.