Critical Legal Issues: WORKING PAPER SERIES

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FOLLOW LOUISIANA'S LEAD:
THE CASE FOR ELIMINATING STATE GAG RULES ON MOTORISTS' FAILURE TO BUCKLE UP

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Lee Mickus is a Partner in the Denver, CO office of Evans Fears & Schuttert LLP. He defends manufacturers and other business interests nationally in product liability and tort lawsuits. He has successfully tried cases to juries in jurisdictions across the country. Mr. Mickus works with a wide range of products and industries, including automobiles, pharmaceuticals, medical devices and recreational equipment. In his practice, Mr. Mickus often develops strategies for addressing expert testimony, including challenging the admissibility of expert opinions that fall short of the Rule 702 standard. Mr. Mickus is also active in rulemaking and legislative reform efforts. He has given presentations and submitted comments to the Advisory Committee on Civil Rules and has testified before several state legislatures on bills affecting a wide range of civil justice issues.

EXECUTIVE SUMMARY

Laws in three-quarters of U.S. states and the District of Columbia prohibit or severely restrict defendants in motor-vehicle accident jury trials from introducing evidence that injured drivers or passengers had not buckled their seatbelt. For more than three decades, these gag rules have unfairly rewarded unbelted plaintiffs by allowing them to avoid the legal consequences of not buckling up.

The Louisiana legislature's recent repeal of the state's evidentiary gag rule creates a timely context within which Evans Fears & Schuttert LLP attorney Lee Mickus examines the history of these laws and makes the case for their elimination.

These laws, Mickus explains, were a product of both the different attitudes about seat belt use motorists held in the 1980s and states' resentment of the federal government's attempt to dictate seat belt standards as part of an air-bag rulemaking. Vehicle drivers and passengers felt seat belts restricted their freedom of movement and could entrap them if an accident occurred. Those opinions have shifted dramatically in three decades, a change that Mickus concludes inspired Louisiana to repeal its gag rule.

Louisiana courts should take advantage of the law's repeal, Mickus argues, and allow jurors to consider seat belt nonuse evidence for proof of comparative fault and for setting damages. The author discusses the numerous public-policy reasons that support seat-belt evidence, including the oddity of rejecting as evidence in a civil trial information that would subject the unbelted motorist to criminal sanctions under state law.

The WORKING PAPER concludes with a brief overview of the status of the evidentiary gag rule in other states. A number of states, including most recently Iowa and Missouri, have allowed courts to admit information about seat belt use at trial. A large majority of states—38 plus D.C.—however, cling to outdated gag rules. Mickus concludes by urging state lawmakers to consider Louisiana's actions and the compelling arguments that support their legislative repeal in future legislative sessions.

FOLLOW LOUISIANA'S LEAD: THE CASE FOR ELIMINATING STATE GAG RULES ON MOTORISTS' FAILURE TO BUCKLE UP

INTRODUCTION

With the signature of Governor John Bel Edwards, Louisiana House Bill 57[1] eliminated a statutory oddity that has existed in the state since 1988: a gag rule that prevents juries from learning that a motorist injured in a collision had failed to buckle his or her seat belt. House Bill 57 repeals La. Rev. Stat. Ann. § 32:295.1(E), which declared that evidence of an occupant's "failure to wear a safety belt . . . shall not be considered evidence of comparative negligence" and also "shall not be admitted to mitigate damages." For more than three decades, this statutory provision unfairly rewarded unbelted plaintiffs by allowing them to avoid the legal consequences of not buckling up, and penalized defendants in civil vehicle-crash lawsuits by holding them responsible for enhanced injuries resulting from that decision to ignore the seat belt.

In discarding this gag rule, Louisiana brings courtroom consideration of seat belt use into line with the state's policy requiring motorists to use this active restraint. States that still keep vehicle-injury juries in the dark about seat belt use should take note of Louisiana's legislative action. As this WORKING PAPER explains, Louisiana based its reform decision on a sound set of public and legal policy factors.

[1] 2020 Louisiana Session Laws & Resolutions, Act No. 37.

I. ORIGINS AND FLAWED FOUNDATION OF LOUISIANA'S SEAT BELT LAW

Like many other states, Louisiana first considered seat belt legislation in response to federal regulatory action. On July 17, 1984, the National Highway Traffic Safety Administration ("NHTSA") issued a new Federal Motor Vehicle Safety Standard that required vehicle manufacturers to equip all new passenger cars with passive restraint systems, such as airbags, beginning in the 1990 model year. This regulation, however, stipulated that this equipment requirement would not go into effect if a sufficient number of states prior to April 1, 1989 enacted mandatory seat belt use laws ("MULs") that contained certain provisions.[2] The Louisiana state legislature, along with most other state legislatures, addressed the seat belt issue in the mid-1980s in response to this federal regulation.[3]

Louisiana's initial mandatory use law, enacted in 1985, imposed a fine on drivers and most front seat passengers if they failed to wear seat belts.[4] The 1985

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[2] 49 Fed. Reg. 28962 (July 17, 1984). The regulation specified that passive restraint requirements would not be imposed if states holding at least two-thirds of the U.S. population were covered by qualifying state mandatory seat belt use laws before April 1, 1989. To count against this quota, a state's MUL had to include certain content, including a prohibition on compliance waivers except for medical reasons. Also, MUL enforcement was required to include penalties of at least a $25 fine per violation, and evidence that an occupant had violated the MUL had to be admissible in any civil litigation brought by the violator to recover damages that resulted from a motor vehicle accident. *Id*. at 28997.

