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Viability of the Seatbelt Defense in Wyoming - Implications of and Issues Surrounding Wyoming Statute 31-5-1402(F), The

Tori R. A. Kricken

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THE VIABILITY OF "THE SEATBELT DEFENSE" IN WYOMING – IMPLICATIONS OF AND ISSUES SURROUNDING WYOMING STATUTE § 31-5-1402(F)

Tori R. A. Kricken[*]

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* Tori R.A. Kricken graduated from the University of Wyoming College of Law in May 2000 and was admitted to the Wyoming and Colorado bars in the fall of 2000. She currently is employed as Staff Attorney for the State of Wyoming, Second Judicial District and serves as adjunct faculty for the University of Wyoming College of Law, teaching in the area of legal writing. Ms. Kricken also serves as a Magistrate for the Albany County Circuit Court and a District Court Commissioner for the Second Judicial District. She would like to extend her gratitude to Mr. Sam Cantrell and Ms. Kelley Anderson, Law Clerks for Chief United States District Judge William F. Downes in the District of Wyoming, for their collaboration on the issues herein.

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I. INTRODUCTION

The nonuse of vehicle occupant restraints is the basis for a defense referred to as the "seatbelt defense."[1] The seatbelt defense alleges that a plaintiff's nonuse of an available restraint caused or enhanced his injuries.[2] The seatbelt defense exists in both statutory[3] and court-imposed forms. Depending upon the jurisdiction, the seatbelt defense can be asserted for one or more purposes: (1) to mitigate damages in crashworthiness lawsuits;[4] (2) to mitigate damages in non-crashworthiness claims; (3) to prove that a vehicle's overall safety and integrity was not defective because of the availability of a safety device; (4) to show misuse or assumption of the risk; and (5) to show proximate cause of an injury.[5] Since the mid-1960s and continuing today, the use of the seatbelt defense in tort litigation has been a subject of heated controversy.[6]

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1. The author notes that, depending on the authority, "seatbelt" is, at times, one word and, at others, two. Unless quoted, "seatbelt" will be used as a single word in this article.

2. MATTHEW BENDER & CO., INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2004).

3. Referred to herein as "seatbelt statutes."

4. *See infra* notes 158-184 and accompanying text for a description of the crashworthiness doctrine.

5. MATTHEW BENDER & CO., INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2004) (and cases cited therein).

6. *Id.*

This article traces the significant history of the seatbelt defense.[7] More importantly, this article analyzes the current state of the law and various constitutional issues surrounding the seatbelt defense in an effort to provide the background for its analysis of Wyoming law. Finally, this article specifically addresses Wyoming's "seatbelt defense statute," Wyoming statute section 31-5-1402(f)[8] in the context of current Wyoming statutory and case law.

II. CURRENT STATE OF THE LAW

A. Common Law Duty

Although jurisdictions vary with respect to the admissibility of seatbelt evidence,[9] most concur that there is no original common law duty to wear a seatbelt. In fact, courts rely on the *lack* of a common law duty to wear a seatbelt for support in their decisions not to admit seatbelt evidence. In those jurisdictions that refuse to admit seatbelt evidence, courts depend on the following reasons for excluding the evidence:

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7. Analyses of the history of the seatbelt defense can be found in numerous articles and secondary authority, including: MATTHEW BENDER & CO., INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2004); MATTHEW BENDER & CO., INC., 7-92 PRODUCTS LIABILITY PRACTICE GUIDE § 92.07 (LexisNexis 2004) (Automobiles); Christopher Hall, J.D., *Nonuse Of Seatbelt As Reducing Amount Of Damages Recoverable*, 62 A.L.R. 5th 537 (1998) (update July 2003); Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based In Common Sense*, 38 TULSA L. REV. 405 (Winter 2002); Katherine Nielsen, Note, *Tort Litigation—The New Case For The "Seat Belt Defense"—Norwest Bank New Mexico, N.A. v. Chrysler Corporation*, 30 N.M.L. REV. 403 (Spring 2000); Peter Scaff, Comment, *The Final Piece Of The Seat Belt Evidence Puzzle*, 36 HOUS. L. REV. 1371 (Winter 1999); Brett R. Carter, Note, *The Seat Belt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215 (Fall 1998); Recent Case, Waterson v. General Motors Corp, 544 A.2d 357 (1988), 102 HARV. L. REV 925 (1989); Schwartz, *The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics, and Economics*, 24 IDAHO L. REV. 275 (1988); Note, *The Seat Belt Issue: Judicial Disregard for Legislative Action*, 4 ALASKA L. REV. 387 (1987); Westenberg, *Buckle Up or Pay: The Emerging Safety Belt Defense*, 20 SUFFOLK U.L. REV. 867 (1986); Michael B. Gallub, Note, *A Compromise Between Mitigation And Comparative Fault?: A Critical Assessment Of The Seat Belt Controversy and A Proposal For Reform*, 14 HOFSTRA L. REV. 319 (Winter 1986); Ackerman, *The Seat Belt Defense Reconsidered: A Return to Accountability in Tort Law?*, 16 N.M.L. REV. 221 (1986); Note, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt?*, 50 MO. L. REV. 968 (1985); Thomas R. Trenkner J.D., Annotation, *Nonuse of Automotive Seatbelts as Evidence of Comparative Negligence*, 95 A.L.R.3d 239 (1979); Thomas R. Trenkner J.D., Annotation, *Automobile Occupant's Failure to Use Seat Belt as Contributory Negligence*, 92 A.L.R.3d 9 (1979); C. Clifford Allen, III, J.D., Annotation, *Nonuse of Seat Belt as Failure to Mitigate Damages*, 80 A.L.R.3d 1033 (1977).

8. Wyoming statute section 31-5-1402(f) states: "Evidence of a person's failure to wear a safety belt as required by this act shall not be admissible in any civil action." WYO. STAT. ANN. § 31-5-1402(f) (LexisNexis 2004).

9. By use of the term "seatbelt evidence," the author means evidence addressing a vehicle occupant's use of or failure to use a passive restraint, as it would be considered in civil litigation involving a motor vehicle accident.

> (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.[10]

But, at common law, a few courts recognize the seatbelt defense, holding that vehicle occupants have a duty based on "the standard of ordinary care" to use an available seatbelt. Those courts hold that a breach of this duty constitutes, at the very least, "passive" negligence. However, because application of the seatbelt defense often produces a harsh all-or-nothing result, a majority of courts historically declined to recognize a common law seatbelt defense.[11] These courts reasoned that a plaintiff's failure to use a seatbelt did not contribute to the "cause" of the accident. They further rejected the application of the doctrine of avoidable consequences, which traditionally applied to post-accident conduct by a plaintiff, reasoning that a plaintiff's failure to wear a seatbelt occurs pre-accident. As a result, failure to wear a seatbelt was not to be considered in mitigation of damages.[12] These courts also cite to other reasons for the rejection of a common law duty to wear a seatbelt such as judicial economy, lack of information about the general utility of seatbelts, and lack of public acceptance of automobile seatbelts.[13] Some of these reasons have been outdated by recent trends and reliable information regarding the effectiveness of seatbelts.

Oklahoma provides an apt example of the historical development of the seatbelt defense. As far back as 1976, the Oklahoma Supreme Court addressed seatbelt evidence admissibility in establishing contributory negligence or for mitigation of damages.[14] Therein, the court stated:

> There is no common law or statutory duty requiring the use of seat belts. Imposition of new and recent technological advances are not usually inducted into doctrines of law, until

10. MATTHEW BENDER & CO., INC., 3-16 DAMAGES IN TORT ACTIONS §16.04 (LexisNexis 2004).
11. MATTHEW BENDER & CO. INC., 1-4 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 4.50 (LexisNexis 2004).
12. *Id.*
13. *Id.*
14. Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976).

> such time as they have been sufficiently tried, proven and accepted for the purpose they were intended. Historically, the seat belt phenomenon is in its infancy. It is in a state of influx.
>
> . . . .
>
> Although there is a conflict in other jurisdictions who have been confronted with this issue, the majority of the cases hold that the failure to use seat belts is not a defense to establish contributory negligence or to reduce the amount of damages to the injured party.
>
> In view of the lack of unanimity on a proper seat belt system, the lack of public acceptance, and in the absence of any common law or statutory duty, we find that evidence of the failure to use seat belts is not admissible to establish a defense of contributory negligence or to be considered in mitigation of damages. For the present time we await the direction of the legislature.[15]

However, since 1976, much has changed. By 1999, the Oklahoma Supreme Court stated:

> After almost a quarter of a century the use of seat belts is no longer in its infancy, and it is generally accepted that seat belt usage reduces traffic fatalities.[16]
>
> . . . .
>
> [T]he parents urge us to look at other jurisdictions which have adopted a common law duty to ensure the use of seat belts. We need not consider whether to adopt such a duty independent of the current statutory scheme . . . . We are not inclined to craft a common law duty where the Legislature has specifically failed to impose a statutory one.[17]
>
> . . . .
>
> The statute provides that: "Nothing in this act shall be used in any civil proceeding in this state and the use or nonuse of seat belts shall not be submitted into evidence in any civil suit in Oklahoma." The Legislature in clear, explicit, and

15. *Id.* at 61-62.
16. Comer v. Preferred Risk Mutual Ins. Co., 991 P.2d 1006, 1011 (Okla. 1999).
17. *Id.* at 1012-13.

> mandatory language prohibits the introduction of seat belt evidence in any civil lawsuit.[18]

So, although Oklahoma recognized a statutory seatbelt defense, it rejected the notion of a common law duty to wear seatbelts. Interestingly, a "chicken and egg" phenomenon exists with respect to a common law duty and the imposition of seatbelt legislation. As is evident, states sometimes refuse to find a common law duty based upon the legislature's failure to enact a statutory duty.[19] On the other hand, litigants also argue that a statutory duty should be considered unconstitutional in light of the lack of any common law duty. Courts, too, use the lack of a common law duty to negate constitutional challenges to seatbelt statutes and to, at times, skirt the potential impact of seatbelt statutes on litigants. The statutes and the common law seem, at times, in direct conflict with each other, as evidenced by an Oklahoma court's discussion.[20]

While the national trend consists of cases recognizing that common law principles do not prohibit the introduction of seat belt evidence in crashworthiness cases,[21] courts have been at a loss to defy the plain language of statutes written in derogation of the common law, based on the reasoning of cases in which the legislature remained silent.[22] Even where a state has enacted laws requiring that manufacturers equip passenger cars with seatbelts, historically seatbelt usage was not mandatory.[23] Without any statutory requirement to wear a seatbelt, courts refused to shift fault to the non-wearer

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18. *Id.* at 1014 (see also footnotes therein).
19. *Id.*
20. *Id.* at 1010.

> The parties agree that we have never recognized that the common law duty of care of a parent, adult, group, or organization toward a minor includes the duty to make seat belts available in all seating positions or to instruct or require the use of seat belts . . . .

Id.

21. *See* Anker v. Kittle, 541 N.W.2d 333, 338 (Minn. 1995). *Anker* cites to Daly v. General Motors Corp., 575 P.2d 1162, 1174-75 (Cal. 1978) (analyzing the admissibility of seat belt evidence in the absence of a gag rule); Seward v. Griffin, 452 N.E.2d 558, 569 (Ill. App. Ct. 1983) (same); McElroy v. Allstate Ins. Co., 420 So. 2d 214, 216-17 (La. Ct. App. 1982) (same), *writ denied*, 422 So.2d 165 (La. 1982); Lowe v. Estate Motors Ltd., 410 N.W.2d 706, 721 (Mich. 1987) (same); Waterson v. General Motors Corp., 544 A.2d 357, 370, 372-73 (N.J. 1988) (same); Dahl v. Bayerische Motoren Wekse, 748 P.2d 77, 81-83 (Or. 1987) (same); Maskrey v. Volkwagenwerk Aktiengersellschaft, 370 N.W.2d 815, 822 (Wis. Ct. App. 1985) (following precedent regarding the admissibility of seat belt evidence in crashworthiness actions).

22. *Anker*, 541 N.W.2d at 338 (citing Wilson v. Volkswagen of Am., 445 F. Supp. 1368, 1374 (D. Va. 1978)) (describing seat belt gag rules as written in derogation of the common law).

23. *See* Watkins v. Hartsock, 783 P.2d 1293 (1989). *See also* Gardner v. Chrysler Corp., 89 F.3d 729, 733-34 (10th Cir. 1996).

for fear that an insurer might try to evade coverage or to prevent wrongdoers from avoiding liability.[24] Still, as time passed, courts analyzed the potential common law duty and legislatures took action by enacting statutes prohibiting seatbelt evidence.[25] Once legislatures enacted such laws, courts were free to conclude that the legislatures "evidenced an intent to modify the common law."[26]

A common law duty to wear a seatbelt arises most often where a state lacks a seatbelt statute. Courts, in those cases, frequently mention the need for legislative, rather than judicial, action and are reluctant to recognize the seatbelt defense in the absence of a legislative mandate creating a duty to wear a seatbelt.[27] Others courts have considered whether the legislature otherwise provided for the defense. For example, in *Derheim v. N. Fiorito Co.*,[28] the court would have permitted the defense if there were a comparative negligence statute in effect; yet, in *Law v. Superior Court of the State of Arizona*,[29] the court reached an opposite result with the same reasoning, judicially permitting the seatbelt defense because Arizona had a comparative negligence statute, even though Arizona had no law compelling use of seatbelts.

With most states adopting seatbelt legislation, the considerations of the common law duty necessarily have decreased.[30] A majority of the states have enacted laws requiring seatbelt use.[31] Generally, these statutes preclude evidence of failure to use a seatbelt for purposes of comparative fault. Some states permit the evidence in some circumstances but limit the amount of percentage reduction in the award.[32] The majority of seatbelt statutes require seatbelt use, but either provide that a violation cannot be grounds to reduce an award on the basis of comparative or contributory negligence, or limit the potential reduction to a small percentage of the award.[33] With so many

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24. *Gardner*, 89 F.3d at 733-34. *See, e.g.*, Hampton v. State Highway Comm'n, 498 P.2d 236 (Kan. 1972) (no duty to use a seat belt under the common law standard of due care or to mitigate damages).

25. *Gardner*, 89 F.3d at 733-34. *See Watkins*, 783 P.2d at 1298; Rollins v. Kansas Dept. of Transp., 711 P.2d 1330 (Kan. 1985).

26. *Gardner*, 89 F.3d at 734.

27. LaHue v. General Motors Corp., 716 F. Supp. 407, 411 (W.D. Mo. 1989).

28. Derheim v. N. Fiorito Co., 492 P.2d 1030 (Wash. 1972).

29. Law v. Superior Court of the State of Arizona, 755 P.2d 1135, 1143 (Ariz. 1988).

30. "Prior to [the Oklahoma statute's] enactment, the Court held, in Field v. Volkswagen of America, Inc., 1976 OK 106, 555 P.2d 48, 84 A.L.R. 3d 1199, that there was no common law or statutory duty requiring the use of seat belts and that the failure to use a seat belt was not a defense to establish contributory negligence or to reduce the amount of damages to the injured party." Bishop v. Takata Corp., 12 P.3d 459, 463 (Okla. 2000).

31. *LaHue*, 716 F. Supp. at 411 (and cases cited therein).

32. *Id.*

33. Lowe v. Estate Motors Ltd., 410 N.W.2d 706, 727-28 n.9 (Mich. 1987). *See* IOWA CODE ANN. § 321.445(4)(b)(2) (West 2003) (5%); LA. REV. STAT. ANN. § 32.295.1(E)(4) (West 2003) (2%); MO. ANN. STAT. § 307.178 (3)(2) (West 2003) (1%). *See also* CAL. VEH.

courts adopting seatbelt legislation, it is worthwhile to consider how this drastic change in statutory law developed.

B. Statutory Evolution

Many states have promulgated laws addressing the seatbelt defense; some effectively codified earlier case law while others drafted statutes allowing the defense to reduce a plaintiff's recovery but only up to a set percentage.[34] A review of the evolution of certain state statutes may provide a helpful background in understanding the evolution of seatbelt statutes as a whole.

1. Michigan

The Michigan Court of Appeals faced its state's "percentage-cap" seatbelt statute[35] in *Thompson v. Fitzpatrick*,[36] and upheld its validity. Thompson was not wearing a seatbelt at the time of an accident with Fitzpatrick. Thompson was ejected from his vehicle and suffered serious injury. Thompson initiated a personal injury action, and the parties stipulated to a partial consent judgment, whereby "the parties agreed [Thompson] sustained $250,000 in damages, $125,000 of which would have been prevented had [Thompson] been wearing his seat belt . . . ."[37] Thompson then successfully moved for summary judgment. The trial court applied the Michigan statute and reduced the damages award by five percent (as opposed to the fifty per-

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CODE § 27315 (i) (West 2003); CONN. GEN. STAT. ANN. § 14-100a(c)(4) (West 2003); D.C. CODE § 40-1607 (2003); FLA. STAT. ANN. § 316.614(10) (West 2003); HAWAII REV. STAT. § 291-11.6 (LexisNexis 2003); IDAHO CODE § 49-764 (LexisNexis 2003); ILL ANN STAT, ch. 95 1/2 § 12-603.1(c) (West 2003); IND. STAT. ANN. § 9-8-13-9 (West 2003); KAN. STAT. ANN. § 8-2504(c) (West 2003); MD. CODE ANN. § 22-412.3(g) (2003); MINN. STAT. ANN. § 169.686 (West 2003); NEV. REV. STAT. § 484.641(3) (LexisNexis 2003); N.J. STAT. ANN. § 39:3-76.2h (West 2003); N.M. STAT. ANN. § 66-7-373(B) (LexisNexis 2003); NY VEH. & TRAF. LAW § 1229-c(8) (McKinney 2003); N.C. GEN. STAT. § 20-135.2A (d) (2003); OHIO REV. CODE ANN. § 4513.26.3(G) (West 2003)); OKLA. STAT. ANN. Tit. 47, § 12-420 (West 2003); TENN. CODE ANN. § 55-9-604 (2003); TEX. REV. CIV. STAT. ANN., art. 6701d, § 107C(j) (Vernon 2003); UTAH CODE ANN. § 41-6-186 (2003); VA. CODE § 46.1-309.2(E) (West 2003); WASH. REV. CODE § 46.61.688(6) (West 2003).

34. Jesse N. Bomer, Comment, *The Seatbelt Defense: A Doctrine Based In Common Sense*, 38 TULSA L. REV. 405, 412 (Winter 2002).

35. MICH. COMP. LAWS ANN § 257.710e(6) (West 2004). This section provides:

> Failure to wear a safety belt in violation of this section may be considered evidence of negligence and may reduce the recovery for damages arising out of the ownership, maintenance, or operation of a motor vehicle. However, such negligence shall not reduce the recovery for damages by more than 5%.

Id. (emphasis added).

36. Thompson v. Fitzpatrick, 501 N.W.2d 172 (Mich. App. 1992).

37. *Id.* at 173.

cent reduction to which the parties had stipulated). The Court of Appeals, relying on an earlier decision,[38] upheld the trial court's ruling and concluded that the statute was clear and unambiguous in its five percent reduction cap.[39]

2. Colorado

In another mutation of the seatbelt defense, Colorado enacted legislation allowing the reduction of a plaintiff's recovery but only with respect to awards for pain and suffering.[40] The Supreme Court of Colorado construed this statute in *Anderson v. Watson*,[41] which involved an accident between cars driven by Anderson and Watson. Watson admitted negligence (in running a red light) and causation.[42] However, Watson raised an affirmative defense that Anderson had failed to mitigate pain and suffering damages by failing to use her seatbelt.[43] Neither litigant presented much evidence as to the relationship between Anderson's injuries and her failure to fasten her seatbelt, but the trial court allowed the jury to consider the evidence in apportioning damages. The jury returned a verdict completely void of a pain and suffering award.[44]

The Colorado Supreme Court conformed its decision with the policy behind the statute of encouraging seatbelt use.[45] The court opined that the

38. Ullery v. Sobie, 492 N.W.2d 739 (Mich. App. 1992).
39. *Thompson*, 501 N.W.2d at 173.
40. COLO. REV. STAT. ANN. § 42-4-237(7) (West 2000). The statute provides:

> Evidence of failure to comply with the requirement of subsection (2) of this section [requiring seatbelt use] shall be admissible to mitigate damages with respect to any person who was involved in a motor vehicle accident and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident. Such mitigation shall be limited to awards for pain and suffering and shall not be used for limiting recovery of economic loss and medical payments.

