

CYCLING, SAFETY, AND VICTIM-BLAMING:
TOWARD A COHERENT PUBLIC POLICY FOR
BICYCLING IN 21ST CENTURY AMERICA

DAVID PIMENTEL*

INTRODUCTION.....	754
I. BICYCLING IS GOOD FOR SOCIETY.....	757
A. <i>Cycling as an Anti-Poverty Initiative</i>	758
B. <i>Cycling as an Antidote for Traffic Congestion</i>	760
C. <i>Public Health</i>	761
D. <i>Youth Empowerment</i>	762
E. <i>Environmental Concerns</i>	763
II. HOW DID WE GET TO BE SO AUTOMOBILE ORIENTED IN THE UNITED STATES?.....	765
III. WHAT WE CAN LEARN FROM MORE BICYCLE-FRIENDLY SOCIETIES	768
A. <i>Going Dutch: The Netherlands Experience</i>	769
B. <i>Idaho's Bicycle Laws</i>	773
IV. VICTIM BLAMING AND MORE: THE INEXPLICABLE HOSTILITY TO CYCLISTS AND CYCLING AND THE TRAGIC CONSEQUENCES OF THIS APPROACH	775
A. <i>Hostility to Cyclists and Cycling in State Legislatures</i>	779
B. <i>The Helmet Myth</i>	781
C. <i>Double Standards in Policing</i>	786
V. WHAT NEEDS TO CHANGE IN THE LEGAL REALM?	791
A. <i>Liability Rules for Car-on-Cyclist Accidents</i>	792
B. <i>The Rules for When Cyclists Should Have to Comply with Laws and Traffic Control Measures Designed for Cars</i>	795
C. <i>Other Rules that Burden or Otherwise Impose Costs on Bicycle Transportation</i>	797
D. <i>Enforcement of Existing Laws that Protect Cyclists and Better Training for Law Enforcement</i>	798
E. <i>Driver Training</i>	800

* Associate Professor of Law, University of Idaho. B.A., Brigham Young University; M.A., University of California, Berkeley; J.D., Boalt Hall School of Law, University of California, Berkeley. Thanks to Michael Lewyn and Ruth Pimentel Kacher for inspiration. Thanks to KateLyn Price for dedicated research assistance. Views expressed herein are exclusively those of the author.

CONCLUSION.....	801
-----------------	-----

INTRODUCTION

While bicycling on a semi-rural, two lane farming road in Sonoma County, California, 25-year-old Ross Dillon was struck by a vehicle and badly injured.¹ Dillon was an experienced cyclist, riding appropriately on the shoulder of the highway, and wearing a helmet at the time of the incident.² One witness described the scene as “awful,” “outrageous,” and “bizarre,” “because the cyclist was not taking any risk.”³ According to the officer’s report, the driver, Cathie Hamer, had reached into the back seat to pull something out of a grocery bag and hit Dillon without seeing him.⁴ Dillon’s medical expenses quickly ate up the \$25,000 available under Hamer’s liability insurance, and because Hamer had no assets, Dillon’s family quickly gave up any hope of a further remedy.⁵

Sonoma County opted not to pursue criminal charges against Hamer.⁶ Because Hamer did not kill Dillon, she is not liable for vehicular manslaughter,⁷ and there was no evidence of recklessness.⁸ The upshot was a human tragedy of enormous proportions—Dillon spent four months in a coma and ten months in a vegetative state from the accident—with no accountability for the harm caused.⁹ The driver

1. David Darlington, *Broken: When Traffic Laws Fail Cyclists*, BICYCLING (Apr. 10, 2010). http://www.bicycling.com/culture/advocacy/broken-when-traffic-laws-fail-cyclists_

2. Darlington, *supra* note 1.

3. Darlington, *supra* note 1.

4. Darlington, *supra* note 1.

One week after the crash, [California Highway Patrol] officer Eric Nelson called Cathie Hamer with a few clarifying questions. She told him she had nothing new to add, and that her attorney would have to participate in any further discussions. Nelson said that he understood, but also wanted to let her know that a “possible” bag of marijuana and rolling papers had been found in the glove compartment of her car.

Darlington, *supra* note 1. The testing on the material was inconclusive. Darlington, *supra* note 1.

5. Darlington, *supra* note 1.

6. Darlington, *supra* note 1.

7. CAL. PENAL CODE § 192(c)(2).

8. CAL. VEH. CODE § 23103; *see* Darlington, *supra* note 1.

9. Darlington, *supra* note 1 (“Part of the reason the Sonoma County district attorney’s office declined to pursue charges against Hamer was its expectation that a jury would identify and sympathize with her, a common occurrence across the country.”).

was guilty of nothing more than “distracted driving,” and despite the tragic consequences, would not be held liable for even that.¹⁰

Cyclist safety is a challenge in our society, and we have not been very effective in protecting it. If Dillon had been running stop signs or had not been wearing a helmet, we would have simply told ourselves that this was his own fault and not given the issue another thought.¹¹ But cyclists who abide by the law fully and take all appropriate safety precautions are nonetheless highly vulnerable on the road. Their flimsy conveyances are no match for the heavyweight motor vehicles that dominate America’s streets and highways.¹²

Unfortunately, bicyclists may be every bit as vulnerable in the legal system as they are on the roads. Their interests are no match for the clout of the automobile industry and a car-dominated culture, far more focused on protecting the interests of the motorist than on protecting the safety and life of the cyclist.¹³

The truth of the matter, however, is that by neglecting the legal interests, standards, and remedies needed by cyclists, the legal system is not just overlooking the rights of an obscure minority; it is undermining far greater principles of public policy.¹⁴ When bicycling becomes a genuine—and legally protected—alternative to driving, the public interest is promoted by its (1) easing the impact of poverty, as low income persons have viable and inexpensive means of transportation (avoiding the prohibitive expense of car payments, gas, and insurance, the latter being disproportionately high in urban centers and low-income neighborhoods), (2) easing traffic congestion

10. *Id.*

11. *See generally* Darlington, *supra* note 1.

12. There were 818 cyclist deaths in 2015, which accounted for 2.3% of all traffic fatalities during the year. *Traffic Safety Facts: Bicyclists and Other Cyclists*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN. 1, 2 (Mar. 2017), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812382>.

13. *See generally* Emily Hammond, *Government Liability When Cyclists Hit the Road: Same Roads, Same Rules, Different Rights*, 35 GA. L. REV. 1051 (2001). Ironically, bicyclists are credited for the creation of the national highway system. *Id.* at 1052. Yet, in a confusing array of inconsistent jurisprudence, cyclists frequently find themselves left without the legal recognition of their right to safe travel on the roads. *Id.*

14. An upward trend of cyclist fatalities has prompted advocacy work in this area. *See A Right to the Road: Understanding & Addressing Bicyclist Safety*, GOVERNORS HIGHWAY SAFETY ASSOCIATION 1, 5 (Aug. 2017), <https://www.ghsa.org/sites/default/files/2017-09/2017BicyclistSafetyReport-FINAL.pdf>. State Farm recently funded a report through the Governors Highway Safety Association producing a list of recommendations for shifting bicycle safety laws into review as a matter of public policy. *See id.* at 25–69.

and freeing up parking, as every driver who chooses to cycle instead is taking one car off the road, (3) improving public health, given the benefits of physical exercise, (4) empowering young people, too young to drive or to earn enough for a car, who could achieve some independence if cycling were an option, and (5) diminishing the environmental degradation incident to the burning of fossil fuels.

The importance of making bicycling a viable alternative to driving, and keeping it so, is evident in other cultures, where the enumerated benefits are more important, perhaps because the needs are more acute.¹⁵ The United States has much to learn from these societies.

But a key aspect of promoting this public policy—one that makes sense in terms of addressing the problems of poverty, traffic, public health, youth empowerment and the environment—is the system of legal rules and standards that govern bicycling in America. Legal rules must not only afford bicyclists the formal right of way, but also assign liability in a way that provides proper incentives to drivers to respect the cyclists' right of way. The application of the car-focused traffic laws should be revisited, as these mechanisms and approaches were designed for motor vehicles and may be ill-suited to the needs and safety of the cyclist.¹⁶ Placing undue burdens or costs on cycling, or merely unjustified ones,¹⁷ can only result in the underutilization of the cycling option, with attendant costs to society as a whole.

Indeed, when it comes to promoting cycling generally, and cyclists' safety in particular, we need to shift the focus from the behavior of the cyclist to the behavior of the drivers who hit them. As long as our legal regime blames cyclists for their accidents and injuries, we cannot hope for cycling to become a viable transportation alternative.

Finally, to achieve their objectives, cyclists need to become advocates for society, not just for themselves. They have an image problem that engenders little sympathy for their cause.¹⁸ Their penchant for rolling through stop signs brands them as scofflaws.¹⁹

15. See *How the Dutch Got Their Cycling Infrastructure*, BICYCLE DUTCH, (July 25, 2017), <https://bicycledutch.wordpress.com/2011/10/20/how-the-dutch-got-their-cycling-infrastructure/> (The Netherlands has the largest community of cyclists and the safest system.). By turning away from car-centric policies and turning towards alternative transportation, cycling boomed in the Netherlands. *Id.* For further discussion of the Dutch system, see *infra* Section III.

16. See discussion *infra* Section V.B.

17. See discussion *infra* Section IV

18. See Will Doig, *Are Urban Bicyclists Just Elite Snobs?*, SALON (Dec. 4, 2011, 12:00 PM), http://www.salon.com/2011/12/04/are_urban_bicyclists_just_elite_snobs/.
19. Asmara M. Tekle, *Roll on, Cyclist: The Idaho Rule, Traffic Law, and the Quest to Incentivize Urban Cycling*, 92 CHI.-KENT L. REV. 549, 552–53 (2017).

The self-righteousness of a privileged group of spandex-clad hardbodies is unlikely to command the attention, much less the respect, of political actors, especially when the complaints of that “special interest” are pitted against the needs and interests of ordinary folks just trying to get to work.²⁰ As long as bicycling is viewed as an exotic sport or pastime, cycling enthusiasts who occupy the roads, whose pelotons interfere with vehicular traffic, or whose on-road behavior flouts the traffic laws, will be viewed as burdens on the community. But cycling as a means of transportation generates enormous positive externalities, even for those who choose never to ride themselves. The legal system must shift to protect and promote the rights and safety of those who cycle.²¹ Only then can cycling serve as a viable alternative to driving; only then can all these societal benefits be achieved.

I. BICYCLING IS GOOD FOR SOCIETY

Cycling is a positive force in virtually any community and benefits the community as a whole.²² This fundamental concept is too often overlooked in the debate over the rights of cyclists on the road, which may be characterized as drivers’ rights versus cyclists’ rights. In the competitive characterization, cyclists are likely to lose every time because (1) they are outnumbered by drivers, and (2) their interest in cycling is often viewed as purely recreational. “Why can’t they ride

20. *Id.* Cycling is often associated with urban young people and newcomers in an urban setting. *Id.* Cycling lanes may be the most visible changes in transforming cities creating an image of gentrification. *Id.* People who bicycle to work and enjoy their morning commute are seen as the new “I don’t have a TV’ guy,” reinforcing the dissidence between cyclists and drivers on the road. *Id.*

21. Bicycle activists and organizations have been advocating for a change in tort law from comprehensive or contributory negligence to a stricter standard similar to the Netherlands. See, e.g., Ken McLeod, *Bicycle Laws in the United States – Past, Present, Future*, 42 *FORDHAM URB. L.J.* 869, 903–04 (2015); see *infra* note 45.