[3] *See Rougeau v. Hyundai Motor America*, 805 So. 2d 147, 152 & n.5 (La. 2002)(indicating that Louisiana's seat belt statute was originally enacted in reaction to NHTSA's regulatory action). *See also Nabors Wells Services, Ltd. v. Romero*, 456 S.W.2d 553, 558 (Tex. 2015)(describing historical context sparking enactment of the Texas seat belt mandatory use law in 1985).

[4] 1985 Louisiana Session Laws & Resolutions, Act No. 377.

version of the statute allowed seat-belt-violation evidence to be admitted in civil lawsuits for the purpose of damage mitigation, but prohibited courts from reducing damages by “more than two percent for the nonuse of a safety belt.”[5] In allowing the admission of seat belt non-usage evidence to support of mitigation of damages contentions, albeit to an extremely limited extent, the 1985 legislation met the specifications of the NHTSA regulation and would have counted toward the federal quota for determining whether the federal passive restraint requirement would take effect in 1989.[6]

In 1988, however, the Louisiana legislature backtracked on allowing seat belt non-usage evidence in civil cases. The legislature amended La. Rev. Stat. Ann. § 32:295.1(E), eliminating the provision that allowed juries to consider a motorist’s violation of the mandatory seat belt law when assessing whether to reduce the plaintiff’s damage award by up to two percent. In its place, the legislature inserted the following prohibition: “Failure to wear a safety belt in violation of this Section shall

[5] La. Rev. Stat. Ann. § 32:295.1(E)(as enacted in 1985), quoted in *Rougeau*, 805 So.2d at 153. A number of other states similarly capped the allowable damages reduction at a small percentage. *See*, *e.g*., W. Va. Code §17C-15-49(d) (jury may reduce recovery for medical expense damages by no more than five percent due to a plaintiff’s failure to wear a seat belt); Or. Rev. Stat. §31-760 (evidence of the failure to wear a seat belt is admissible only to mitigate damages, and then by no more than five percent); Wis. Stat. Ann. 347.48(2m)(g)(allowing reduction of damages for a plaintiff’s violation of seat belt use statute of no more than fifteen percent).

[6] *Rougeau*, 805 So.2d at 153.

not be admitted to mitigate damages."[7] Significantly, this amendment placed Louisiana's law out of compliance with NHTSA's regulatory specifications for avoiding the air-bag mandate. Louisiana was in fact not alone in losing its place on the agency's list; numerous other states also adopted evidentiary seat-belt use gag rules.[8] At the end of the period specified in the federal regulation, an insufficient number of states had enacted MULs conforming to the federal regulatory minimums. Accordingly, the Federal Motor Vehicle Safety Standard's airbag equipment mandate took effect, and all passenger vehicles manufactured in the 1990 and later model years had to include passive restraints.[9]

Louisiana's gag rule reflected public perception of seat belts and the political climate in the 1980s. Motorists had not widely accepted the use of seat belts, let alone saw wearing seat belts as a duty.[10] Before states enacted MULs, less than 15% of American motorists wore seat belts.[11] Some questioned the efficacy of seat belts in

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[7] 1988 Louisiana Session Laws & Resolutions, Act No. 759. La. Rev. Stat. Ann. § 32:295.1(E) has remained unchanged since 1988.

[8] Barry F. Bohan & Stephen P. Teret, *Seat Belts and the Law: Mandatory Use Laws and the Legal Consequences of Non-Use*, U.S. Dept. of Transportation Final Report No. DOT HS 807 576 at 19 (May 1990)("Virtually all of these MULs, however, do not meet the minimum criteria for state MULs found in Standard 208, in many cases because the state MUL contains a gag provision, which is a specific violation of [49 C.F.R. § 571.208] S4.1.5.2.").

[9] *Id*.

[10] *See*, *e.g.*, *McElroy v. Allstate Ins. Co*., 420 So.2d 214, 216 (La. Ct. App. 1982)("there is no duty to wear a lap seat belt, and the failure to wear such a belt or other restraining devices does not constitute contributory negligence on the part of an injured party.").

[11] 49 Fed. Reg. at 28983 ("Based on recent NHTSA data, the overall safety belt usage rate for front seat occupants is 12.5 percent."). *See also* Alyssa Fernandez, *'Government Intrusion in Private*

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preventing injuries,[12] and even feared that seat belts could exacerbate some crash-related injuries or create entrapment hazards.[13] This flawed understanding of the benefits of seat belts was likely compounded by a degree of resentment toward federal intrusion into an area of state authority.[14] Legislators who preferred passive airbags to manually-operated restraints, or who did not want federal regulators influencing the state legislative process, therefore had reason to support including the gag provision in the MUL.[15]

Motorists' opinions of seat belt use have significantly shifted in the 30 years since Louisiana enacted its gag provision. Louisiana residents, like vehicle users across the United States, have now accepted seat belts as part of their driving routine. The most recent NHTSA data show that the vast majority of Louisiana's motor vehicle

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Life': Before Masks, Dallas Residents Had Anti-Seat Belt Tantrums, DALLAS MORNING NEWS, July 9, 2020 ("The News reported on April 3, 1985 that only 12.8% of Dallasites used a seat belt while 'the rest either hide, mutilate or simply ignore their belts.'").

