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While the COVID-19 crisis has forced societies and governments to confront new challenges and answer new questions, it has also renewed and reignited longstanding debates about the extent of individuals' obligations to each other.[1] In particular, the American body politic is once again embroiled in conflict over the reach of an individual's personal choices and the extent to which consideration of the potentially harmful effects of our choices on others should shape individual behaviors.[2] Today, this fight centers on public health measures intended to reduce the spread and severity of COVID-19, such as masking, distancing, and vaccination.[3] Debates rage over where the freedom of individual choice—a nearly-sacred tenant of the gospel of American exceptionalism—intersects with and must yield to the interests of others. Governments at all levels have largely responded to the current crisis with ad hoc improvisation and strained efforts to balance public health imperatives against real and imagined threats to individual liberty.

These clumsy attempts include carving out a creative range of exemptions to masking, testing, and vaccine requirements, as well as draping businesses with blanket immunity shields that protect against

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1. *See* Susan Page & Nada Hassanein, *No Vaccination? Americans Back Tough Rules and Mask Mandates to Protect the Common Good*, USA TODAY (Aug. 22, 2021), https://www.usatoday.com/story/news/nation/2021/08/22/americans-back-mask-covid-vaccine-mandate-protect-common-good/8134392002/.

2. Page, *supra* note 1.

3. *Id.*

liability even for grossly negligent conduct.[4] Each of these measures has met ferocious opposition from one camp or another, and elected and aspiring public officials have weaponized the COVID-19 crisis to the point that outbreaks of fights at local school board meetings regularly make national news.[5]

While the pandemic created too many unprecedented challenges, the debate over the line between public safety and personal choice is anything but new.[6] A few decades ago, that debate manifested around state laws mandating seatbelt use by drivers and occupants of motor vehicles.[7] Then, as now, states facing an epidemic of traffic injuries and fatalities struggled to persuade a reluctant population to take the basic measure of buckling up.[8] Then, as now, the messy politics of legislating public safety resulted in the imposition of mandates coupled with broad liability shields.[9]

It remains far too early to understand or appreciate the long-term impacts of the current iteration of legislative attempts to protect the public in the face of vocal opposition. However, states can learn from the seatbelt debate that trading blanket immunity for safety mandates can create problems that vex the judicial branch even long after societal and technological changes have minimized the utility of such liability shields.

This Article examines one example of the immunity grants that legislative bodies too often bake into laws passed to address public safety emergencies: prohibition of the seatbelt defense. The Article begins by explaining the theory behind the defense and tracing the history of the passage of seatbelt mandate laws that incorporate prohibition of the defense.[10] It then illustrates scenarios in which

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4. Chris Marr, *Covid-19 Shield Laws Proliferate Even as Liability Suits Do Not*, BLOOMBERG LAW (Jun. 8, 2021), https://news.bloomberglaw.com/daily-labor-report/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not.

5. Ivana Saric, *The Fight Over Mask Mandates in Schools Turns Violent*, AXIOS (Aug. 26, 2021), https://www.axios.com/mask-school-mandate-violence-covid-3abff916-242d-4db5-87f7-b4314dc57c3d.html.

6. Philip Bump, *When the Battle Over American Freedom Was Centered on Seat Belt Laws*, WASHINGTON POST (Sept. 16, 2021), https://www.washingtonpost.com/politics/2021/09/16/when-battle-over-american-freedom-was-centered-seat-belt-laws/.

7. Bump, *supra* note 6.

8. *Id.*

9. *See infra* Section II.

10. This Article does not examine judicially created limitations on seatbelt nonuse evidence, which typically centered on absence of any common law duty to wear a seatbelt. For an overview of court decisions limiting the seatbelt defense, *see* Steven B. Hantler et

banning the defense creates breakdowns of fundamental tort principles and undermines justice. Next, the Article discusses the original justifications offered by opponents of the seatbelt defense and highlights the ways behavioral and technological changes have rendered those justifications empty. Finally, the Article argues that piecemeal, limited exemptions to bans on the seatbelt defense are ineffective and therefore, the Article advocates for full reinstatement of the seatbelt defense.

I. THE SEATBELT DEFENSE: A LEGAL THEORY DEEPLY ROOTED IN TORT PRINCIPLES

Simply, the seatbelt defense is the use of a vehicle occupant's failure to wear a seatbelt as a defense in a tort action.[11] The defense takes multiple forms, each presenting a straightforward application of the basic principles of fairness underlying tort law. This Section examines several applications of the seatbelt defense. While it does not purport to offer an exhaustive review of potential applications for the defense, this Section illustrates the most common—and most commonsense—applications for the seatbelt defense in modern tort law.

A. Contributory and Comparative Negligence

It is not difficult to imagine how often a collision plaintiff's failure to wear a seatbelt could amount to contributory negligence, particularly in a simple two-car, two-person collision case. If a defendant presents evidence that the plaintiff acted negligently by failing to buckle up, and that negligence was a cause that contributed to the plaintiff's damages, our most basic understanding of tort law as a vehicle to compensate the innocent plaintiff demands at least a reduction in the plaintiff's award.[12]

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al., *Moving Toward the Fully Informed Jury*, 3 GEO. J. LAW & PUB. POLICY 21, 32–36 (2005).