22. Recently, the Smithsonian featured the Patrick F. Taylor Foundation Object Project. Caitlyn Kearney, *Bicycles Have Changed But Fellowship Remains*, SMITHSONIAN: O SAY CAN YOU SEE? (Oct. 20, 2015), <http://americanhistory.si.edu/blog/bicycles-have-changed-fellowship-remains>. The exhibit highlights how Americans used the bicycle “for personal liberation.” *Id.* “A phenomenon that became a nationwide craze from the 1880s to the 1910s, bicycling was an affordable means of mobility, leisure, and freedom.” *Id.* Sue Macy makes a compelling case that the women’s liberation movement was facilitated by the availability of bicycle transportation. See generally SUE MACY, *WHEELS OF CHANGE: HOW WOMEN RODE THE BICYCLE TO FREEDOM (WITH A FEW FLAT TIRES ALONG THE WAY)* (2017).

somewhere else?” is a question/complaint that makes sense, if at all, only if cycling is characterized purely as a form of recreation or exercise.²³

If cycling, in contrast, is a form of essential transportation, then children need safe routes to school and workers need routes that will take them to their workplaces. When cyclists and cycling are crowded out of the public thoroughway, there is a community-wide loss.

A. *Cycling as an Anti-Poverty Initiative*

The perceived necessity of an automobile as a staple of the American lifestyle has created immense financial pressures on impoverished Americans.²⁴ The amount of money needed for basic survival in America is vastly higher than it needs to be because we are so quick to treat a car as an essential.²⁵ Those people with limited incomes spend a disproportionate share of their income on car

23. This type of NIMBYism is unhelpful, of course. If bicyclists are just as unsafe “somewhere else,” it accomplishes nothing for them to move. And when they are hit, injured cyclists are confronted by unsympathetic juries because most individuals identify as a motor vehicle driver. Daniel Duane, *Is it OK to Kill Cyclists*, N.Y. TIMES (Nov. 9, 2013), http://www.nytimes.com/2013/11/10/opinion/sunday/is-it-ok-to-kill-cyclists.html?pagewanted=all&src=ISMR_AP_LO_MST_FB&r=0 (“[J]urors identify with drivers.’ Convictions carry life-destroying penalties, up to six years in prison, . . . and jurors ‘just think, well, I could have made the same mistake. So they don’t convict.”). Jurors are more likely to find a cyclist was negligent if they are not wearing a helmet at the time of the accident, and jurors may think the cyclist must ride in the bike lane but may not realize that the lanes are not all connected requiring the cyclist to travel in the traffic lane. Shaana A. Rahman, *Gear Up for Bicycle Accident Cases*, 48 TRIAL 26, 30 (Feb. 2012).

24. Of course, there are places in America—usually urban centers such as New York City, where parking is scarce and where public transit is ubiquitous—where car ownership is not considered necessary. Kara King, *The 10 Best US Cities for Getting Around Without a Car*, THRILLIST (Apr. 29, 2016), [https://www.thrillist.com/news/nation/10-best-us-cities-for-getting-around-without-a-car-2016-san-francisco-new-york-boston_\(listing San Francisco, New York, and Boston as the top three\)](https://www.thrillist.com/news/nation/10-best-us-cities-for-getting-around-without-a-car-2016-san-francisco-new-york-boston_(listing San Francisco, New York, and Boston as the top three).). Overwhelmingly, this is the exception to the rule in America since the mid-20th century. See Witold Rybczynski, *Car-Free in America?* N.Y. TIMES (May 12, 2009, 2:07 PM), https://roomfordebate.blogs.nytimes.com/2009/05/12/carless-in-america/?_r=0 (“There are only six American downtown districts that are dense enough to support mass transit, which you need if you’re going to be carless . . .”).

25. See Bill Gifford, *The Bicycle Diaries: Is it Possible to Live in America Without a Car? Uh, Sort Of.*, SLATE (Nov. 23, 2005, 5:24 PM), http://www.slate.com/articles/news_and_politics/dispatches/2005/11/the_bicycle_diaries.html.

payments, car insurance, gasoline, and maintenance.²⁶ If bicycling were considered a viable alternative, their financial troubles could be eased significantly, as the money sucked up by the car could be repurposed to ease financial pressures the household otherwise faces.²⁷ Already, statistics show that bicycle use is highest among the top *and bottom* quartiles of the socio-economic spectrum.²⁸ We know that affluent types may mount expensive carbon-fiber bicycles for sport, and these may be the cyclists easiest to resent and revile. However, America's poorest segment of society is already relying on bicycles to a much greater degree than the middle class.²⁹ As bicycling

26. Hannah Wickford, *Typical Percentages for Household Budgets*, THE NEST, <http://budgeting.thenest.com/typical-percentages-household-budgets-3299.html> (last visited Feb. 12, 2018) (citing the Bureau of Labor Statistics and noting that the average American household spends over 17% of its budget on transportation). BLS also reported that "[l]ow-income families spent a far greater share of their income on core needs, such as housing, *transportation*, and food, than did upper-income families," and

[f]or households in the lower third, the average annual cost of fuel, auto insurance, vehicle maintenance and repair, and public transportation in 1996 averaged \$2,000 a year; by 2014, this group spent nearly \$2,100 just on fuel. These extreme cost increases force households to make difficult choices and trade-offs to meet core needs.

Issue Brief, Household Expenditures and Income, PEW CHARITABLE TRUSTS (Mar. 30, 2016) (emphasis added), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/03/household-expenditures-and-income>; Alexa Mason, *Car Free: Living in America Without a Car*, SAVINGADVICE.COM (Mar. 27, 2017), http://www.savingadvice.com/articles/2017/03/27/104947_living-without-a-car.html (noting the financial benefits of living without a car: (1) no car payments, (2) no insurance payments, (3) immunity from gasoline price hikes, (4) no car repair bills, (5) no need for gym membership, which all result in a much healthier bank account).

27. The demand for a cycling alternative for low-income people is evident in the operation of urban bike-share programs. In Philadelphia, bike-share company Indego partnered with the city to set up an AccessPass to subsidize use of bike-sharing for low income users. *Bike Share in the US: 2010-2016*, NAT'L ASS'N OF CITY TRANSPORTATION OFFICIALS, <https://nacto.org/bike-share-statistics-2016/> (last visited Feb. 12, 2018). Ridership among individuals who made less than \$35,000 a year increased from 27% to 44% in 2016. *Id.*

28. See Brian McKenzie, *Modes Less Traveled – Bicycling and Walking to Work in the United States 2008-2012*, U.S. CENSUS BUREAU 1, 13 fig. 11 (May 2014), <https://www.census.gov/prod/2014pubs/acs-25.pdf>. Data from the 2008–2014 census report households in the lowest income category, less than \$10,000 per year, showed the highest bicycling and walking to work rate at 1.5% and 8.2%. *Id.* at 7–11. The rates are also high among individuals in the highest education bracket. *Id.* at 11.

29. *Id.* at 7–11.

is a lifeline to them, any legal policy that is hostile to cyclists is inherently hostile to the poor.³⁰

B. *Cycling as an Antidote for Traffic Congestion*

One of the key criticisms of cycling is that it obstructs traffic; drivers complain that cyclists get in their way and make it difficult to get where they are going.³¹ This perception, though common, ignores the simple truth that virtually every driver who chooses to make a trip by bicycle has taken one car off the road. Those people who continue to drive benefit not only from the easing of congestion, but also from the increased availability of parking once they reach their destination.

The benefits of traffic calming cannot be overstated. One of the worst bottlenecks in the United States, I-90 between Roosevelt Road and Nagle Avenue in Chicago, is congested throughout the day in both directions.³² Daily delays on this twelve-mile stretch total an estimated seventeen million hours annually.³³ No doubt, Chicago has many such bottlenecks, as does virtually every metropolitan area in the country, adding to the tally of wasted fuel, and more particularly, wasted time. However those hours are valued, the congestion is costing these drivers, and the economy overall, a staggering amount.

The social cost of more cars on the road, of course, goes well beyond the time lost in traffic jams and slowdowns. Given their size and power, every vehicle on the road is capable of doing terrible harm. More cars mean more accidents, more injuries, and more fatalities. The social cost of these accidents—both human cost as well as

30. Indeed, recent studies in impoverished and developing countries have also demonstrated a strong connection between bicycle use and household income; those people interested in alleviating poverty around the world are recognizing that bicycle ownership and use can be an important factor in economic growth, something to be tracked and actively promoted. See, e.g., Gaurav Singhal, *An Analysis of the Huge Unnoticed Potential Increased Bicycle Density has in Accelerating Rural Growth in India*, BICYCLEPOTENTIAL BLOG, <http://www.bicyclepotential.org/2009/01/bicycle-report.html> (linking to studies that show that bicycle ownership improves a family's income in India (by 36–39%), in Uganda (by 35%), in Tanzania (by 55%), and in Sri Lanka (saving household expense by 30% in the poorest households)).

31. See Duane, *supra* note 23.

32. American Highway Users Alliance, *Unclogging America's Arteries: Prescriptions for Healthier Highways* I, VII (2015), <http://www.highways.org/wp-content/uploads/2015/11/unclogging-study2015-low-res.pdf> (a study of America's worst 30 bottlenecks analyzing the negative economic and environmental impacts caused by traffic congestion).

33. *Id.* at 13.

property damage and losses—adds to the toll motor vehicle transportation takes on society.³⁴ Cycling, of course, is an alternative that can dramatically mitigate these costs.

C. Public Health

The more active people are, the healthier they will be, so a shift in favor of bicycling will bring greater health in general.³⁵ The benefits of improved public health, however, are not limited to the individuals who get that exercise. Poor health in individuals imposes serious costs on society as a whole, as public health is closely tied to a country's social well-being and economic growth.³⁶ It affects the productivity of workers and children's ability to learn in school.³⁷ A health setback can result in financial ruin for families of limited means; indeed, it is the individual greatest cause for bankruptcy in the United States.³⁸ And chronic diseases cost the U.S. economy \$1.3 trillion per year.³⁹

Accordingly, virtually anything that improves general public health will generate benefits for society as a whole, from economic growth to education. Thus, promotion of cycling for transportation (as an alternative to driving) or for recreation (as an alternative to sedentary activity) is a worthy public goal. At the same time, the legal and social structures that discourage cycling—by burdening cyclists with restrictions, taxing them, denying them legal protection, or maintaining unsafe conditions for them—are profoundly misguided, or at least short-sighted, needlessly perpetuating societal harm.⁴⁰

34. *Id.* at 32 (concluding that finding a solution to traffic congestion should be a policy priority and doing so will result in billions of dollars saved due to lost time and fuel, reductions in greenhouse gas emissions, and fewer vehicle crashes).

35. See Jeroen Johan de Hartog, Hanna Boogaard, Hans Nijland, & Gerard Hoek, *Do the Health Benefits of Cycling Outweigh the Risks?*, 118 ENVIRONMENTAL HEALTH PERSPECTIVES 1109, 1109–16 (June 30, 2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2920084/>.

36. See *Financing the Future: Choice and Challenges in Public Health*, THE ECONOMIST INTELLIGENCE UNIT 1, 5–7 (2015), http://globalhealth.eiu.com/wp-content/uploads/2015/12/FinalProofwCover_11.24.15_EIU_JandJ_Global_Health-6.pdf.

37. *Id.* at 6.

38. *Id.* at 6.

39. *Id.* (citing a study by the Milken Institute).