[12] *See*, *e.g.*, *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48, 62 (Okla. 1976)("Devices such as seat belts confine and restrict, and they may magnify the motorist's fear of entrapment in a burning or submerged vehicle.").

[13] *See*, *e.g.*, *Lawrence v. Westchester Fire Ins. Co*., 213 So.2d 784, 786 (La. Ct. App. 1968)("Many people fail to use them because of the fear o[f] entrapment in a burning or submerged car and there is also the belief that seat belts increase the frequency or severity of abdomen, pelvis and lumbar sprain injuries.").

[14] Bohan & Teret, *supra* n.8, at 19-20 ("There is evidence that state legislatures deliberately drafted their MULs so as to not fall under the two-thirds provision of Standard 208.").

[15] *Id.* at 25 ("Another important reason for gag provisions may have been to insure that a state's MUL did not count toward the two-third population coverage required by Standard 208 in order to rescind the passive restraint installation provision.").

occupants—87.5% in 2019—use their seat belts.[16] Any concerns about possible harm or questions about the overall beneficial effects from wearing seat belts have been dispelled. The Louisiana Highway Safety Commission declares that "wearing your seat belt is the single most important thing a driver or passenger can do to protect themselves in the event of a crash."[17] Louisiana's Department of Public Safety and Corrections maintains an educational program "designed to encourage compliance with the safety belt usage requirements."[18] And the Louisiana legislature in 1995 deepened its commitment to mandatory belt use by moving seat belt violations from a secondary to a primary violation.[19] In sum, the circumstances that led to adoption of Louisiana's statutory gag rule many years ago have changed, and the Louisiana legislature's repeal of that provision amounts to an acknowledgement that a plaintiff's seat belt usage is an appropriate fact for juries to consider.

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[16] National Highway Traffic Safety Administration, *Seat Belt Use in 2019 – Use Rates in the States and Territories*, Report No. DOT HS 812 947 at 1 (Apr. 2020). Louisiana's seat belt use rate in 2019 was slightly below the 90.7% national rate. *Id*. at 2.

[17] Louisiana Highway Safety Commission, Occupant Protection, http://www.lahighwaysafety.org/Pages/OurPrograms/OccupantProtection.aspx (last visited July 12, 2020). Similarly, Destination Zero Deaths, a joint project of the Louisiana Department of Transportation and Development, the Louisiana State Police, and the Louisiana Highway Safety Commission, acknowledges on its website that "[s]eat belts reduce the risk of death by 45% for drivers and front-seat passengers involved in crashes." Destination Zero Deaths, Occupant Protection – Front Seat & Back Seat, http://www.destinationzerodeaths.com/?ViewFilter=Occupant (last visited July 12, 2020).

[18] La. Rev. Stat. Ann. § 32:295.1(H).

[19] *See* 1995 Louisiana Session Laws & Resolutions, Act No. 643. The Louisiana State Legislature subsequently amended La. Rev. Stat. Ann. § 32:295.1(F) to confirm that law enforcement officers could stop motorists solely for the failure to buckle up. *See* 1999 Louisiana Session Laws & Resolutions, Act No. 1344.

II. REPEAL OF LOUISIANA'S GAG RULE SHOULD RESULT IN COURTS ADMITTING SEAT BELT NON-USE EVIDENCE

With the repeal of the gag rule, Louisiana's courts now have a free hand in deciding whether to admit evidence that a plaintiff who received injuries in a motor vehicle crash had not buckled an available seat belt. Because research has demonstrated the dramatic ability of seat belts to prevent injuries and the public now acknowledges the duty of motorists to use seat belts to protect themselves in the foreseeable event of a crash, courts should allow evidence of seat belt non-use to address a plaintiff's comparative fault, and also the related issues of injury causation and mitigation of damages.

Louisiana's courts have recognized the relevance of seat belt non-usage evidence to determining the cause of an unbelted occupant's injuries and the relative contribution of each party's conduct to the outcome.[20] Despite observing the relevance of this evidence, the courts until now have ruled that "exclusion is consistent with the policy determination made by the Louisiana legislature[.]"[21] The Louisiana Supreme Court explained that the legislature had effectively tied the courts' hands, even though exclusion of this evidence likely resulted in allocating a much larger damages award to a defendant than his or her actions actually caused:

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[20] *See*, *e.g.*, *Rougeau*, 805 So.2d at 158.

[21] *Johnston v. Cincinnati Ins. Co.*, No. 2:12-CV-01049-PM-KK, 2013 WL 5268963, at *4 (W.D. La. Sept. 16, 2013).