11. *See* Hansen v. Howard O. Miller, Inc., 460 P.2d 739, 742–43 (Idaho 1969); *see also* Robert F. Cochran, Jr., *New Seat Belt Defense Issues: The Impact of Air Bags and Mandatory Seat Belt Use Statutes on the Seat Belt Defense, and the Basis of Damage Reduction Under the Seatbelt Defense*, 73 MINN. L. REV. 1369, 1371 (1989) (noting that the "seat belt defense in an automobile personal injury case reduces the damages for which the defendant is responsible, because the plaintiff's failure to wear a seat belt caused a portion of plaintiff's damages.").

12. Bentzler v. Braun, 149 N.W.2d 626, 640–41 (Wis. 1967) ("a matter of common knowledge, an occupant of an automobile either knows or should know of the additional safety factor produced by the use of seat belts," and therefore is "in those cases where seat belts are available and there is evidence before the jury indicating a causal relationship

American tort law first recognized the concept of contributory negligence in 1824, when Massachusetts adopted the defense because a plaintiff should not recover "unless . . . he used ordinary care; for without that, it is by no means certain that he himself was not the cause of his own injury."[13] American jurisdictions quickly followed Massachusetts' lead and adopted contributory negligence, relying on Lord Ellenborough's famous declaration that, "[a] party is not to cast himself upon an obstruction which has been made by the fault of another, and avail[s] himself of it, if he do[es] not himself use common and ordinary caution to be in the right."[14] Modern shifts toward more forgiving standards of comparative negligence and apportioned fault still rely on the principle that the "idea of fairness . . . calls on tort law to take account of the plaintiff's contributory negligence in ascertaining the liability of a negligent defendant[.]"[15] These basic tenets of tort law require juries to consider whether a plaintiff's failure to wear a seatbelt breached the duty to exercise ordinary care and whether such breach caused or contributed to the plaintiff's injuries.

1. Failure to Wear a Seatbelt is Negligent Conduct

Negligence law is rooted in objective reasoning, and whether certain conduct is negligent depends on jurors' conceptions of the general "reasonable person."[16] In general, however, modern tort law applies a loose formula to determine whether a party exercised reasonable care.[17] Learned Hand's famous formula holds that the duty of reasonable care depends upon the relationship between the likelihood of harm, the gravity of potential harm, and the burden of taking steps to prevent or mitigate the harm.[18] Where the likelihood or gravity of potential harm

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between the injuries sustained and the failure to use seat belts, it is proper and necessary to instruct the jury in that regard.").

13. Smith v. Smith, 19 Mass. (2 Pick.) 621, 623 (1824).

14. Irwin v. Sprigg, 6 Gill 200, 205 (Md. 1847) (quoting Butterfield v. Forrester, 103 Eng. Rep. 926, 927 (K.B. 1809)). For an overview of American adoption of the doctrine of contributory negligence, *see* Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 839–41 (1946).

15. Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 725 (1978) (noting that "the fairness idea is entirely satisfied by a liability-dividing rule . . . .").

16. *See* RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. L. INST. 1965) ("[t]he standard [of conduct] which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual.").

17. UDR Texas Props., L.P. v. Petrie, 517 S.W.3d 98, 106–07 (Tex. 2017) (Willett, J., concurring).

18. United States v. Caroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

increases, the duty to take preventive or mitigative measures increases proportionally, especially if the burden of taking such measures is low.[19] Conversely, where the burden to prevent harm is high, tort law tolerates a higher likelihood and greater gravity of potential harm.[20]

Applying these general principles to collision cases, failure to wear a seatbelt unquestioningly amounts to negligent conduct.[21] Refusing to wear a belt dramatically increases the likelihood and gravity of potential injuries, and the burden of belting is negligible.[22] Accordingly, where a plaintiff's injuries were actually or proximately caused by their own failure to take reasonable care by buckling up, the seatbelt defense should apply to prevent a plaintiff from profiting from their own negligence.

a. Failure to Buckle Up Increases Potential for and Degree of Injury

The life-saving benefits of wearing a seatbelt are commonly known.[23] Unrestrained vehicle occupants are both more likely than belted occupants to suffer injuries in a collision and more likely to suffer more severe injuries than their belted counterparts.[24] Unbelted occupants are more likely than their belted counterparts to suffer injuries disproportionate to the force of impact.[25] A light tap on the rear end of a vehicle can send an unrestrained driver or front-seat passenger into the steering wheel or through the windshield, causing injuries—or more severe injuries—where a restrained driver would suffer no or only mild injuries.[26] Moreover, an unrestrained occupant's body is subject to the full brunt of forces of movement a collision creates, increasing the likeliness and severity of spine and soft tissue injuries.[27] In general, a vehicle occupant who wears a seatbelt is 45% less likely to suffer fatal

19. *Id.*

20. *Id.*

21. *See* Cullen v. Timm, 184 Ga. App. 80, 83, 360 S.E.2d 745, 749 (1987) (affirming jury award of equal amounts to plaintiffs with disproportionate injuries because the failure of one plaintiff to wear seatbelt while other plaintiff was restrained authorized jury "to take into consideration such issues as ordinary care, comparative negligence, and assumption of the risk with special reference to" the unrestrained plaintiff, "and to reduce accordingly what might conceivably been a larger award of general damages.").

22. *Bentzler*, 149 N.W.2d at 639–40.

23. *Id.* at 640.

24. *Traffic Safety Facts: Occupant Protection*, NHTSA (Jun. 2020), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812967.

25. *Id.* at *8.