40. See discussion *infra* Section I.E.

D. Youth Empowerment

A general lament has arisen in recent years about how helicopter parenting, and other highly protective parenting approaches, are infantilizing America's youth.⁴¹ Safety concerns are prompting parents to insist that their kids be driven everywhere they need to go.⁴² This dynamic is deleterious to American youth and American families both, as the patterns of dependency continue now through adolescence,⁴³ and as parents shoulder serious burdens involved in the chauffeuring of their children from one supervised activity to another. The freedoms associated with youth have dramatically diminished, to the point that university deans complain about the lack of self-sufficiency exhibited by incoming freshmen.⁴⁴

41. See, e.g., George F. Will, *Intensive Parenting Producing Infantilized Youths*, THE JAPAN TIMES (May 14, 2015), <http://www.japantimes.co.jp/opinion/2015/05/14/commentary/world-commentary/intensive-parenting-producing-infantilized-youths/#.WYx0OFF96M8> (published originally as George F. Will, *Punishing Parents Who Deviate From the Government-enforced Norm*, WASH. POST (May 13, 2015), https://www.washingtonpost.com/opinions/punishing-parents-who-deviate-from-the-government-enforced-norm/2015/05/13/05cd035e-f8c4-11e4-a13c-193b1241d51a_story.html); Nancy Gibbs, *The Growing Backlash Against Overparenting*, TIME (Nov. 30, 2009), <http://content.time.com/time/subscriber/printout/0,8816,1940697,00.html> ("From peace and prosperity, there arose fear and anxiety; crime went down, yet parents stopped letting kids out of their sight; the percentage of kids walking or biking to school dropped from 41% in 1969 to 13% in 2001.").

42. Jane E. Brody, *Turning the Ride to School into a Walk*, N.Y. TIMES (Sept. 11, 2007), <http://www.nytimes.com/2007/09/11/health/11brod.html>.

43. Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1274–78 (2011) (These negative effects include dependency and inability to cope with life's challenges; inability "to manage their time, strategize, and negotiate open conflict during play;" decreased creativity, spontaneity, and enjoyment than children raised under different child rearing practices; decreased empathy; and immaturity.); Hara Estroff Marano, *A Nation of Wimps*, 37 PSYCHOLOGY TODAY 58, 64–68 (Nov. 1, 2004), <https://www.psychologytoday.com/articles/200411/nation-wimps>.

44. See, e.g., JULIE LYTHCOTT-HAIMS, HOW TO RAISE AN ADULT: BREAK FREE OF THE OVERPARENTING TRAP AND PREPARE YOUR KID FOR SUCCESS 6 *et seq.* (2015) (Lythcott-Haims is a former "dean of freshmen" at Stanford University); see also BEN SASSE, THE VANISHING AMERICAN ADULT (2017) (The former President of Midland University in Nebraska wrote, "Denying meaningful rites of passage and obscuring the distinction between childhood and adulthood cheats the generation coming of age of something vital. Lowering expectations, cushioning all blows, and tolerating aimlessness not only hurts them, it also deprives their neighbors, who desperately need their engagement." *Id.*

If bicycling is promoted and developed as a safe alternative to driving, adolescents and pre-adolescents may be able to recapture the level of independence that their parents or grandparents grew up with. Young people would be able to get themselves to and from their various activities and exercise greater self-sufficiency in their own lives. As a bonus, parents would be relieved of the enormously time-intensive task of shuttling their otherwise capable children to and from school as well as their other activities.

E. Environmental Concerns

If a rise in bicycling for basic transportation means a commensurate decline in the burning of fossil fuels, and the emissions that accompany it, the environment will benefit from that shift.⁴⁵ While this benefit's obviousness may thrust it to center stage in the debate over the virtues of cycling vis-à-vis driving,⁴⁶ it is perhaps one of the least effective themes of pro-bicycling advocacy. The concerns about carbon emissions and their impact on global warming remain controversial in America, so this argument may alienate a large contingent of American society.⁴⁷ Those members of society who are

45. See generally Colleen Maker, *Strict Liability in Cycling Laws to Ready the Roads for Environmentally Friendly Commuting*, 42 B.C. ENVTL. AFF. L. REV. 473 (2015).

46. Karl Ulrich has argued, however, that the environmental footprint of a cyclist is actually greater than that of a driver because the cyclist lives so much longer and contributes to environmental degradation for so many more years. Karl T. Ulrich, *The Environmental Paradox of Bicycling* 1-12 (Univ. of Pa., Working Paper, July 2006), <https://ssrn.com/abstract=1335210> (also available at <http://dx.doi.org/10.2139/ssrn.1335210>). If this theory is true, it may not be appropriate to put too much emphasis on environmental benefits of bicycling. But that Ulrich's thesis does not undermine the general public policy arguments in favor of bicycling is easily demonstrated by taking Ulrich's argument to its logical extreme. If the environment benefits from people dying young, we should expect environmentalists to champion any activity that contributes to early death. And no one—not even the tobacco lobby—is prepared to couch its advocacy in such terms. Moreover, others have argued that Ulrich underestimates the environmental benefits of cycling. Andrew Leonard, *Bikers, They Ain't No Good: Are the Health Benefits of Cycling Bad for the Environment?*, SALON (July 18, 2006, 6:20 PM) (citing Paul A.T. Higgins, *Exercise-based transportation reduces oil dependence, carbon emissions and obesity*, 32 ENVTL. CONSERVATION, 197-202 (2005)), <http://www.salon.com/2006/07/18/bikers/>.

47. Louis Jacobson, *Yes, Donald Trump Did Call Climate Change a Chinese Hoax*, POLITIFACT (June 3, 2016, 12:00 PM), <http://www.politifact.com/truth-o-meter/statements/2016/jun/03/hillary-clinton/yes-donald-trump-did-call-climate-change-chinese-h/>.

already convinced that environmental concerns are worthy of attention may already be on board with the virtues of cycling; for those members of society who are climate change skeptics, the appeal to environmentalism may merely exacerbate political division and allow the pro-bicycling lobby to be labeled and dismissed as part and parcel of a larger liberal conspiracy. At the same time, the self-righteousness often attributed to bicyclists—who may be tempted to view themselves as morally superior (primarily for reasons related to environmental impact and physical fitness)—and their holier-than-thou condemnations of the car-driving public will only obscure the degree to which everyone else, including car drivers, benefit from a robust bicycling culture.⁴⁸ The environmental benefits of cycling speak for themselves, to a large degree; so advocacy for cycling needs to emphasize the other, less obvious benefits, particularly for the non-cycling public.

* * *

The problem, of course, is that our system has created a host of disincentives for people to bicycle. Despite the fact that cycling generates benefits for everyone, and that public policy should be actively promoting cycling, we have imposed burdens on cyclists, including “safety” measures that put the burden on cyclists rather than on the motorists who hit them, *de facto* legal presumptions against cyclists, and taxes on bikes.⁴⁹ Rather than create safe bike routes for those who choose to cycle, we expect cyclists to ride on the side of the road, next to large, heavy, and fast-moving traffic, and then blame the cyclist when the road sharing does not go well, or when an accident otherwise occurs.

The cost of these disincentives is seriously exacerbated by the “Safety in Numbers” effect, which generates a counter-intuitive result.⁵⁰ The concept has been explained as “the phenomenon by which the per-walker or per-bicyclist frequency of being struck by motorists declines as the amount of walking or bicycling on a street or in a region increases.”⁵¹ The idea is pithily articulated in the title of Niall McCarthy’s article: “The More Cyclists in a Country, The Fewer Fatal

48. See Doig, *supra* note 18.

49. See generally Maker, *supra* note 45.

50. Peter Lyndon Jacobsen, David R. Ragland & Charles Komanoff, *Safety in Numbers for Walkers and Bicyclists: Exploring the Mechanisms*, INJURY PREVENTION 1, 1 (2015), http://www.onestreet.org/images/stories/Safety_in_Numbers_2015.pdf.

51. *Id.*

Crashes.”⁵² The problem is that a safety-inspired measure that puts the burden on the cyclist—such as a legal requirement that cyclists wear helmets, or that they wear reflective clothing—only discourages the cyclist from riding at all. With fewer cyclists on the road, drivers are less likely to expect them and less likely to watch for them, and therefore, more likely to hit them and kill them. The cyclist-burdening safety measure effectively backfires by leaving the remaining cyclists at *greater* risk of harm than before. The “safety in numbers effect” was documented in conjunction with the introduction of mandatory helmet laws in Australia and is discussed further in Section IV.B.⁵³

II. HOW DID WE GET TO BE SO AUTOMOBILE ORIENTED IN THE UNITED STATES?

The streets of America were not always presumed to be the domain of motor vehicles, of course. Roads were built and maintained originally for a far less mechanized usage; pedestrians, horses, horse-drawn transport, and even bicycles were the primary users of public thoroughways before the automobile came on the scene.⁵⁴

52. Niall McCarthy, *The More Cyclists in a Country, the Fewer Fatal Crashes – Report*, FORBES (Feb. 24, 2015, 8:30 AM), <https://www.forbes.com/sites/niallmccarthy/2015/02/24/the-more-cyclists-in-a-country-the-fewer-fatal-crashes-report-infographic/#7c0dfee933b3>.

53. Luke Turner, *Australia’s Helmet Law Disaster*, 64 IPA REVIEW 28, 28–29 (Apr. 2012), <http://www.vehicularcyclist.com/ozdisaster.pdf> (“Importantly, helmet laws severely reduce the number of cyclists on the road, leading to increased risk among those who remain through reduced safety in numbers, a researched and acknowledged influence on cyclist accident and injury rates.”).

54. With the adoption of the U.S. Constitution in 1788, Congress was given the power “[t]o establish Post Offices and post Roads.” U.S. CONST. art. I, § 8, cl. 7. At the time, transportation was increasingly necessary to connect the settlements across the nation, and the federal government was expected to support infrastructure growth. Away from the rivers where settlers could travel by boat, land travel was mostly on “Indian trails, which could be traversed by only packhorses or mules.” Paul Stephen Dempsey, *Transportation: A Legal History*, 30 TRANSP. L.J. 235, 243 (2003). Many roads were created for government organizations, such as the Infantry U.S. Army Bicycle Corps who “set out across the country on their bicycles in 1896-7.” RIP3D, *History of Mountain Biking and the Mountain Bike Pioneers*, MOUNTAIN BIKE MAYHEM (Sept. 26, 2010), http://mountainbikemayhem.com/news_and_info/history-of-mountain-biking-and-the-mountain-bike-pioneers. Many of our transportation norms herald from the time before automobiles were introduced in the 1900s. Right hand of the road travel, for example, originates from when wagons were in general use and drivers used their right hand to handle the reins and watch for ditches. Richard F. Weingroff, *On the Right Side of the Road*, U.S. DEP’T TRANSP. FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/infrastructure/right.cfm> (last visited Jan. 29, 2018).