> Because this [seat belt non-use] evidence is only relevant to show her own negligence in causing her injuries, the evidence is inadmissible in this case under [La. Rev. Stat. Ann. §] 32:295.1(E). Thus, even though her failure to wear a seat belt may have caused her to sustain worse injuries than she would have had she followed the mandatory seat belt law, and even though the defendant may ultimately have to shoulder the burden of these increased injuries, the Legislature has chosen this result and we must enforce the statute as written.[22]

With the gag rule now repealed, no justification exists for withholding this evidence from the jury. The view that motorists do not have a duty to buckle up, as courts held in some early decisions,[23] no longer holds up. The MUL itself establishes a legal requirement for drivers and passengers to fasten their seat belts.[24] As the Texas Supreme Court has observed, to ignore in civil court a statutory obligation the violation of which would subject the perpetrator to a monetary fine in criminal court would be an "oddity" under the law.[25] Further, unlike the era in which the Louisiana legislature enacted the gag rule, seat belt use is now "an unquestioned part of daily life for the vast majority of drivers and passengers."[26] In every year since 2010, more

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[22] *Rougeau*, 805 So.2d at 158.

[23] *See*, *e.g*., *Williams v. Chrysler Motor Co*., 271 So.2d 551, 553 (La. Ct. App. 1972)(finding no duty to fasten a seat belt "exists since it is required neither by statute nor by judicial decision.").

[24] La. Rev. Stat. Ann. § 32:295.1(A) & (B).

[25] *Nabors Wells Services*, 456 S.W.2d at 566 ("The result is certainly an oddity: the unbelted plaintiff is likely to be punished with a criminal citation carrying a monetary fine from the police officer investigating the accident, but in the civil courtroom his illegal conduct will be rewarded by monetary compensation.").

[26] *Id*. at 555.

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than 75% of motorists both in Louisiana and nationally used their seat belts—and that percentage has increased over the years to the point that the current use rate approaches 90%.[27] This widespread use of seat belts demonstrates societal acceptance and an expectation that motorists will buckle up.

Two other indisputable facts compel the conclusion that motor vehicle occupants violate a duty of care if they fail to wear seat belts. First, the foreseeable risk of a crash exists every time a driver steers an automobile down the driveway and into traffic. More than six million motor vehicle crashes occur in this country annually, resulting in injuries to approximately two million people.[28] Based on this reality, the Texas Supreme Court recognized that "[t]he general danger of driving is obvious to everyone."[29] Because every motorist must expect that a collision will occur, no defensible reason exists, including artificial distinctions between "crash-causing" and "injury-causing" conduct that some courts[30] have employed to avoid finding a duty to wear seat belts, for ignoring a plaintiff's decision not to fasten a seat belt when that

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[27] National Highway Traffic Safety Administration, *Seat Belt Use in 2019*, *supra* n.16, at 1-2 (reporting seat belt use rates from 2012–2019); National Highway Traffic Safety Administration, *Seat Belt Use in 2014 – Use Rates in the States and Territories*, Report No. DOT HS 812 149 at 2 (June 2015)(reporting seat belt use rates from 2007–2014).

[28] *See* National Highway Traffic Safety Administration, *Traffic Safety Facts 2017: A Compilation of Motor Vehicle Crash Data*, Report No. DOT HS 812 806 at 17 (2019)(estimating 6,452,000 motor vehicle crashes in the United States during 2017, of which 1,889,000 involved injuries and 34,247 resulted in one or more fatalities).

[29] *Nabors Wells Services*, 456 S.W.2d at 565.

[30] *See*, *e.g.*, *Lawrence*, 213 So.2d at 786 ("Whatever may be the true value of the seat belt as a factor in preventing injuries, it seems to be recognized that the failure to have the seat belt fastened does not contribute to the occurrence of the accident.").

person seeks to recover damages for crash-related injuries.[31]

Second, when a crash occurs, wearing a seat belt unquestionably reduces or prevents injuries. According to NHTSA analysis, "[t]he simple act of buckling a seat belt can improve an occupant's chance of surviving a potentially fatal crash by from 44 to 73 percent . . . They are also highly effective against serious nonfatal injuries."[32] The indisputable safety benefits of seat belts sweeps away the concerns about effectiveness voiced in pre-MUL rulings and used as a basis for finding no obligation to use a seat belt.[33] In sum, the public now recognizes a duty to buckle up, the ability of seat belts to protect occupants in the crashes that occur every day has been conclusively established, and a plaintiff's failure to fulfill that duty is a proper consideration in determining the extent of that individual's comparative fault.[34]

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[31] *Nabors Wells Services*, 456 S.W.2d at 562, 565 (tort law requires people to guard against foreseeable risks, and under comparative fault principles that obligation cannot be split to "immunize a plaintiff from his own injury-causing conduct.").

[32] L.J. Blincoe, T.R. Miller, *et al.*, *The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised),* Report No. DOT HS 812 013 at 193 (2015). Louisiana similarly has concluded that "[s]eat belts reduce the risk of death by 45% for drivers and front-seat passengers involved in crashes." Destination Zero Deaths, *supra* n.17. *See also* Helmut Schneider, Emily Pfetzer, William Black and Jeff Dickey, *Factors Influencing Seatbelt Utilization in Louisiana and Strategies to Improve Usage Rate*, Report No. FHWA/LA. 16/572 (Apr. 2017)("Seat belts are credited with saving thousands of lives each year[.]").