26. *Id.*

27. *Id.*

injuries and 50% less likely to suffer severe injuries in a collision than an unrestrained occupant.[28]

Plainly, refusing to wear an available safety belt increases the likelihood that the plaintiff will suffer harm as well as the degree of harm the plaintiff is likely to suffer. Because the burden of wearing a safety belt is negligible, especially weighed against the increased risk and gravity of harm, failing to wear an available seatbelt is negligent conduct.

b. Burden of Belting is Negligible

Especially compared to the degree of risk buckling up prevents, the burden of wearing a seatbelt is negligible. Since 1968, all new motor vehicles manufactured and sold in the United States have been required to incorporate seatbelts.[29] As a result, nearly all passenger cars and trucks on American roads are equipped with seatbelts. Buckling up therefore imposes no additional cost on drivers or purchasers of passenger vehicles.

Additionally, since safety belts were introduced in vehicles, seatbelt comfort has improved steadily. Product designers now take account of differences in body shapes and sizes, and most safety belt systems feature multi-point adjustability to make buckling up more comfortable than ever. Even while seatbelts have become more comfortable, accessories advertised to make vehicle occupants even more comfortable are widely available. Simply, buckling up does not create discomfort sufficient to meaningfully burden a vehicle occupant.

While belted occupants sometimes suffer injuries such as seatbelt rash or bruising, the frequency and severity of injuries caused by seatbelts have decreased as seatbelt systems—along with other vehicle safety features—have incorporated new technologies. The potential for seatbelt injury imposes the greatest arguable burden on drivers and passengers, but that burden shrinks in proportion to the protection that seatbelts provide.[30] Wearing a seatbelt reduces a vehicle occupant's chances of suffering serious injury by 50%.[31] The risk of seatbelt injury also fails to meaningfully burden a vehicle occupant.

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28. *Id.* at *6.

29. Federal Motor Vehicle Safety Standard Act, 49 C.F.R. § 571.208 (2021); s*ee* Michelle R. Mangrum, *The Seat Belt Defense: Must the Reasonable Man Wear a Seat Belt*, 50 MO. L. REV. 968, 979–80 (1985).

30. Mangrum, *supra* note 29, at 968.

31. *Traffic Safety Facts: Seat Belt Use in 2010—Overall Results*, NHTSA (Sept. 2010) http://www-nrd.nhtsa.dot.gov/Pubs/811378.pdf.

Because seatbelt use dramatically decreases both the likelihood and severity of potential collision-related injuries, and wearing a seatbelt imposes no meaningful burden on vehicle occupants, failure to buckle up fits squarely into tort law's most basic understanding of negligent conduct.

2. Negligent Failure to Belt Can Cause Damages

Failure to wear a belt can actually and proximately cause huge damages.[32] Where an unrestrained vehicle occupant suffers injuries they would not have sustained if they wore a seatbelt, the failure to belt is the actual cause of the occupant's injuries.[33] Moreover, if the failure to buckle up causes more severe injuries to the unrestrained occupant than the same collision would yield a belted occupant, the occupant's failure to wear the seatbelt is a superseding intervening cause that should at least factor into any calculation of damages or apportionment of fault.[34]

B. Product Liability Defense

Another straightforward application for the seatbelt defense arises in product liability cases centered on challenges to a vehicle's crashworthiness. For example, an unrestrained plaintiff who brings a products liability claim against an auto manufacturer should be subject to the defense that he misused the product. If a plaintiff had actual or constructive knowledge of a product's safety features but failed to use them and therefore suffered an injury, the defendant is entitled to the defense that the plaintiff's misuse undermines a claim that the product was defectively designed.[35]

In the automobile context, design defect cases typically hinge on a vehicle's crashworthiness—that is, how well a vehicle protects its occupants during common collision scenarios.[36] Crashworthiness cases have produced many of the "nuclear verdicts" that cause outrage and outcry from industry groups and defense bars.[37] Plaintiffs and their

32. *See* Cochran, *supra* note 11, at 1374–75.

33. *Id.*

34. *See* Leonard Charles Schwartz, *The Seat Belt Defense and Mandatory Seat Belt Usage: Law, Ethics, and Economics*, 284 IDAHO L. REV. 275, 284–85 (1988).

35. RESTATEMENT (THIRD) OF TORTS, *Products Liability*, § 15 cmt. b (AM. L. INST. 1998).

36. Blankenship v. General Motors Corp., 406 S.E.2d 781, 782–83 (W. Va. 1992).

37. *See, e.g., Nuclear Verdict Fact Sheet*, INSURANCE COUNCIL OF TEXAS, https://www.insurancecouncil.org/userfiles/uploads/Nuclear_verdicts_fact_sheetr.pdf (last visited Jan. 27, 2022).

counsel argue that such verdicts are necessary to serve the deterrent purpose of tort law,[38] which seeks to compel behavior that benefits the public.[39] Automobile manufacturers are too rich (and well-insured) to be affected by damages awards that fairly compensate plaintiffs even in catastrophic cases. Accordingly, eye-popping punitive damages awards are necessary to compel manufacturers to design and produce safer vehicles.

While that argument is persuasive, manufacturers have an equally strong argument that plaintiffs in crashworthiness cases should be subject to the seatbelt defense.[40] Today's vehicles no longer treat safety as an afterthought; automakers no longer retrofit vehicles designed for speed or performance with rudimentary safety belts. Rather, modern cars and trucks are equipped with holistic, integrated safety systems whose components operate in tandem to keep occupants safe.[41] Accordingly, a plaintiff who fails to buckle their seatbelt uses the vehicle's safety system and should be subject to the traditional products liability defense of misuse.[42]

II. BANS ON THE DEFENSE: THE PRICE FOR SEATBELT MANDATES

Unsurprisingly, then, as automobiles began including safety devices like seatbelts, courts recognized the applicability of the seatbelt defense.[43] Despite the seatbelt defense's deep roots in tort law fundamentals, most states have enacted some statutory limitation or outright prohibition of the seatbelt defense.[44] Most of these prohibitions were enacted with and are codified within statutes mandating seatbelt

38. *See* Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which is the Optimal Negligence Rule*, 24 N. ILL. U. L. REV. 41, 46–47 (2003) (outlining "[t]he three principal rationales for tort law" as "deterrence, compensation and corrective justice.").