Unfortunately, cars and pedestrians did not mix well. Indeed, pedestrian deaths tallied more than 200,000 in the United States in the 1920s, a public health and safety catastrophe by any measure.⁵⁵ The automobile lobby had to act to make sure their industry was not faulted for this disastrous toll on humanity, so they began a propaganda campaign to shift the blame away from cars and drivers.⁵⁶ If the streets were “meant for” cars, they reasoned, it was the responsibility of the pedestrian, not the driver, to take precautions to avoid being hit. The automobile industry carefully cultivated this perception, exonerating automobile drivers for the carnage in the streets by attributing responsibility to the pedestrians and cyclists who dared to claim a space on public roadways.⁵⁷

As Peter Norton documents, the campaign was clever—some would characterize it as nefarious—and enormously successful:

Until the mid 1930s (the claim goes), street railways served city people well. To find new customers, however, automotive interest groups, led by General Motors, conspired to foil the free market by acquiring street railways, scrapping them, and substituting buses and, ultimately, urban highways. Automotive interests acted in concert, secretively and sometimes illegally.⁵⁸

Michael Lewyn, in his article *The Criminalization of Walking*, further details the tactics of the automobile industry and its allies in their effort to blame the horrific death toll on the pedestrians themselves:

As part of this propaganda campaign, the automobile lobby used the term “jaywalker.” The term “jay” originally meant “a country hayseed out of place in the city.” Thus, a jaywalker was a pedestrian out of place in the city—one oblivious to the dangers of motor traffic. Automobile lobbyists and lobbyist-

55. Hunter Oatman-Stanford, *Murder Machines: Why Cars Will Kill 30,000 Americans This Year*, COLLECTORS WKLY. (Mar. 10, 2014), <https://www.collectorsweekly.com/articles/murder-machines/>.

56. *Id.*

57. Peter D. Norton, *Street Rivals: Jaywalking and the Invention of the Motor Age Street*, 48 TECH. & CULTURE 331, 340 (2007).

58. PETER D. NORTON, FIGHTING TRAFFIC: THE DAWN OF THE MOTOR AGE IN THE AMERICAN CITY 10 (2008) (citing *The Industrial Reorganization Act: Hearing on S. 1167 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93rd Cong. 1865–70 (1974) (statement of Bradford C. Snell, Assistant Counsel, Subcomm. on Antitrust & Monopoly)).

influenced “safety groups” used this term to stigmatize walkers. For example:

- Chicago taxicab company president John Hertz asserted: “We fear the ‘jay walker’ worse than the anarchist”
- In 1920, self-styled safety advocates dragged San Francisco pedestrians into mock courtrooms to lecture them on the perils of jaywalking.
- In Los Angeles, an automobile club posted signs warning that “jay walking” was prohibited, even though at the time this term was not in the city’s traffic code.
- In some cities, auto lobbyists used their advertising power to take over the press. For example, in 1923 the Chicago Motor Club bought space in the Chicago Tribune for advertisements claiming that pedestrians caused 90% of auto collisions. The National Automobile Chamber of Commerce, another industry group, created an “accident news service” designed to show that most accidents were caused by careless pedestrians.
- Auto lobbyists also hijacked public education, using peer pressure to influence students. For example, in 1925 a student jury in a Detroit public school tried a fellow student for jaywalking, sentencing the defendant to wash school blackboards for a week.

Ultimately, auto lobbyists persuaded governments to supplement industry propaganda with state coercion. In Los Angeles, the automobile club created a coalition called the Los Angeles Traffic Commission, which drafted a model traffic ordinance that included anti-jaywalking provisions. The city council passed the ordinance in 1925. Violators were fined or even arrested. Other cities quickly followed suit.⁵⁹

Against this backdrop, it is not particularly surprising that cyclists, like the pedestrians discussed by Lewyn, have ended up with the short end of the stick in the allocation of rights to the road. The legal framework in most states—both in law and, especially, in practice—places the burden of safety on the cyclist. Both the law and the people administering it appear to indulge in the presumption that if a driver hits a cyclist, the fault is probably with the cyclist.⁶⁰ This concept is

59. Michael Lewyn, *The Criminalization of Walking*, 2017 ILL. L. REV. 1167, 1170–71 (2017) (footnotes omitted) (citing Norton, *supra* note 58).

60. Duane, *supra* note 23.

discussed further below in Section IV. on “Victim Blaming,” and more particularly in Section IV.C. on “Double Standards.”

III. WHAT WE CAN LEARN FROM MORE BICYCLE-FRIENDLY SOCIETIES

The popular approach in the United States is to simply require bicycles to adhere to the same rules as drivers, but the legal rules that apply to cars are *not* in fact designed to keep bicyclists safe or to facilitate bicycle traffic. They are designed for cars, for the purpose of regulating traffic. There are many laws that apply to automobiles that simply do not and cannot apply to bicycles. Certainly, the laws covering mandatory use of seatbelts, for example, do not apply to bicycles, and compelling arguments can be—and have been—made that speed limits shouldn’t apply to bicycles either.⁶¹ It should not surprise us, therefore, to find that automobile traffic laws are dramatically inappropriate for bicycle traffic and that, indeed, cyclists’ adherence to them both imperils the cyclists’ safety and exacerbates the traffic congestion they were designed to ease. A powerful demonstration of this effect was orchestrated in San Francisco in July 2015:

Hundreds of cyclists rode through The Wiggle [a popular bike route through town] yesterday evening in protest of a San Francisco police captain’s calls for a crackdown on bikers coasting through stop signs. But instead of breaking the law, protesters wanted to show the city just how bad traffic would be if every bicycle approached intersections just as a car does.

Riders arrived at every stop sign in a single file, coming to a complete stop and filing through the intersection only once they were given the right-of-way. The law-abiding act of civil disobedience snarled traffic almost immediately.

...

“Stop signs are major hindrance to bike safety and have an impact on pedestrian safety,” [Supervisor John] Avalos added.

61. The argument is that a car is required to be equipped with a functional speedometer, and that a car exceeding a posted speed limit is presumed to be driving faster than is reasonable and prudent (in violation of law). Because a bicycle need not be equipped with a speedometer, it may violate equitable principles (if not due process) to prosecute a cyclist for exceeding the posted limit. Jon Schofield, *Never Litigate as a Matter of Principle – Unless, of Course, You’re Being Accused of Speeding on a Bicycle*, 22 UTAH B.J. 37, 39 (Aug. 2009); see *infra* note 192.

. . . Drivers caught in the traffic had to wait at least ten minutes to clear the city block. And in two instances, drivers frustrated by cyclists obeying the law broke the law themselves and weaved into a lane of oncoming traffic, gunning their motors straight through the intersection to skirt the gridlock.⁶²

Although the police's threatened crackdown on scofflaw bicyclists was purportedly motivated by concerns for safety and order, the consequence of cyclist compliance apparently served neither purpose. To the extent that these laws are inappropriate for cyclists, it should not surprise us when cyclists routinely disregard them.

Unlike cars, which are much faster and a couple of orders of magnitude heavier, bicycles are unlikely to pose such a serious threat to pedestrians and pose almost no threat at all to occupants of cars. Bicyclists already have compelling reasons to avoid unsafe behaviors, even without the threat of enforcement; it is the cyclist's own life that is at greatest risk from unsafe behaviors on the road.⁶³

If it makes sense to create different legal rules and standards for bicycles than for cars, how should they be different? It is worth looking at other jurisdictions to understand what bicycle laws tailored for the needs and safety of bicyclists—and, for that matter, designed to promote good traffic flow for cars as well—might look like.

A. *Going Dutch: The Netherlands Experience*

The Netherlands has the highest number of bicycles per capita of any country and is arguably the most bicycle-friendly and bicycle-centric society in the world.⁶⁴ The bicycles in the Netherlands are

62. Kevin Montgomery, *This Is What Happened When Bicyclists Obeyed Traffic Laws Along the Wiggle Yesterday*, S.F. WKLY. (July 30, 2015), <https://archives.sfweekly.com/thesnitch/2015/07/30/this-is-what-happened-when-bicyclists-obeyed-traffic-laws-along-the-wiggle-yesterday>. Of course, “civil disobedience” is a misnomer; the cyclists' demonstration is better characterized as “civil obedience.”

63. See discussion of deterrence theory in this context *infra* Section V.A.

64. Leszec J. Silbilski, *Cycling Is Everyone's Business*, THE WORLD BANK: PEOPLE SPACES, AND DELIBERATION BLOG (Feb. 4, 2015) (“The Netherlands holds the record as the nation with the most bicycles per capita.”) <https://blogs.worldbank.org/publicsphere/cycling-everyone-s-business>; Christopher F. Scheutze, *If You Build It, the Dutch Will Pedal*, N.Y. TIMES (Sept. 6, 2017) (describing the Netherlands as “one of the world's most bike-friendly countries”),

overwhelmingly utilitarian in design and built for basic transportation, rather than lightweight “sport” bikes built with an athlete or sports person in mind.⁶⁵ As a rule, the Dutch do not wear spandex (or Lycra, the term they would use for it) and do not wear helmets.⁶⁶

In the Netherlands, bicycle fatalities by motor vehicles were 3,300 in 1971, 500 of which were children.⁶⁷ This crisis launched the *Stop de Kindermoord* (i.e., Stop the Child Murder) protests, calling for safer streets for cyclists and pedestrians.⁶⁸ Rather than blaming the children, discouraging children from riding on busy streets or at all, or imposing helmet requirements on the children, the Dutch government focused on driver behavior and infrastructure. Their system is now arguably the safest in the world.⁶⁹ Death rates for Dutch cyclists declined from 425 deaths in 1965 to 138 in 2009,⁷⁰ a decrease of 68%, even as total bicycle use has steadily risen in that country to become the highest in the world.⁷¹

<https://www.nytimes.com/2017/09/06/world/europe/bicycling-utrecht-dutch-love-bikes-worlds-largest-bike-parking-garages.html>.

65. James D. Schwartz, *Anatomy of a Dutch Bicycle*, URB. COUNTRY: BICYCLE TRANSP. BLOG (Jan. 2011), <http://www.theurbancountry.com/2011/01/anatomy-of-dutch-bicycle.html>.

66. Henry Jeffreys, *Cycling in Lycra is Bad for the Soul*, SPECTATOR (May 7, 2016, 9:00 AM), <https://www.spectator.co.uk/2016/05/cycling-in-lycra-is-bad-for-the-soul/> (“If you look at countries where cycling is genuinely popular, such as Denmark or Holland, nobody wears [Lycra].”). See generally Zachary Shahan, *Why the Dutch Don’t Wear Helmets*, TREEHUGGER (Feb. 13, 2014), <https://www.treehugger.com/bikes/why-dutch-dont-wear-helmets.html>.

67. *Stop de kindermoord – Against Children Deaths Caused by Motor Vehicles, The Netherlands*, ENVTL. JUST. ATLAS, <https://ejatlas.org/conflict/stop-de-kindermoord-stop-the-child-murder-protest-for-children-deaths-caused-by-motor-vehicles> (last visited Jan. 30, 2018).

68. *Id.*

69. Mike McLeish, *The Best Cycling Holiday for Beginners: The Netherlands*, ADVENTURES ALL AROUND (Feb. 22, 2017), <https://adventuresallaround.com/the-best-cycling-holiday-for-beginners-why-the-netherlands-is-the-place-to-bel/>.

70. BICYCLE HELMET RESEARCH FOUND., *Cycling Deaths in Selected Countries*, <http://www.cyclehelmets.org/1258.html> (last visited Jan. 30, 2018) (citing “[s]tatistics from IRTAD (the OECD’s International Road Traffic and Accident Database)”).

71. Renate van der Zee, *How Amsterdam Became the Bicycle Capital of the World*, GUARDIAN (May 5, 2015), <https://www.theguardian.com/cities/2015/may/05/amsterdam-bicycle-capital-world-transport-cycling-kindermoord>; Stuart Kenny, *Which Country Cycles More Than Any Other in the World? Here’s the Top 10*, MPORA (Dec. 7, 2015), <https://mpora.com/road-cycling/which-country-cycles-more-than-any-other-in-the-world-heres-the-top-10>.