[33] *See*, *e.g.*, *Lawrence*, 213 So. 2d at 786 (questioning seat belt effectiveness and suggesting that the lap belts prevalent in pre-1968 vehicles "can cause more rather than less injuries in many crash conditions").

[34] *See Nabors Wells Services*, 456 S.W.2d at 565 ("[W]e will not belabor the point with statistics To do so suggests there is still legitimate debate over the propriety of seat-belt use. That debate has long ended."). *See also Geyer v. Mankin,* 984 S.W.2d 104, 107 (Ky. Ct. App.1998)("[I]f there is relevant and competent evidence that the plaintiff was contributorily at fault by failing to wear an available seatbelt and that such fault was a substantial factor in contributing to or enhancing

In addition to seat-belt compliance's relevance to a plaintiff's comparative fault, courts should also allow introduction of evidence that a vehicle occupant failed to buckle up to support defendants' arguments on injury causation and failure to mitigate damages.[35] When a motorist does not devote the few seconds needed to buckle up, that choice often results in injuries that otherwise would not have occurred. The Georgia Governor's Office of Highway Safety has stated that:

> One of the leading causes of motor vehicle injuries and deaths is failure to wear safety belts[.] In Georgia, forty-six percent (46%) of all vehicle crash fatalities in 2015 were attributed to non-restraint use.[36]

The vastly disproportionate fatality rate among unbelted motorists further demonstrates the causative effect of seat belt non-usage. For example, 35.1 percent of Louisiana motor vehicle crash fatalities in 2015 were unrestrained occupants, even though unbelted motorists represented only 14.1 percent of the total.[37] Medical

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the plaintiff's injuries, then the issue of the plaintiff's fault is submitted to the jury for determination. If the jury determines that the plaintiff has some degree of fault due to failure to wear a seatbelt, the liability of the parties is then determined by their respective degrees of fault.").

[35] In this setting, injury causation and the failure to mitigate damages address essentially the same concept: whether the plaintiff experienced injuries and damages that a properly worn seat belt would have prevented. So long as the jury is allowed to consider the fact that the plaintiff did not fasten the available seat belt, hear evidence of the effects of that failure, and fully use that information in distinguishing the damages resulting from the defendant's conduct from those attributed to the plaintiff's failure to wear a seat belt, then the legal label applied likely has only academic significance.

[36] Georgia Governor's Office of Highway Safety, Seatbelt Statistics, https://www.gahighwaysafety.org/research/restraint-statistics/ (last visited Aug. 29, 2019).

[37] Louisiana Strategic Highway Safety Plan at 34, fig. 4.7 (July 2017); *Seat Belt Use in 2019 – Use Rates in the States and Territories*, *supra* n.16, at 1.

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evidence also indicates that seat belt non-usage produces higher treatment costs. Trauma center studies have found that a disproportionately high percentage of unbelted patients required hospitalization following motor vehicle crashes, and unbelted patients also experienced more severe injuries that cost more money to treat.[38] Because a plaintiff's decision not to wear a seat belt often produces a substantially different injury outcome when a crash occurs, evidence of the plaintiff's failure to wear a seat belt bears directly on the jury's determination of what caused the plaintiff's injuries and whether they could have been reduced if only the plaintiff had acted with reasonable care for his or her own safety.

Plaintiffs may urge judges to ignore the strong legal bases for admitting non-use of a seat belt,[39] arguing that the information will have a prejudicial impact on the

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[38] *See*, *e.g.*, M.C. Sokolosky, J.E. Prescott, et al., *Safety Belt Use and Hospital Charge Differences among Motor Vehicle Crash Victims*, 89(8) W.V. MED. J. 328 (1993):

> The unbelted patients had a 34% higher injury severity score, a 97% increase in the need for extended care after discharge from the hospital, and a 186% increase in hospital charges compared to belted patients. Our study concluded that seat belt use among motor vehicle crash victims reduced their hospital costs, and improved their outcome as compared to those patients not wearing seatbelts.

See also Robert Rutledge, Allen Lalor, *et al.*, *The Cost of Not Wearing Seat Belts: A Comparison of Outcome in 3396 Patients*, 217(2) ANNALS OF SURGERY 122 (1993)("Seat belt usage is associated with a significant decrease in mortality rate, hospital charges, length of stay, intensive care unit stay, and ventilator requirements.").