Id. (emphasis added).
41. Anderson v. Watson, 953 P.2d 1284 (Colo. 1998).
42. *Id.* at 1286.
43. *Id.* at 1286-87. Watson based her affirmative defense on Colorado statute section 42-4-237(7).
44. *See* Anderson v. Watson, 929 P.2d 6 (Colo. App. 1996).
45. *Anderson*, 953 P.2d at 1290. The court stated the following:

> We note that our outcome today comports with the General Assembly's goal in enacting the Mandatory Seat Belt Act, *i.e.*, to promote seat belt use. This aim is amply reflected in the provisions of the Mandatory Seat Belt Act . . . . By decreasing the amount of pain and suffering damages in proportion to injuries attributable to seat belt non-use, the General Assembly sent a signal to drivers and front-seat passengers to buckle up. It is not unusual for the legislature to circumscribe non-economic damages as a declaration of public policy.

legislature had not intended to place the entire burden of proving the seatbelt defense on the defendant. Instead, the defendant must prove a *prima facie* case of seatbelt nonuse for the defense to be presented to the jury.[46] Anderson's admission that she had not been wearing a seatbelt fulfilled this requirement. Accordingly, the Colorado Supreme Court affirmed the trial court's jury instruction on the seatbelt defense and, accordingly, the jury's determination that Anderson's nonuse justified elimination of her pain and suffering damages.[47]

3. Tennessee

Tennessee was once a part of the majority in refusing to allow seatbelt evidence for the purpose of reducing damage awards.[48] But in 1994, the Tennessee legislature amended the state's seatbelt statute to allow reduction in certain circumstances.[49] The statute prohibits evidence of seatbelt nonuse *except* to establish the causal relationship between non-use and injuries, and even then, only in product liability cases. The Tennessee legislature apparently places a great deal of importance on whether an action arises out of a products liability theory. The reasoning behind this distinction is unclear.[50]

4. Others

Statutes like those existing in Michigan, Colorado, and Tennessee beg the question of whether limitations on the seatbelt defense make sense. Even Wisconsin, the jurisdiction that brought one of the earliest approvals of the seatbelt defense,[51] has resorted to a similar statutory scheme.[52] But these trends belie the confusion that remains in remaining states, as discussed in secondary authority:

> In some jurisdictions, proof of an accident victim's failure to wear a seat belt is a defense in suits against the driver or car manufacturer involved in the victim's injury. Courts have had conceptual difficulty with this issue, because the failure to wear a seat belt affects the extent of a plaintiff's injuries

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Id.

46. *Id.* at 1292.

47. *Id.*

48. *See* Brett R. Carter, Note, *The Seatbelt Defense in Tennessee: The Cutting Edge*, 29 U. MEM. L. REV. 215, 225 (1998). The original Tennessee statute provided that "in no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belts be considered in mitigation of damages on the trial of any civil action." *Id.* (quoting TENN. CODE ANN. § 59-930 (1963)).

49. TENN. CODE ANN. § 55-9-604 (1994).

50. Carter, *supra* note 48.

51. Bentzler v. Braun, 149 N.W.2d 626 (Wis. 1967).

52. The Wisconsin statute allows for no more than a fifteen percent reduction. WIS. STAT. § 347.48(g) (2004).

> and not the occurrence of a collision. Under common law contributory negligence rules, most courts refused to recognize this so-called "seat belt defense." A few courts, however, applied the seat belt defense if the failure to wear a seat belt contributed to a plaintiff's injury. In those jurisdictions, the defense was an absolute bar to a plaintiff's recovery.
>
> Under comparative negligence, some courts reject the defense. Some are unwilling to impose a standard of care without a specific legislative mandate. Others believe that the methods used to prove the connection between a lack of seat belt use and the injuries suffered are not adequate. Finally, some jurisdictions' statutes specifically preclude references to seat belt use in accident suits.
>
> A growing trend under comparative negligence, however, is to permit the defense, with various procedural limitations. The negligence reflected by the plaintiff's failure to use a seat belt may reduce the plaintiff's total damages, or it may be used merely to lower recovery for any damages specifically related to the failure to use the seat belt. In some states, statutes limit the percentage of damages reduction that is permitted for a plaintiff's failure to use a seat belt.[53]

C. In the Context of Comparative Negligence

Comparative negligence eliminates the harsh all-or-nothing effect of the seatbelt defense. As a result, some courts that previously refused to recognize the defense have altered their opinions, holding that damages resulting from a plaintiff's failure to use a seatbelt could be apportioned under comparative negligence, as are other types of negligent conduct.[54] Yet, courts in other comparative negligence jurisdictions continue to reject the admissibility of such evidence in apportioning damages, especially where the legislature has failed or refused to pass seatbelt legislation.[55] Still other courts remain unconvinced as to the methods of proving the effects of seatbelt nonuse relative to injuries.[56]

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53. MATTHEW BENDER & CO. INC., 1-4 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 4.50 (LexisNexis 2004).
54. *Id.*
55. *Id.*
56. *Id.*

D. The Majority View

A majority of jurisdictions believe that seatbelt evidence should not be allowed to reduce a plaintiff's recovery.[57] However, even these states make exceptions in certain areas. The first exception arises when the plaintiff wishes to admit seatbelt evidence.[58] In these situations courts allow evidence of seatbelt use *not* for the purpose of the seatbelt defense but, instead, to support the plaintiff's claim, for example, of a failure in the vehicle's seatbelt mechanism. As a second exception, some courts allow defendants to admit seatbelt evidence but only where the plaintiff attacks the vehicle's safety or restraint system.[59] A Tenth Circuit case, *Gardner v. Chrysler Corporation*,[60] illustrates the distinction between these exceptions.

Gardner was a passenger in the front seat of a minivan. Gardner was not wearing a seatbelt when the vehicle was rear-ended by a car traveling approximately twenty to twenty-five miles per hour. As a result of the accident, Gardner's seatback collapsed, propelling her to the rear of the vehicle and inflicting severe injuries. Gardner's theory of the case alleged that the seat design was defective because it buckled under the force of a moderate rear impact. Chrysler's defense pointed to secondary impacts that occurred when the minivan lost control and turned over in a ditch. Chrysler's experts opined that these secondary impacts caused the seatback to fail and that the failure would never have occurred had Gardner been properly belted.[61]

Gardner argued that Chrysler's defense should fail because Kansas statute forbade the admission of seatbelt evidence. The trial court permitted the jury to consider the evidence and the jury returned a defense verdict. On appeal, Gardner argued that Chrysler was impermissibly permitted to plead the seatbelt defense. Although Chrysler was not permitted to argue that Gardner's failure to wear a seatbelt *caused or contributed to* her injuries, Gardner believed the jury equated her nonuse with negligence.[62] The Tenth Circuit found no violation of the statute. Gardner had alleged a defect in the seat design, of which the seatbelt was an integral part. Therefore, Chrysler could introduce evidence of seatbelt nonuse to counter the claim. The court

57. Very few state courts have recognized the nonuse of restraints as a defense to show that the plaintiff's negligence caused his or her own injuries. *See* MATTHEW BENDER & CO. INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2004). For statutes refusing evidence of seatbelt use/nonuse in order to reduce recovery *see* Bomer, *supra* note 34, at n.121. For decisions refusing to allow evidence of seatbelt nonuse to reduce a plaintiff's recovery *see* Bomer, *supra* note 34, at n.121.

58. Bomer, *supra* note 34, at 417-19.

59. *Id.* at 419.

60. Gardner v. Chrysler Corp., 89 F.3d 729 (10th Cir. 1996).

61. *Id.* at 733.

62. *Id.*

acknowledged that the evidence could have a prejudicial effect but concluded that the evidence had to be admitted regardless.[63]

The distinction between the two exceptions stems from *who* sponsors the evidence. In the first exception, the defendant prefers that seatbelt evidence stay out because keeping the evidence out works as a defense in itself. If a plaintiff cannot admit evidence related to seatbelts, then that plaintiff's attack on the seatbelt's design must fail. Nearly every state faced with this question has determined that its legislature could not have intended such a result.[64]

In the second exception, the defendant wants the seatbelt evidence in, while the plaintiff wants it out. The defendant does not want the evidence in for the explicit purpose of pleading the seatbelt defense. Instead, the defendant wants to use the evidence to counter the plaintiff's argument of a defective safety/restraint system—if a plaintiff wishes to challenge the integrity of a vehicle's seatbelt mechanism, then that plaintiff must have, in fact, been utilizing the system at the time of the alleged failure.[65]

E. The Many Minority Views

While not yet the majority, a growing number of states allow the seatbelt defense,[66] but the nuances of the defense vary from jurisdiction to jurisdiction. The factions generally fall into seven different categories.

The first category is comprised of states that have adopted the defense through judicial decision only. In comparison, the states belonging to the second category have statutes allowing for the seatbelt defense that do not seem to limit the defense's applicability.[67] The third minority category limits the seatbelt defense's applicability to mitigation of damages, while the fourth allows evidence of seatbelt nonuse for the purpose of proving comparative negligence, but not mitigation of damages. The fifth category allows the trier of fact to consider seatbelt evidence but only for the purpose of reducing a plaintiff's pain and suffering award. States in the sixth category

63. *Id.* at 737.

64. Bomer, *supra* note 34, at 419.

65. *Id.* at 419-20.

66. For decisions allowing seatbelt evidence in one form or another, *see* Bomer, *supra* note 34, at n.156. For statutes allowing evidence of seatbelt nonuse to reduce a plaintiff's recovery in at least some circumstances, *see id.*

67. Questions of interpretation sometimes arise because some statutes were written when contributory negligence ruled, although the state has, since its enactment, adopted comparative fault. Moreover, some courts have construed statutes prohibiting evidence of failure to use a seat belt as permitting such evidence when offered for purposes other than establishing negligence, such as mitigating punitive damages or establishing the defense of assumption of the risk. MATTHEW BENDER & CO. INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2004).

choose a more liberal approach and only allow the seatbelt defense in actions based in products liability. The seventh category is the largest of the minority factions and consists of states that acknowledge the validity of the seatbelt defense but place a percentage cap on the amount a plaintiff's recovery that may be reduced.[68] America's jurisdictions are literally and figuratively all over the map with regard to the seatbelt defense. Counsel must be alert to changes in statutory and case law; the law in this area is still emergent.[69]

III. CONSTITUTIONAL CONSIDERATIONS

Courts have, on occasion, analyzed statutes and precedent that prohibit seatbelt evidence from various constitutional perspectives:

A. Due Process

The Fourteenth Amendment of the United States Constitution prohibits the taking of life, liberty, or property without due process.[70] States generally carry similar provisions in their constitutions, which essentially adopt an ancient concept of liberty as expressed in Chapter 39 of the Magna Carta: "No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or otherwise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."[71] The concepts of procedural and substantive due process are based in these historic statements.[72]

Defendants do not often challenge seatbelt statutes from a procedural due process perspective, likely because they "understand[] that in the passage of legislation, the legislative process itself provides sufficient procedural safeguards."[73] But where a party challenges a seatbelt statute on the ground that it violates due process, a claimed violation of procedural due process triggers a two-part analysis.[74] First, a court must determine whether a substantive right of life, liberty, or property is affected. Second, in determining what process is due, courts must balance the importance of the private interest at stake; the government interest in administrative efficiency;

68. Bomer, *supra* note 34, at 421-23.
69. MATTHEW BENDER & CO. INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2004).
70. U.S. CONST. amend. XIV.
71. McKinney v. Jarvis, M1999-00565-COA-R9-CV, 2000 Tenn. App. LEXIS 165, at *3-5 (Tenn. Mar. 16 2000) (internal quotations omitted).
72. *Id.*
73. *Id.*
74. Cressy v. Grassman, 536 N.W.2d 39, 43 (Minn. Ct. App. 1995).

and the risk of erroneous deprivation under current procedures.[75] In *Cressy v. Grassman*,[76] a Minnesota Court opined:

> Even assuming the implication of a substantive right, which is questionable, we affirm the district court based on an application of the above balancing test. The private interest at stake, appellants' right to reduce any judgment against them, is important. But no less important is the government's interest in maintaining efficient trial procedure by avoiding complicating trial with expert-witness testimony on the mitigating effects of seatbelt use.
>
> As for the third factor, appellants' right to present a defense is not at risk. Although unable to reduce awards to the extent of damages that are attributable to seat-belt nonuse, appellants may still present evidence of respondents' comparative fault—if any—in *causing* the accident.[77]

From a *substantive* due process perspective, a different argument can be made. As a general rule, "[a] statute satisfies the requirements of due process if it is reasonably related to a proper legislative purpose and is neither arbitrary nor discriminatory."[78] Substantive due process prevents the state from infringing on an individual's rights to life, liberty, or property when the state action does not promote any legitimate state interest. The test is whether there is a "reasonable connection between the statute and the promotion of the safety and welfare of the community."[79] If the statute does not impinge on fundamental rights, the court's only interest is whether "the legislature was acting in pursuit of permissible state objectives and, if so, whether the means adopted were reasonably related to the accomplishment of those objectives."[80]

Courts tend to hold that statutes related to the admissibility of seatbelt evidence are related to the mandatory use of, or encouraging the use of, seatbelts, which is a legitimate state interest:

> The mandatory use of automobile seat belts is a question of state interest. Even if the states were indifferent to it, the interest has been thrust upon them by the United States Con-

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75. *Id.* at 43. However, this analysis may vary from state to state.
76. *Id.*
77. *Id.*
78. C.W. Matthews Contracting Co., Inc. v. Gover, 428 S.E.2d 796, 798 (Ga. 1993).
79. McKinney v. Jarvis, M1999-00565-COA-R9-CV, 2000 Tenn. App. LEXIS 165, at *3-5 (Tenn. Mar. 16 2000).
80. 16B AM. JUR. 2D *Constitutional Law* § 912 (2004). *See McKinney*, 2000 Tenn. App. LEXIS 165, at *3-5.

> gress. Congress declared that it was in the public interest for the states to adopt mandatory seatbelt use laws. (49 U.S.C.A. § 30127(d)). In 1994 Congress enacted a system of rewards and punishments for compliance/non-compliance. 23 U.S.C.A. § 153(a)(2) and (h) . . . .
>
> Prior to the legislative mandate, however, a majority of the states rejected the seat belt defense, meaning that they did not recognize a common-law duty to buckle up. *Amend v. Bell*, 89 Wn.2d 124, 570 P.2d 138 (Wash. 1977). Among the reasons the *Amend* court cited why the state might wish to exclude evidence of the failure to use a seat belt were (1) the defendant should not be able to diminish the consequences of his negligence by the plaintiff's failure to anticipate the defendant's part in causing the accident itself; and (2) allowing the seat belt defense would lead to a veritable battle of experts as to what injuries would have or have not been avoided had the plaintiff been wearing a seat belt. In *Fischer v. Moore*, 183 Colo. 392, 517 P.2d 458 (Colo. 1973), the court said that a tort-feasor must accept the plaintiff as he finds him, and that he may not rely upon the injured party's failure to utilize a voluntary protective device to escape all or a portion of the damages which the plaintiff incurred as a consequence of the defendant's negligence.
>
> We think that these are legitimate interests for the state to deal with. Everyone may not agree with the choice made by the legislature, but the choice does have a rational connection to the legitimate state interests.[81]

A common substantive due process analysis concludes that the legislature has established public policy by mandating seatbelt use and has encouraged compliance with that policy by imposing a penalty for failure to comply. The analysis continues that the legislature chose to limit that penalty by allowing for fines or certain other consequences. Plainly, encouraging seatbelt use is a rational exercise of legislative power such that court-imposed limitations on the means of such encouragement is irrational. Thus, courts conclude that the legislature may set the state's public policy and weigh the positive benefits of that policy against the severity of the penalty for non-compliance.[82]

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81. *McKinney*, 2000 Tenn. App. LEXIS 165, at *6-9.
82. *C.W. Matthews Contracting Co., Inc.*, 428 S.E.2d at 798 (internal citations omitted).

That said, courts apply a rational basis standard of review to due process challenges surrounding seatbelt statutes.[83] They deduce that these statutes further a legitimate state interest, at the very least, by "promoting safety." Some employ a two-step approach under a rational basis test: "In order to pass constitutional muster the challenged statute must: first, further any legitimate state interest or public value; and second, reasonably relate to accomplish the articulated state interest or public value."[84] For example, a Pennsylvania statute passed constitutional muster under a rational basis review due to the "legislature's concomitant goals of promoting safety through seat belt use and not denying recovery for injured plaintiffs."[85] The court concluded that the statute bore a reasonable relationship to its legislative purpose and found that:

> Taken as a whole [the statute] represents a legislative balance between the imposition of a seat belt mandate and permitting recovery for victims. When it mandated seat belt compliance, the Pennsylvania legislature clearly sought to protect drivers and passengers [traveling] along Pennsylvania roads and highways. However, the legislature understood that this protection should not end upon noncompliance. The evidentiary preclusion . . . of seat belt non-use further protects drivers and passengers, by allowing them to seek recovery unimpeded by the seat belt defense when they are injured in an accident. A rational policy would be that noncompliance . . . warrants punishment through fines, but not the harsh result of denying or severely limiting an injured plaintiff's recovery.
>
> An additional rational basis for the legislation is grounded in the concepts behind Federal Rule of Evidence 403. In many cases, evidence of seat belt non-use would be unfairly prejudicial and therefore outweigh any probative value it may have. The admission of such evidence would complicate factual issues for the trial judge and the jury since the issue of whether the failure to use the restraint caused or contributed injury or death is always problematic and the proofs often weak or confusing. The Pennsylvania legislature could rationally have recognized this potential prejudice

83. *See* Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240, at *4 (E.D. Pa. Oct. 30, 1996) ("Having found that neither a fundamental nor important right is implicated by the evidentiary preclusion in § 4581(e), a rational basis standard of review is applicable for a due process analysis.").

84. Carrasquilla v. Mazda Motor Corp., 166 F. Supp. 2d 181, 186 (M.D. Penn. 2001) (internal citations omitted).

85. *Id.*

> when it enacted subsection (e) along side the seat belt mandate.[86]

Where a defendant argues that a plaintiff's failure to wear a seatbelt, not the defendant's driving, caused the plaintiff's injuries, often the defendant also claims that he cannot constitutionally be liable for those injuries because his conduct does not directly cause the injury. This argument often fails due to the recognition the legislature can assign statutory responsibility for certain injuries, saving the statute from being deemed irrational for punishing people who did not directly cause an injury.[87] Further still, courts recognize that defendants do, in fact, play a causal role in such injuries, even where a plaintiff's injuries are undoubtedly aggravated by failure to wear a seatbelt, because "[t]he courts have clearly held that the failure to wear a seat belt doesn't cause the accident."[88] Especially where legislatures heatedly debated the matter, courts rely on their considerations of the pros and cons of seatbelt legislation and concluding, like the court in *Bower*, that:

> [Where] the statute is not irrational, and the defendants were afforded a full and fair trial as to their liability, the defendants were not denied due process of law. Due process is denied when the legislature enacts a law that prescribes new or alters existing rules of evidence or prescribes methods of proof that altogether deny a party his or her constitutional rights. 29 Am. Jur. 2d Evidence § 6. Eliminating the seat belt defense on the issue of causation did not preclude the defendants from making other defenses as to causation.[89]

In *Milbrand v. Daimler-Chrysler Corp.*,[90] a Texas court took a results-oriented approach in assessing Texas's statute that prohibits a defendant from introducing seatbelt evidence in civil trials and realized:

> [A] decision by this Court to treat the Texas statute as procedural would likely encourage federal forum shopping in cases where the plaintiff was not wearing a seat belt. The introduction or exclusion of the seat belt evidence also impacts the amount of blame apportioned by the fact finder thus effecting the outcome of the litigation in a significant way. Therefore, employing federal law in this case would violate the underlying policies of *Erie* [to discourage forum

86. *Id.* at 186-87 (internal citations omitted).
87. Bower v. D'Onfro, 663 A.2d 1061, 1064-65 (Conn. App. Ct. 1995) (some internal citations omitted).
88. *Id.* at 1064 (some internal citations omitted).
89. *Id.* at 1065 (some internal citations omitted).
90. Milbrand v. Daimler-Chrysler Corp., 105 F. Supp. 2d 601 (E.D. Tex. 2000).

> shopping and to avoid inequitable administration of the laws].[91]

In concluding that the statute established a substantive law, the court found persuasive the fact that the provision was part of the Texas Transportation Code and Texas's mandatory seatbelt law, which placed a legal duty upon specified persons to wear seatbelts, provided for fines where that duty was breached, and provided that use or nonuse of a seatbelt was inadmissible in a civil trial. The court found that the statute was "designed to regulate the behavior of individuals outside of the courtroom and consequently falls on the procedural side of the Erie line . . . . Texas's statute modifies state tort law and is a 'classic example of the type of substantive rule of law binding upon a federal court in a diversity case.'"[92] The court reviewed other opinions wherein similar statutes were held substantive.[93] Reminding attorneys and litigants that, "under federal due process analysis, legislative acts have a presumption of constitutionality and the burden is on the party complaining of the violation to show that the legislature has acted in an arbitrary and irrational way," the court concluded that the defendant, "having failed to demonstrate how the Texas legislature acted in an arbitrary and irrational way in enacting the seat belt statute, fail[ed] to meet its burden of establishing a due process violation."[94]

In an issue of first impression in the Third Circuit, a defendant contended the statute created an "irrebutable presumption as to the elements of causation and product defect, and thus violated substantive due process rights."[95] The court questioned the viability of the "irrebutable presumption doctrine" but noted that it was treated similarly to the equal protection clause. The court opined, "the challenged statute must not be arbitrary or patently beyond the necessities of the case, and the means which it employs

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91. *Id.* at 604

92. *Id.* at 605 (quoting Potts v. Benjamin, 882 F.2d 1320, 1324 (8th Cir. 1989)).