39. *Id.*

40. The seatbelt defense also applies where tort law and contract law overlap. Where plaintiffs sue automakers on breach of warranty principles, failure to wear an available seatbelt is relevant to a plaintiff's duty to mitigate damages. James Joseph Gettel, *Comparative Fault as a Defense to Breach of Warranty under the Uniform Commercial Code*, 14 N.C. CENT. L.J. 628 (1984).

41. *See* Cochran, *supra* note 11, at 1380.

42. Gardner by and through Gardner v. Chrysler Corp., 89 F.3d 729, 737 (10th Cir. 1996) (affirming trial court order admitting evidence of plaintiff's nonuse of seat belt to disprove design defect allegations because "Chrysler designed an occupant restraint system that included the seat belt . . . .").

43. *See* Jesse N. Bomer, *The Seatbelt Defense: A Doctrine Based in Common Sense*, 38 TULSA L. REV. 405, 407–12 (2002).

44. *Id.* at 416–17.

use and imposing penalties for failure to comply.[45] This legislative pairing was no coincidence; legislators (and the stakeholders who lobby them) demanded these liability shields and carveouts as the price for supporting legislation that—like the pandemic-related measures currently whipping Americans into a personal freedom frenzy—purports to tell individuals how to take care of themselves.[46]

A. Origins of Statutory Seatbelt Defense Limits

Prior to the introduction of mandatory seatbelt laws, some states already limited the seatbelt defense under the principle that there is no affirmative duty to buckle up.[47] However, statutory limits on the defense proliferated with—and as a response to—state laws mandating seatbelt use.[48] Debates around seatbelt mandates "centered on two issues," with advocates of the mandate arguing "for the benefits in terms of injuries prevented or minimized and money saved[,]" while opponents "were concerned with whether the Act infringed on personal freedom to choose . . . ."[49] To balance those competing interests, many states included in their seatbelt mandates express limitations on evidence of seatbelt nonuse in civil actions.[50]

B. Scattershot Approaches to the Defense

Some states broadly prohibit the use of evidence of seatbelt nonuse for almost any conceivable purpose, while others have attempted to narrow their prohibitions to allow for limited use of the seatbelt defense in certain scenarios.[51] Of the states that limit or ban the seatbelt defense, the majority outright prohibits the use of evidence of seatbelt nonuse to reduce a plaintiff's recovery in any type of tort case.[52] Some

45. Cochran, *supra* note 11, at 1399–1400.

46. *See* Ryan v. Gold Cross Services, 903 P.2d 423, 427–28 (Utah 1995) (assuming that seatbelt mandate that bans seatbelt defense in civil actions reflects legislature's legitimate interest in "public policy which encourages seat belt use yet at the same time weigh[s] the positive benefits of such a policy against the severity of the penalties for noncompliance.").

47. Cochran, *supra* note 11, at 1400; Mangrum, *supra* note 29, at 968 (noting a majority of courts who faced the seatbelt defense had rejected it).

48. Mangrum, *supra* note 29, at 974.

49. *Ryan*, 903 P.2d at 427.

50. C.W. Matthews Contracting Co., Inc. v. Glover, 263 Ga. 108, 109, 428 S.E.2d 796, 798 (1993) ("legislature set the state's public policy [in mandating seatbelt use] but weighed the positive benefits of the policy against the severity of the penalty for non-compliance.").

51. Cochran, *supra* note 11, at 1400.

52. *See, e.g.*, O.C.G.A. § 40-8-76.1 (2021).

states have recognized some of the unjust and illogical effects of prohibiting the defense,[53] and amended their codes to permit the use of the defense under limited, specific circumstances.[54] Noble though those efforts have been, remedying the problems with banning the seatbelt defense requires an axe, rather than a scalpel.[55]

Georgia's prohibition on the seatbelt defense exemplifies the majority approach.[56] Georgia's statute covers the range of conceivable applications for the seatbelt defense, from liability determination to damages calculation. After declaring that "[e]ach occupant of the front seat of a passenger vehicle shall, while such passenger vehicle is being operated on a public road, street, or highway of this state, be restrained by a seat safety belt," Georgia's seatbelt law provides:

> The failure of an occupant of a motor vehicle to wear a safety belt in any seat of a motor vehicle which has a safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation, or insurer, shall not be any basis for cancellation of coverage or increase in insurance rates, and shall not be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle.[57]

In Georgia, therefore, evidence of seatbelt nonuse is absolutely barred from use to reduce a plaintiff's recovery.[58] Georgia's statute also bars evidence of seatbelt nonuse from consideration "by the finder [trier] of fact on any question of liability of any person, corporation, or insurer,"[59] which ensures that evidence of a plaintiff's failure to buckle up may not be used as a defense to product liability claims.[60] Georgia's legislature plainly sought to sweeten the medicine of legislation that threatens the American religion of individualism by severely restricting the State's ability to compel personal behavior change.

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53. *See infra* Section III.

54. Arkansas and Tennessee recognized the effects of prohibiting the defense. *See* Bomer, *supra* note 43, at 422 n. 165.