In response to the *Stop de Kindermoord* protests, coupled with the demands of energy/oil crisis that arose in that same time (the early 1970s), the Dutch government was happy to shift focus away from cars and orient public policy in favor of promoting and protecting cycling. The Netherlands approach is an interesting contrast to what had happened in the United States forty to fifty years earlier.⁷² In both cases, the death toll became unacceptably high. The Dutch responded by protecting cycling and cyclists. The United States responded by clarifying that the roadways belong to cars, and anyone else should use, or even cross, these streets at their peril.

One of the key investments the Dutch made was in the redesign of roads and intersections to minimize the potential for automobile-cyclist accidents. In the Netherlands, for example, one is far more likely to find two-way bike routes, separated from the automobile traffic lanes by a median.⁷³ Dutch cyclists on these routes, therefore, are not relegated to the shoulders of the road, trying to navigate the space between the moving traffic and the parked cars on the side, or needing to claim part of the automobile lane because of the absence of a safe or sizeable shoulder.

Intersection design also changed to accommodate the safety of cyclists. A cyclist making a left turn through one of these intersections is NOT required to ride out in the middle of the traffic to get to the left turn lane, as is typically required in the United States. The cyclists have crosswalk-like lanes that make them more visible to drivers turning at the intersection and that minimize the potential for bicycle-automobile contact.⁷⁴

The Dutch do more than invest in bicycle safety; they also make specific efforts to instruct drivers on how to avoid injuring cyclists. One of the ways cyclists are injured, of course, is when a parallel-parked car suddenly opens a driver-side door. A driver who is not cognizant of that risk will not look for a cyclist before throwing her door open.⁷⁵ To address this problem, a standard part of Dutch driver education and licensing is to train the driver always to open his or her

72. See *supra* note 59 and accompanying text.

73. *State of the Art Bikeway Design, or Is It?*, BICYCLE DUTCH, <https://bicycledutch.wordpress.com/2011/04/07/state-of-the-art-bikeway-design-or-is-it/> (last visited Jan. 30, 2018).

74. BicycleDutch, *Junction Design the Dutch - Cycle Friendly - Way*, YOUTUBE (Apr. 3, 2011), <https://www.youtube.com/watch?v=FLApbxLz6pA> (showing how cycling lanes in the Netherlands are designed and require no additional road space).

75. McLeod, *supra* note 21, at 905–06.

driver-side door with the right hand.⁷⁶ This forces the driver to turn his or her body, bringing passing bicyclists more fully into view before the door can be opened.⁷⁷ Such simple requirements protect the cyclist from car door injuries, serve as a regular reminder to drivers that cyclists are out there, and remind drivers that they have the responsibility to ensure that cyclists are safe on the roadways.

The ubiquity of cyclists in the Netherlands helps, of course. The fact that there are so many cyclists makes drivers more aware of them and more likely to anticipate a cyclist's presence or a cyclist's behavior.⁷⁸ It follows that everything that we do in the United States that discourages cycling, and takes cyclists off the roads, makes the cyclists that much more at risk, as it will not occur to drivers to look for them or to give them space.⁷⁹

Finally, and importantly, Dutch law creates strong presumptions of liability against the driver in any automobile-bicycle accident.⁸⁰ The liability factor may be very important in impressing upon drivers the importance of watching for cyclists. Much of our tort and criminal law is driven by the concept of deterrence, as we know that fear of liability will drive behavior and encourage appropriate levels of precaution.⁸¹ The Dutch laws are designed to deter unsafe practices by drivers, rather than to deter unsafe practices by cyclists. Both the theory and the empirics suggest that the Netherlands' approach may be more effective in promoting safety.⁸²

76. See Russell Shorto, *The Dutch Way: Bicycles and Fresh Bread*, N.Y. TIMES (July 30, 2011), http://www.nytimes.com/2011/07/31/opinion/sunday/the-dutch-way-bicycles-and-fresh-bread.html?_r=0.

Dutch drivers are taught that when you are about to get out of the car, you reach for the door handle with your right hand—bringing your arm across your body to the door. This forces a driver to swivel shoulders and head, so that before opening the door you can see if there is a bike coming from behind.

Id.

77. *Id.*

78. See discussion of the safety-in-numbers effect *supra* notes 50–53 and accompanying text.

79. *Id.*

80. Maker, *supra* note 45, at 486.

81. See discussion of deterrence theory *infra* Section V.A.

82. See statistics on bicycle fatalities *supra* note 70 and accompanying text; discussion of deterrence theory in this context *infra* Section V.A.

B. Idaho's Bicycle Laws

The San Francisco protesters who conducted the exercise in “civil obedience” discussed above were advocating for a change in the law, one that would hold bicyclists to different standards than cars.⁸³ The article spoke of reform, specifically in terms of the “Idaho Stop” law:

Cyclists, along with a growing number of organizations and local politicians, believe bike riders shouldn't be legally treated like cars, but rather treated as what they are—bikers. There's been a growing call for the city and California to adopt what is known as the “Idaho Stop” law. Since 1982, Idaho has permitted cyclists to treat stop signs as yields and red lights as stop signs, which allows bikers to conserve energy, clear intersections faster, and become more visible (and thus safer) by getting in front of traffic.

Board of Supervisors President London Breed endorsed the Idaho Stop yesterday, admitting to the Examiner that's how she already treats stop signs while biking.

Breed's colleague on the board, Supervisor John Avalos, similarly endorses the policy, telling SF Weekly, “The law makes absolute sense.”⁸⁴

It is a rare thing when San Franciscans are agitating to adopt laws that are in effect in Idaho.⁸⁵ But Idaho's laws, which acknowledge the needs and interests of bicyclists, stand alone in the United States as a sharp contrast to the prevailing approach in the other forty-nine states.⁸⁶

In a very recent article, Professor Asmara Tekle makes a particularly compelling case for the Idaho Stop laws, citing a wide

83. Montgomery, *supra* note 62.

84. Montgomery, *supra* note 62 (emphasis omitted).

85. The author grew up in the San Francisco Bay Area, went to graduate school there, and worked in The City for a number of years, before ultimately moving to Idaho. The zeitgeist of the two places is strikingly dissimilar.

86. McLeod, *supra* note 21, at 913 n.268. Note, however, that Idaho Stop laws have been adopted in a few local jurisdictions in Colorado. *E.g.*, ASPEN, COLO., MUNICIPAL CODE art. XXIV, §§ 04.010-.020 (2016); DILLON, COLO., MUNICIPAL CODE ch. 8, art. V, § 8-5-20 (2016); SUMMIT, COLO., MUNICIPAL CODE art. 9, § 5, (2012) (Summit County Traffic Code); BRECKENRIDGE, COLO., MUNICIPAL CODE art. 7, ch. 1, § 1412, cl. 12(a) (2010).

range of reasons they are logical and effective, including the physics of cycling (forcing cyclists to make unnecessary stops disproportionately increases the difficulty, and effort required, to go from point A to point B),⁸⁷ and the cyclists' own feelings of security (the Idaho rule "enables cyclists to *feel* safer by 'get[ting] out ahead of traffic [rather than fighting] for space on a road with no bike lane.')."⁸⁸ Her analysis strongly suggests that other jurisdictions should be adopting such rules, and that bicycle advocacy groups should be embracing them far more than they do.⁸⁹

It is worth noting that Idaho's adoption of these bicyclist-friendly laws was not accompanied by any measurable increase in bicycle accidents or fatalities:

This law, in part, has allowed Idaho to lead the way in reducing bicycle accident rates. For example, in the year following the adoption of the law, bicycle accidents declined by 14.5 percent. And Idaho has regularly been among the lowest in the rate of bike/car fatalities as a percent of population among the states.⁹⁰

Tekle's examination of the various studies confirms that the Idaho laws have not generated negative safety outcomes:

[Bicycle accident] fatalities in Idaho fall squarely at the bottom and under the national average. For instance, as compared to the national average of 2.2% of traffic fatalities who were cyclists in 2014, Idaho experienced a fatality rate of

87. Tekle, *supra* note 19 at 553–54.

88. Tekle, *supra* note 19, at 557–58 (emphasis in original) (quoting Emily Badger, *Let's Talk Seriously About Why Cyclists Break Traffic Laws*, WASH. POST (Jan. 9, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/09/lets-talk-seriously-about-why-cyclists-break-traffic-laws/?utm_term=.5bb2aac9d0e5).

89. Tekle, *supra* note 19, 558–60.

90. Kurt Holzer, *Living with Stop as Yield for Cyclists*, BIKE LAW: IDAHO BLOG (Jan. 27, 2016), <https://www.bikelaw.com/2016/01/living-with-stop-as-yield-for-cyclists/> (emphasis omitted). There were zero pedacyclist fatalities in 2015 in Alaska, Idaho, Maine, Rhode Island, and Wyoming. U.S. DEP'T TRANSP. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 2015 DATA: BICYCLISTS AND OTHER CYCLISTS 7 (Mar. 2017), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812382>; see also TRAFFIC SAFETY FACTS 2014 DATA: BICYCLISTS AND OTHER CYCLISTS, *supra* note 12, at 7.

cyclists involved in traffic accidents of 1.1%, the 12th lowest rate in the nation⁹¹

Tekle further quotes Brian Shea of the Idaho Department of Transportation, describing “the ‘general consensus’ among stakeholders such as ‘transportation officials, [urban] planning staffs, law enforcement, [and] bicycle advocacy groups . . . is that the law has helped to facilitate the ease and convenience of cycling without causing any risks to cyclists or increasing the number of crashes.”⁹²

Presumably, drivers in Idaho know what to expect from bicyclists and know to make allowances for them. Presumably, where there are a lot of cyclists, drivers learn to watch out for them.⁹³ And, as discussed *infra*, the greatest factor contributing to cyclist safety is the fact that drivers—those who are controlling the dangerous res—are aware of and make allowances for the potential victims of accidents.

IV. VICTIM BLAMING AND MORE: THE INEXPLICABLE HOSTILITY TO CYCLISTS AND CYCLING AND THE TRAGIC CONSEQUENCES OF THIS APPROACH

As noted at the outset, cyclists may have an image problem.⁹⁴ As long as they come across as “elitist snobs” or scofflaws, they will not get much sympathy from drivers, law enforcement officials, or state legislators. It is very common to see outrage directed at cyclists even though the dangers and harms posed by automobiles are disproportionately worse, even by orders of magnitude.⁹⁵ Typical of

91. Tekle, *supra* note 19 at 556 (citing U.S. DEPT. OF TRANSP., DOT HS 812 261, TRAFFIC SAFETY FACTS 2014 170–71 (May 2016)).

92. Tekle, *supra* note 19 at 555–56 (citing E-mail from Brian M. Shea, Senior Transp. Planner, Planning Servs, Div. of Eng’g Servs, Idaho Transp. Dep’t, to Asmara Tekle, Professor of Law, Tex. Southern Univ., Thurgood Marshall Sch. of Law (Aug. 31, 2016, 9:52 a.m.) (on file with Prof. Tekle)).