93. Specifically, the *Milbrand* court referenced: Gardner v. Chrysler Corp., 89 F.3d 729, 736 (10th Cir 1996) (applying the Kansas statute and stating that it is not "simply a rule of evidence which we could then ignore under our diversity jurisdiction," but rather is a substantive rule of law because it is concerned with changing behavior outside of the courtroom); Barron v. Ford Motor Co. of Canada Ltd., 965 F.2d 195 (7th Cir. 1992) (finding that North Carolina's seat belt statute could be either procedural—if motivated by a concerns that jurors attach too much weight to evidence of the plaintiff's nonuse—or substantive—if designed not to penalize a plaintiff's nonuse and ultimately applying the law substantively); Dillinger v. Caterpillar, Inc., 959 F.2d 430, 434 n.11 (3d Cir. 1992) (rejecting the argument that federal law should apply, noting that the seatbelt defense was "intended to have legal consequences in itself and is not merely a matter of evidence of some other fact"); Sours v. General Motors Corp., 717 F.2d 1511, 1519-20 (6th Cir. 1983) (holding the admissibility of seatbelt evidence to be a matter of substantive law noting "the delicate balance of policy interests" at stake). *Milbrand*, 105 F. Supp. 2d at 605.

94. *Milbrand*, 105 F. Supp. 2d at 608.

95. Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240, at *20 (E.D. Pa. 1996).

must have a real and substantial relation to the object sought to be attained."[96] However, the court refused to decide the statute's constitutionality because the proposed seatbelt evidence was irrelevant under the facts of the case.[97]

Finally, in an interesting twist, one court refused to address a substantive due process argument under the determination that the statute destroyed the defendant's entire defense and, as such, the defendant had no right to present evidence. The court concluded:

> [A] party has no right to present evidence lacking relevance to a recognized cause of action . . . . Because Anker acknowledges the gag rule's true effect is to destroy his right of action, he cannot complain about the exclusion of evidence pertaining to it; this information is not relevant to the development of facts surrounding a recognized cause of action.[98]

While this last result is not the "norm," courts generally hold that statutes related to the exclusion of seatbelt evidence pass the substantive due process test. Such laws further legitimate state interests of promoting safety and encouraging seatbelt use while limiting the penalties for failure to do so. As a result, defendants likely will not succeed in challenging seatbelt laws from this approach.

B. Equal Protection

The next oft-addressed constitutional argument centers around equal protection. The equal protection clauses of both the United States Constitution and the Constitutions of many of the states "require that all persons similarly situated be treated alike under the law."[99] Some defendants assert that seatbelt statutes differentiate between classes of plaintiffs and defendants based upon those who use and do not use seatbelts. While some courts admit the distinction, they tend to rationalize the reasons therefore.

Where a state equal protection analysis is analogous to a review under federal equal protection standards, there are three tiers to the equal protection analysis:

> When a statute infringes on a fundamental right or burdens a suspect class, it is adjudged under a strict scrutiny analysis. When the statute infringes on an important, but not funda-

96. *Id.* at 21.
97. *Id.* at 24.
98. Anker v. Little, 541 N.W.2d 333, 340 (Minn. Ct. App. 1995).
99. *In re* Harhut, 385 N.W.2d 305, 310 (Minn. 1986).

> mental right or burdens a sensitive, but not suspect class, the statute is adjudged under an intermediate level of scrutiny. When a statute does not infringe on a fundamental right or burden a suspect class or implicate intermediate scrutiny, the statute is adjudged using a rational basis test where the statute will be upheld "if any set of facts reasonably may be conceived to justify it."[100]

Courts universally conclude that defendants in seatbelt cases are not members of suspect classes nor do they identify fundamental or important rights upon which seatbelt statutes infringe.[101] The right to assert the seatbelt defense is "not the type of important vested right so as to warrant a level of heightened scrutiny."[102] As a result, the rational basis test applies to these statutes.[103] "Under the rational basis test, there is a strong presumption that the statute is constitutional."[104] The burden is on the individual attacking the legislative arrangement to negate every conceivable basis that might support it.[105]

In *Ryan v. Gold Cross Services, Inc.*,[106] the Utah Supreme Court considered whether Utah's seatbelt statute violated "the uniform operation of laws provision" of Utah's constitution. In a thorough analysis of the issue, the court reiterated that the test it applied to determine compliance with "the uniform operation of laws" provision is "whether the classification is reasonable, whether the objectives of the legislative action are legitimate, and whether there is a reasonable relationship between the classification and the legislative purposes."[107] The defendant argued that, even if the court applied a rational basis standard, the statute could not pass constitutional review because the statutory classification has no rational relationship to a legiti-

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100. Milbrand v. Daimlerchrysler Inc., 105 F. Supp. 2d 601, 607 (E.D. Tex 2000) (quoting Lucas v. United States, 757 S.W.2d 687, 704 (Tex. 1988)).

101. *Milbrand*, 105 F. Supp. 2d at 607 (holding that the categories reserved for suspect classes are race, national origin, gender, and alienage). Heightened scrutiny has been applied in situations involving illegal alien children, illegitimacy, and gender. Plyler v. Doe, 457 U.S. 202 (1982) (illegal alien children); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender). Also heightened scrutiny has been recognized in certain other instances according to state law. *See* Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240, at *13 (E.D. Pa. Oct 24, 1996). Because there is no "important" substantive right for a civil defendant to present evidence of seat belt non-use, the analysis merits a "rational basis" review. *Id.* at *14.

102. *Milbrand*, 105 F. Supp. 2d at 607.

103. Under a rational basis analysis, two step approach, "[i]n order to pass constitutional muster the challenged statute must: first, further any legitimate state interest or public value; and second, reasonably relate to accomplish the articulated state interest of public value." *Kelly*, 1996 U.S. Dist. LEXIS 16240 at *14-15.

104. Heller v. Doe, 509 U.S. 312, 320 (1993).

105. *Id.* at 320.

106. Ryan v. Gold Cross Services, Inc., 903 P.2d 423 (Utah 1995).

107. *Id.* at 426.

mate legislative purpose. The court first reminded its readers that, as a general rule, violation of a safety standard set by statute or ordinance constitutes *prima facie* evidence of negligence. However, Utah's seatbelt statute contained an exception, stating that violation of the statute "does not constitute contributory or comparative negligence."[108] As a result, a defendant in an automobile negligence action is prohibited from using evidence of the plaintiff's nonuse of a seatbelt to employ the doctrine of comparative negligence. The court concluded that, as part of Utah's statutory scheme, the seatbelt statute created a class of tort defendants who are treated differently from other tort defendants. Therefore, the primary issue facing the court was whether such disparate treatment is justified. To that end, the court concluded:

> The three-step analytical model set out above is our tool for determining whether a challenged scheme of nonuniform treatment is justified under the principles of article I, section 24. The first question we address is whether there is anything inherently unreasonable in the legislature's treating defendants in automobile negligence actions where the plaintiff was not wearing a seat belt differently from defendants in other negligence actions . . . .
>
> The second issue we address is the legitimacy of the legislation's objectives . . . .
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> . . . .
>
> We conclude that the legislature may legitimately set a public policy which encourages seat belt use yet at the same time weigh the positive benefits of such a policy against the severity of the penalties for noncompliance.
>
> The legislature may also have legitimately concluded that those whose negligence causes automobile accidents should not escape any portion of liability simply because the injured party was not wearing a seat belt . . . .
>
> Because we can find legitimate objective behind the legislation, we next address the third question in our analysis: whether the legislature chose a reasonable means to achieve its objectives. We find that the classification resulting from section 41-6-186 is not an unreasonable means for achieving the legitimate objectives discussed above. Mandating that nonuse of a seat belt does not constitute contributory or

108. *Id.* at 427.

> comparative negligence is a reasonable means of ensuring that a legislated public policy encouraging seat belt use adequately weighs the impingement on personal freedom resulting from such a policy against the severity of the penalties for noncompliance. In addition, the challenged legislation is reasonably related to the legitimate legislative purpose of ensuring that those persons who negligently cause automobile accidents will not escape liability for injuries caused by the plaintiff's nonuse of a seat belt.[109]

Utah's analysis demonstrates a parallel between a substantive due processes analysis and an equal protection assessment. Courts are inclined to hold seatbelt statutes constitutional under equal protection standards, as they did with substantive due process standards. The New Mexico Supreme Court offered the following:

> The Court also finds that this statute does not violate the equal protection provisions of the United States and New Mexico Constitutions. Defendant argues that this statute creates a class of defendants who have the random misfortune of allegedly injuring a plaintiff who fails to exercise ordinary care by not wearing a seat belt where in virtually any other instance of a plaintiff's failure to use ordinary care which leads to or contributed to the plaintiff's injury, evidence of the plaintiff's breach of duty would be considered by the jury in apportioning fault and damages. Defendant argues this classification works an injustice against included defendants by making them pay for damages caused entirely by the plaintiff's failure to exercise due care for his safety and by failing to use an available seat belt. The problem with this argument is that a common law duty to wear a seat belt did not exist prior to the enactment of this statute and with the enactment of this statute, the legislature specifically declined to make failure to wear a seat belt the basis for negligence or fault. Therefore, the statute does not affect the substantive rights of defendants or plaintiffs. In New Mexico, there never was a "seat belt defense" and there still is not a "seat belt defense."
>
> Alternatively, even if this statute can be construed as creating statutory classifications, the Court finds that the equal protection test to be applied in this situation is the rational basis test because this legislation concerns social and economic issues and does not infringe on substantial or impor-

109. *Id.* at 427-28 (internal citations omitted).

> tant rights nor involve sensitive classes. Applying the rational basis test to this legislation, the Court finds that § 66-7-373B is rationally related to a valid legislative purpose, namely, encouragement of seat belt use through a fine system, while preserving the right to compensation for injuries caused by negligent tortfeasors.[110]

Where defendants have argued that seatbelt statutes unconstitutionally differentiate between defendants in cases where the injured plaintiff violated the seatbelt requirement and defendants in cases where the plaintiff violated any other basic driving rules, courts have held that "seatbelt use . . . relates primarily to the *extent of damages* and has little bearing on the driver's possible negligence in *causing* the accident," which, by itself, "is a sufficient basis for different treatment."[111] Those courts also recognize that the statutory classification ensures that a plaintiff is not denied a fair recovery: "(1) by excessive expert witness fees resulting from the need to disprove that seat-belt nonuse caused additional damages; and (2) by the effect that such nonuse would have on a jury's determination of comparative fault."[112] Finally, they reason that providing victims with an opportunity to recoup their losses in a civil action serves a legitimate state interest.[113] As a result, the law is rationally related to a legitimate state interest and does not violate the equal protection clause.[114] Courts generally find that any "classification" is reasonable if it is related to a legitimate state interest and treats all similarly situated persons equally, "as it prohibits anyone from offering, as evidence of negligence, the fact that a party failed to wear a seat belt."[115]

The same argument was made in Connecticut wherein the defendants asserted the statute distinguished between plaintiffs and defendants and deprived defendants of property and money without a compelling state interest. The court rejected a strict scrutiny analysis because: (1) the statute did not confer a fundamental right; (2) the defendants were not denied the fundamental right of access to the courts; and (3) the defendants failed to identify any suspect class against which the statute discriminated.[116] The court concluded that a rational basis test applied and recognized a strong presumption of legislative validity that is "overcome only when it plainly appears that the terms of the legislation are not reasonable or that they are not rationally adapted to the promotion of public health, safety, convenience,

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110. Armijo v. Atchison, Topeka & Santa Fe Ry. Co., 754 F. Supp. 1526, 1535 (D.N.M. 1990) (some internal citations omitted).
111. Cressy v. Grassman, 536 N.W.2d 39, 42 (Minn. Ct. App. 1995) (emphasis in original).
112. *Id.*
113. *Id.* at 42-44.
114. *Id.*
115. C.W. Matthews Contracting Co., Inc. v. Grover, 428 S.E.2d 796, 799 (Ga. 1993) (quoting Allrid v. Emory Univ., 285 S.E.2d 521 (Ga. 1982)).
116. Bower v. D'Onfro, 663 A.2d 1061, 1065-66 (Conn. App. Ct. 1995).

or welfare."[117] The court ultimately concluded that they failed to meet their burden of overcoming the presumption of validity and that this statute was rationally related to a legitimate state purpose.[118]

In *Kelly v. Ford*,[119] the Court concluded, "a legislative determination that a party may not assert a defense in a cause of action for negligence does not . . . disturb vested rights."[120] The court discussed that, at common law, Pennsylvania never recognized a right to assert a seatbelt defense, so a defendant could not be deprived of an "important" substantive right when no such right existed.[121] The court relied on prior precedent[122] in stating that a "criminal defendant has a fundamental right to present defense evidence, unless it is specifically excluded by an established evidentiary rule."[123] Thus, if a criminal defendant does *not* have a right to present evidence of seatbelt nonuse at trial, the court thought it unlikely that the Pennsylvania Supreme Court would afford a civil defendant such a right.[124]

Courts recognize that the underlying purpose of seatbelt legislation is to promote safety. Additionally, they give credence to secondary goals such as, reduction of the financial burden on defendants and the states and avoidance of U.S. Department of Transportation's passive restraint exemption, forcing auto manufacturers to implement passive restraint systems.[125] However, courts have, at times, recognized the counter-argument that these statutes actually dilute the primary purpose of legislation to encourage seatbelt use.[126]

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117. *Id.* at 1066 (some internal citations omitted).
118. *Id.* at 1065-66 (some internal citations omitted). The same result held in *Milbrand*, 105 F. Supp. 2d at 607, wherein the court determined that the defendant "fails to provide the Court with any support for its argument that the Texas statute is not related to a legitimate state purpose." *Id.* In short, the defendant failed to rebut the presumption of constitutionality.
119. Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240 (E.D. Pa. Oct 24, 1996).
120. *Id.* at 10 (quoting Solonoski, III v. Yuhas, 657 A.3d 137, 142 (Pa. Commw. Ct. 1995)).
121. *Kelly*, 1996 U.S. Dist. LEXIS 16240, at *10-11.
122. Commonwealth v. Shoup, 620 A.2d 15 (Pa. Super. Ct. 1993).
123. *Kelly*, 1996 U.S. Dist. LEXIS 16240, at *11.
124. *Id.* at *12.
125. *Id.* at *16 n.7.
126. The *Kelly* court stated:

> In theory, it is conceivable that an individual may be less motivated to wear a seat belt if he or she will still recover for injuries sustained as a result. But in evaluating human nature, it is rational to conclude that the statutory evidentiary preclusion would not influence an individual's willingness to buckle up. It is not irrational to suggest that people wear a seat belt either to protect themselves in the event of an accident or to avoid fines and that often those who choose not to wear a seat belt do so either

In response, these courts remain cognizant that state legislatures seek to protect drivers and passengers traveling along roads and highways. However, legislatures understand that this protection should not end upon noncompliance.[127] Seatbelt statutes attempt to protect drivers and passengers, by allowing them to seek recovery unimpeded by the seatbelt defense when they are injured in an accident. Courts and legislatures conclude that a rational policy would be that noncompliance with the seatbelt laws warrants punishment through fines, not the harsh result of denying or severely limiting an injured plaintiff's recovery.[128]

Other courts echo these thoughts, concluding that encouraging seatbelt use is a rational exercise of legislative power.[129] With a rational exercise of legislative power, these courts find that imposing limitations upon the means of such encouragement is not irrational.[130] As a result, legislatures act in a rational and nondiscriminatory manner in setting the state's public policy with respect to seatbelt usage but also in weighing the benefits of said policy against the severity of the penalty for non-compliance.[131] Again, litigants likely will be unsuccessful in challenges to seatbelt laws on an equal protection basis.

C. Separation of Powers

Where substantive due process and equal protection of law arguments are unsuccessful, some defendants may assert that a seatbelt statute is a rule of evidence such that a state's legislature "crosses the line" between the separation of powers in attempting to limit admissibility of seatbelt evidence in civil cases. A separation of powers argument is based on the con-

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because they are unaware of or ignore the potential dangers inherent in accidents, or they simply forget.

Kelly, 1996 U.S. Dist. LEXIS 16240, at *18-19.

127. *Id.* at *17.

128. *Id.*

129. C.W. Matthews Contracting Co., Inc. v. Gover, 428 S.E.2d 796, 798-99 (Ga. 1993).

130. *Id.*

131. *Id.* *See* Ryan v. Gold Cross Services Inc., 903 P.2d 423, 428 (Utah 1995) (holding "the legislature may legitimately set a public policy which encourages seat belt use yet at the same time weight the positive benefits of such a policy against the severity of the penalties for noncompliance"); Bendner v. Carr, 532 N.E.2d 178, 182 (Ohio Ct. App. 1987) (concluding the statute is "rationally related to a valid legislative purpose: encouragement of seat-belt use through a fine system, while preserving the right to compensation for injuries caused by negligent drivers"); Armijo v. The Atchinson, Topeka & Santa Fe Ry. Co., 754 F. Supp. 1526, 1535 (D.N.M. 1990) (reaching same result as court in *Bender*); Mott v. Sun Country Garden Prods., Inc., 901 P.2d 192, 197-98 (N.M. Ct. App. 1995) (same); Anker v. Little, 541 N.W.2d 333, 340 (Minn. Ct. App. 1995) (addressing argument that the "gag rule" creates an irrational distinction by rendering the crashworthiness doctrine unavailable only to plaintiffs relying on seat belt evidence. The court said the argument fails because "he has not proven beyond a reasonable doubt that the legislature's 1963 decision was something different than a balanced decision to temper the imposition of duty with a concession on liability.").

cept that the powers of the government are divided into three departments: the legislative, the executive, and the judicial.[132] The debate revolves around whether these statutes fall under the auspices of the legislative branch or the judicial branch. If the rule is determined to be evidentiary, only the judiciary has the authority to pass such a rule. However, if the statute addresses a legitimate question of public policy, it falls into the legislative realm. "The legislative power is the authority to make, order, and repeal law; the judicial power is to interpret and apply the law. It is primarily for the legislature to determine the public policy of [a] state . . . ."[133]

Courts often relate seatbelt statutes to other policy-type legislation that serves to limit admissibility in cases. They recognize that, in many instances,

> [T]he legislature has determined that the people of the state would be better served by restricting the evidence that may be used in court. The various testimonial privileges and statutes of frauds found throughout the [state] code could be placed in the same class. We think these statutes are the products of legitimate legislative activity.[134]

As a result, the legislation is determined policy-making in nature, despite its evidentiary side effects.

In *Ryan v. Gold Cross Services, Inc.*,[135] the Utah Supreme Court considered whether Utah's seatbelt statute acted as an evidentiary rule and, therefore, constituted a legislative encroachment on the judicial function of creating rules of evidence and procedure. The court declined to address the contention directly because it disagreed with the defendant's characterization of the statute as an evidentiary or procedural rule and found, instead, that Utah's statute was substantive in nature:

> The legislature may resolve, as a matter of public policy and substantive law, the scope of legal definitions of negligence . . . . Although section 41-6-186 contained language which at first glance appears to be a rule of evidence, i.e., evidence of seat belt use "may not be introduced as evidence," the statute's operative provisions announce a substantive princi-

132. McKinney v. Jarvis, No. M1999-00565-COA-R9-CV, 2000 Tenn. App. LEXIS 165, at *8-10 (Tenn. Ct. App. Mar. 16, 2000).

133. *Id.* at *8-9.

134. *Id.* at *9-10 (referring to Tennessee's Dead Man's Statute; Sales Article's Parol Evidence Rule, restriction on proof of other agreements affecting negotiable instrument) (internal citations omitted).

135. Ryan v. Gold Cross Services, Inc., 903 P.2d 423, 425-26 (Utah 1995).

> ple: "The failure to wear a seat belt does not constitute contributory or comparative negligence . . . ."
>
> Once the statute is conceptualized as a statement of substantive negligence law, the language regarding admissibility is mere surplusage . . . .
>
> The Utah legislature has made a policy choice regarding legal principles of negligence; it has not enacted an evidentiary rule.[136]

Utah is not alone in its interpretation. New Mexico law is clear on the issue with respect to its seatbelt statute that clearly and unambiguously prohibits consideration of the violation of the Safety Belt Use Act as constituting negligence or negligence *per se*, as well as using evidence of the failure to wear a seatbelt to limit or apportion damages. The New Mexico Supreme Court reviewed the legislative development of the statute and prior precedent, noting that the legislature "made a conscious choice to preclude evidence of the failure to wear a seat belt to limit or apportion damages" and "undoubtedly concluded that seat belt use was desirable, and that although the enactment of a law providing for small fines would encourage people to wear seat belts, an injured plaintiff should nevertheless not be denied recovery when involved in a collision with a negligent tortfeasor."[137] Specifically with respect to the separation of powers challenge, the court opined that the statute was the enactment of a substantive state policy, not a rule of evidence. The Court found that it was "clearly within the power of the legislature to determine whether or not to impose as a matter of State policy an obligation on its citizens to wear a seat belt and to establish the sanctions for non-conformity with that obligation."[138]

And, of course, other courts have followed suit. The Tenth Circuit concluded that Kansas's seatbelt statute "is not simply a rule of evidence, which we could then ignore under our diversity jurisdiction, but represents the substantive law of Kansas . . . ."[139]

In Virginia, one court considered whether the statute that precluded seatbelt evidence as evidence of negligence or in consideration of mitigation of damages was a substantive or procedural rule of law. The court recognized, "by its own terms, the Virginia statute contemplates both substantive and procedural elements."[140] For instance, the statute has been interpreted to

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136. *Id.* at 425-26.
137. Armijo v. The Atchinson, Topeka & Santa Fe Ry. Co., 754 F. Supp. 1526, 1534-35 (D.N.M. 1990).
138. *Id.*
139. Gardner v. Chrysler Corp., 89 F.3d 729, 736 (10th Cir. 1996).
140. Brown v. Ford Motor Co., 67 F. Supp. 2d 581, 585 (E.D. Va. 1999).

prohibit evidence of seatbelt nonuse in support of a defense to liability and in mitigation of damages.[141] The court surmised that the statute "forbids evidence of nonuse of seatbelts in a motor vehicle with respect to both liability and damages."[142] The court also noted the difference in prior Virginia precedent in that the former case involved a defendant who wanted to introduce a plaintiff's failure to wear a safety belt as evidence of the plaintiff's negligence while in the latter case, the defendant used evidence of the plaintiff's nonuse of her seatbelt to demonstrate that its product, taken as a whole, was not negligently designed and that it was fit for its intended purpose."[143] The court relied upon precedent in the Seventh Circuit (regarding North Carolina's statute) that held the statute substantive but recognized that the substantive application of the statute was narrow and did not reach the question of whether evidence of seatbelt nonuse was admissible as a defense to plaintiff's allegations of negligent design or strict liability. The court held that evidence of seatbelt nonuse was admissible for defendant to demonstrate that it was reasonable in not making the sunroof out of laminated glass because it had provided a backup system in the form of seatbelts.[144]

The Virginia court also reviewed Tennessee precedent that designated limited areas of inadmissibility per the seatbelt statute.[145] As a result of these assessments, the court concluded that the Virginia statute impacted a plaintiff's substantive rights with respect to contributory negligence and mitigation of damages, but the statute's substantive power extended no further. In its silence with respect to negligence and breach of warranty, the statute did not disturb the procedural nature of the admission of evidence and comment of counsel.[146] The Court continued:

> Insofar as [the Virginia statute] provides that failure to wear a seatbelt is not contributory negligence and may not be considered in mitigation of damages, it is substantive and thus controlling under *Erie v. Tompkins*. However, insofar as [it] limits the admissibility in evidence of the failure to wear a seatbelt or counsel's comment upon such failure with regard to issues other than contributory negligence and mitigation of damages, it is procedural and not controlling in the instant case. Because the admissibility of evidence and comments of counsel are procedural matters, this portion of

141. Freeman v. Case Corp., 924 F. Supp. 1456, 1470 (W.D. Va. 1996), *rev'd on other grounds*, Freeman v. Case Corp., 118 F.3d 1011 (4th Cir. 1997) (holding in products liability action against a tractor manufacturer that evidence of plaintiff's nonuse of the seatbelt was inadmissible).