55. *See infra* Section V.

56. Bomer, *supra* note 43, at 416–17.

57. O.C.G.A. § 40-8-76.1(d) (2021).

58. *Id.*; *see C.W. Matthews*, 263 Ga. at 110, 428 S.E.2d at 799 (noting the legislature's "broad statement of purpose read in conjunction with the language of O.C.G.A. § 40-8-76.1(d)" required broad, across-the-board exclusion of seatbelt nonuse evidence in civil actions).

59. O.C.G.A. § 40-8-76.1(d).

60. Denton v. Daimlerchrysler Corp., 645 F. Supp. 2d 1215, 1221–22 (N.D. Ga. 2009).

South Carolina offers another example of a broad ban on the seatbelt defense baked into a seatbelt law.[61] South Carolina directly prohibits courts from applying to unrestrained plaintiffs the fundamentals of tort law that undergird every other type of tort action, baldly stating that failure to buckle up "is not negligence per se or contributory negligence and is not admissible as evidence in a civil action."[62]

Arkansas and Tennessee demonstrate the minority approach, which attempts to thread the needle of permitting the seatbelt defense in limited cases while erecting procedural barriers to limit the application further.[63] When it first mandated seatbelt use, Arkansas also broadly limited the use of a plaintiff's seatbelt nonuse in civil actions.[64] In 2016, however, Arkansas's legislature amended the statute to allow defendants in products liability cases to use the defense, but only if they followed a set of strict procedural steps, including raising the defense at the earliest opportunity.[65] Arkansas's statute provided that:

> Evidence of the failure [to wear a seatbelt] may be admitted in a civil action as to the causal relationship between noncompliance [with the seatbelt mandate] and the injuries alleged, if the following conditions have been satisfied:
>
> (A)The plaintiff has filed a products liability claim other than a claim related to an alleged failure of a seat belt;
>
> (B)The defendant alleging noncompliance . . . shall raise the defense in its answer or timely amendment thereto in accordance with the rules of civil procedure; and
>
> (C)Each defendant seeking to offer evidence alleging noncompliance has the burden of proving:
>
> (i)Noncompliance;
>
> (ii) That compliance would have reduced injuries; and
>
> (iii)The extent of the reduction of the injuries.[66]

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61. S.C. CODE. ANN. § 56-5-6540(C) (2021).

62. *Id.*

63. *See* Bomer, *supra* note 43, at 420–22.

64. Spencer G. Dougherty, *Unbuckling the Seat Belt Defense in Arkansas*, 73 ARK. L. REV. 135, 136–37 (2020).

65. ARK. CODE. ANN. § 27-37-703 (2021) (ruled unconstitutional by Mendoza v. WIS Int'l, Inc., 490 S.W.3d 298, 304 (Ark. 2016)).

66. *Id.*

Tennessee's approach mirrors its neighbor. While Tennessee previously barred evidence of nonuse to reduce recoveries in all civil cases,[67] it now permits the use of the seatbelt defense, but only in products liability cases and only where the defendant raises the defense in its answer or timely amendment.[68] Other states endeavor to strike the public safety/personal choice balance through different approaches, including permitting the defense in determinations of damages but barring it for liability, or capping the percentage of fault attributable to a plaintiff's failure to wear a seatbelt.[69]

Because each of these approaches relies on the legal fiction that general tort principles are inapplicable to a vehicle occupant's failure to buckle up, limitations on and prohibitions of the defense cause breakdowns in justice that cannot be solved through ad hoc carveouts and exemptions.

III. IN PRACTICE: STRANGER THAN LEGAL FICTION

Barring the seatbelt defense collides with basic legal principles in ways that cannot be sufficiently resolved on a case-by-case basis. This Section offers a look at three reasons why prohibiting or limiting the seatbelt defense produces absurd and unjust results.

A. Crashworthiness and Integrated Safety Systems

Under the crashworthiness doctrine, which has been adopted in all fifty states, an auto manufacturer can be held liable for negligence, breach of warranty, or strict liability where a design defect enhanced a plaintiff's injury beyond what the plaintiff would have suffered as a result of a collision.[70] This doctrine permits an injured plaintiff to recover against an automaker where a defect in the vehicle's design caused or exacerbated the plaintiff's injury—even where the defect does not cause the initial collision or impact.[71] The doctrine imposes on manufacturers "a duty to use reasonable care in the design of its vehicle

67. Bomer, *supra* note 43, at 421–22.

68. TENN. CODE. ANN. § 55-9-604 (2021).

69. For example, Iowa, Michigan, and Oregon cap the reduction of a plaintiff's recovery at 5%, and Wisconsin at 15%. IOWA CODE § 321.445(4) (1997); MICH. COMP. LAWS § 257.710e(6) (1997); OR. REV. STAT. § 31.760 (2021); Cochran, *supra* note 11, at 1419 n.200.

70. *Blankenship*, 406 S.E.2d at 782–83; 63A AM. JUR. 2d *Products Liability* § 931 (2021).