93. See discussion of the Safety in Numbers effect *supra* notes 50–53 and accompanying text.

94. See Doig, *supra* note 18.

95. A great example is a recent op-ed in the *New York Times* written by someone whose mother was struck by a cyclist, fell and hit her head, and died shortly thereafter. Lucy Madison, *Wheels of Misfortune*, N.Y. TIMES (Aug. 11, 2017), https://www.nytimes.com/2017/08/11/opinion/traffic-bike-laws.html?_r=0. Not to minimize the magnitude of the author’s loss, but her anti-cyclist diatribe seemed strangely disproportionate, as the author cited statistics showing that in New York City over 10,000 pedestrian injuries involved motor vehicles, while only 361 pedestrian injuries involved cyclists in the given year (2015). *Id.* The number of pedestrian deaths in New York City in 2015 involved with motor vehicles was 137, while the number of

the anti-cyclist invective is this editorial from the *New York Post*, entitled “Bike-Lane Bloodbath,” decrying the new bike-sharing program being rolled out in New York City:

Here’s an argument against shutting down hospitals: Under its new bicycle-sharing program, City Hall is about to flood the streets with 10,000 more weapons of pedestrian destruction.

What’s the connection?

Seems a new study by two Hunter College professors found that, from 2007 to 2010, 4,121 people in the state had to go to the hospital after being hit by a bike.

And 55 percent of those victims got hit in the five boroughs — a figure that will surprise absolutely no one who’s ever tried to negotiate the streets and sidewalks while in the vicinity of a bike rider.⁹⁶

This remarkable piece, predicting a “bloodbath,” was not concerned about the deaths and injuries that the cyclists would suffer. The concern was for pedestrians, characterizing bicycles as “weapons of pedestrian destruction.”⁹⁷ It made no mention of the motor vehicles that pose far greater threats to pedestrians or of the fact that

deaths involved with cyclists was omitted from her op-ed. *Id.* The reported figure was, in fact, 0 for 2015, NYC DEP’T OF TRANSP., BICYCLE CRASH DATA REPORT (2015), <http://www.nyc.gov/html/dot/downloads/pdf/bicycle-crash-data-report-2015.pdf>, notwithstanding the author mother’s death in 2016, and a single death in 2014 she mentions in her piece. Madison, *supra*. The article decried the fact that rogue cyclists threaten our safety, and clearly framed cyclists as “bad guys.” *Id.* However, at least arguably, her own statistics should have made the cyclists out as *victims*, as 4,433 *cyclists* were injured, and fourteen killed, in accidents involving motor vehicles in New York City that same year. *Id.* Nonetheless, the op-ed was published, and cyclists were vilified, while drivers of motor vehicles escaped criticism. Yet in New York City in 2015, those drivers were involved in nearly thirty times as many pedestrian injuries and involved in 137 pedestrian fatalities (compared to cyclists, who were involved in zero pedestrian fatalities). BICYCLE CRASH DATA REPORT, *supra*.

96. Opinion, *Bike-Lane Bloodbath*, N.Y. POST (Sept. 21, 2011), <http://nypost.com/2011/09/21/bike-lane-bloodbath/>.

97. *Id.*

replacing motor vehicles with bicycles must necessarily make pedestrians safer.⁹⁸

Moreover, the true public safety risk arising from putting bicycles on the streets is that the cyclists themselves are in harm's way. The narrative is not focused on the danger cyclists are in—the perception is, perhaps, that cyclists who are injured in accidents get what they deserve—but rather on the dangers cyclists impose on others.⁹⁹ The victim blaming approach to these issues—giving drivers a pass but shaming cyclists—ultimately does great harm.¹⁰⁰ In this victim-blaming regime, every safety measure designed to put the burden of safety on the cyclist simultaneously functions to assign blame to the cyclist. The burdens and the shame work together to and depress ridership.¹⁰¹ The ultimate result is more harm to those who still dare to ride.¹⁰² The antipathy shown to cyclists in the legal rules and in the enforcement of them is not merely hostile to their legal privileges, it is hostile to their safety, health, and right to life.

We can learn a lot about victim blaming in cycling accidents by looking at the concept of victim blaming in rape.¹⁰³ One possible explanation for the reflex to blame cyclists is the attempt to reassure ourselves that “this could not happen to me.” This dynamic has been identified in the behavior of female jurors in rape cases, who apparently are far more willing to blame the victim than their fellow male jurors.¹⁰⁴ The idea of being victimized by a rapist is so

98. The statistics on deaths, cited *supra* in note 95, establish that motor vehicles were involved in 137 pedestrian fatalities in New York City in 2015, while bicyclists were involved in zero.

99. See Madison *supra* note 95 (summarizing the story).

100. Where the highest and lowest income brackets reflect the highest users of bicycles as alternative transportation, if victims are not seen as “elite snobs,” victim blaming is projected on those in the lowest income bracket who may already face substantial obstacles overcoming bias from police officers and juries.

101. Shaming has a powerful deterrent effect on behavior. As one commentator on victim blaming explains, “modern shaming is just plain mean-spirited and . . . society is venting its frustration with crime on certain vulnerable categories of [individuals].” Deni Smith Garcia, *Three Worlds Collide: A Novel Approach to the Law, Literature, and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 110 (1999).

102. See discussion of safety in numbers *supra* notes 50–53 and accompanying text.

103. See, e.g., *Rape Culture, Victim Blaming, and the Facts*, SO. CONN. ST. UNIV., <http://www.southernct.edu/sexual-misconduct/facts.html> (last visited Jan. 30, 2018).

104. Several prosecutors have stated they “believed that women jurors are good for male defendants in rape cases, because they are critical of the victims.” Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 306 (2005).

unthinkably awful that the female juror is desperately looking for reassurance that she is not similarly vulnerable. By possibly thinking that “I would never go out dressed like that, at that time of night, in that neighborhood,” the juror reassures herself that she is not at risk, and in so doing, blames this victim for the rape she suffers: “They are much more judgmental about the victim, for placing herself in a vulnerable position Women will say, ‘if that was me he would have had to kill me because I would have fought and fought.’”¹⁰⁵ Similarly, we may be tempted to judge the injured cyclist, telling ourselves “I never would have ridden a bike on such a busy street” or “I wouldn’t have ridden without a helmet.”

Similarly, this impulse to reassure ourselves plays out in two ways in the context of cycling accidents. First, we can reassure ourselves that we are not at risk of death because we do not cycle much, if at all, and only crazy people would dare take to the streets on such a dangerous contraption. Second, because virtually everyone is a driver, more people can identify with the driver than with the cyclist in these accident cases.¹⁰⁶ In this situation, assigning blame for the accident to the cyclist is reassuring to us; we want to believe that we would not be to blame for the catastrophic harm caused by such an accident. The comparatively small percentage of cyclists may be thinking the opposite, but their small numbers would be insufficient to overcome the bias favoring drivers in this desperate play for reassurance.

The hostility to cyclists takes various other forms. We see it arise on questions of taxation, where cyclists are somehow presumed not to be bearing their fair share of the public tax burden.¹⁰⁷ We see it in enforcement, when police officers, judges, and juries are too quick to assume that the bicyclist must be at fault for any accident.¹⁰⁸ We see it in laws that purport to ensure the safety of cyclists but that ultimately place the burden of the safety measures on the cyclist, including mandatory helmet laws.¹⁰⁹ Each category is discussed in more detail below.

What is curious is the hostility itself. Whether it is traceable to petty jealousies, to the automobile industry’s successful campaign to persuade us that roads are first and foremost (or even exclusively) for

105 *Id.*

106 *See* Duane, *supra* note 23.

107 *See* Bob Adelman, *Oregon Passes Resentment Tax: \$15 Per Bicycle*, NEW AM. (July 18, 2017), <https://www.thenewamerican.com/usnews/politics/item/26499-oregon-passes-resentment-tax-15-per-bicycle>.

108 *See* discussion *infra* Section IV.C.

109 *See* discussion *infra* Section IV.B.

motor vehicles, or to something else, there is no doubt that it is real. And society's insistence on implementing policies hostile to bicycles is imposing serious costs on everyone.

A. *Hostility to Cyclists and Cycling in State Legislatures*

One of the popular misconceptions is that cyclists are freeloaders that use roads that they do not pay for and impose burdens on drivers and on society without making meaningful contributions to the building and maintenance of the roads they use.¹¹⁰ This misconception has prompted state legislatures to consider imposing direct taxes on cyclists and on cycling, among other measures hostile to cyclists.

In Montana, legislator Scott Sales has identified the problem of cyclists on the roads as something requiring particularly hostile and punitive approaches.¹¹¹ His problem is not so much the commuter, who cycles to work and around town in the course of life's routines. He is incensed at recreational cyclists, some of whom come from out of state to ride the scenic highways of Montana.¹¹²

Sales participated in killing a bill that would have required drivers to give three feet of passing space to cyclists at low speed, and five feet of passing space at speeds over thirty-five miles per hour.¹¹³ Sales, who has described cyclists as "some of the rudest and most self-centered people [he's] ever encountered," has proposed imposing a road tax on cyclists, as well as banning them from the roads altogether unless the road has at least a three-foot shoulder.¹¹⁴ His proposals presuppose cycling as an evil to be discouraged.

Viewed from another perspective, Montana's scenic highways are a serious draw for tourist dollars—every cyclist who comes to Montana pays for lodging, restaurant meals, etc. in the Montana economy.¹¹⁵ The state of Montana spends almost \$10 million each year to promote tourism and business development in the state.¹¹⁶ Why

110. See Adelman, *supra* note 107.

111. See Robert Annis, *Montana Legislator Plans to Introduce Extensive Anti-Cyclist Bill*, BICYCLING (Mar. 16, 2017), <http://www.bicycling.com/culture/advocacy/montana-legislator-plans-to-introduce-extensive-anti-cyclist-bill>.

112. *Id.*

113. *See id.*

114. *Id.*

115. *Id.*

116. Governor's Office of Budget and Program Planning, State of Montana, 2019 State Budget, [https://budget.mt.gov/Portals/29/execbudgets/2019_Budget/Section%](https://budget.mt.gov/Portals/29/execbudgets/2019_Budget/Section%20)

should the state of Montana simultaneously implement proposals designed to discourage tourism and harm tourist-oriented businesses? These proposals make sense only in the context of short-sighted, anti-cyclist prejudice.

Of course, the Montana legislation has only been proposed; it has not been adopted or implemented.¹¹⁷ In contrast, Oregon has adopted a new tax on bicycles, imposing a \$15 assessment on the purchase of any new adult bicycle for more than \$200.¹¹⁸ This tax has been justified in terms of making the cyclists pay their fair share of public road maintenance.¹¹⁹

The argument sounds logical enough, but glosses over some important distinctions. First, it may be hard to measure cyclists' "fair share" of public road maintenance because bicycles do not contribute appreciably to public road degradation; a "fair share" of the maintenance expenses may be negligible for someone who imposes so little wear and tear on the roads.¹²⁰ Second, it is not particularly fair to make bicyclists pay for roads in places where bikes are not permitted to use those roads, but are relegated to the shoulder, or freeways which they may not be permitted to use at all. Third, almost all cyclists already pay for the roads because they are drivers as well¹²¹—they pay car registration taxes and fees and gasoline taxes when they fuel their cars, as well sales taxes, income taxes, and

20A%20-%202019B.pdf. Moreover, bicycle tourism in Montana has the potential to generate as much as \$377 million for the Montana economy. *See* Annis, *supra* note 111.

117. *See* Annis, *supra* note 111.

118. *See* Adelman, *supra* note 107.

119. *See* Adelman, *supra* note 107. To Oregon's credit, they have earmarked the tax revenues for improvements that will benefit cyclists, but even with that restriction on the use of revenues, the legislation still misses the point. *See* discussion at Section IV.A.