142. *Freeman*, 924 F. Supp. at 1469.

143. *Brown*, 67 F. Supp. 2d at 585-86.

144. *Id.* at 586.

145. *Id.*

146. *Id.*

> the statute is not controlling, and this Court will not expand the substantive provision of the statute beyond its clear and unambiguous terms.[147]

Given at least one court's willingness to consider the procedural aspect of a rule of law that prohibits the introduction of seatbelt evidence in a civil trial, litigants may find room to argue this point. While generally considered substantive rules of law, and, thus, within the providence of the legislature, the Virginia court sheds some light on the possibility that these rules may be procedural and outside the realm of the legislature.[148]

D. Access to Courts/Open Courts Doctrine

While not one of the more common constitutional challenges to seatbelt statutes, some litigants argue these laws deprive defendants of their right of access to courts. "Open access to the courts is the right of every person to resort to the courts for the protection of legally recognized interests to have justice administered without sale, denial or delay."[149] The argument goes that these statutes close the courts to defendants by not allowing them to present evidence of seatbelt nonuse.[150]

The flaw with the open courts argument lies in the fact that, as a rule, the "access to courts" provision of state constitutions does not guarantee redress for every wrong, but, rather, prohibits state legislatures from eliminating remedies available at common law unless they do so to further legitimate objectives.[151] In applying the open courts doctrine to a seatbelt statute, one court held that, while the crashworthiness doctrine is a product of common law negligence, no court recognized that particular duty until 1968, five years after passage of the state's seatbelt statute. The court further concluded that, even if a remedy for crashworthiness vested at common law, wrongful death actions did not vest at common law and were not protected by the state's constitution. Finally, even assuming the seatbelt statute abrogated a common law right, the plaintiff did not demonstrate that the legislature lacked a legitimate reason for doing so.[152]

Other courts have commented on being unaware of any case where the "access to courts" provision has been implicated when the legislature

147. *Id.* at 587.
148. It is important to note that many of the cases distinguish seatbelt statutes on the basis of the "type" of case, *e.g.* negligence, crashworthiness, products liability, *et cetera*. These distinguishing features will be addressed later in this article beginning *infra* at notes 155-227 and accompanying text.
149. Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240, at *25 (E.D. Pa. Oct. 24, 1996) (internal quotation omitted).
150. *Id.*
151. Anker v. Little, 541 N.W.2d 333, 339 (Minn. Ct. App. 1995).
152. *Id.*

eliminated the right of a defendant to present a defense.[153] A Connecticut court addressed the defendants' claims that Connecticut's statute deprived them of access to the courts insofar as the defendants asserted that the constitution preserved the right to defend against liability by showing contributory negligence. In response, the court noted that Connecticut's access to courts provision "recognized all existing rights and removed from the power of the legislature the authority to abolish those rights in their entirety."[154] However, the legislature retained the power to provide reasonable alternatives to the enforcement of such rights. Additionally, the court concluded: (1) there was no common law duty to wear a seatbelt in Connecticut, so the defendants cannot claim that they have been deprived of a common law right; (2) because Connecticut's access to court's provision preserved only those rights that existed in 1818 (when it was enacted), the defendants must prove that contributory negligence existed as an established defense in 1818, and, although there was an English case that addressed this issue in 1809, it was not until 1824 that any American case arose and not until 1844 that one arose in Connecticut; and (3) the Connecticut precedent on which the defendants relied did not apply to the access to courts as a defense. In the case before the court, the statute did not bar the defendant from bringing a cause of action, but from presenting a defense. The defendants were left with reasonable alternative defenses, so, their right to defend liability was not impaired by the legislature. Therefore Connecticut's seatbelt statute did not conflict with prior precedent and the defendants' access to the courts under the Connecticut constitution, was not hindered.[155]

But in a landmark decision, *Glyn-Jones v. Bridgestone/Firestone, Inc.*,[156] the plaintiff argued that the Texas statute violated the open courts provision of the Texas Constitution. She asserted that a strict application of the statute effectively eliminated her common-law cause of action against the defendant on a crashworthiness theory. In addition to the presumption of statutory validity, the court reiterated that:

> The supreme court has established a two-part test for evaluating a challenge under the open courts provision. First, the statute must restrict a well-recognized common-law cause of action. Second, the restriction must be unreasonable or arbi-

153. *Kelly*, 1996 U.S. Dist. LEXIS 16240 at *26. *See* C.W. Matthews Contracting Co., Inc. v. Grover, 428 S.E.2d 796, 799 (Ga. 1993) ("The statute does not deprive appellant of its 'right of access' to courts in violation of [the Georgia Constitution]. We further hold that the statute denies appellant neither its constitutional right to trail by jury, nor any other constitutional right complained of here.").

154. Bower v. D'Onfro, 663 A.2d 1061, 1065 (Conn. App. Ct. 1995) (internal citations omitted).

155. *Id.*

156. Glyn-Jones v. Bridgestone/Firestone Inc., 857 S.W.2d 640 (Tex. App. 1993).

> trary when balanced against the purpose and basis of the statute.
>
> We conclude that the restriction imposed by [Texas's seatbelt statute] is arbitrary and unreasonable insofar as it prohibits the introduction of seat belt evidence in a crashworthiness case. Further, the statute unreasonably denies Glyn-Jones and other similarly situated redress for their injuries. We, therefore, hold that [the Texas statute] violates the open courts provision of the Texas Constitution.[157]

Glyn-Jones served, in many respects, to reveal the opportunity to "skirt" seatbelt evidence statutes as applied to products liability cases, crashworthiness cases, and similar cases where evidence of the use or failure to use a seatbelt was deemed necessary, but for purposes other than negligence. As this field develops, courts continue to differentiate between these cases and traditional negligence cases.

IV. PRODUCTS LIABILITY CASES/CRASHWORTHINESS

Crashworthiness is a products liability doctrine established in *Larsen v. General Motors Corporation.*[158] In *Larsen*, auto manufacturers were exposed to liability for failure to construct vehicles free from defects. The court reasoned that there was no difference between imposing a duty of reasonable care in design and imposing a duty of reasonable construction. "A defect in either can cause severe injury or death and a negligent design defect should be actionable."[159] The *Larsen* decision caused a nationwide flood of products liability claims aimed at auto manufacturers, and in many of those cases, the seatbelt defense was an important issue. Courts split on whether to admit seatbelt evidence, often noting that legislative action was needed.[160]

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157. *Id.* at 643-44 (internal citations omitted).

158. Larsen v. General Motors Corporation, 391 F.2d 495, 503 (8th Cir. 1968). In *Glyn-Jones*, the Texas court further explained the crashworthiness doctrine:

> Crashworthiness cases involve a form of design defect. The design defect can be anything that compromises the safety of the vehicle as a whole. Crashworthiness cases differ from other design defect cases, however, because there is no causal connection between the defect and the accident. The seller or manufacturer of the vehicle is liable only for those additional or enhanced injuries that would not have occurred but for the defect.

Glyn-Jones, 857 S.W.2d at 643.

159. *Larsen*, 391 F.2d at 503.

160. Carter, *supra* note 48, at 223-24.

"In a crashworthiness claim, a plaintiff does not seek compensation for injuries received from the initial collision between the vehicle and another object."[161] Rather, the plaintiff seeks compensation for injuries that result from the "second collision" that occurs when the plaintiff strikes the interior of the vehicle or is thrown from the vehicle. Thus, in crashworthiness cases, plaintiffs seek compensation for injuries beyond those that would have resulted from the collision absent the defective design. If the defendant is able to show that the use of a seatbelt would have prevented some of the plaintiff's injuries, the jury is permitted to apportion damages.[162] Courts recognize that:

> The seat belt defense plays a vital role in achieving fairness in cases premised on crashworthiness. While the manufacturer should certainly be held to a reasonable standard of design, the plaintiff should also be held to a standard of reasonableness. Allowing a plaintiff to challenge an automobile's overall safety scheme without allowing evidence of whether the plaintiff, in fact, used such safety features is patently unfair. Accordingly, the crashworthiness case is distinguishable from a regular personal injury case because in a personal injury case the safety features are not directly an issue.[163]

Just as the use of seatbelt evidence in any civil case has caused a stir, the appropriate use of seatbelt evidence in crashworthiness cases has been a source of controversy.[164] For a long time, many courts refused to permit the introduction of evidence that a victim was not wearing a seatbelt in a products liability action.[165] Courts provided several reasons for this resistance: (1) there is no duty to mitigate damages prior to sustaining an injury; (2) a defendant must take the plaintiff as he finds him; (3) there is no common law duty to wear a seatbelt; and (4) seatbelt evidence leads to excessive speculation by experts and juries (and thus protracted litigation).[166] More recently, in some states, legislatures amended their statutes to allow seatbelt evidence in products liability cases if it relates to causation.[167] As a

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161. *Id.* at 224.
162. *Id.*
163. *Id.* at 224-25.
164. *See* Gen. Motors Corp. v. Wolhar, 686 A.2d 170, 173 (Del. 1996).
165. 2 MADDEN & OWEN, PROD. LIAB. § 21:7 (3d ed. 2000).
166. *See* Swajian v. Gen. Motors Corp., 559 A.2d 1041, 1043 (R.I. 1989).
167. MATTHEW BENDER & CO., INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07[c] (LexisNexis 2003). "More recently, some courts have relaxed their skepticism to the introduction of seatbelt evidence in product liability actions." *See, e.g.*, Jimenez v. DaimlerChrysler Corp., 269 F.3d 439, 457 (4th Cir. 2001); *Wolhar*, 686 A.2d at 176, 177. However, in deciding whether to admit seatbelt evidence, courts carefully adhere to the limitations placed on the use of this evidence by state legislatures. *See, e.g.*, Rougeau v. Hyundai Motor Am., 805 So. 2d 147, 157 (La. 2002); Ulm v. Ford Motor Co., 170 Vt. 281,

result, in crashworthiness cases, the seatbelt defense may be admissible even though it is inadmissible in other litigation. In other states, statutes prohibiting or limiting seatbelt evidence still apply to crashworthiness cases.[168]

A statute may prohibit the introduction of seatbelt evidence for the purpose of establishing a plaintiff's comparative negligence but not for other purposes, such as evidence in negligent design cases.[169] However, there is substantial contrary authority, which allows evidence of seatbelt nonuse to establish a vehicle's negligent design.[170] As one treatise states, "the appropriateness of evidence of seat belt non-use (as opposed to availability) raises difficult issues apart from the defectiveness vel non of a vehicle's design, and the propriety of such evidence is not so clear."[171] At least one court also has concluded:

> [T]hat the restriction imposed by [the seat belt statute] is arbitrary and unreasonable insofar as it prohibits the introduction of seat belt evidence in a crashworthiness case. Further, the statute unreasonably denies [the plaintiff] and other similarly situated redress for their injuries. We, therefore, hold that [the statute] violates the open courts provision of the [State's] Constitution.[172]

States' willingness to recognize differences between crashworthiness cases and negligence cases continues. In a 2000 case, a defendant asserted that a "Texas statute was not intended to deprive a defendant-manufacturer of the ability to rebut a plaintiff's allegation on the elements of defect, causation, and/or damages."[173] The court disagreed and distinguished between "crashworthiness" cases and "traditional product liability cases." The court stated that, in non-crashworthiness product liability cases, the statute barred admission of seatbelt evidence on the issue of contributory negligence as a matter of law.[174]

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750 A.2d 981, 987-88 (Vt. 2000). Connelly v. Hyundai Motor Co., 351 F.3d 535, 543 (1st Cir. 2003).

168. MATTHEW BENDER & CO., INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07[c] (LexisNexis 2003).

169. *See Connelly*, 351 F.3d at 542-44. *See also* MacDonald v. Gen. Motors Corp., 784 F. Supp. 486, 499 (M.D. Tenn. 1992); LaHue v. Gen. Motors Corp., 716 F. Supp. 407, 416 (W.D. Mo. 1989); *Wolhar*, 686 A.2d at 176-77.

170. *See* Milbrand v. DaimlerChrysler Corp., 105 F. Supp. 2d 601, 606 (E.D. Tex. 2000); *Rougeau*, 805 So. 2d at 157; *Swajian*, 559 A.2d at 1046; Lowe v. Estate Motors, Ltd., 410 N.W.2d 706, 720-21 (Mich. 1987); Horn v. Gen. Motors Corp., 551 P.2d 398, 404 (Cal. 1976).

171. 2 MADDEN & OWEN, PROD. LIAB. § 21:7 (3d ed. 2000) (emphasis omitted).

172. Glyn-Jones v. Bridgestone/Firestone Inc., 857 S.W.2d 640, 643-44 (Tex. App. 1993).

173. *Milbrand*, 105 F. Supp. 2d at 606.

174. *Id.*

Continuing to develop courts' differentiation of the two types of cases, *Kelly v. Ford*, distinguished a crashworthiness theory wherein liability is imposed on the manufacturer for "'failing to minimize the injuries or even increasing the severity of the injuries sustained in an accident brought about by a cause other than the alleged defect.'"[175] Notably, the court suggested that a due process analysis might be different under a crashworthiness theory.[176]

Pennsylvania bases its strict liability doctrine on the Restatement (Second) of Torts section 402A, which disallows evidence of contributory negligence and avoidable consequences.[177] Therefore, the Court of Appeals for the Third Circuit found that concluded that permitting the seatbelt evidence would be at odds with the dictates of the Pennsylvania Supreme Court prohibiting evidence of the plaintiff's negligence in products liability actions.[178]

In Oklahoma, the courts have concluded that the state's seatbelt statute prevents civil penalty for choosing not to wear a seatbelt, but it does not prohibit the introduction of seatbelt evidence in a manufacturers' liability action for a defective safety restraint system.[179] One court reasoned that the statute's purpose was to "prevent people from being punished for failure to wear a seatbelt, not to grant immunity to the manufacturer for the failure to install working seatbelts."[180] Oklahoma courts assess the overall state of the law as follows:

> Most states have some form of statute limiting or prohibiting seat belt evidence. It is unnecessary to exhaustively list every case in which the use or nonuse of a seat belt and the crashworthiness of the vehicle were at issue because these cases either do not involve allegations that the seat belt itself was defective, or were determined prior to the enactment of seat belt evidence statutes, or involve state statutes which differ from Oklahoma's. However, it is noteworthy that several courts have determined that in a products liability action seat belt evidence is admissible to establish safety design of the vehicle or to disprove proximate cause, but not to show negligence.

175. Kelly v. Ford Motor Co., No. 94-2579, 1996 U.S. Dist. LEXIS 16240, at *23 (E.D. Pa. Oct 24, 1996) (quoting Habeckler v. Clark Equip. Co., 36 F.3d 278, 282 (3d Cir. 1994)).
176. *Id.*
177. Vizzini v. Ford Motor Co., 569 F.2d 754, 764-68 (3d Cir. 1977).
178. *Id.* at 764-68.
179. Bishop v. Takata Corp., 12 P.3d 459, 460-61 (Okla. 2000).
180. *Id.* at 462.

> A few courts have held that all evidence relating to seat belt use or nonuse is inadmissible in a products liability action.
>
> Some federal courts have avoided applying state seat belt statutes by determining that the state law is procedural and thus not controlling. Other courts allowed products liability actions for defective seat belts without mentioning seat belt exclusions statutes.[181]

After this summary, the *Bishop* court concluded that the reasoning of *Glyn-Jones*[182] was persuasive; the statute was not intended to protect seatbelt manufacturers from liability for defective restraint systems because: (1) if the legislature intended to abolish crashworthiness actions against seatbelt manufacturers, it would have utilized a subsection of a traffic statute to effect such a change and (2) the statutory provision addressing the admissibility of seatbelt evidence was included to clarify that the sole legal sanction for the failure to wear a seatbelt is the criminal penalty provided by the statute, and that the failure to wear a seatbelt could not be used against the injured person in a civil trial.[183] Finally, the court concluded that, if Okalahoma's statute protected a manufacturer from liability for a defective seatbelt, the statute would inexplicably create a new defense to products liability claims that neither the legislature nor the court previously had recognized. The effect would be to create an exception to products liability actions by extinguishing claims for defective seatbelts. The court was not convinced that the legislature intended this result. Consequently, it held that the statute did not apply and that seatbelt evidence could be introduced in a manufacturers' products liability action for a defective restraint system.[184]

Other courts may follow the lead of Okalahoma and Texas; at the very least, courts must determine whether their seatbelt legislation encompasses crashworthiness cases. Often the "plain language" of the statute appears to do just that; however, it is doubtful that state legislatures intended such drastic consequences. Whether courts wish to make these differences apparent in their rulings or whether legislatures wish to amend their statutes to reflect this "new" form of cases, the issue must be addressed.

V. OTHER POTENTIAL EXCEPTIONS

While categorized as "exceptions" to the majority rule, many courts find specific areas in which they chisel away at the all-encompassing nature

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181. *Id.* at 462 n.13 (internal citations omitted).
182. Bridgestone/Firestone, Inc. v. Glyn-Jones, 878 S.W.2d 132 (Tex. 1994).
183. *Bishop*, 12 P.3d at 465.
184. *Id.* at 464-66 (the purpose of the act is to codify "public policy of encouraging seat belt use and to make seat belt use mandatory for drivers and front-seat passengers by providing a penalty for nonuse").

of the seatbelt laws in their respective states. The nature and extent of these exceptions is, at times, based on public policy or fairness justifications. At other times, the courts rely on the plain language of the statute, relying on the "plain meaning rule" and seeking to enforce a statute according to its terms.[185] This approach was taken by a Kansas court that determined the seatbelt statute's language conveyed the legislature's intent to bar admission of seatbelt evidence "in any action where the purpose of its introduction is to establish comparative negligence or to mitigate damages."[186] But the statute did not apply if the evidence was introduced for another purpose, such as to defend allegations of a defect or to establish its presence in the vehicle. In reaching this conclusion, the court referred not only to the plain language of the statute but also the interpretive tenet "*expressio unius est exclusio alterius*," which stands for the proposition that "the legislature's defining the reach of a statute implies that matters beyond that reach are not included."[187] Finally, the court noted that statutes in derogation of the common law are to be liberally construed and reasoned that the statute reflected the legislature's intent to make seatbelt use mandatory but to minimize any penalty for nonuse and to isolate such nonuse from any connotation of fault.[188]

A few of the most notable "exceptions" to the exclusion of seatbelt evidence are set forth below.

A. Used to Negate a Determination of Proximate Cause

Certain courts look at the admissibility of seatbelt evidence, not to determinate negligence, but to negate a determination of proximate cause.[189] In *Milbrand v. Daimler-Chrysler Corp.*,[190] the court rejected the argument that, even if seatbelt evidence cannot be used to establish negligence or to reduce damages, it may be used to negate a determination of proximate cause. The court opined:

> The Court notes that Texas Courts have narrowly applied the Texas statute providing but a single exception in Bridgestone/Firestone [v. Glyn-Jones, 878 S.W.2d 132 (Tex. 1994)]. The Court also finds persuasive Plaintiff's argument that a rule such as that proposed by Defendant would undermine the purpose and effect of the Texas statute . . . . Therefore, the Court finds that evidence that [the plaintiff]

185. Gardner v. Chrysler Corp., 89 F.3d 729, 736 (E.D. Tex. 2000).
186. *Id.*
187. *Id.*
188. *Id.*
189. *See* Barron v. Ford Motor Co., 965 F.2d 195, 201 (7th Cir. 1992); Gen. Motors Corp. v. Wolhar, 686 A.2d 170, 176 (Del. 1996).
190. Millbrand v. DaimlerChrysler Corp., 105 F. Supp. 2d 601 (E.D. Tex. 2000).