[39] Courts have characterized the legal basis for admitting seat belt non-usage evidence in different ways. The Texas Supreme Court held that the seat belt non-usage evidence was properly considered "for the purpose of apportioning responsibility under [the Texas] proportionate-responsibility statute" and not under the failure to mitigate damages doctrine. *Nabors Wells Services*, 456 S.W.2d at 564, 566-67. In contrast, New York law admits seat belt non-usage evidence to support a mitigation of damages defense. N.Y. Veh. & Traffic Code sec. 1229-c(8) ("[n]on-compliance with the

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jury. Such an argument, however, actually highlights the case for admitting non-use of seat belts. Juries now *expect* motor vehicle occupants to wear their seat belts. Based on the demonstrated effectiveness of seat belts, juries may reasonably conclude that a person's decision not to wear a seat belt resulted in unnecessarily severe injuries that could have been avoided if the plaintiff simply had buckled up. This reasoning would not reflect "prejudice," in the sense of a biased or unfair action, but rather a jury's rational allocation of fault or assessment of avoidable injury based upon the plaintiff's negligent conduct.

Whether a plaintiff had buckled his or her belt is a relevant fact that directly bears on how the injuries occurred and who bears responsibility for those injuries.[40] Relevant evidence is admissible,[41] and fairness dictates that the person who causes or exacerbates an injury be held accountable for his or her actions. In considering how seat belt non-usage evidence will impact juries, the Texas Supreme Court concluded that such evidence would help jurors allocate responsibility among the parties

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provisions of this section … may be introduced into evidence in mitigation of damages provided the party introducing said evidence has pleaded such non-compliance as an affirmative defense."). As discussed in n.35, *supra*, there is little practical significance among the plausible legal bases for admission, as they all seek to separate the damages caused by the crash itself from those that resulted from the plaintiff's failure to fasten the seat belt, and allocate those damages to the responsible party. *See*, *e.g.*, *Rougeau*, 805 So.2d at 156 (excluding non-use evidence when offered on injury causation, despite no express prohibition in La. Rev. Stat. Ann. § 32:295.1(E) when such evidence is offered for that purpose, because comparative fault exclusion "implicitly affects the causation issue.").

[40] *See Rougeau*, 805 So.2d at 158.

[41] *Id*. at 155 ("La. Evid. C. art. 402 states that all relevant evidence is admissible, except as otherwise provided by other legislation.").

appropriately:

> There are no windfalls under the rule we announce today. Even when trial courts properly admit seatbelt evidence, defendants will still be held liable for the damages they caused, but not the injuries the plaintiff caused by not using a seat belt.[42]

With the repeal of La. Rev. Stat. Ann. § 32:295.1(E), the Louisiana legislature removed the only impediment preventing courts from admitting evidence of seat belt non-usage. Going forward, courts applying Louisiana law should routinely allow juries to hear and act on this evidence.

III. OTHER STATES STILL CLINGING TO A GAG RULE SHOULD FOLLOW LOUISIANA'S POSITIVE ACTION

Louisiana's repeal of its three-decade old statutory gag rule warrants attention from those states that retain similar exclusionary provisions. The public's changed opinion of seat belt usage, coupled with most states' shift away from strict contributory negligence approaches to proportionate fault allocation, renders these evidentiary gag rules anachronistic. The Texas Supreme Court described that state's prohibition on admitting seat belt non-use evidence as a rule that "may have been appropriate in its time, but today . . . is a vestige of a bygone legal system and an oddity in light of modern societal norms."[43] Louisiana's repeal of its gag rule

[42] *Nabors Wells Services*, 456 S.W.2d at 566.

[43] *Id*. at 555.

represents a logical move to align its court practices with the state's policies that recognize the benefits of seat belts and promote their use.[44]

Texas and Louisiana are certainly not the only states that have taken the position that juries may consider seat belt non-use evidence. A number of other states allow the jury to consider this evidence broadly for comparative negligence or reduction of damages, particularly if the defendant can show that a properly worn seat belt would have substantially reduced the plaintiff's injuries. For example, in 2013 Oklahoma enacted a statute directing that "the use or nonuse of seat belts [by adult occupants] shall be submitted into evidence in any civil suit in Oklahoma."[45] Statutes in California, Florida, and New York also allow juries to hear this evidence.[46] In several other states, including Arizona, Arkansas, Kentucky, and New Jersey, seat belt non-usage evidence is admissible pursuant to court rule.[47] Recent legislative

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[44] *See*, *e.g.*, n.18 & n.19, *supra*, and accompanying text.

[45] Okla. Stat. Ann. tit. 47, § 12-420 (2013).

[46] Cal. Vehicle Code § 27315(i) (seat belt non-use evidence is admissible to reduce damages if defendant can show passenger would have sustained reduced injuries); Fla. Stat. Ann. § 316.614(10)(seat belt non-usage may be considered as evidence of comparative negligence); N.Y. Veh. & Traf. Law § 1229–c(8), quoted in n.39, *supra*.

[47] *Law v. Superior Court*, 755 P.2d 1135 (Ariz. 1988)(non-usage is admissible to establish comparative fault); *Baker v. Morrison*, 309 Ark. 457, 462 (1992)("[W]e hold that [the plaintiffs'] nonuse of their seat belts may have been admissible as evidence of their comparative fault if such nonuse was a proximate cause of [the plaintiffs'] injuries.")(applicable rule of admissibility as a result of the Arkansas Supreme Court's ruling in *Mendoza v. WIS Int'l,* 2016 Ark. 157 (2016) declaring that state's exclusionary statute (Ark. Code Ann. § 27-37-703) to be unconstitutional); *Geyer,* 984 S.W.2d 107, quoted in n.35, *supra*; *Waterson v. General Motors Corp.,* 544 A.2d 357 (N.J. 1988)("[i]f a jury finds a plaintiff negligent for failure to wear a seat belt, plaintiff's recovery for injuries that could have been avoided by seat-belt use may be reduced by an amount reflecting plaintiff's comparative fault in

actions in Iowa and Missouri have also broadened the permissible uses of this evidence,[48] although these statutes retain significant limitations.