120. "[I]t takes 9,600 bicycles to cause the damage of one car on a paved street." Joseph Rose, *Portland Bike Riders Pay 'More than Fair Share' of Road Costs, Says New Bicycle Transportation Alliance Campaign*, THE OREGONIAN (Nov. 12, 2013, 7:57 AM)

http://www.oregonlive.com/commuting/index.ssf/2013/11/portland_bike_riders_pay_more.html (citing a 2010 University of California at Berkeley study on "Repricing Highway Pavement Deterioration"); Joe Lindsey, *The Best Responses to Anti-Cyclist Claims*, BICYCLING (Aug. 12, 2015) <http://www.bicycling.com/training/tips/best-responses-anti-cyclist-claims> ("[I]t's worth noting that bicycles create wear and tear orders of magnitude less than automobile traffic, which itself is an order of magnitude less than truck traffic.")

121. *See* Rose, *supra* note 120 ("89 percent of Oregonians with bikes also own cars, requiring them to pay gas taxes as well as licensing and registration fees.").

property taxes assessed more generally, which are widely used for the road maintenance line items in public budgets.¹²²

The argument also misses the much larger point that cycling benefits everyone, not just the cyclists. For the reasons articulated in Section I, *supra*, the state should be encouraging cycling in general, for the benefit of car drivers, for the benefit of the poor, for the promotion of public health, etc. Oregon is right to prioritize investment in bicycle-friendly infrastructure for all of these reasons, and profoundly wrong to place the burden for such investment on the shoulders of cyclists alone.¹²³ Taxing anything will discourage it, and Oregon's willingness to impose such a tax makes sense only if the legislature believes that there are too many cyclists and that cycling activities should be discouraged, even punished, through tax liability.

A more policy-coherent approach would be to fund bicycle-friendly infrastructure through gasoline taxes, which encourages cycling on both ends, as it would simultaneously discourage driving and make cycling more attractive. Indeed, if cycling is an effective means of alleviating some of the impact of poverty, improving public health, easing traffic, empowering our youth, and cleaning up our environment, it is an activity that generates serious positive externalities; therefore, cycling is something we should subsidize from the public fisc rather than penalize through taxation.

B. *The Helmet Myth*

More than just the imposition of taxes discourages bicycle use. The imposition of other burdens on cyclists, including safety-oriented ones, will similarly discourage bicycle use. A great example is the imposition of mandatory helmet laws.

Bicycle helmets would appear, at first blush, to be uncontroversial. Who could possibly object to adopting this extra measure of safety? As one commentator observed, "In the United States the notion that bike helmets promote health and safety by preventing head injuries is taken as pretty near God's truth. Unhelmeted cyclists are regarded as irresponsible, like people who

122. See Rose, *supra* note 120 ; Lindsey, *supra* note 120 ("Total user fees (including tolls) account for only 50.4 percent of all road funding in the US. . . . So where does the rest of the money for all roads, and the majority of funding for local roads, come from? Two broad sources: general taxes and bonds.").

123. See Doig, *supra* note 18.

smoke.”¹²⁴ In practice, however, the issue is not nearly so simple. The emphasis on helmets, and on mandatory helmet laws in particular, is problematic for a variety of reasons.¹²⁵

First, the helmet requirement is yet another attempt to foist the responsibility for bicycle injuries and bicycle deaths on the cyclists themselves, rather than on the drivers who hit them. News coverage of bicycle accidents invariably point out when the cyclist was “not wearing a helmet,” lest anyone feel sympathy for the victim.¹²⁶

Second, helmet laws draw attention to the risks of cycling, which can be alarming to the cyclists, and in the case of children, to their parents as well. “Safety” education programs, often featuring the smashing of a watermelon to illustrate to children what will happen to their heads if they don’t wear a helmet, serve only to terrify children and scare people away from cycling altogether.¹²⁷ Far more people die in car accidents than cycling accidents, but we do not insist that people wear helmets every time they step in a car. Australian Professor Piet de Jong observed, “Pushing helmets really kills cycling and bike-sharing in particular because it promotes a sense of danger that isn’t justified.”¹²⁸ de Jong continues, “Statistically, if we wear helmets for cycling, maybe we should wear helmets when we climb ladders or get into a bath, because there are lots more injuries during those activities.”¹²⁹ The fears generated discourage people from bicycling at all. The irony is striking, since the health benefits of

124 Elisabeth Rosenthal, *To Encourage Biking, Cities Lose the Helmets*, N.Y. TIMES (Sept. 29, 2012), <http://www.nytimes.com/2012/09/30/sunday-review/to-encourage-biking-cities-forget-about-helmets.html>.

125. See Peter Walker, *The Big Bike Helmet Debate: “You Don’t Make it Safe by Forcing Cyclists to Dress for Urban Warfare,”* THE GUARDIAN (Mar. 21, 2017, 2:00 PM), <https://www.theguardian.com/lifeandstyle/2017/mar/21/bike-helmet-cyclists-safe-urban-warfare-wheels>.

126. Caitlin Giddings, *Five Cyclist-Blaming Headlines—And How to Reframe Them*, BICYCLING (Nov. 11, 2015), <http://www.bicycling.com/culture/advocacy/five-cyclist-blaming-headlines-and-how-reframe-them>. Giddings goes on to detail other anti-cyclist sentiments that are routinely depicted in these news stories.

127. See Lenore Skenazy, *Enough with the Smashed Watermelons! Helmet Mania Is Scaring Kids Away from Biking*, FREE-RANGE KIDS (July 24, 2016) <http://www.freerangekids.com/enough-with-the-smashed-watermelons-helmet-mania-is-scaring-kids-away-from-biking/>; Sue Knaup, *Are Helmet Programs Scaring Kids Away from Bicycling?* THE BIKE HELMET BLOG (Nov. 10, 2015), <http://www.bikehelmetblog.com/2015/11/are-helmet-programs-scaring-kids-away.html>.

128. Rosenthal, *supra* note 124.

129. Rosenthal, *supra* note 124.

cycling outweigh the risk of injury by estimates ranging from a 20:1 ratio to a 77:1 ratio.¹³⁰

Third, the burden of buying a helmet and then donning it every time one rides increases the cost (in money, time, and hassle) of a bike ride, which further discourages cycling. Mandatory helmet laws are perceived as fatal to the success of any urban bikeshare program.¹³¹ Seattle tried to find functional workarounds, but its first effort at a bike-sharing program failed anyway.¹³² Even for the casual rider, the mandatory helmet burden is a significant one. Cosmetic concerns associated with helmets may prompt potential riders to resort to their cars: “[H]aving to wear a helmet could be a deciding factor on whether to commute by bike. Let’s face it; you cannot get to the office or an important meeting with a helmet head, so instead many professional women forego riding altogether.”¹³³

The helmet law orthodoxy is further complicated by the fact that helmets do not actually provide substantial protection to a cyclist who is hit by a car. The data on brain injuries suggest that helmet use is

130. Rosenthal, *supra* note 124; Turner, *supra* note 53, at 29 (“[T]he health benefits [of cycling] outweigh[] the risks from traffic accidents by a large margin. British research suggests life years gained through cycling outweigh years lost in cycling fatalities by a factor of 20:1. A recent study of users of Barcelona’s public bike hire scheme puts this ratio at 77:1.”).

131. Gigi Douban, *A Pothole for Bike-Sharing Programs: Helmets*, MARKETPLACE (Sept. 4, 2015, 5:00 AM), <https://www.marketplace.org/2015/09/04/business/pothole-bike-sharing-programs-helmets>; David Gutman, *Will Helmet Law Kill Seattle’s New Bike-Share Program?* SEATTLE TIMES (Dec. 19, 2016, 7:00 AM), <http://www.seattletimes.com/seattle-news/transportation/will-helmet-law-kill-seattles-new-bike-share-program/>; *Helmets Pose Challenge For Vancouver Bike Share Program*, HUFFPOST (July 19, 2013, 9:12 AM), http://www.huffingtonpost.ca/2013/07/19/vancouver-helmet-laws-bike-share-program_n_3626479.html (“Vancouver’s former planning director is urging the city to relax its helmet laws or face the failure of its \$6 million bike share program,” as bikeshare programs where helmet laws are enforced have “languish[ed].”).

132. See David Gutman, *Seattle’s Pronto Bike Share Shut Down on March 31*, SEATTLE TIMES (Mar. 28, 2017, 6:00 AM), <http://www.seattletimes.com/seattle-news/transportation/seattle-pronto-bike-share-shutting-down-friday/>.

133. Blogpost, *The Bicycle Helmet: To Wear or Not to Wear? Debating Whether Helmet Laws Save Lives or Discourage Cycling*, LASESANA (Oct. 24, 2012), <https://lasesana.com/2012/10/24/the-bicycle-helmet-to-wear-or-not-to-wear/>.

of limited value,¹³⁴ and there is some evidence that helmets can exacerbate “rotational” brain injuries and cause neck injuries.¹³⁵

As already noted in the discussion of the “Safety in Numbers” principle, anything that discourages cycling, depressing the number of cyclists on the road, makes cycling more dangerous.¹³⁶ That principle suggests that mandatory helmet laws, intended to make biking safer, have the opposite effect.¹³⁷

Even if helmet use is not mandatory, the data suggest that “bicycle-related fatalities are positively and significantly associated with increased helmet use.”¹³⁸ There is some evidence that cyclists who are wearing helmets, prompted by a false sense of security, are more likely to engage in risky behavior on their bikes.¹³⁹ “Some bicyclists also claim that the wind noise through the helmet reduces the ability to hear vehicles approaching from behind.”¹⁴⁰ Even more importantly, drivers give less clearance to helmeted cyclists, which exposes cyclists to a greater risk of being hit, presumably because their helmets make them look less vulnerable.¹⁴¹ It should not be

134. Knaup, *supra* note 127 (“[B]ike helmets are only designed to withstand crashes up to the speed reached by falling over from a standstill. They do little if anything to prevent brain injury in most crashes.”).

135. Sue Knaup, *My Bike Helmet Saved My Life!* THE BIKE HELMET BLOG (Aug. 28, 2015), <http://www.bikehelmetblog.com/2015/08/my-bike-helmet-saved-my-life.html>; Walker, *supra* note 125.

136. See discussion of the Safety in Numbers effect, *supra* in text accompanying notes 50–53.

137. Oliver Milman, *Mandatory Bike Helmet Laws do More Harm than Good, Senate hears*, THE GUARDIAN (Aug. 12, 2015, 1:28 AM), <https://www.theguardian.com/lifeandstyle/2015/aug/12/mandatory-bike-helmet-laws-do-more-harm-than-good-senate-hears>.

138. G.B. Rodgers, *Reducing Bicycle Accidents: A Re-evaluation of the Impacts of the CPSC Bicycle Standard and Helmet Use*, 11 J. OF PRODUCTS LIABILITY, 307–17 (1988).

139. See *History of Helmet Law in Australia*, CYCLISTS’ RIGHTS ACTION GROUP <http://crag.asn.au/history-of-helmet-law-in-australia/#12>; Peter Ubel, *Warning: Bicycle Helmets Could Be Hazardous for Your Health*, FORBES (Feb. 27, 2017, 9:04 AM), <https://www.forbes.com/sites/peterubel/2017/02/27/warning-bicycle-helmets-could-be-hazardous-for-your-health/2/#9fd84117e2f6>.

140. Matthew Dolman, *How Can Bicycle Accidents Lead to Traumatic Brain Injury?* TAMPA BAY PERSONAL INJURY BLOG (May 5, 2015), <https://www.dolmanlaw.com/traumatic-brain-injury-bicycle-accident>.