> was not wearing his seat belt is not admissible to prove causation or not negate proximate cause.[191]

The same consideration yielded the opposite result in *MacDonald v. General Motors Corp.*,[192] wherein evidence of seatbelt nonuse was held to be inadmissible as to the issues of proximate cause and mitigation of damages based on the purpose and construction of Tennessee's Act.[193] The court first looked to the elements of the tort, pointing out that: "Just as is the case in a negligence action, a products liability claim must include the element of proximate causation of the plaintiff's injuries, a determination 'ordinarily for the trier of fact.'"[194] The court then looked to another statute providing for no absolute liability and found that the seatbelt statute was qualified by it. The court pointed out that proximate cause was an element of strict liability and that to prevent the defendant from defending against one of the elements of the tort was "a step toward the imposition of absolute liability."[195] It acknowledged "the defendant's right to disprove the plaintiff's theory of causation" and allowed the evidence for the purposes of disproving proximate cause.[196] This area continues to develop and has not been considered by many courts as of yet.

B. Federal Rule of Evidence 403

Federal Rule of Evidence 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[197] The notion may be inherent in many court decisions, but several explicitly have held that any probative value of seatbelt evidence is outweighed by its prejudicial nature.[198] The *Carrasquilla* court suggested that a rational basis for excluding seatbelt evidence would be that:

> In many cases, evidence of seatbelt non-use would be unfairly prejudicial and therefore outweigh any probative value it may have. The admission of such evidence would complicate factual issues for the trial judge and the jury since the issue of whether the failure to use the restraint caused or contributed injury or death is always problematic

191. *Id.* at 607.
192. MacDonald v. Gen. Motors Corp., 784 F. Supp. 486 (M.D. Tenn. 1992).
193. *Id.* at 500.
194. *Id.* at 499 (quoting Young v. Reliance Electric Co., 584 S.W.2d 663, 668 (Tenn. Ct. App. 1979)).
195. *Id.*
196. *Id.* at 500.
197. FED. R. EVID. 403.
198. Kelly v. Ford Motor Co., No. 94 2579, 1996 U.S. Dist. LEXIS 16240, at *18 (E.D. Pa. Oct. 24, 1996).

> and the proofs often weak or confusing. The Pennsylvania legislature could rationally have recognized this potential prejudice when it enacted subsection (e) along side the seat belt mandate.[199]

In other words, by barring seatbelt evidence, statutes eliminate the "trial-within-a-trial" necessary to establish whether nonuse contributed to the plaintiff's injuries. A court may rely upon the potential prejudice of seatbelt evidence when considering its introduction into evidence. However, as more states develop precedent based upon legislation, the use of the rules of evidence to support their decisions seems less necessary.

C. Mitigation of Damages

Perhaps the largest area in which courts carve out an exception to statutes prohibiting the admission of seatbelt evidence lies in the area of mitigation. Black's Law Dictionary defines the "mitigation-of-damages doctrine" as:

> The principle requiring a plaintiff, after an injury or breach of contract, to use ordinary care to alleviate the effects of the injury or breach. If the defendant can show that the plaintiff failed to mitigate damages, the plaintiff's recovery may be reduced. Also termed *avoidable-consequences doctrine.*[200]

Several states allow seatbelt evidence to show the plaintiff's failure to mitigate his damages.[201] In many states, the issue of seatbelt nonuse as a defense or damage-mitigation factor is undecided; either there is no case law or the opinions are subject to varying interpretations. In some jurisdictions, the defense is or is not available depending on the case.[202]

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199. Carrasquilla v. Mazda Motor Corp., 166 F. Supp. 2d 181, 187 (D. Pa. 2001).

200. BLACK'S LAW DICTIONARY 1018 (7th ed. 1999). *See generally* John R. Grier, Comment, *Rethinking the Treatment of Mitigation of Damages Under the Iowa Comparative Fault Act in Light of* Tanberg v. Ackerman Inv. Co., 77 IOWA L. REV. 1913, 1916 (1992). The author writes,

> The duty to mitigate damages, on the other hand, occurs after the legal wrong by the defendant, and the failure by the plaintiff to carry out this duty only bars the recovery of those damages which accrue after the legal wrong by the defendant. Unlike contributory negligence, the plaintiff's duty to mitigate damages arises only after the defendant's tortious conduct.

Id.

201. *See* MATTHEW BENDER & CO., INC., 2-12A SCIENTIFIC AUTOMOBILE ACCIDENT RECONSTRUCTION § 12A.07 (LexisNexis 2003).

202. *Id.*

The mitigation approach is based on the notion that the defendant must prove which injuries the plaintiff could have avoided through use of a seatbelt. Essentially, the defendant is bifurcating the injuries into "first" and "second" collisions, and the defendant will not be liable for any of the second collision injuries. Thus, the doctrine of avoidable consequences arguably places the cost of the "add-on injuries" to the cheapest cost avoider—the plaintiff—who can control whether or not the seatbelt is worn. One commentator has discussed that:

> Although this approach appears to be equitable, it cannot be applied logically in the context of an accident case involving the injuries that were aggravated by a plaintiff's failure to use a seat belt. The mitigation of damages approach presupposes that the defendant is not the best cost avoider for those second collision injuries over which he had no control. Therefore, this rule should apply only to postaccident conduct, which occurs "after a legal wrong has occurred, but while some damages may still be averted." When applied to preaccident conduct, the plaintiff is no longer the cheapest cost avoider for the full extent of his second collision injuries because such injuries are not outside the defendant's control.
>
> Dean Prosser has suggested that the mitigation approach is applicable only when damages can be accurately attributed to their respective proximate causes. Therefore, proponents of the mitigation theory argue that a defendant should not be responsible for injuries resulting from a plaintiff's failure to use a seat belt. Such proponents have failed to consider, however, that the negligent conduct of the defendant is both a cause-in-fact and proximate cause of the totality of the plaintiff's injuries. Where a defendant's negligence causes a first collision, it is also an immediate cause of the second collision as a matter of law. Accordingly, "the second collision injuries are an amalgam of the defendant's fault in causing the [accident] and the plaintiff's fault in failing to wear his seat belt." Since a negligent defendant should be liable to the extent that his fault contributed to the plaintiff's injuries, the defendant should not be fully absolved from second collision liability because his negligence is a contributing cause of that second collision.[203]

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203. Michael B. Gallub, Note, *A Compromise Between Mitigation And Comparative Fault?: A Critical Assessment of The Seat Belt Controversy And a Proposal For Reform*, 14 HOFSTRA L. REV. 319, 322-25 (Winter 1986) (internal citation omitted).

The seatbelt defense allows a defendant to argue that a plaintiff's injuries were caused or aggravated by the plaintiff's failure to wear a seatbelt.[204] "The issue would seem to be one of comparative negligence rather than mitigation of damages since the duty to mitigate is generally recognized as not coming into play until after the tortious act occurs."[205] A plaintiff does not have the opportunity to fasten his seatbelt in the instant between the collision and the plaintiff's impact inside or outside of the car ("second collision"); thus, an argument for mitigation, perhaps, cannot be made. On the other hand, under comparative negligence principles, a plaintiff's liability might arise *prior to* the accident when he had the opportunity to fasten his seatbelt but failed to do so. There, a plaintiff might be partly responsible for injuries that might have been avoided had he worn a seatbelt. Nevertheless, many jurisdictions have blurred the distinction between comparative/contributory negligence and mitigation of damages with respect to a plaintiff's failure to wear a seatbelt.[206]

Those states that keep the concepts of comparative fault/contributory negligence and mitigation of damages distinct generally preclude seatbelt evidence as to mitigation of damages. States that treat mitigation the same as comparative negligence with respect to the seatbelt defense reflect a greater willingness to admit such evidence.[207] While seatbelt evidence traditionally was inadmissible, as states abandoned contributory negligence for comparative negligence, many permitted seatbelt evidence to be considered on the issue of damages, but not liability.[208] Some courts that previously refused to recognize the seatbelt defense have indicated that damages resulting from the plaintiff's failure to use an available seatbelt may be apportioned under comparative negligence pursuant to a mitigation of damages argument.[209] But other courts continue to reject the admissibility of evidence of a plaintiff's failure to wear a seatbelt in apportioning damages under a variety of rationales.[210] To demonstrate the diversity in this area, a few decisions may be worth noting.[211]

In *Spier v. Barker*,[212] the New York Court of Appeals, prior to the state's adoption of a comparative fault statute, ruled that a plaintiff's nonuse

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204. MATTHEW BENDER INC. & CO., 3-16 DAMAGES IN TORT ACTIONS § 16.04 (LexisNexis 2003).
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *See* MATTHEW BENDER & CO. INC., 1-4 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 4.50, n.16 (LexisNexis 2003) (and cases cited therein).
210. *See* MATTHEW BENDER & CO., INC., 1-4 COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 4.50, n.17 (LexisNexis 2003) (and cases cited therein).
211. *See* MATTHEW BENDER & CO., INC., 3-16 DAMAGES IN TORT ACTIONS § 16.01 (LexisNexis 2003) (and cases cited therein).
212. Spier v. Barker, 323 N.E.2d 164 (N.Y.1974).

of an available seatbelt constituted a breach of his duty to mitigate injuries.[213] The court reasoned that, since the plaintiff acted in disregard of his own interests, his recovery should be reduced to the dollar amount of the injuries that he would have sustained had he used his seatbelt. The court relied on studies indicating the effectiveness of seatbelts in significantly reducing the likelihood of ejection and preventing "the second collision" of the occupant with the interior portion of the vehicle.[214]

Yet, in *Dillinger v. Caterpillar, Inc.*,[215] the Third Circuit Court of Appeals held that the district court erred when it admitted evidence of the plaintiff's seatbelt nonuse, even for the limited purposes of mitigating damages.

In *State v. Ingram*,[216] the court held that mitigation issues cannot be raised due to the plaintiff's failure to wear a seatbelt. The mitigation of damages doctrine cannot logically encompass the seatbelt defense because the act of fastening a seatbelt is an act the injured party must perform before the injury causing the act occurs.[217]

In *McCord v. Green*,[218] the court stated:

> Numerous fatalities occur in automobile collisions when one car, forced off a bridge or waterside highway, plunges into a river or is overturned and set ablaze. Obviously the victims would have had a much greater chance of surviving had they not been trapped in the submerged or burning car by buckled seat belts. There is no doubt, of course, that seat belts do provide protection to belted occupants of cars in a head-on collision or cars braked to a screeching halt, as the belt-wearer may be prevented from lurching forward against the steering wheel, dashboard, or windshield.
>
> These are not the only kinds of accidents which can happen to automobiles. Judicial notice may be taken of the fact that a heavy majority of the appeals which reach this court are concerned with litigation over intersectional collisions. In such cases the protective value of a seat belt is dubious, for

213. *Id.* at 167. Other courts have held that, under the facts and circumstances of a particular case, a plaintiff's failure to wear a seat belt can constitute a failure to mitigate damages. *See, e.g.*, Ins. Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984); Pritts v. Walter Lowery Trucking Co., 400 F. Supp. 867, 873-74 (W.D. Pa. 1975); Wilson v. Volkswagen of Am., 445 F. Supp. 1368, 1373 (E.D. Va. 1978).

214. *Spier*, 323 N.E.2d at 167.

215. Dillinger v. Caterpillar, Inc., 959 F.2d 430, 440 (3d Cir. 1992).

216. State v. Ingram, 427 N.E.2d 444 (Ind. 1981).

217. *Id.* at 448.

218. McCord v. Green, 362 A.2d 720 (D.C. Ct. App. 1976).

> many an occupant pinned down by his belt beside a door bashed in by a broadside impact, could suffer injuries which would not have occurred had he been thrown free. In the very case we are considering, the host driver might have been badly hurt had he put on his seat belt that night, for his testimony describes the side of his car as being crushed by the force of defendant Green's vehicle. Consequently, even though intersectional collisions may occur with enough frequency to be called a foreseeable incident of city driving, whether or not a seat belt will do more harm than good to the victims of such an accident is unpredictable.[219]

In *Miller v. Miller*,[220] the court opined that the standard of due care is measured by the customary conduct of the reasonable person. Reflecting the age of the opinion, the court relied upon the "scant use" that persons make of seatbelts, "plus the fact that there is no standard for deciding when it is negligence not to use an available seat belt" in concluding that it should not impose a duty to use seatbelts. As was common, the court relied upon the legislature to take action.

In *Kavanagh v. Butorac*,[221] the plaintiff, an unbelted passenger in an automobile that collided with the defendant's vehicle, suffered injuries by "forcible contact" with the rearview mirror. The doctrine of avoidable consequences was inapplicable in spite of a safety expert's testimony that the plaintiff would not have struck the mirror if his seatbelt had been fastened. The court concluded that "[o]nly by speculation can it be said that the injuries would have not occurred if the seat belt was fastened."[222]

In *Kopischke v. First Continental Corp.*,[223] the trial court refused to instruct the jury on the plaintiff's failure to use a seatbelt, notwithstanding a statute requiring that all new vehicles since 1966 be outfitted with safety belts. The court relied on what it characterized as the "well-reasoned position of the Washington court in *Amend v. Bell*" and refused to impose a standard of conduct on persons riding in vehicles equipped with seat belts.[224] The court rejected the notion that a defendant could diminish the consequences of his negligence by a plaintiff's failure to wear a seatbelt. As bases for its conclusion, the court relied on the following: (1) the plaintiff need not predict the negligence of the defendant; (2) seatbelts are not present in all vehicles, so a defendant should benefit by the fortuitous circumstance that plaintiff was riding in a car so equipped; (3) the majority of motorists do not

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219. *Id.* at 723-24
220. Miller v. Miller, 160 S.E.2d 65 (N.C. 1968).
221. Kavananagh v. Butorac, 221 N.E.2d 824 (Ind. Ct. App. 1966).
222. *Id.* at 833.
223. Kopischke v. First Continental Corp., 610 P.2d 668 (Mont. 1980).
224. *Id.* at 683.

habitually use their seatbelts; and (4) allowing the seatbelt defense would lead to a battle of experts (and speculation by juries) as to what injuries would have been avoided had the plaintiff been wearing a belt.[225]

In *Parise v. Fehnel*,[226] the trial court refused to instruct the jury that the plaintiff's failure to use a seatbelt could be considered in mitigation of damages. While not foreclosing the possibility of the seatbelt defense in future cases, the appellate court concluded that the defense was not appropriate in the case at bar due to the lack of "expert testimony showing a relationship between the plaintiff's injuries and his failure to use seat belts."

In *Bentzler v. Braun*,[227] a refusal to instruct on seatbelt nonuse in a reduction of damages was proper where there was no evidence that such failure caused or aggravated any of the plaintiff's injuries. Cases such as *Bentzler* logically lead to the next question: what type of proof or expert testimony is sufficient to draw a causal connection between failure to wear a seatbelt and the resulting injuries?

VI. ISSUES OF PROOF/EXPERTS

While the debate surrounding the potential use of seatbelt evidence is evolving and heated, it is even more so with respect to issues of "proof" and expert testimony. Courts are able, at times, to avoid the application of seatbelt statutes on the theory that failure to utilize an available seatbelt will be considered only on issue of damages, not on issue of liability, and that a causal link between damages and failure to wear a seatbelt must be proven.[228] Courts are detailed in their discussions of these issues, noting that

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225. *Id.*

226. Farise v. Fehnel, 406 A.2d 345 (Pa. Super. Ct. 1979).

227. Bentzler v. Braun, 149 N.W.2d 626 (Wis. 1967).

228. Roach v. Szatko, 244 A.D.2d 470 (N.Y. App. Div. 1997), *leave to appeal dismissed*, 694 N.E.2d 886 (1998). Additionally, one court concluded:

> Prior to the enactment of [the Virginia statute], evidence of nonuse of a seatbelt was admissible if "the defendant can demonstrate, by competent and satisfactory evidence, the extent of the plaintiff's injuries could have been avoided by wearing a seatbelt." Chretien v. General Motors Corp., 959 F.2d 231, 1992 WL 67356, *4 (4th Cir. 1992) (unpublished opinion, cited in Table as 959 F.2d 231) (quoting Wilson v. Volkswagen of Am., 445 F. Supp. 1368, 1373 (E.D. Va. 1978). Recognizing the substantive nature of [the Virginia statute's] proscribing the admissibility of nonuse of plaintiff's seatbelt as evidence of contributory negligence or in mitigation of damages, the Court prohibited the Defendant's expert witness Dr. Robert Piziali, a bio-mechanical engineer, from testifying that the Plaintiff's failure to wear a seatbelt exacerbated her injuries or that her ejection exacerbated her injuries. With respect to the negligence of design and breach of warranty claims, however, the Federal Rules of Evidence govern. Thus, the Court allowed Dr. Piziali to testify that the Plaintiff's failure to wear a seatbelt caused her to be ejected from the Ranger, and that

a defendant has the initial burden to present evidence that the plaintiff's vehicle contained available, operational seatbelts. Thereafter, the burden shifts to the plaintiff to present contrary evidence as to the belt's operability. In applying this procedure, a Florida court concluded in *Zurline v. Levesque* that "there was no competent evidence that appellant's failure to wear the seatbelt caused or substantially contributed to her injuries and for that reason the seatbelt defense should not have been submitted to the jury."[229]

In determining what constitutes "competent evidence" of a causal relationship between the failure to wear a seatbelt and the injury sustained, the *Zurline* court relied on *Burns v. Smith*,[230] in which a Florida district court rejected a plaintiff's contention that testimony from an accident reconstruction expert was required to address the causal relationship between the nonuse of a seatbelt and the injuries sustained. The *Burns* court concluded that, under the facts presented wherein the plaintiff was thrown from his car seat and received head and neck injuries, it was not beyond the province of the jury that "the failure to use an available and operational seat belt produced or contributed substantially to producing at least a portion of plaintiff's damages."[231]

The *Zurline* court also relied on *State Farm Mut. Auto Ins. Co. v. Smith*,[232] in which the plaintiff was thrown about inside the car as a result of the collision and claimed injury to the lower back, an injury not "obviously" resulting from direct contact with the windshield, the door, or the dashboard.[233] The *Smith* court believed that the specific dynamics of seatbelts in various automobile scenarios were not matters within the common understanding or juries, "or for that matter judges."[234] While expressing its concern with whether anyone, expert or layman, could truly apportion causation and degree of injury between the initial impact and failure to use a seatbelt, the *Smith* court noted that prior precedent clearly placed the burden of proof on the defendant to introduce competent evidence on this issue.[235] The *Zurline* court further explained this concept as follows:

> the way a person lands after an ejection determines the forces that act on his or her body.

Brown v. Ford Motor Co., 67 F. Supp. 2d 581, 587 (E.D. Va. 1999). The *Brown* court also found that Piziali was *not* qualified to testify as an expert upon the causation or exacerbation of injuries.

229. Zurline v. Levesque, 642 So. 2d 1169, 1170-71 (Fla. Dist. Ct. App. 1994).

230. Burns v. Smith, 476 So. 2d 278 (Fla. Dist. Ct. App. 1985).

231. *Id.* at 279.

232. State Farm Mut. Auto Ins. Co. v. Smith, 565 So. 2d 751 (Fla. Dist. Ct. App. 1990), *cause dismissed*, 570 So. 2d 1306 (Fla. 1990).

233. *Id.* at 754.

234. *Id.* at 753, n.3.