71. *Products Liability*, *supra* note 70.

to avoid subjecting the user to an unreasonable risk of injury in the event of a collision."[72]

In crashworthiness cases, the inquiry is focused on "the product design as an integrated whole," and "consider[s] all the factors which contribute to the event which causes the injury."[73] "The design of individual components within [a] car need not be considered in a vacuum because safety features such as seatbelts are a part of the overall design."[74] Therefore, evidence that a crashworthiness plaintiff failed to use one of the key parts of that overall design is "relevant to the issue of whether the overall design is defective and unreasonably dangerous."[75] In effect, "[t]he seatbelt defense is to plaintiffs what the crashworthiness rule is to defendants," because each theory guarantees that "the parties are held responsible if their negligence causes exacerbation of damages."[76] Although some states have followed Arkansas' approach by permitting seatbelt nonuse in crashworthiness cases, states like Georgia deny crashworthiness juries the information necessary to assess a vehicle's safety design fairly.[77]

B. Comparative Negligence and Apportioned Fault

Another problem arises where states that prohibit the seatbelt defense also employ comparative negligence or other apportionment schemes that require factfinders to calculate damages then reduce the awards by the plaintiff's proportion of fault.[78] Beginning in the middle of the Nineteenth century and accelerating during the 1960s and 1970s, comparative negligence or apportioned fault schemes have gradually replaced pure contributory negligence in the overwhelming majority of

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72. Larsen v. General Motors Corp., 391 F.2d 495, 502 (8th Cir. 1968).

73. Estate of Hunter v. GMC, 729 So.2d 1264, 1271 (Miss. 1999) (quoting HILDY BOWBEER & BARD D. BORKON, LITIGATING THE COMPLEX MOTOR VEHICLE CASE 1992, 9, 37 (1992)).

74. LaHue v. General Motors Corp., 716 F. Supp. 407, 417, 418 (W.D. Mo. 1989) (noting that "case law supports defendant's position that an automobile is a product which may be considered as a whole," and therefore holding "[t]he defendant in this case should be permitted to introduce evidence concerning whether seat belts were available and operable.").

75. *Id.* at 418.

76. Cochran, *supra* note 11, at 1397.

77. *See, e.g.*, OHIO REV. CODE ANN. §§ 4513.263(F)(1)–(2) (2021); *see also* TENN. CODE ANN. § 55-9-604(a).

78. *See* Mangrum, *supra* note 29, at 976 ("[t]he most persuasive arguments in favor of the seat belt defense can be made in pure comparative fault jurisdictions.").

U.S. jurisdictions.[79] States adopted comparative negligence to remedy the stark injustice of denying any recovery to a plaintiff who bore even 1% of the fault.[80] In these states, a negligent plaintiff may still recover, but their recovery must be reduced by the percentage of the fault a factfinder attributes to the plaintiff in causing their own damages.[81] Where these states prohibit those same factfinders from considering the plaintiff's failure to wear a seatbelt, defendants are punished beyond their culpability, and plaintiffs walk away with inflated awards.[82]

For example, both Georgia and South Carolina, which employ broad prohibitions on the seatbelt defense, rely on comparative fault schemes that require factfinders to calculate the plaintiff's share of responsibility.[83] Ironically, Georgia was the first state to adopt comparative negligence to moderate the extreme results of pure contributory negligence schemes.[84] Georgia's apportionment scheme applies to plaintiffs who are "to some degree responsible for the injury or damages claimed," and requires "the trier of fact, in its determination of the total amount of damages to be awarded, if any [to] determine the percentage of fault of the plaintiff[.]"[85] Only after the award is reduced by the percentage of fault attributed to the plaintiff may the factfinder apportion the remaining fault among defendants—and, under certain conditions, nonparties.[86] Importantly, "the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed."[87] South Carolina's apportionment system similarly bars a plaintiff from recovering where their own negligence exceeds that of the combined negligence of the defendants.[88]

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79. *See* Jennifer J. Karangelen, *The Road to Judicial Abolishment of Contributory Negligence*, 2 BALTIMORE L. R. 265, 269 (2004).

80. *Id.*; *see also* Robinette, *supra* note 38, at 41.

81. Robinette, *supra* note 38, at 42.

82. Peter Scaff, *The Final Piece of the Seat Belt Evidence Puzzle*, 36 HOU. LAW REV. 1371, 1408 (1999) ("comparative causation provides a more equitable means for allocating the risk of loss for defendants . . . ." and "introduction of seat belt evidence under a comparative causation scheme is an effective and efficient means of properly allocating responsibility . . . .").

83. O.C.G.A. § 51-12-33 (2021); S.C. CODE ANN. § 15-38-15 (2021).

84. Robinette, *supra* note 38, at 42.

85. O.C.G.A. § 51-12-33(a) (2021).

86. O.C.G.A. § 51-12-33(b) (2021).

87. O.C.G.A. § 51-12-33(g) (2021).

88. S.C. CODE ANN. § 15-38-15; *see* Humphrey v. Day & Zimmerman Int'l, Inc., 997 F.Supp.2d 388, 397 (D.S.C. 2014) ("[i]n South Carolina, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant") (citing Hurd v. Williamsburg Cty., 611 S.E.2d 488, 492 (S.C. 2005)).

Paradoxically, in both states, defendants are prohibited from introducing evidence that a plaintiff failed to exercise reasonable care by buckling up.[89] In collision cases involving unrestrained plaintiffs, factfinders must stubbornly ignore the very facts that are critical to fair apportionment of fault. As a result, unrestrained plaintiffs get away with recovering more than they are due.