While those states have dropped their gag rules, a large majority of states continue to exclude entirely seat belt non-usage evidence, or severely restrict the jury's ability to use that evidence to apportion fault or limit damages based on the plaintiff's failure to buckle up. Jurisdictions that retain these antiquated approaches to seat belt evidence include:

- Alabama[49]
- Colorado[50]
- Connecticut[51]
- Delaware[52]
- District of Columbia[53]

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not wearing a seat belt."). *See also* N.J.S.A. § 39:3-76.2h (New Jersey seat belt statute does not alter existing laws pertaining to civil trials for personal injuries).

[48] Iowa Code Ann. § 321.445(4)(b)(2)(2018)(allowing juries to reduce damages by up to twenty-five percent based on a plaintiff's failure to fasten a seat belt); Mo. Rev. Stat. § 307.178(5) (allowing admission of seat belt non-use evidence "for any purpose" in lawsuits "arising out of the design, construction, manufacture, distribution, or sale of a passenger car.").

[49] Ala. Code § 32-5B-7 (bars consideration of the failure to wear a seat belt as evidence of negligence or to reduce the liability of a defendant).

[50] Colo. Rev. Stat. § 42-4-237(6)(evidence of failure to use a seat belt is admissible to mitigate non-economic damages, but may not be considered by the jury in determining its award for economic damages).

[51] Conn. Gen. Stat. § 14-100a(c)(3)(A plaintiff's failure to wear a seat belt is not admissible).

[52] Del. Code title 21, § 4802(i)(Evidence of the failure to wear a seat belt is not admissible).

[53] D.C. Code § 50-1902 (bars consideration of the failure to wear a seat belt either to show

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- Georgia[54]
- Hawaii[55]
- Idaho[56]
- Illinois[57]
- Indiana[58]
- Iowa[59]
- Kansas[60]
- Maine[61]
- Maryland[62]

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negligence or in mitigation of damages).

[54] Ga. Code § 40-8-76.1(d)(evidence of the failure to use a seat belt is not admissible).

[55]Haw. Rev. Stat. Ann. § 291-11.6 specifies that it does not displace the existing laws and rules pertaining to civil actions claiming personal injury or wrongful death damages sustained in a motor vehicle accident. At the time Hawaii's statute was enacted, its courts had not recognized a common-law tort duty requiring motorists to wear their seat belts at the risk of being charged with a failure to mitigate damages should an accident occur. *Kealoha v. Cty. of Hawaii*, 74 Haw. 308, 321, 844 P.2d 670, 677 (1993).

[56] Idaho Code § 49-673(8)(failure to use a seat belt may not be considered as evidence of contributory or comparative negligence).

[57] 625 ILCS 5/12-603.1(c)(evidence of the failure to wear a seat belt is not admissible either to prove negligence or in mitigation of damages).

[58] Ind. Code § 9-19-10-7 (evidence of the failure to use a seat belt is inadmissible except in a product liability suit involving a seat belt failure).

[59] Iowa Code § 321.445 (admission of evidence of the failure to wear a seat belt is allowed in mitigation of damages, but the jury may not reduce the award by more than 25 percent).

[60] Kan. Stat. § 8-2504(c)(evidence of the failure to wear a seat belt is not admissible).

[61] Me. Stat. title 29A, § 2081(5)(evidence of the failure to wear a seat belt is not admissible).

[62] Md. Trans. Code § 22-412-3(h)(evidence of the failure to wear a seat belt is not admissible).

- Massachusetts[63]
- Michigan[64]
- Minnesota[65]
- Mississippi[66]
- Missouri[67]
- Montana[68]
- Nebraska[69]
- Nevada[70]
- New Hampshire[71]

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[63] Mass. Acts 1993, ch. 387, § 3(evidence of the failure to wear a seat belt is not admissible).

[64] Mich. Comp. Law § 257.710e(7)(permits the introduction of seat belt non-usage evidence to prove negligence and to reduce damages, but award may not be reduced by more than five percent).

[65] Minn. Stat. § 169.685.4 (evidence of the failure to wear a seat belt is not admissible except in a product-liability suit involving the seat belt).

[66] Miss. Code § 63-2-3 (the failure to wear a seat belt is not *per se* negligence). Mississippi courts have held that statute precludes admission seat belt non-usage evidence for any purpose. *See Jones v. Panola County*, 725 So.2d 774 (Miss. 1998).

[67]Mo. Stat. § 307.178(4) & (5)(in a product liability lawsuit addressing the design or construction of a motor vehicle, seat belt non-usage evidence is admissible as evidence of comparative negligence or fault, causation, absence of a defect or hazard, and failure to mitigate damages. If the lawsuit does not involve such product liability claims, evidence of the failure to wear a seat belt is admissible only to mitigate damages, and then by no more than one percent).