235. *Id.*

> The "competent evidence" standard referred to in Pasakarnis requires a defendant to introduce evidence of the causal relationship between the injury and the failure to use a seat belt that is not uncertain, speculative, or conjectural—because that is the evidentiary standard applicable to plaintiffs for establishing their damages.
>
> The dynamics of seatbelt protection from injuries from side impacts may be even less a matter of common understanding that from frontal collisions. In fact, if the automobile in which appellant was driving did not have side impact protection, wearing a seatbelt may have actually increased appellant's chances of suffering fatal injuries in the crash. Thus, the "common understanding of the jury" cannot be substitutes for proof where there is no evidence of the causal connection between the injuries suffered and nonuse of the seatbelt under the circumstances of this case.[236]

Given the multiple uses for experts in cases involving seatbelt evidence, the question of whether expert testimony is a prerequisite to the seatbelt defense has been debated.[237] Courts are troubled by required expert testimony. For example, where an accident reconstruction expert testifies, counsel may object because the accident reconstruction expert has no medical training and, thus, cannot testify concerning causation of an injury. On the flip side, medical expert testimony may be objected to because the physician cannot testify about whether the use of a seatbelt could have avoided or minimized an injury. "This raises questions concerning which experts are truly competent in this field to advise the jury, and upon what issues."[238] As the *Smith* court stated, "review of the literature on this subject indicates the windshield, door or dashboard impact injuries, which as laymen we have come to believe are avoided by the use of seatbelts, are not necessarily prevented when a seat belt is worn."[239] The concern is that no one, neither expert or layman, can truly apportion causation and degree of injury between the initial impact and the failure to use a seatbelt.[240]

Along those lines, courts have held that a defendant failed to show a sufficient causal relationship between the plaintiff's failure to use a seatbelt and the existence or extent of the plaintiff's injuries to justify a reduction of damages awarded to the plaintiff. In *Potts v. Benjamin*,[241] the vehicle occupants were injured when a truck collided with their vehicle. The court held

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236. Zurline v. Levesque, 642 So. 2d 1169, 1170-71 (Fla. Dist. Ct. App. 1994).
237. *Smith*, 565 So. 2d at 752-55.
238. *Id.*
239. *Id.*
240. *Id.*
241. Potts v. Benjamin, 882 F.2d 1320 (8th Cir. 1989) (applying Arkansas law).

that the failure of one occupant to wear her seatbelt did not justify a reduction in her damage award under either a comparative negligence or mitigation of damages theory because the defendants failed to prove that the occupant's injuries would have been reduced had she been wearing a belt. After determining that a jury could assess the occupant's percentage of fault under the comparative negligence statute if the defendants could demonstrate the degree to which her injuries would have been reduced by wearing a seatbelt, the appellate court noted that the defendants proffered no evidence upon which the jury could distinguish the injuries caused by the defendants' negligence from those caused by the occupant's failure to use a seatbelt.[242] With regard to a mitigation of damages argument, the court noted that, under state law, the burden of showing that a plaintiff could have avoided damages rests with the defendant, including the burden of proving the damage that the plaintiff could have avoided.[243] Given the defendants' failure to make an offer of proof as to the harm that the occupant could have avoided by fastening her seatbelt, the court concluded that the only evidence in the trial record was the simple fact of nonuse, and this fact was insufficient to warrant the submission of a mitigation issue to the jury.[244]

In *Baker v. Morrison*,[245] the court first noted that the accident at issue occurred *before* the effective date of a statute providing that failure to use a seatbelt cannot be considered evidence of comparative negligence and cannot be admitted in evidence in the trial of any civil action with regard to negligence. The *Baker* court went on to hold that, although the plaintiffs' nonuse of their seatbelts could have been admitted as evidence of comparative fault had the defendant demonstrated a causal connection between the nonuse and the damages incurred in the accident, the defendant failed to make such a showing.[246] The court noted that, the only evidence offered on the issue came by way of the plaintiffs' admissions that they were not wearing seatbelts. The court held that these admissions were not sufficient proof that the nonuse of their seatbelts proximately caused the plaintiffs' injuries. There was no testimony concerning the relationship of the plaintiffs' nonuse of seatbelts to their injuries and, without any evidence that their nonuse caused the injuries, the trial court erred in allowing evidence concerning the plaintiffs' failure to wear seatbelts.[247]

In *Franklin v. Gibson*,[248] the defendant asserted that no expert testimony should be required and proferred no such testimony to demonstrate a causal relationship between the failure to wear a seatbelt and the damages.

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242. *Id.* at 1323.
243. *Id.*
244. *Id.*
245. Baker v. Morrison, 829 S.W.2d 421 (Ark. 1992).
246. *Id.* at 462.
247. *Id.*
248. Franklin v. Gibson, 188 Cal. Rptr. 23 (Cal. Ct. App. 1982).

The appellate court concluded that jury consideration of seatbelt evidence was improper given the defendants' failure to establish that the plaintiffs' injuries were aggravated by seatbelt nonuse.[249]

In *Smith v. Butterick*,[250] evidence was sufficient to raise the seatbelt defense in action where the vehicle owner testified that the automobile's seatbelts were operational; where a mechanical engineer reported that the passenger would not have hit interior surfaces of vehicle if she was restrained by an operational seatbelt; and given that other people in vehicle sustained less severe injury.[251]

In *Laughlin v. Lamkin*,[252] a physician testified that, had the passenger been wearing a seatbelt, she would have been less likely to move around or strike things in the vehicle. The physician also testified that, given the type of accident, a seatbelt might not have had any effect in preventing injury to the passenger's head. The court concluded that the testimony was insufficient to support an instruction allowing the jury to apportion fault against the passenger based on her failure to wear a seatbelt.[253]

The court in *Shahzade v. C.J. Mabardy, Inc.*[254] affirmed a damage award in the plaintiff's favor and held that the trial judge properly refused to instruct the jury on the issue of the plaintiff's comparative negligence in not wearing a seatbelt. In that case, the court held that the defendant failed to produce evidence of a causal relationship between the plaintiff's injuries and her failure to wear a seatbelt. The appellate court said that, absent such proof, the jury would be left to speculate as to whether the plaintiff's nonuse of her seatbelt contributed to her injuries.[255]

Acknowledging that the nonuse of a seatbelt may be introduced as evidence in mitigation of damages, the court in *Vredeveld v. Clark*,[256] nevertheless held improper a jury instruction that the plaintiff's recovery could be reduced in light of her admission that she was not wearing a seatbelt, where the defendant produced no evidence of a causal relationship between seatbelt nonuse and the plaintiff's injuries. The court noted that no evidence had been presented regarding the extent to which the plaintiff's injuries would have been diminished had she been wearing a seatbelt.[257]

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249. *Id.* at 24.
250. Smith v. Butterick, 769 So. 2d 1056 (Fla. Dist. Ct. App. 2000).
251. *Id.* at 1058-59.
252. Laughlin v. Lamkin, 979 S.W.2d 121 (Ky. Ct. App. 1998).
253. *Id.*
254. Shahzade v. C.J. Mabardy, Inc., 586 N.E.2d 3 (Mass. 1992).
255. *Id.*
256. Vredeveld v. Clark, 504 N.W.2d 292 (Neb. 1993).
257. *Id.*

The cases discussing evidentiary issues surrounding causation, expert testimony, and the seatbelt defense are too numerous to mention in any comprehensive detail.[258] Yet, once a court considers allowing seatbelt evidence, the party desiring its introduction carries the burden of proving a causal relationship (*e.g.* relevance) and providing a witness suitable to describe that evidence (*e.g.* an expert witness).[259] It has been discussed that:

> A plaintiff may also use an expert in his or her case in chief to testify that had the seat belt been worn, the plaintiff would have suffered the same injuries (for example, in cases of flailing from side to side) or perhaps, in a case of moderate damages, that the plaintiff would have incurred other, more serious injuries. Some counsel, however, may prefer to use the expert on rebuttal, if the local rules permit this.
>
> Defendants must also make certain that they preserve their seat belt defense in the answer to the plaintiff's complaint. Once that is done, depending on the court, the defense may use one or more experts to introduce the seat belt defense. There must be testimony about: the movements of the plaintiff in the vehicle (or in being ejected from the vehicle) during the different phases of the accident; what those movements would have been if restraints had been used; and the physiological consequences of those movements.
>
> The testimony can be given by a biomechanicist, some of whom have M.D. degrees, or by a combination of reconstructionist/engineer and physician. As part of the testimony, demonstrative evidence, such as NHTSA test films, may be considered for use and references may be made to some of the vast literature.[260]

While a biomechanicist or a combination of reconstructionist/engineer and physician have been considered sufficient, one court addressed the "ideal expert" to testify concerning the plaintiff's failure to wear his seatbelt—a witness who had degrees in physics, mathematics, and biomedical engineering and was a senior engineer of safety research.[261] However, the ideal expert is not required in every case, as certain factual scenar-

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258. *See* MATTHEW BENDER & CO., INC., 3-16 DAMAGES IN TORT ACTIONS § 16.01 (LexisNexis 2003) (and cases cited therein).

259. Franklin v. Gibson, 188 Cal. Rptr. 23 (Cal. Ct. App. 1982) (holding that burden is on defendant to show, through experts, what injuries would have been sustained in a collision if seat belts had been used).

260. MATTHEW BENDER & CO., INC., 7-92 PRODUCTS LIABILITY PRACTICE GUIDE § 92.07 (LexisNexis 2003) (Automobiles).

261. Waterson v. General Motors Corp., 544 A.2d 357, 361 (N.J. 1988).

ios have been held "matters of common sense," thereby completely negating the need for any expert testimony.[262] But, reliance on common sense is, perhaps, too risky. Where a defendant failed to prove that the plaintiff's failure to wear a seatbelt caused or enhanced the plaintiff's injuries, his seatbelt defense likely will not be presented to the jury for consideration.[263] And, where an expert testifies only that the plaintiff "would have been less likely to move around or strike things in the car" had she been wearing a seatbelt, but cannot conclude with any degree of probability that the plaintiff's injuries would have been lessened, then "the general and vague testimony [is] not sufficient to support an instruction allowing the jury to consider the issue of [the plaintiff's] comparative fault in causing her injuries."[264] After all, the admission of seatbelt evidence often complicates issues for the judge and the jury. The issue of whether failure to use a seatbelt caused or contributed injury is difficult and "the proofs often weak or confusing."[265] That said, a litigant wishing to prove that seatbelt use or nonuse caused or aggravated injuries should look closely at the expert he proposes.

VII. WYOMING

A. The Seatbelt Statute

Wyoming falls in the group of states that have adopted statutes addressing the admissibility of seatbelt evidence. Wyoming statute section 31-5-1402(f) states: "Evidence of a person's failure to wear a safety belt as required by this act shall not be admissible in any civil action." The legislature originally made this provision effective on June 8, 1989. The 1989 Session Laws provide, in relevant part:

> SYNOPSIS: AN ACT to create W.S. 31-5-1401 and 31-5-1402 relating to safety belts in passenger vehicles; requiring that the driver and all front seat passengers of passenger vehicles wear safety belts; . . . providing that evidence of not wearing a safety belt is not admissible in any civil action . . .
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> . . . .
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> 31-5-1402. Safety belts required to be used; exceptions.

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262. McNeil v. Yellow Cab Co., 147 Cal. Rptr. 733, 735 (Cal. Ct. App. 1978) (holding that it is a matter of common sense that the absence of use of seatbelts caused some if not all of the plaintiff's claimed injuries in a case where the plaintiffs were passengers in a taxi thrown about because of lack of seatbelts).

263. *Laughlin v. Lamkin*, 979 S.W.2d 121, 125 (Ky. App. 1998).

264. *Id.* at 125.

265. Kelly v. Ford Motor Co., No. 94 2579, 1996 U.S. Dist. LEXIS 16240, at *18 (E.D. Pa. Oct. 24, 1996).

> (a) Each driver and front seat passenger of a passenger vehicle operated in this state shall wear, and each driver of a passenger car shall require that a front seat passenger shall wear, a properly adjusted and fastened safety belt when the passenger vehicle is in motion on public streets and highways.
>
> . . . .
>
> (f) Evidence of a person's failure to wear a safety belt as required by this act shall not be admissible in any civil action.[266]

Effective July 1, 2000, the Wyoming Legislature amended Wyoming statute section 31-5-1402 to make it applicable to all passengers rather than only front seat passengers. The Legislature made other minor revisions at that time as well. While the available legislative history does not provide any insight into the reasoning for these changes,[267] one may surmise that the Wyoming Legislature either (a) hoped to avoid an equal protection argument that front seat passengers and rear seat passengers should not be distinguished and/or (b) hoped to expand the encouragement of seatbelt use to all vehicle occupants. In any event, seatbelt use now applies to all occupants. Beyond the enactment of the original statute and the changes discussed above, little has been discussed surrounding Wyoming's seatbelt statute. In the fifteen years since its enactment, the statute has been discussed in only one Wyoming Supreme Court case.[268]

B. The Case: Dellapenta v. Dellapenta

In what may be called Wyoming's landmark case[269] regarding seatbelt evidence, if only because it is the only one of its kind, the Wyoming Supreme Court addressed an accident that occurred before the passage of Wyoming statute section 31-5-1402. In *Dellapenta v. Dellapenta,* the mother lost control of her car when she rounded a turn onto an icy patch of road, causing the death of her son and injury to her daughter. The father filed a civil suit for damages base on negligence. The jury found for the mother, and the father appealed to the Wyoming Supreme Court. The crux

266. Safety Belt Usage Act, 1989 Wyo. Sess. Laws ch. 274 (Original Senate File No. 202, Enrolled Act No. 138, Senate).
267. Motor Vehicle Seat Belts Act, 2000 Wyo. Sess. Laws ch. 101, § 1.
268. Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992).
269. *Id.*
270. *Id.* at 1154.
271. *Id.* at 1158-59 (internal citations omitted).
272. *Id.* at 1159.
273. Safety Belt Usage Act, 1989 Wyo. Sess. Laws ch. 274 (effective on June 8, 1989).

of the case was parent-child immunity in negligence actions.[270] The Wyoming Supreme Court affirmed in part and reversed and remanded in part, holding that parental immunity did not bar the suit because driving was not an essential parental activity. The court also addressed the admissibility of seatbelt evidence as well as Wyoming's new seatbelt legislation. The court first noted the plethora of statistics available as to seatbelt safety and was well convinced of the need for seatbelts.[271] With this in mind, the court noted the "sound public policy" of imposing on parents "a [common law] duty to buckle the seat belts of their minor passengers who are dependent on adult care and supervision for their well being and safety."[272]

The court next recognized the Wyoming Legislature's recent[273] enactment of Wyoming statute section 31-5-1402, which required the use of seatbelts by the driver and front seat passenger of a passenger vehicle and also prohibited "in a civil action the admissibility of evidence of failure to wear a seat belt."[274] However, the court noted that the accident in question occurred in November 1987, *before* the enactment of the statute. The court opined:

> Finding no statute in place at the time of the accident to require seat belt use, and in light of the foregoing public policy discussion, we hold, as did a Wisconsin court, "there is a duty, based on the common law standard of ordinary care, to use available seat belts independent of any statutory mandate."[275]

Given its finding of a common law duty, the court also had to consider the admissibility of seatbelt evidence:

> Nonuse of available seat belts has been allowed as a defense to actions in products liability and comparative or contributory negligence by permitting juries to mitigate damages by determining the percentage of injury sustained by the plaintiff as a result of the second collision. The propriety of the application of the seat belt defense in negligence actions has been discussed extensively.
>
> Only one prior case has presented this court with a seat belt evidence issue; lacking an offer of proof at the trial court

274. *Dellapenta*, 838 P.2d at 1159.
275. *Id.* at 1160 (quoting Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626, 639 (Wis. 1967)).
276. *Id.* at 1162 (internal citations omitted).

> level, we declined to give it consideration. *Chrysler Corp. v. Todorovich*, 580 P.2d 1123, 1135 (1978). In the case at bar, we have a single vehicle rollover; this is a simple negligence case and does not involve the application of Wyoming's comparative negligence statute. Wyo. Stat. § 1-1-109 (1988). Therefore, we decline to discuss the "seat belt defense" as such. Though appellant presents this question of admissibility as an evidentiary issue, our analysis of this claim will place it in the light of a second negligence claim or action against Mrs. Dellapenta. We will not apply the Wyoming statute retroactively to prohibit the introduction of seat belt evidence in this case since the failure to use the seat belts occurred before the current statute. Wyo. Stat. § 31-5-1402.[276]

The court, quoting from the seminal *Pasakarnis* case,[277] then confirmed that failure to wear an available, operational seatbelt is "obviously pertinent and thus should be deemed admissible in an action for damages."[278] Based on this rationale, and specifically refusing to address the seatbelt defense and declining to apply Wyoming statute section 31-5-1402, the Wyoming Supreme Court determined that seatbelt evidence should be introduced as evidence in the case.

With respect to proof issues and expert testimony, the court relied upon the requirement that competent evidence be presented to establish a causal relationship between nonuse and plaintiff's injuries before the issue may be submitted to the jury.[279] The court looked for guidance to a Wisconsin court that conclude[d], "'in those cases where seat belts are available and there is evidence before the jury indicating causal relationship between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard.'"[280] The court agreed with the Wisconsin court that it is improper for the jury to speculate on the effect that seatbelts would have had "in the absence of credible evidence by one qualified to express the opinion of how the use or nonuse of seat belts would have affected the particular injuries."[281] The court further opined:

> We agree with those courts that would allow the introduction of evidence of seat belt nonuse where an offer of proof is made to show a causal relationship between nonuse and injuries to the occupant. In this case such an offer was made

277. Ins. Co. of N. Am. v. Pasakarnis, 451 So. 2d 447, 454 (Fla. 1984)
278. *Dellapenta*, 838 P.2d at 1162 (quoting *Pasakarnis*, 451 So. 2d at 453).
279. *Id.*
280. *Id.* (quoting *Bentzler*, 149 N.W.2d at 640-41).
281. *Id.*

> through the testimony of Officer Schofield, a fifteen year veteran of the Wyoming Highway Patrol trained in accident investigation with experience in investigating over 700 accidents. Officer Schofield testified that Nicholas died from drowning and hypothermia as a result of being ejected from the vehicle. The Wyoming Rules of Evidence provide through Rule 402 for the admission of relevant evidence. Rule 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Officer Schofield's testimony is relevant evidence under Wyo. R. Evid. 402 and provides a causal relationship between nonuse of the seat belt and Nicholas' injuries.
>
> However, the record is void of any offer of proof made on behalf of the injuries incurred to Bianca. We hold that the trial court erred only in denying admission of evidence of nonuse of seat belts by Nicholas and find no error in the trial court's denial of seat belt evidence for Bianca.[282]

The court ultimately remanded the matter to allow evidence of the son's seatbelt nonuse to be submitted to the jury where a causal connection existed between nonuse and the injuries sustained.

C. The Dissents

While the majority's opinion is what establishes Wyoming law, Justice Cardine and Justice Thomas wrote adamant, lengthy, and somewhat persuasive dissents.[283] Justice Cardine notably wrote:

> A wise and old judge of a court of limited jurisdiction in one of our sparsely populated rural communities was once asked, "Do judges make law?" His response was: "Of course they do, I made some myself today." And so today our court assumes a position of extreme judicial activism in derogation of constitutional powers given to 90 elected legislators by enacting for the people of the state of Wyoming, retroactively, a seat belt law.

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282. *Id.* at 1162-63

283. *Id.* at 1166. The dissents are "somewhat persuasive" given the fact that they stand for a minority opinion of the Wyoming Supreme Court and do not carry any formally binding or persuasive power.

> Bad cases make bad law. Sadly, this is one of those bad cases. It is a case in which members of this court cannot accept a jury finding of no negligence, thus denying recovery for the death of this minor child. But, instead of confronting the issue honestly and forthrightly, by reversing the judgment as not supported by the evidence and granting a new trial in accordance with W.R.C.P. 50(d) . . . the court legislates for Wyoming a seat belt law that the Wyoming legislature has consistently refused to adopt, although lobbied heavily in every session.[284]

Justice Cardine quoted Wyoming statute section 31-5-1402 and noted that "[t]he legislation adopted demonstrates the detail necessary to know what is required for compliance and is illustrative of the problems created by court meddling in an area of this kind which more properly is suited to legislative consideration."[285] He looked disapprovingly upon the majority's recitation of crash statistics, noting that those same statistics were available to legislators during hearings on the seatbelt statute, and dubbed the court's decision unwarranted "judicial activism."[286]

Beyond his disapproval of the court's judicial activism, Justice Cardine also noted that the court never before recognized a common law duty to wear a seatbelt.[287] In fact, in *Chrysler Corp. v. Todorovich*,[288] the trial court sustained an objection to the admission of seatbelt evidence, which was affirmed on appeal. Justice Cardine attributed the court's actions to "'it-is-so-because-we-say-so' jurisprudence [that] constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place."[289] He concluded that "[t]he purported new rule finds a duty never before articulated by any other court"[290] and cautioned:

> There is a flip side to the rule now adopted. Failure to wear a seat belt has generally been called the "seat belt defense." The defense (contributory negligence) is asserted against the injured persons seeking to recover damages for personal injuries. Traditionally failure to wear seat belts could defeat a claim of damage for personal injury. If it is thought that the recently enacted statute prevents that result, think again about the propensity of this court for declaring legislative

284. *Id.* at 1167 (Cardine, J., dissenting).
285. *Id.* at 1167-68 (Cardine, J., dissenting).
286. *Id.* at 1168 (Cardine, J., dissenting).
287. *Id.* (Cardine, J., dissenting).
288. Chrysler Corp. v. Todorvich, 580 P.2d 1123 (Wyo. 1978).
289. *Dellapenta*, 838 P.2d at 1168 (Cardine, J., dissenting) (quoting McCullough v. Golden Rule Ins. Co., 789 P.2d 855, 865 (Wyo. 1990) (Golden, J., dissenting)).
290. *Id.* at 1168 (Cardine, J., dissenting).

> enactments unconstitutional. Once declared unconstitutional, the seat belt defense will again be in effect.[291]

This prediction provides Wyoming practitioners interesting ammunition for the constitutional arguments addressed in other states, but not Wyoming. Finally, Justice Cardine poignantly summarizes his focus, stating:

> I have no doubt that seat belts save lives. But are we, as judges, constitutionally vested with the power and authority to adopt this kind of vague, incomprehensible legislation? We know we are not, and we do a disservice to separation of powers and the orderly, efficient functioning of our form of government when we do. I would prefer to face head on what we perceive as an incorrect and unjust verdict by a jury. The jury system is not perfect, although it is right most of the time. We have the power and duty to supervise the jury and correct an injustice when reasonable minds would not differ that the jury was wrong, and we should do so.[292]

Here, again, Justice Cardine suggests that the court's creation of new law is unconstitutional and infringes upon the separation of powers doctrine. Nevertheless, the point is clear that the Wyoming Supreme Court adopted a decidedly different approach than the Wyoming Legislature, although one questions the impact of those differences given the court's recognition that Wyoming statute section 31-5-1402 would dictate in the future.