C. Constitutional Problems

Finally, blocking the seatbelt defense raises constitutional concerns, particularly where states permit the defense in limited scenarios.[90] For example, in 2016, the Supreme Court of Arkansas struck down the statutory provision granting limited permission to use the defense in products cases.[91] On a certified question from a federal district court, the court held that the legislature exceeded its authority in enacting Arkansas Code Annotated § 27-37-703, "which restrict[ed] the admissibility of seat belt-nonuse evidence in civil actions . . . ."[92]

In the underlying action, a backseat plaintiff suffered severe injuries when the vehicle driver fell asleep and crashed the car.[93] Because the driver was acting within the scope of his employment at the time, the plaintiff sued both the driver and his employer.[94] The defendants sought to introduce the plaintiff's seatbelt nonuse as evidence of comparative negligence, but Arkansas law barred the evidence.[95] The district court certified the question of whether the limitation on seatbelt nonuse evidence violated Arkansas' separation of powers principles to the Supreme Court of Arkansas, which accepted the question.[96]

The defendants argued the limitation on the seatbelt defense amounted to a procedural rule governing the admissibility of evidence, which Arkansas' constitution reserves to the judicial branch.[97] In defense of the limitation, the plaintiff framed the statute as affecting substantive tort law, which the legislature is fully empowered to do.[98]

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89. *See supra* Section II.

90. *See*, *e.g.*, *Mendoza*, 490 S.W.3d at 298; *but see* McKinney v. Jarvis, No. M1999-00565-COA-R9-CV, 2000 Tenn. App. LEXIS 165, at *8 (Tenn. Ct. App. Mar. 16, 2000) (holding prohibition of seatbelt nonuse is a "question that falls into the legislative realm[]" and therefore comports with separation of powers).

91. *Mendoza*, 490 S.W.3d at 304.

92. *Id.* at 299.

93. *Id.* at 300.

94. *Id.*

95. *Id.*

96. *Id.* at 299; *see* Mendoza v. WIS Int'l, Inc., 2015 Ark. 321 (2015).

97. *Mendoza*, 490 S.W.3d at 301.

98. *Id.*

The court noted that Arkansas amended its broad prohibition on the defense, which provided that evidence of seatbelt nonuse "shall not be considered under any circumstances as evidence of comparative or contributory negligence," to permit the seatbelt defense in products liability cases.[99] In amending the statute, the legislature dropped the qualifying "comparative or contributory negligence" language.[100] Because the revised statute therefore broadly declared that "failure of an occupant to wear a properly adjusted and fastened seat belt shall not be admissible into evidence in a civil action," the court held the amendment had transformed the substantive law into a rule of evidence.[101] Therefore, the statute violated separation of powers and the Arkansas Constitution.[102]

Earlier constitutional challenges centered on whether limitations on the seatbelt defense violated due process or equal protection. Courts faced with these questions concluded that legislatures had a legitimate interest in limiting the civil penalties for violating seatbelt mandates. Some courts offered so much deference to legislatures that they would skate over the constitutional analysis.

For example, the Georgia Supreme Court in *C.W. Matthews Contracting v. Gover* dismissed a constitutional challenge to O.C.G.A. § 40-8-76.1. [103] The court reasoned that—just as the state had a legitimate interest in encouraging the use of seatbelts—the state also had a legitimate interest in "imposing limitations upon the means of such encouragement[.]"[104] Similarly, the court held that the statute "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."[105] Accordingly, Georgia's ban on seatbelt nonuse evidence satisfied both equal protection and due process.

In 2000, Tennessee's intermediate appellate court fielded a due process challenge to its statutory limitation on seatbelt evidence.[106] The Tennessee Court of Appeals echoed the reasoning from *C.W. Matthews*, concluding that Tennessee's rejection of the seat belt defense was rationally related to the state's interest in "enact[ing] a system of

99. *Id.* at 302.
100. *Id.*
101. *Id.* at 301.
102. *Id.* at 303–04.
103. 263 Ga. at 110, 428 S.E.2d at 799.
104. *Id.* at 109, 428 S.E.2d at 798.
105. *Id.* at 110, 428 S.E.2d at 799.
106. *McKinney*, 2000 Tenn. App. LEXIS at *1.

rewards and punishments for compliance/noncompliance" with the seatbelt mandate.[107]

The Utah Supreme Court more closely analyzed the interest-balancing at play.[108] It, unlike the courts in Tennessee and Georgia, acknowledged baldly that the "statutory scheme . . . creates a class of tort defendants who are treated differently from other tort defendants," and therefore centered its analysis on "whether this disparate treatment is justified."[109] Again, unlike the courts in *C.W. Matthews* and *McKinney*, the court acknowledged that the seat belt statute "does not, in and of itself, promote safety," but serves the legislature's purpose of resolving the "conflicting interests" of public safety and personal choice.[110] Striking that balance, the court held, served a legitimate state interest separate and apart from the policy of encouraging seatbelt use.[111]

Next, the court examined "whether there is a reasonable relationship" between the limitation on the seatbelt defense and the state's interest in striking the safety or freedom balance.[112] Because "[m]andating that nonuse of a seat belt does not constitute contributory or comparative negligence is a reasonable means of ensuring that a legislated public policy encouraging seat belt use adequately weighs the impingement on personal freedom," Utah's prohibition on seatbelt nonuse evidence was therefore constitutional.[113] Changes in law and society since these challenges potentially alter this interest-balancing calculation because the facts underlying state justifications of banning the defense have shifted the equation.