[68] Mont. Code § 61-13-106 (evidence of the failure to wear a seat belt is inadmissible).

[69] Neb. Rev. Stat. § 60-6,273 (evidence of the failure to wear a seat belt is admissible only to mitigate damages, but any reduction may not exceed five percent).

[70] Nev. Stat. § 484D.495.4 (the failure to wear a seat belt does not constitute negligence or causation). Case law suggests that evidence of seat belt non-usage nonetheless may be admissible in product liability lawsuits. *See Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 252 P.3d 649 (Nev. 2011).

- New Mexico[72]
- North Carolina[73]
- Ohio[74]
- Oregon[75]
- Pennsylvania[76]
- Rhode Island[77]
- South Carolina[78]
- South Dakota[79]
- Tennessee[80]

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[71] Alone among the states, New Hampshire does not have a statute requiring the use of seat belts. New Hampshire case law indicates that evidence of the failure to wear a seat belt is not admissible in New Hampshire. *See Thibeault v. Campbell*, 622 A.2d 212 (N.H. 1993)(holding that another driver's negligence is not foreseeable, so there is no duty to guard against it by wearing a seat belt.).

[72] N.M. Stat. § 66-7-373(A)(evidence of the failure to wear a seat belt may not be used either to show negligence or to mitigate damages).

[73] N.C. Gen. Stat. § 20-135.2A(d)(evidence of the failure to wear a seat belt is not admissible).

[74] Ohio Rev. Code § 4513.263(F)(1) & (2)(introduction of seat belt non-use evidence is allowed for the limited purpose of showing that the failure to buckle up contributed to the plaintiff's harm in order to diminish recovery of non-economic losses. Also, evidence that a vehicle occupant was not wearing a seat belt may be admitted in product liability crashworthiness lawsuits brought against motor vehicle manufacturers or distributors).

[75] Or. Rev. Stat. § 31-760 (evidence of the failure to wear a seat belt is admissible only to mitigate damages, and then by no more than five percent. The limitation on admissibility does not apply to product liability suits or where the failure to use a seat belt was a substantial contributing cause of the accident out of which the suit arose).

[76] Pa. Stat. title 75, § 4581(e)(evidence of the failure to wear a seat belt is not admissible).

[77] R.I. Stat. § 31-22-22(h)(evidence of the failure to wear a seat belt is not admissible).

[78] S.C. Stat. § 56-5-6540(C)(evidence of failure to wear a seat belt is not admissible).

[79] S.D. Code § 32-38-4 (evidence of the failure to wear a seat belt is not admissible).

- Utah[81]
- Vermont[82]
- Virginia[83]
- Washington[84]
- West Virginia[85]
- Wisconsin[86]
- Wyoming[87]

When state legislators develop agendas for upcoming sessions, they should consider the problematic public policy that statutory gag rules present. In the interest

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[80] Tenn. Code § 55-9-604 (evidence of the failure to wear a seat belt is admissible in product liability lawsuits to establish that the plaintiff's injuries were caused by the failure to wear a seat belt, but seat belt non-usage evidence is not otherwise admissible).

[81] Utah Code § 41-6a-1806 (evidence of the failure to wear a seat belt is not admissible on issues of negligence, injuries, or mitigation of damages).

[82] Vt. Stat. title 23, § 1259(c)(evidence of the failure to wear a seat belt is not admissible).

[83] Va. Code § 46.2-1094(D)(evidence of the failure to wear a seat belt is not admissible).

[84] Wash. Rev. Code § 46.61.688(6)(bars the admission of evidence of the failure to wear a seat belt on the question of negligence in any civil action). Washington courts have extended that exclusion to mitigation of damages. *Clark v. Payne,* 61 Wash.App. 189 (1991).

[85] W.V. Code § 17C-15-49 (evidence of the failure to wear a seat belt is not admissible on the question of negligence; however, a defendant may request the court to find that the failure was a proximate cause of the injuries, and if the court so finds, the jury may consider this and reduce medical damages by up to five percent. A plaintiff's stipulation to the five percent reduction will prevent the evidence from reaching the jury).

[86] Wis. Stat. § 347.48(2m)(g)(permits the introduction of evidence of the failure to wear a seat belt, but the evidence may not serve to reduce damages by more than 15 percent). The failure to wear a seat belt can be introduced at trial only to address the incremental injuries the non-usage may have caused the plaintiff. *See Gaertner v. Holka*, 580 N.W.2d 271 (Wisc. 1998).

[87] Wyo. Stat. § 31-5-1402(f)(evidence of the failure to wear a seat belt is not admissible).

of occupant safety, states encourage motorists to think about using seat belts every time they enter a vehicle. Yet when those same motorists sit on a jury, gag rules in some states prevent those jurors from learning that a plaintiff did not buckle an available seat belt and consequently holding that plaintiff accountable for the injuries incurred by the choice not to buckle up. Louisiana's decision to repeal its evidentiary gag rule represents a positive step to align court practices regarding seat belts with public policy promoting seat belt use.

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