Justice Thomas also wrote in his dissent:

> As Justice Cardine notes, this jurisdiction has not yet agreed that the failure of a plaintiff to wear a seat belt can be invoked by a defendant as a theory to limit or avoid the recovery of damages. Yet, the Court here has decided that the failure to require the wearing of seat belts can serve as a ground for liability . . . .
>
> I understand that the facts of this case are not controlled by Wyo. Stat. § 31-5-1402 (1991) because the tragic accident antedated the adoption of the statute. I note, however, that the rule adopted by the Court is antithetical to the statute. . .
>
> Indeed, this statute seems to confirm the absence of the seat belt defense in Wyoming, and hardly seems consistent with

291. *Id.* (Cardine, J., dissenting) (internal citations omitted).
292. *Id.* at 1169 (Cardine, J., dissenting).

> a theory of liability that depends upon requiring children to wear seat belts. I even wonder what the reaction of the Court would be to a statute that created a classification of only parents and children if a constitutional attack were made upon such a statute. Yet the judicial classification is accomplished without comment as to the duties of adults other than parents.[293]

Justice Thomas, to a large degree, echoes Justice Cardine's concerns. Both dissents provide ample room for argument that *Dellapenta* is controlling authority for any accidents that occur after the effective date of Wyoming statute section 31-5-1402. Additionally, the majority opinion and the dissents, taken together, fail to address many of the more recent adaptations to seatbelt defense legislations and cases.

D. Potential New Answers: Wyoming Statutes Annotated section 31-5-1402(f) is a Substantive Law that Does not Violate the Separation of Powers Doctrine, Equal Protection Clause, or Due Process Concepts.

On September 30, 2004, Judge William F. Downes of the United States District Court for the District of Wyoming squarely addressed, perhaps for the first time in Wyoming, the constitutionality of Wyo. Stat. section 31-5-1402(f).[294] The opinion is not published and presents, due to its issuance by a federal district court, only persuasive authority for the Wyoming Supreme Court. However, the court addresses, persuasively, many issues that plague Wyoming's seatbelt statute.

The court was concerned primarily with the "procedural versus substantive" nature of Wyo. Stat. section 31-5-1402(f). After lengthy discussion, it concluded "the language of the statute is clear; the legislative intent is to bar admission of evidence of nonuse of a safety belt in any civil action . . . . In doing so, the legislature impliedly advances the substantive principle that seat belt nonuse cannot be used to establish comparative fault."[295] The court supported this proposition by analyzing the Wyoming Legislature's intent in light of Wyo. Stat. section 31-5-1402 as a whole as well as *Dellapenta*[296] and persuasive case law from other jurisdictions. The end result is

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293. *Id.* at 1166 (Thomas, J., dissenting).
294. *Order on Plaintiff's Motion in Limine Concerning Seat Belt Usage*, Huff v. Shumate, No. 02-CV-1047-D (Sept. 30, 2004).
295. *Id.* at 13-14.
296. Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992).

that noncompliance with the statute simply cannot be used to establish comparative fault.[297]

After concluding that section 1402(f) is substantive law, the court briefly considered the separation of powers doctrine, noting only: "With respect to Defendant's 'separation of powers' argument, having previously determined that section 1402(f) is a substantive law, its enactment therefore being inherently within the powers delegated to the legislature by the Wyoming Constitution, *Squillace v. Kelley*, 990 P.2d 497, 501 (Wyo. 1999), the Court finds that it does not violate the separation of powers doctrine."[298]

Third, the court considered whether section 1402(f) violates the equal protection clauses of the Wyoming and United States Constitutions. The court, as well as the parties involved in *Huff v. Shumate*,[299] agreed that a rational basis review was the appropriate standard under which the statute should be examined.[300] Under a rational basis review, the court recognized that the party challenging the statute must demonstrate, beyond a reasonable doubt, that the statutory classification bears no rational relationship to a legitimate state objective.[301] With that concept as well as the strong presumption of validity afforded statutes, the court acknowledged that it need only satisfy itself that "the legislature could rationally have concluded that the purposes would be achieved."[302]

The court recognized that the "purposes" of section 1402(f) were: (1) to encourage the use of seatbelts; (2) to limit the penalties for seatbelt nonuse; and (3) to preserve the right to compensation for accidents caused by negligent tortfeasors.[303] Concluding these to be socio-economic legislative purposes, the court stated: "[t]he legislature is presumed to have acted upon a knowledge of the facts and to have had in view the promotion of the general welfare of the people as a whole."[304]

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297. *Order on Plaintiff's Motion in Limine Concerning Seat Belt Usage*, Huff v. Shumate, No. 02-CV-1047-D, 15 (Sept. 30, 2004). Judge Downes also concludes, in *dicta*, that "[w]ith respect to the existence of a common law duty to 'buckle up', the Court finds that by enacting § 1402, the legislature effectively abrogated the common law insofar as it relates to one's duty to wear 'a properly adjusted and fastened safety belt when the motor vehicle is in motion on public streets and highways.'" *Id.* at 15 n.6 (quoting WYO. STAT. ANN. § 31-5-1402(a) (LexisNexis 2003)).

298. *Id.* at 18.

299. *Huff*, No. 02-CV-1047-D.

300. *Id.* at 19. The Court inherently concluded that section 1402(f) does not warrant heightened review because it does not jeopardize the exercise of a fundamental right or categorize on the basis of an inherently suspect characteristic. *See* Nordlinger v. Han, 505 U.S. 1, 10 (1992).

301. Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 854-55 (D. Wyo. 1994).

302. *Huff*, No. 02-CV-1047-D at 22.

303. *Id.* at 22.

304. *Id.* at 23.

However, in a statement indicative of the internal struggle it faced, the court commented:

> It is this Court's opinion that statutes such as § 31-5-1402(f) cast grave doubts upon the legislature's wisdom and its adherence to its obligation to act for the good of the people of this State who elected them to office, rather than for the benefit of powerful lobbyist groups . . . . Clearly, this Court is not without its doubts; yet, "[a]ll reasonable doubts are to be resolved in favor of the validity of the statute."[305]

That said, the Court identified that it was conceivable that section 1402(f) serves those mentioned purposes for which it was enacted, ultimately concluding that, "[t]hough it is difficult to see how § 1402(f) encourages seat belt use, it is equally difficult to conclude that subsection (f) discourages seat belt use."[306]

Despite this conclusion, addressing the rational basis review in light of Wyo. Stat. section 1-1-109 provided another hurdle, albeit a small one, for the court. Of course, Wyoming's legislature has the ability to limit, and even reject altogether, the application of comparative negligence in certain circumstances[307] and did that very thing with section 1402 by limiting the application of comparative fault principles to negligence actions arising out of automobile accidents involving unbelted occupants. Ultimately, the court was left with no option but to conclude "the Defendant has not demonstrated beyond a reasonable doubt that section 1042(f) violates the equal protection guarantees of the United States and Wyoming Constitutions."[308]

With the equal protection clauses disposed of, the court turned its attention to substantive due process, considering whether the legislature rationally could have concluded that section 1402(f) serves a legitimate state interest.[309] In light of the court's conclusions with respect to its equal protection analysis, the court made short work of its due process analysis, stating only:

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305. *Id.* at 24 (quoting Greenwalt v. Ram Rest Corp, 71 P.3d 717, 731 (Wyo. 2003)).

306. *Id.* at 25.

307. *See* Greenwalt v. RAM Restaurant Corp., 71 P.3d 717 (Wyo. 2003). The court recognized that the legislature has undertaken to modify the reach of § 1-1-109 in other matter, such as the Dram Shop statute, WYO. STAT. ANN. § 12-8-301 (LexisNexis 2003) and the Wyoming Recreation Safety Act, WYO. STAT. ANN. § 1-1-121 (LexisNexis 2003).

308. By phrasing its conclusion in such a way, one wonders whether the court left room for some other defendant to carry that burden.

309. *Huff*, No. 02-CV-1047-D at 29. The court and the parties agreed that § 1402(f) does not involve a fundamental right; therefore, the statute will be upheld so long as it promotes a legitimate public policy objective through reasonable means. Board of County Comm'rs v. Crow, 65 P.3d 720, 727 (Wyo. 2003).

> [T]he Court finds under this deferential standard of scrutiny that the legislature's objective in enacting § 1402(f) is legitimate. Moreover, the means chosen to do so, *i.e.*, the classification, are grounded in a rational basis. Therefore, the Court incorporates its findings under its equal protection rational basis review and concludes likewise that § 31-5-1402(f) does not violate the substantive due process guarantees of the United States and Wyoming Constitutions.[310]

In the end, the United States District Court for the District of Wyoming concluded that section 1402(f) presents a substantive law that does not violate the separation of powers doctrine; equal protection concepts; or the due process clauses of the Wyoming and United States Constitutions. Even so, or perhaps especially so, Wyoming practitioners are left with unanswered questions.

E. Unanswered Questions

The *Dellapenta* majority suggests that the case applies only to pre-Wyoming statute section 31-5-1402 cases; the court refuses to address the seatbelt defense. This result leaves it to Wyoming practitioners to wonder exactly how the court might approach the defense if squarely confronted with it. The *Huff v. Shumate*[311] decision provides more guidance but does not address all potential issues and was not issued by the Wyoming Supreme Court.

Interestingly, the *Dellapenta* court arguably adopts the minority position of a common law duty to wear seatbelts.[312] While this common law duty may, at first blush, seem not to matter in light of the legislatively imposed duty, it does. In fact, the existence of a common law duty opens the door to several constitutional arguments that have been rejected by other states based upon the lack of a common law duty. As discussed,[313] the majority of states have determined that there is no common law duty to wear a seatbelt and that such issues are best left to legislative action. Courts also rely upon this determination to rule out constitutional challenges to the "access to courts" doctrine,[314] substantive due process challenges,[315] and equal protection challenges.[316] The existence, or lack thereof, of a common law duty to wear a seatbelt arises frequently. One ponders whether Wyoming's

310. *Huff*, No. 02-CV-1047-D at 30.
311. *Huff*, No. 02-CV-1047-D at 1.
312. Of course, *Huff* determined that a common law duty had been abrogated by the Wyoming Legislature. *Huff*, No. 02-CV-1047-D at 15 n.6.
313. *See supra* notes 9-33 and accompanying text regarding common law duty.
314. *See supra* notes 149-157 and accompanying text discussing the access to courts doctrine.
315. *See supra* notes 70-98 and accompanying text regarding due process.
316. *See supra* notes 99-131 and accompanying text regarding equal protection.

recognition of this duty will cause constitutional conflict. To date, the Wyoming Supreme Court has not addressed any of the constitutional challenges addressed herein and Wyoming practitioners are open to argue any of these challenges.

Nor has Wyoming had the opportunity to address the other potential exceptions to Wyoming statute section 31-5-1402(f), such as the mitigation of damages exception,[317] exceptions falling under products liability or the crashworthiness doctrine,[318] and the causation exception.[319] While the language of Wyoming statute section 31-5-1402(f) plainly excludes "[e]vidence of a person's failure to wear a safety belt" "in any civil action"[320] and the Wyoming Supreme Court has mentioned, in *dicta*, that the statute "prohibits in a civil action the admissibility of evidence of failure to wear a seat belt,"[321] one thing that is patently clear is that many courts have managed to carve out exceptions to statutes just as plain and unambiguous as Wyoming statute section 31-5-1402(f). Whether the courts look to legislative intent (and conclude that the legislature never intended seatbelt legislation to prohibit seatbelt evidence in crashworthiness cases) or whether they rule a portion of the statute unconstitutional, the result is the same: seatbelt precedent is dynamic in every jurisdiction. The uniqueness of Wyoming's situation is simply the lack of authority—no Wyoming Supreme Court case has directly interpreted Wyoming statute section 31-5-1402(f) on facts occurring after its effective date. One wonders how the following constitutional arguments would be resolved:

1. The Scope of Wyoming Statute Section 31-5-1402(f)

In construing any statute, courts must ascertain the legislature's intent as nearly as possible from the plain language of the statute.[322] A court is obligated to make sense of a statute and to give full force and effect to the legislative product.[323] A court "must not give a statute a meaning that will nullify its operation if it is susceptible of another interpretation."[324] Further,

> Courts have a duty to uphold the constitutionality of statutes which the legislature has enacted if that is at all possible, and any doubt must be resolved in favor of constitutionality. Though [the court] has the duty to give great deference to legislative pronouncements and to uphold constitutionality

317. *See supra* notes 200-227 and accompanying text regarding mitigation of damages.
318. *See supra* notes 158-184 and accompanying text regarding crashworthiness.
319. *See supra* notes 189-196 and accompanying text regarding causation.
320. WYO. STAT. ANN. § 31-5-1402(f) (LexisNexis 2004).
321. Dellapenta v. Dellapenta, 838 P.2d 1153, 1159 (Wyo. 1992).
322. White v. Fisher, 689 P.2d 102, 105 (Wyo. 1984).
323. *Id.*
324. *Id.*

> when possible, it is the court's equally imperative duty to declare a legislative enactment invalid if it transgresses the state constitution.[325]

The threshold question in reviewing any statute is whether the legislature possessed the constitutional power to enact the legislation in the first place. When the legislature oversteps its constitutional authority and attempts to legislate in an area reserved to another branch of government, the statute must be held unconstitutional regardless of whether judicial interpretation can yield an otherwise acceptable result.[326]

But, the argument can and has been made[327] that Wyoming statute section 31-5-1402(f) does not, in fact, preclude evidence of a person's failure to wear a seatbelt. The plain language of the statute provides that "[e]vidence of a person's failure to wear a safety belt *as required by this act* shall not be admissible in any civil action."[328] The legislature may have intended that evidence of failure to use a seatbelt in "violation of the act" would not be admitted in a civil action since a statutory violation generally may be used as evidence of negligence. That said, it could be argued that the primary purpose of Wyoming statute section 31-5-1402(f) is to prevent using the violation of the statute as evidence of negligence *per se*, not to hold inadmissible *all* evidence of seatbelt nonuse. *Dellapenta* may support this interpretation in the court's language that seatbelt statutes do not preclude all evidence of failure to wear a seatbelt.[329] Further, although one must recall that Wyoming statute section 31-5-1402(f) was not in effect at the time of the *Dellapenta* accident, the court nevertheless clearly concluded that it "would allow the introduction of evidence of seat belt non-use where an offer of proof is made to show a causal relationship between non-use and injuries to the occupant."[330] If a court concurs with this argument, then evidence of a person's failure to wear a seatbelt is not entirely inadmissible; it may be admissible to the issue of damages or issues other than negligence *per se*.

2. Separation of Powers

To a large extent, *Huff v. Shumate*,[331] suggests what the Wyoming Supreme Court would determine when faced with a separation of powers

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325. *Id.* (internal citations omitted).
326. *Id.*
327. *See* Brief for Defendant, Masters v. Willey et al., No. 28262, slip op. (Albany County, Wyo. Nov. 18, 2003). *See also* Brief for Plaintiff, Masters v. Willey et al., No. 28262, slip op. (Albany County, Wyo. Nov. 21, 2003).
328. WYO. STAT. ANN. § 31-5-1402(f) (LexisNexis 2003) (emphasis added).
329. Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992).
330. *Id.* at 1162.
331. *Order on Plaintiff's Motion in Limine Concerning Seat Belt Usage*, Huff v. Shumate, No. 02-CV-1047-D (Sept. 30, 2004).

issue. Nevertheless, some consideration of the possibilities is appropriate. The Wyoming Legislature undoubtedly has the power, within constitutional bounds, to enact a seatbelt statute affecting the substantive rights of its citizens. Still, the question remains whether the legislature has the power to enact a rule of "evidence," as it might be argued Wyoming statute section 31-5-1402(f) is. Evidentiary rules are procedural in nature.[332] The Wyoming Constitution does not permit the legislative branch to enact rules of procedure. Rather, "matters dealing [with] procedure . . . are entirely within the province of the Court."[333] On the other hand, "laws conferring substantive rights . . . must come from the legislature."[334]

The Wyoming Constitution provides:

> The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and not person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.[335]

The powers of the Wyoming Supreme Court are provided in Article 5, Section 2, as follows:

> The Supreme Court shall have general appellate jurisdiction, coextensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law.[336]

It is well recognized that, "the courts have the inherent right to prescribe rules" and this power is full, entire, complete, and absolute.[337] The inherent rulemaking power of Wyoming courts is,

> [L]imited only by their reasonableness and conformity to constitutional and legislative enactments. The legislative enactments referred to include those that deal with the substantive rights of persons or the jurisdiction of the court.

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332. *See In re* Estate of Reed, 672 P.2d 829, 834 (Wyo. 1983).
333. White v. Fisher, 689 P.2d 102, 106 (Wyo. 1984). *See* Squillace v. Kelley, 990 P.2d 497, 501 (Wyo. 1999); Kittles v. Rocky Mountain Recovery, Inc., 1 P.3d 1220 (Wyo. 2000).
334. *See* Nixon v. State, 51 P.3d 851, 854-55 (Wyo. 2002).
335. WYO. CONST., art. II, § 1.
336. WYO. CONST, art. V, § 2.
337. *White*, 689 P.2d at 106 (holding "the power of this court to control the course of litigation in the trial courts of this state is quite plenary").

> Matters dealing with procedure, particularly in the minor courts, are entirely within the province of this court.[338]

To the extent the legislature attempts to "dictate procedure in the inferior courts . . . the statute is unconstitutional."[339] The Wyoming Legislature also is well aware of the court's inherent and plenary rulemaking authority, as it has enacted Wyoming statute section 5-2-114, which states:

> The Supreme Court of Wyoming may from time to time adopt, modify and repeal general rules and forms governing pleading, practice, and procedure in all courts of this state, for promoting the speedy and efficient determination of litigation upon its merits.[340]

This statute refers to evidentiary rules and "does not constitute a delegation of rule-making authority from the legislature."[341] Rather, the statute simply reveals that "the legislature recognizes these pertinent constitutional provisions which afford [the supreme court] full authority over rules of practice and procedure and the Court's inherent power to prescribe rules."[342]

The Wyoming Constitution grants sole power to prescribe evidentiary rules to the judicial branch. The Wyoming Supreme Court has, in fact, promulgated Rules of Evidence that "govern proceedings in the courts of this state"[343] and govern the admissibility of evidence in civil trials. Yet, the argument can be made that the Wyoming Legislature has done the same by enacting Wyoming statute section 31-5-1402(f), which attempts to circumscribe the rules of evidence by enacting special legislation that renders a person's failure to wear a seatbelt inadmissible (even when such evidence is relevant, probative, and otherwise admissible under the rules of evidence).

On the other hand, the legislature may enact substantive laws.[344] The doctrine is not so rigid as to forbid any overlap between the branches of

338. *Id.*
339. *Kittles*, 1 P.3d at 1223. *See also* Nixon v. State, 51 P.3d 851, 854-55 (Wyo. 2002).
340. WYO. STAT. ANN. § 5-2-114 (LexisNexis 2003).
341. *White*, 689 P.2d at 107. *See also* Squillace v. Kelley, 990 P.2d 497, 501 (Wyo. 1999); Peterson v. State, 594 P.2d 978, 981-82 (Wyo. 1979).
342. *Squillace*, 990 P.2d at 501.
343. WYO. R. EVID. 101.
344. *Squillace*, 990 P.2d at 501.

government.[345] Further, the Tenth Circuit Court of Appeals held that an analogous Kansas statute[346] is substantive, holding:

> Kan. Stat. Ann. § 8-2504(c) is not simply a rule of evidence, which we could then ignore under our diversity jurisdiction, but represents the substantive law of Kansas, one concerned with the channeling of behavior outside the courtroom, and where as in this case the behavior in question is regulated by state law rather than by federal law, state law should govern even if the case happens to be in federal court.[347]

With persuasive authority and guidance from the Tenth Circuit, it is hard to imagine that the Wyoming Supreme Court would differ in opinion with respect to a separation of powers argument.

3. Equal Protection

Wyoming statute section 31-5-1402(f) also must be found constitutional under an equal protection analysis. "Equal protection mandated that persons similarly situated shall be treated alike, both in privileges conferred and liabilities imposed."[348] The Wyoming Constitution does not contain a "single" equal protection clause similar to that found in the Fourteenth Amendment to the United States Constitution;[349] rather, "it contains a variety of equality provisions, *viz*, Article 1, sections 2, 3, and 34; and Article 3,

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345. Greenwalt v. RAM Restaurant Corp., 71 P.3d 717, 724 (Wyo. 2003). ("It is elementary that public policy considerations are not the exclusive province of the judicial department. The legislative department of our state government lives and works in that province, too, because it exercises plenary legislative power.").

346. The statute provides a sanction for failure to wear a seatbelt and bars evidence of seatbelt nonuse in "any action for the purpose of determining any aspect of comparative negligence or mitigation of damages." Kan. Stat. Ann. § 8-2504 (LexisNexis 2003); Gardner v. Chrysler Corp., 89 F.3d 729, 736 (10th Cir. 1996).

347. *Id.* (internal quotations omitted).