IV. CHANGING REALITIES: DIMINISHING JUSTIFICATIONS FOR BANNING THE DEFENSE

When states started mandating seatbelt use, political pressure mounted to build safeguards into the statutes to limit the government's infringement on individual choice.[114] Legislators also ensured that the new public safety measures did not create a new defense in car wreck cases.[115] Plaintiffs' lawyers worried seatbelt mandates would create a

107. *Id.* at *6.
108. *Ryan*, 903 P.2d at 423.
109. *Id.* at 427.
110. *Id.*
111. *Id.* at 428.
112. *Id.* at 426.
113. *Id.* at 428.
114. *Id.* at 427.
115. *Id.*

new basis for defendants to claim contributory negligence—and therefore to use evidence of seatbelt nonuse as the basis for finding unrestrained plaintiffs negligent *per se*.[116]

At the time, pure contributory negligence schemes were more common than comparative fault schemes, so if plaintiffs were found to be contributorily negligent for failure to wear a seatbelt, they were totally barred from recovering any damages.[117] That unforgiving standard, therefore, justified concerns that seatbelt mandates would tip the balance in collision cases heavily in favor of defendants.

However, all but four states have now abolished pure contributory negligence.[118] American tort law now relies on the notion that negligent plaintiffs should still be permitted to recover the extent of their damages that the defendants' negligence caused.[119] Since pure contributory negligence relies on the idea that only the perfect plaintiff deserves compensation, pretending seatbelt nonuse was not negligent conduct made a bit more sense. Now that our application of negligence law has become more rooted in reality—and correspondingly fairer, fears of seatbelt nonuse as a basis for apportioning fault to a plaintiff no longer adequately justify banning the seatbelt defense.

Moreover, the decades of behavioral and technological changes since the widespread adoption of seatbelt mandates have shifted the values in the negligence calculation. First, the burden of wearing a seatbelt has continued to diminish.[120] Seatbelt use has increased over the decades. In 2020, the National Highway Traffic Safety Administration (NHTSA) recorded a seatbelt use rate in the U.S. at 90.3%, compared to 70.7% in 2000 and 58% in 1994.[121] The near ubiquity of seatbelt use both reduces the urgency of state interest in encouraging widespread buckling and strengthens the argument that refusing to buckle up carries some culpability that tort law should recognize. An argument that the burden of belting justifies the increased risk to unrestrained occupants simply carries less and less weight as more and more Americans buckle their seatbelts as a matter of habit.

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116. *Id*.

117. *See* Mangrum, *supra* note 29, at 975–76.

118. Robinette, *supra* note 38, at 44–45.

119. *Id.* at 43.

120. As early as 1985, a myriad of commentary argued that the burden of seat belt use was outweighed by the safety benefits of buckling up. Mangrum, *supra* note 29, at 979–80.

121. *Trends in Occupant Restraint Use and Fatalities*, NHTSA, https://one.nhtsa.gov/people/injury/research/buckleup/ii__trends.htm (last visited Nov. 15, 2021); National Highway Traffic Safety Administration, *Seat Belt Use in 2020–Overall Results* (Feb. 2021), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/813072.

Changes over time also affected the factors on the other side of the negligence formula. Today's seatbelts are much more effective at preventing serious injury or death, making a plaintiff's failure to wear one that much more negligent. Moreover, modern vehicles employ integrated safety systems comprised of multiple components that work in tandem to protect occupants.[122] Therefore, failure to wear a seatbelt can compromise the effectiveness of other safety features built into the vehicle's design, increasing the potential for and severity of collision-related injuries.[123]

The progression of American tort law toward fair allocation of fault combined with behavioral and technological changes nullify the old justifications for limiting or banning the seatbelt defense. Accordingly, a full revival of the defense is a necessary step in the development of tort law.

V. IT'S TIME: REINSTATE THE DEFENSE

Not only are the original justifications for banning the defense no longer persuasive, but the benefits of repealing the bans are also literally immeasurable. The nature of confidential settlements and exclusion of evidence makes quantification impossible, but one can imagine the savings potential in insurance payouts if collision cases involving unrestrained plaintiffs were valued appropriately instead of benefiting from artificial inflation. Presumably, those savings could be passed onto insured drivers through reduced premiums.

Additionally, fairly apportioning fault between plaintiffs and defendants will better serve the compensatory and deterrent functions of tort law. Unrestrained plaintiffs will no longer be rewarded for their own negligence, and defendants will no longer be unduly punished because they collided with (or designed a vehicle occupied by) a negligent plaintiff.

Modern efforts to revive the defense have largely proven unsuccessful. Perhaps recognizing the diminishing weight of the original arguments against the defense, most advocates for continuing to limit or ban evidence of seatbelt nonuse now argue that permitting the defense will turn every collision case into a battle of the experts on the issue of causation.

This new argument also falls short. First, expert testimony already dominates crashworthiness litigation, and allowing those experts to consider evidence of seatbelt nonuse will simply enhance the credibility

122. *See supra* Section III.

123. *Id.*

and probative value of their testimony. Moreover, expert testimony is unnecessary in most collision cases. In most scenarios, lay jurors can understand the risks of seatbelt nonuse and can determine whether and to what extent failure to buckle up causes a plaintiff's injuries. Finally, near-ubiquitous seatbelt use will continue to shrink the number of cases in which plaintiffs are unrestrained, limiting the number of cases necessitating expert opinions on seatbelt causation. While reviving the seatbelt defense may increase the need for expert testimony in some cases, the benefits of lifting limits on the defense outweigh the potential for complications of simple collision cases.

As today's raging public health debate continues to boil over, lessons from the past can instruct the future. During public safety emergencies, when encouraging widespread behavioral change remains urgent, the short-term effects of baking exemptions and liability shields into legislative mandates seem insignificant. However, as the history of the seatbelt defense illustrates, once the policy objectives of the mandates have been realized, the costs of exemptions and immunities become clear. Reviving the seatbelt defense now will move American tort law further in its march toward fair allocation of fault and remedy the unjust results of this anachronistic policy.