348. Frank v. State, 965 P.2d 674, 678 (Wyo. 1998). *See also* Allhusen v. State, 898 P.2d 878, 884 (Wyo. 1995).

349. Article 1, Section 6 of the Wyoming Constitution provides: "No person shall be deprived of life, liberty or property without due process of law." WYO. CONST. art I, § 6. Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

section 27."[350] Since the Wyoming constitution affords "more robust protection against legal discrimination than the federal constitution,"[351] practitioners may wish to focus on Wyoming law interpreting equal protection, as opposed to federal law.[352]

In *Greenwalt v. RAM Restaurants*,[353] the Wyoming Supreme Court addressed equal protection and found that the "bedrock principles" of a rational basis review are:

> 1. The federal equal protection clause and the Wyoming equality provisions "have the same aim in view."
>
> 2. A classification in a statute . . . comes to the reviewing court bearing a strong presumption of validity.
>
> 3. A party attacking the rationality of the legislative classification has the heavy burden of demonstrating the unconstitutionality of a statute beyond a reasonable doubt.
>
> 4. Equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices and line-drawing. In areas of social policy, a statutory classification must be upheld if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.
>
> 5. The reviewing court never requires a legislature to articulate its reasons for enacting a statute; therefore, it is entirely irrelevant for equal protection purposes whether the conceived reason for the challenged distinction actually motivated the legislature. The absence of "legislative facts" explaining the distinction on the record has no significance in rational-basis review. In other words, a legislative choice is not subject to courtroom fact-finding and need not be based upon evidence or empirical data.

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350. Greenwalt v. RAM Restaurant Corp., 71 P.3d 717, 730 (Wyo. 2003).

351. Allhusen v. State, 898 P.2d 878, 884 (Wyo. 1995) (internal citations omitted). In Vasquez v. State, 990 P.2d 476 (Wyo. 1999) (and in Justice Golden's concurring opinion in Saldana v. State, 846 P.2d 604 (Wyo. 1993)), the Wyoming Supreme Court opined that the Wyoming Constitution may provide greater rights than its federal counterpart. The court set forth neutral criteria to analyze whether Wyoming's Constitution should be considered as extending broader rights to Wyoming citizens than its federal equivalent. *Id.*

352. This is true even though an equal protection analysis under the Wyoming Constitution may not differ significantly from an equal protection analysis under the United States Constitution. *Greenwalt*, 71 P.3d at 730.

353. *Id.*

To ascribe a purpose or purposes to the statutory classification, "the court may properly consider not only the language of the statute but also general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, enacted statements of purpose, formal public announcements, and internal legislative history. If an objective can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary." "The court is expected to safeguard constitutional values while at the same time maintaining proper respect for the legislature as a coordinate branch of government."

6. These restraints on judicial review have added force where the legislature must necessarily engage in a process of line-drawing. Defining the class of persons subject to a regulatory requirement inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and that the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration. Such scope-of-coverage provisions are unavoidable components of most social legislation. The necessity of drawing lines renders the precise coordinates of the resulting legislative judgment virtually unreviewable because the legislature must be allowed leeway to approach a perceived mischief incrementally.

7. The rational-basis test is "not a toothless one." It allows the court to probe to determine if the constitutional requirement of some rationality in the nature of the class singled out has been met.

8. Equal protection permits a state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others; it does not prevent a reasonable classification of the objects of legislation. The question in each case is whether the classification is reasonable in view of the object sought to be accomplished by the legislature. All reasonable doubts are to be resolved in favor of the validity of the statute. The legislature is presumed to have acted upon a knowledge of the facts and to have had in view the promotion of the general welfare of the people as a whole. The legislature having presumably determined that a difference of conditions exists rendering the legislation proper, the court must be able to say, upon a critical examination of the statute in the light of the object sought to be accom-

> plished, or the evil to be suppressed, that the legislature could not reasonably have concluded that distinctions existed relating to the purpose and policy of the legislation.[354]

The court uses a multi-part test to analyze equal protection challenges: (1) Identify the legislative classification at issue; (2) identify the legislative objectives; and (3) determine whether the legislative classification is rationally related to the achievement of an appropriate legislative purpose. In this last element the court is evaluating whether the legislature's objectives justify the statutory classification.[355]

The court addressed equal protection issues in *Huff v. Shumate*.[356] Yet, this opinion clearly demonstrates "grave doubts" about the statute and concerns regarding the real-life application of Wyo. Stat. section 31-5-1402(f).[357] With respect to Wyoming statute section 31-5-1402(f), opponents may assert that the classification is that of defendants who are deprived of a valid defense where there is credible evidence that a plaintiff's injuries were caused, in whole or in part, by that person's failure to wear a seatbelt. However, even proponents likely will concede that the legislation draws an explicit distinction between vehicle occupants who wear seatbelts and those who do not. That distinction results in an implicit distinction between defendants sued by belted plaintiffs and those sued by unbelted plaintiffs. Because this class is not one that traditionally has been subjected to disfavor by Wyoming laws, the factor is essentially "neutral" and a rational basis standard of review is appropriate.[358]

The rational basis test analysis requires a court to "ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution."[359] The purpose of Wyoming's seatbelt statute likely is to save lives, to encourage seatbelt use, and to prevent enhanced injuries by requiring the use of seatbelts by vehicle occupants. But, opponents may argue that nothing justifies disparate treatment among motor vehicle accident defendants and there is no reason to reward those who violate the statute. Clearly, the argument goes, all individuals have a duty to act reasonably and protect themselves from harm and/or to mitigate damages they may suffer in an accident. However, the statute differentiates among individuals based upon plaintiffs who failed to "buckle up." Yet, encouraging the use of seatbelts while preserving the right

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354. *Id.* (internal citations omitted).
355. *Id. See also* Allhusen v. State, 898 P.2d 878, 885-86 (Wyo. 1995).
356. *Order on Plaintiff's Motion in Limine Concerning Seat Belt Usage*, Huff v. Shumate, No. 02-CV-1047-D, 15 (Sept. 30, 2004).
357. *Id.* at 24.
358. *See* Armijo v. Atchison, 754 F. Supp. 1526, 1535 (D.N.M. 1990).
359. RONALD D. ROTUNDA & JOHN E. NOWAK, CONSTITUTIONAL LAW, § 18.3 (6th Ed. 1999).

to compensation for injuries caused by tortfeasors has been held a permissible state purpose by many other courts.[360] If the latter position is believed, the statute survives the rational basis test and does not violate the equal protection clause of either of the United States or the Wyoming constitutions.

Yet, defense counsel may argue that by excluding seatbelt evidence, the legislation actually discourages seatbelt use (or certainly does not *encourage* it). Defendants in actions where the plaintiff's injuries were caused or enhanced by the failure to wear a seatbelt are essentially deprived of tort defenses otherwise available at common law. The ultimate question, of course, is whether there is a rational basis for the legislature to enact a rule regarding the admissibility of seatbelt evidence. Arguments can be made either way. The majority of courts have held a rational basis exists.[361] However, Wyoming has not addressed the issue. If successfully argued that the statute is in direct conflict with the state interest of encouraging seatbelt use, then an equal protection challenge may prevail. Additionally, the argument that the legislature wanted to ensure full and fair compensation for accident victims or to ensure that those who cause motor vehicle accidents do not escape liability for damages caused by the plaintiff's negligence may fall flat as an irrational adoption of a cost-shifting scheme for these tort actions.[362]

Another rational basis for these statutes historically was that the effectiveness of seatbelts in preventing injuries was unestablished and somewhat suspect. As a result, legislatures deemed it appropriate to encourage seatbelt use through such legislation while minimizing the penalties for noncompliance. More recently, studies have shown that seatbelts, in fact, reduce injuries and save lives. Thus, the effectiveness of this initial rationale behind the statute is lessened. For example, in reviewing the constitutional-

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360. *See Armijo*, 754 F. Supp. at 1535; Bower v. D'Onfro, 663 A.2d 1061, 1065 (Conn. 1995); Cressy v. Grassman, 536 N.W.2d 39, 43 (Minn. 1995); C.W. Matthews Contracting Co., Inc. v. Grover, 428 S.E.2d 796, 798 (Ga. 1993) ("Plainly, encouraging the use of seat belts is a rational exercise of legislative power. We do not believe that imposing limitations upon the means of such encouragement is irrational.").

361. *See* notes 98-128 and accompanying text regarding equal protection.

362. Strict products liability originally was adopted, in part, because it was believed that the "costs of damaging events due to defectively dangerous products can best be borne by the enterprises who make and sell these products." PROSSER AND KEETON, TORTS 692 (5th ed.). *See also* Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 342-44 (Wyo. 1986). The reasons for such cost-shifting was not due to "deep pockets" of manufacturers but an assumption that the costs of accidents would be shifted to product users in the form of higher prices. *Id.* Further, the Wyoming Supreme Court recently found in a non-products case that "the risk of harm should fall on the person best able to prevent that harm." Borns v. Voss, 70 P.3d 262, 274 (Wyo. 2003). The argument might be made that similar policy reasons do not exist in seatbelt cases, as any passenger can prevent harm to himself by simply using his seatbelt. Further, the defendant is unable to "spread" the costs of unwarranted liability to other drivers; thus, the risk-bearing economic theory may be inapplicable. Finally, even in products liability cases, a plaintiff's recovery is reduced pursuant to Wyoming's comparative fault statute for that portion of injuries caused by the plaintiff's own failure to use ordinary care.

ity of Wyoming's Guest Statutes, the Wyoming Supreme Court concluded that what once was a rational basis for a statutory classification may lose the presumption of rationality with changing times.[363] The same may be said of the seatbelt classification, which arguably rewards those who fail to wear seatbelts by excusing them from exercising ordinary care.

4. Potential Conflicts with Wyoming Statute Section 1-1-109

In 1973, the Wyoming Legislature adopted comparative negligence.[364] The primary purpose of the legislation was to ameliorate the harsh effects of contributory negligence, which barred recovery when the plaintiff was negligent in causing his own injuries. Under comparative negligence, a plaintiff's recovery was diminished in proportion to the amount of negligence attributed to that person. Additionally, the original statute only applied when the plaintiff was, in fact, comparatively negligent.[365]

In 1986, the statute was amended to encompass all "fault," as opposed to "negligence."[366] Additionally, the legislature repealed Wyoming statute section 1-1-110, which previously provided for contribution among tortfeasors, and legislatively abrogated the doctrine of joint and several liability.[367] The purpose of this legislative action was to institute a system whereby "a defendant is liable only to the extent of his percentage of fault as compared to all other actors."[368]

The statute was again amended in 1994 to clarify that the term "fault" encompassed essentially all theories of liability for tort claims, including strict products liability and breach of warranty and also subsumed those tort claims as well as tort defenses based on the plaintiff's fault (such as assumption of the risk and misuse of a product).[369] The result was such

363. *See* Nehring v. Russell, 587 P.2d 67 (Wyo. 1978). This case involved a constitutional challenge on equal protection grounds to a statute that affected the relative rights of parties involved in a motor vehicle accident. The court held that Wyoming's Guest Statute, Wyo. Stat. Ann. § 31-5-1116 (Michie 1977), was not repealed by the adoption of comparative negligence; that the statute did not violate the guarantees found in the Fourteenth Amendment to the United States Constitution, but that the statute did violate the equal protection guarantees found in the Wyoming Constitution. In striking down the statute, the court noted that, while encouraging hospitality may have been a rational basis for the statute back when automobiles were not as prevalent, "such justification has been eroded away by time and changing circumstances." *Id.* at 77-78. The court found it "irrational to reward generosity by allowing the host to abandon ordinary care and by denying to nonpaying guests the common law remedy for negligently inflicted injury." *Id.* at 78.

364. WYO. STAT. ANN. § 1.7.2 (Michie 1973) (later renumbered to WYO. STAT. ANN. § 1-1-109).

365. *See* Anderson Hwy. Signs & Supply, Inc. v. Close, 6 P.3d 123, 125 (Wyo. 2000) (citing Palmero v. Cashen, 627 P.2d 163, 166 (Wyo. 1981)).

366. WYO. STAT. ANN. § 1-1-109 (Michie 1986).

367. Anderson Hwy. Signs & Supply, Inc. v. Close, 6 P.3d 123, 126 (Wyo. 2000).

368. 1986 Wyo. Sess. Laws ch. 24. (Preamble to Wyo. Stat. Ann. § 1-1-109 (1986))

369. WYO. STAT. ANN. § 1-1-109(a)(iv) (Michie 1994).

that, regardless of the basis of liability, a defendant pays only for his own share of the total fault (and is not answerable for the negligence of other actors).[370]

Wyoming's comparative fault system permeates virtually every aspect of civil tort litigation. The overriding public policy behind the adoption and subsequent modifications of comparative fault was to guarantee basic fundamental fairness to each tort litigant by insuring that each party is held responsible only for that portion of the damages caused by his fault.

On the opposite end of the spectrum, it may be asserted that Wyoming statute section 31-5-1402(f) thwarts the public policy behind comparative negligence by relieving a person of responsibility for failing to wear a seatbelt (and thereby "causing" or "aggravating" injury to himself). While the Wyoming Legislature has stated that tortfeasors should be held liable only for that portion of damages for which they bear proportional fault, the seatbelt legislations seems to indicate the opposite.

Every person in Wyoming has a duty to exercise ordinary care for his own safety.[371] "Ordinary care" means the degree of care that might reasonably be expected of the ordinary careful person under the same or similar circumstances.[372] It lies in the jury's province to determine how an ordinary careful person would act.[373] One may wonder, then, why individuals who fail to wear a seatbelt should be absolved of this responsibility when there is no dispute that wearing a seatbelt amounts to the exercise of ordinary care for one's own safety per the Wyoming Supreme Court[374] and as has been inherently recognized by the Wyoming Legislature in the adoption of legislation mandating that vehicle occupants wear seatbelts.[375]

Litigants may assert that persons who fail to wear a seatbelt and, as a result, cause or enhance their injuries, do not deserve differential treatment from any other accident victim, nor should their recoveries be increased beyond those damages proximately caused by a given defendant. Persons who violate other motor vehicle statutes (such as failing to maintain control of a vehicle, failure to yield the right of way, or failure to obey the speed limit) will have that conduct assessed by a jury and damages reduced by their share of total fault. Yet, the legislature has determined that those who fail to wear seatbelts should not face the same results.

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370. WYO. STAT. ANN. §§ 1-1-109(d) & (e) (Michie 1994).
371. Hape v. Rush, 492 P.2d 974, 977 (Wyo. 1972).
372. Nehring v. Russell, 582 P.2d 67 (Wyo. 1978).
373. *Id.*
374. Dellapenta v. Dellapenta, 838 P.2d 1153, 1159 (Wyo. 1992) (taking judicial notice that "[d]efinite and substantial evidence exists to support the effectiveness of seat belts in preventing death and reducing injuries").
375. WYO. STAT. ANN. § 31-5-1402 (Lexis 2000).

But, proponents will suggest any conflict between Wyoming statute section 1-1-109 and Wyoming statute section 31-5-1402(f) is illusory. The seatbelt statute limits the effect of the comparative fault statute under specific circumstances, which limitation is within the legislature's authority. For example, in a dram shop case, the Wyoming Supreme Court stated: "While it is true that the legislature in [section 1-1-109] espoused the comparative negligence approach for negligence actions, this is not to say that the legislature is precluded from subsequently limiting, or even rejecting altogether, the application of comparative negligence in negligence actions arising out of particular circumstances."[376] The court obviously recognized that the legislature can choose to alter the effect of comparative fault in certain situations by eliminating a particular cause of action. It follows, then, that the legislature may rationally choose to eliminate a particular type of evidence in certain situations, as it arguably has done with Wyoming statute section 31-5-1402(f).

Finally, a basic principle of statutory interpretation may resolve the apparent tension between the statutes. Specific statutes control over more general ones involving the same subject.[377] The comparative fault statute is general; it deals with all types of fault and negligence actions. The seatbelt statute, on the other hand, is specific to automobile accident cases in which a plaintiff fails to wear a seatbelt. Perhaps then, the simple answer is that the seatbelt statute controls.

5. Due Process

> *"[D]ue process is an elusive concept; its exact boundaries are undefinable, and its content varies according to specific factual contexts."*[378]

There are two types of due process: procedural and substantive. Procedural due process "relates to the requisite characteristics of proceedings looking toward a deprivation of life, liberty, or property. . . ."[379] Accordingly, notice and opportunity to defend must be afforded the individual to be affected, and the deprivation must be resolved in a manner consistent with essential fairness.[380] But the whole concept of due process:

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376. Greenwalt v. RAM Restaurant Corp., 71 P.3d 717, 735 (Wyo. 2003) (quoting Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300, 309 (Idaho 1999)).

377. Board of County Comm'rs for Sublette County v. Exxon Mobil Corp., 55 P.3d 714, 723 (Wyo. 2002).

378. Mortgage Guaranty Ins. Corp. v. Langdon, 634 P.2d 509, 527-28 (Wyo. 1981) (McClintock, J. & Raper, J., dissenting) (quoting 16A AM. JUR. 2D *Constitutional Law* § 807 (1981)).

379. *Id.* (McClintock, J. & Raper, J., dissenting) (quoting 16A AM. JUR. 2D *Constitutional Law* § 813 (1981)).

380. *Id.* at 527 (McClintock, J. & Raper, J., dissenting).

> [R]eaches those situations where the deprivation of life, liberty, or property is accomplished by legislation which, by operating in the future, can, *given even the fairest procedure in application* to individuals, destroy the enjoyment of all three. Substantive due process may be roughly defined as the constitutional guaranty that no person shall be deprived of his life, liberty, or property for *arbitrary reasons,* such a deprivation being constitutionally supportable only if the conduct from which the deprivation flows is proscribed by *reasonable legislation* (that is, legislation the enactment of which is within the scope of the legislative authority) *reasonably applied* (that is, for a purpose consonant with the purpose of the legislation itself).
>
> It has been said that protection from arbitrary action is the essence of substantive due process, and similarly, that, in substantive law, due process may be characterized as a standard of *reasonableness,* which is similar to the standard or test of *'rational grounds'* used in determining a claim of unequal protection of the laws. . . .[381]

A substantive due process analysis of Wyoming statute section 31-5-1402(f) encompasses these arguments. As discussed earlier,[382] the statute must be reasonably related to an appropriate interest. The same arguments made under the equal protection category can again be made with respect to substantive due process.[383] If the legislation is arbitrary and unreasonable, it must fail.

Likewise, a statute that does not implicate or infringe upon a fundamental right will withstand substantive due process review if the legislature rationally could have concluded that it serves a legitimate state interest.[384] Because Wyoming's seatbelt legislation does not involve a fundamental right, the rational basis test demands only a "reasonable fit" between a governmental purpose Wyoming statute section 31-5-1402 will assert that the statute rationally pursues the legitimate state purpose of encouraging indi-

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381. *Id.* at 527-28 (McClintock, J. & Raper, J., dissenting) (quoting 16A AM. JUR. 2D *Constitutional Law* § 816 (1981)) (footnotes omitted and all emphasis added).

382. *See* notes 313-326 and accompanying text.

383. *Order on Plaintiff's Motion in Limine Concerning Seat Belt Usage*, Huff v. Shumate, No. 02-CV-1047-D, 29-30 (Sept. 30, 2004).

384. 16B AM. JUR. 2D *Constitutional Law* § 912 (2004). *See* Carrasquilla v. Mazda Motor Corp., 166 F. Supp. 2d 181, 186 (D. Pa. 2001) (stating that neither a fundamental nor important right is implicated by the evidentiary preclusion in Pennsylvania's seatbelt statute); Bower v. D'Onfro, 663 A.2d 1061, 1065 (Conn. 1995) (illustrating that Connecticut's statute eliminating the seat belt defense on the issue of causation did not deny the defendants due process because it did not preclude them from making other defenses as to causation); Cressy v. Grassman, 536 N.W.2d 39, 43 (Minn. 1995).

viduals to use seatbelts, which preserving the right to compensation for accidents caused by negligent tortfeasors. They clearly can rely on numerous other courts that have held that similar statutes promote the same legitimate governmental purpose and, therefore, do not violate substantive due process.[385]

VIII. CONCLUSION

Whether or not the state of the law is settled in Wyoming, the fact of the matter remains that the seatbelt defense is alive and well in many forms and in many jurisdictions. Wyoming practitioners are faced with a statute that has yet to be challenged in the Wyoming Supreme Court—on a constitutional basis and as to its application to crashworthiness or hybrid situations. Certainly those defenses and arguments can be made, and oftentimes successfully. Further, where Wyoming arguably has taken the minority position in recognizing a common law duty to wear a seatbelt, those challenges may have even more viability than in other states. The Wyoming Supreme Court must be alert to the impending challenges.

In the meantime, and perhaps more importantly in light of Judge Downes' comments in *Huff v. Shumate*,[386] the Wyoming Legislature should consider a timely review of the viability and scope of Wyoming statute section 31-5-1402(f) in light of recent developments throughout the states. It may be pertinent to consider revising the statute or, at the very least, clarifying it.

As it stands now, practitioners must look to the language in *Dellapenta*;[387] the plain language of the statute; and, perhaps, Judge Downes' conclusions in *Huff* in making their arguments. In any event, the ever-changing nature of the seatbelt defense appears in its infancy in Wyoming, leaving practitioners in for a wild ride.

385. *See, e.g., Carrasquilla*, 166 F. Supp. 2d at 186; Armijo v. Atchison, 754 F. Supp. 1526, 1535 (D.N.M. 1990); Mott v. Sun Country Garden Products, Inc., 901 P.2d 192, 197 (N.M. App. 1995); C.W. Matthews Contracting Co. v. Gover, 428 S.E.2d 796, 798 (Ga. 1993); Bender v. Carr, 532 N.E.2d 149, 181-82 (Ohio 1987).

386. *Huff*, No. 02-CV-1047-D.

387. Dellapenta v. Dellapenta, 838 P.2d 1153 (Wyo. 1992).