141. See Craig Baird, *Bike Helmets Can Make Roads More Dangerous for Cyclists*, SAYS BIKE REGINA, REGINA LEADER-POST (May 2, 2017, 12:07 PM), <http://leaderpost.com/news/local-news/bike-helmets-can-make-roads-more-dangerous-for-cyclists-says-bike-regina>; Ian Walker, *Drivers Overtaking Bicyclists: Objective Data on the Effects of Riding Position, Helmet Use, Vehicle Type and*

surprising, therefore, that the risk of injury on a bicycle in Australia went up dramatically after the introduction of compulsory helmet laws, even after a period of decline,¹⁴² or that, when faced with this data, the Australian federal government abandoned its compulsory helmet policy.¹⁴³

The countries of the European Union have been reluctant to impose mandatory helmet laws and have adopted only limited helmet safety standards.¹⁴⁴ Helmet use is low (estimated at less than 1%) in the Netherlands in any case and, as already noted, it is a far safer place to ride than most if not all other countries.¹⁴⁵ Curiously, for the small percentage of cyclists in the Netherlands who *do* wear helmets, their rates of serious injury are significantly higher than for the cyclists who do not wear helmets.¹⁴⁶

Without helmet laws or significant helmet use, overall death rates for Dutch cyclists have steadily declined since the *Stop de Kindermoord* protests in the early 1970s.¹⁴⁷ Unfortunately, rather than follow the Dutch policy, the United States has followed the ill-fated and arguably misguided Australian policy, choosing to deal with bicycle safety issues by shifting the responsibility for safety to the cyclist-victim with measures like mandatory helmet laws.

Bicycle deaths in the United States have declined, but at a far more modest pace, from 690 in 1965 to 630 in 2009, a decrease of less than 9% (contrasted with the Netherlands' 68% decrease over the same period), tracking a general 8% decline in bicycling ridership in the United States from 2000–2010.¹⁴⁸ Indeed, despite the American

Apparent Gender, 39 ACCIDENT ANALYSIS & PREVENTION 417 (Mar. 2007) (abstract available at <http://www.sciencedirect.com/science/article/pii/S0001457506001540>).

142. *History of Helmet Law*, *supra* note 139.

143. *History of Helmet Law*, *supra* note 139.

144. The EU allows helmets with thinner foam and lighter weight than what would be permitted under U.S. standards. *Bicycle Helmet Standards*, BICYCLE HELMET SAFETY INSTITUTE (Sept. 20, 2016), <http://www.bhsi.org/standard.htm#therest>.

145. See *Why are Dutch Cyclists More Likely to be Injured if They Wear Helmets?* Bicycle Helmet Research Foundation, <http://www.cyclehelmets.org/1261.html> (last visited Feb. 28, 2018); see also McLeish, *supra* note 69.

146. See *Why are Dutch Cyclists More Likely to be Injured if They Wear Helmets?* *supra* note 145. While an estimated 0.5% of Dutch cyclists wear helmets, 13.3% of the cyclists who were admitted to the hospital after accidents were helmet wearers. *Id.*

147. As noted above at notes 69–70, the cyclist death rate in the Netherlands declined from a high of 425 deaths in 1965, to 138 in 2009, a decrease of 68%, even as total bicycle use steadily rose in that country to become the highest in the world.

148. Brad Edmondson, *The U.S. Bicycle Market: A Trend Overview*, GLUSKIN TOWNLEY GROUP (2011), <http://docplayer.net/15436956-The-u-s-bicycle-market-a>

emphasis on helmets (and the Dutch aversion to them), American cyclists are four times more likely to die in an accident than Dutch cyclists.¹⁴⁹ It is worth noting that the decline in ridership in the United States corresponds with the adoption of the mandatory helmets laws, most of which went into effect in the late 1990s and early 2000s.¹⁵⁰ While correlation does not prove causation, the data suggest that helmet laws succeeded in suppressing bike usage, and lowered the accident rate by a corresponding degree, but had little if any positive impact on safety for those who continued to ride.

Mandatory helmet laws have adverse consequences for cyclists not just in terms of safety, but in terms of legal exposure. In states with mandatory helmet laws, for example, cyclists who fail to wear one may be deemed negligent *per se*.¹⁵¹ In other states, where the doctrine of contributory negligence persists, failure to wear a helmet may reduce recovery by the wrongfully hit and injured cyclist.¹⁵² Current tort law emphasizes the need to apportion damages when the plaintiff has acted or enhanced the risk for the injury he or she suffered;¹⁵³ therefore, a judge or jury is likely to assign some portion of blame to an unhelmeted cyclist, relieving the driver (who hit the cyclist) of liability, at least in part.¹⁵⁴

C. Double Standards in Policing

If we want to make bicycling safer and protect the lives of children, commuters, and recreational cyclists, the focus should be on altering the behavior of drivers rather than altering the behavior of cyclists.¹⁵⁵ No doubt bicyclists who create dangerous situations should be held to

trend-overview.html (female ridership fell by 13% during that decade, and children's ridership fell by more than 20%).

149. McCarthy, *supra* note 52.

150. See *Bicycle Helmet Laws*, HELMETS (January 1, 2018), <http://www.helmets.org/mandator.htm>.

151. Cf. *Bieber v. Nace*, 2012 WL 727631, at *3 (M.D. Pa., Mar. 6, 2012) (holding that because there was no mandatory helmet law applicable, "[t]he jury cannot find Mr. Bieber negligent *per se* for not wearing a helmet").

152. See, e.g., *Mitchell v. Roy*, 51 So. 3d 153, 166 (La. Ct. App. 2010).

153. RESTATEMENT (SECOND) OF TORTS § 465 (AM. LAW INST. 1965).

154. States with mandatory helmet laws specifically geared toward children under age eighteen may remove contributory negligence as a defense. See GA. CODE ANN. § 40-6-296; MASS. GEN. LAWS ANN. ch. 85, §11B. Other states allow the negligence defense. CAL. VEH. CODE § 21212.; W. VA. CODE ANN. § 17C-11A-4 (indicating no restriction on negligence defense when a person under fifteen years of age fails to wear a safety helmet).

155. Walker, *supra* note 125.

higher standards, but the reflex to place all blame on the cyclist for accidents imposes a disturbing double standard that disadvantages the party that is already more vulnerable and at risk. Daniel Duane described the scenario in his provocative *New York Times* Op-Ed “Is it OK to Kill Cyclists?”:

When two cars crash, everybody agrees that one of the two drivers may well be to blame; cops consider it their job to gather evidence toward that determination. But when a car hits a bike, it’s like there’s a collective cultural impulse to say, “Oh well, accidents happen.” If your 13-year-old daughter bikes to school tomorrow inside a freshly painted bike lane, and a driver runs a stop sign and kills her and then says to the cop, “Gee, I so totally did not mean to do that,” that will most likely be good enough.¹⁵⁶

The double standard is certainly a manifestation of the hostility to cyclists discussed above. However, it gets particularly problematic when it manifests itself in the behavior of law enforcement. For example, one of the key dangers for cyclists on the road comes from drivers’ failure to use their turn signals.¹⁵⁷ A cyclist who is unaware that a car intends to turn is immediately at risk, and the consequences can be deadly. Lack of enforcement of such rules betrays a sympathy for drivers’ lapses,¹⁵⁸ while the cyclist gets no such latitude, either because she’s already dead, or because she faces a system that will be far less forgiving of her own lapses.

Why is it that law enforcement is more likely to find fault with the cyclist than the driver who failed to follow the rules of the road? Police officers, as administrators of the state with coercion powers, make

156. Duane, *supra* note 23. See, e.g., the discussion of the cases of Evan Wilder, Amelie Le Moullac, and Zach Teutsch, *infra* notes 161–168 and accompanying text.

157. A new study shows that failure to use turn signals causes nearly two million accidents in the US each year. R. Ponziani, *Turn Signal Usage Rate Results: A Comprehensive Field Study of 12,000 Observed Turning Vehicles*, SAE Technical Paper 2012-01-0261 (2012); Christine Mattheis, *Ride Smart: Here’s How to Avoid the Five Most Common Bike-Car Collisions*, BICYCLING (Apr. 30, 2010), <https://www.bicycling.com/culture/advocacy/ride-smart> (identifying failure to use turn signals as one of the primary causes of bicycle-automobile collisions).

158. Mike Vallet, *Half of Drivers Don’t Use Turn Signals*, FOX BUSINESS (Jan. 11, 2016), <http://www.foxbusiness.com/features/2012/05/04/half-drivers-dont-use-turn-signals.html> (suggesting that the turn signal law is “rarely enforced”).

moral and common-sense identifications.¹⁵⁹ They choose to proceed with one course of action over another, which research has identified as both patterned and improvisational: “[P]olice decision making is richly normative and contingent rather than narrowly rule driven and fixed. When police come into contact with citizens, they render moral judgments and concoct actions as they tag people with identities and project identities of their own.”¹⁶⁰ Accordingly, the popular perception that cyclists are scofflaws may lead officers to look for, or even assume, fault on the part of the cyclist.

The cases of Evan Wilder, Amelie Le Moullac, and Zach Teutsch offer compelling examples. In the case of Wilder, a Washington D.C. driver’s road rage prompted him to cut off the cyclist and cause the accident, but when the police officers showed up, they cited the cyclist.¹⁶¹ “While in the emergency room, Wilder says a D.C. police officer issued him a \$100 ticket for following too closely to a vehicle. . . . The driver of the truck wasn’t issued a ticket. Wilder says his bike sustained about \$400 worth of damage.”¹⁶² Only the footage from the cyclist’s helmet-mounted camera, documenting the entire incident, was sufficient to prompt the police to make further inquiry.¹⁶³

In the video, the driver can be heard yelling, “The bike lane is over there, dude,” while Wilder attempts to explain to the man that the narrow road is marked to allow bikes to use the full lane.

At one point [after cutting off the cyclist and causing the collision], the truck driver picks up Wilder’s bike off the ground and throws it over the bed of his truck and onto the other side of the road.¹⁶⁴

159. See Trish Oberweis & Michael Musheno, *Policing Identities: Cop Decision Making and the Constitution of Citizens*, 4 L. & SOC. INQUIRY 897, 898 (1999).

160. *Id.*

161. CBS D.C., *D.C. Police Investigating \$100 Ticket for Cyclist Who Caught Incident on Camera*, (May 20, 2014, 5:00 PM), <http://washington.cbslocal.com/2014/05/20/d-c-police-investigating-100-ticket-for-cyclist-who-caught-incident-on-camera>.

162. *Id.*

163. *Id.*

164. *Id.*

In the case of Le Moullac, a truck driver in San Francisco made a right turn across the bicycle lane, running her over and killing her, but the driver was not cited.¹⁶⁵

[The driver] told SFPD investigators that he only felt an impact to the rear of his vehicle—thereby giving the impression that he was completing his turn when Ms. Le Moullac ran into the back of his vehicle. He also told his employer that he thought he had hit a safety cone and gave conflicting stories about his use of the turn signal. He did not know there was a witness. Nor did he know there was surveillance video that would show the front wheel and cab jump into the air [when it ran her down]. Thankfully, the San Francisco Bicycle Coalition located the surveillance video showing that [the driver] had actually run Ms. Le Moullac over.¹⁶⁶

The police were content to accept the driver's story, and he would have escaped consequences for his per se negligence, and the death it caused, if Le Moullac's family had not pursued its wrongful death claim, with support of a bicycle advocacy group.¹⁶⁷

D.C. cyclist Zach Teutsch suffered a permanent disability after a driver turned left in front of him as he came through an intersection.¹⁶⁸ The cyclist was cited, not the driver, based on testimony from the driver and one other witness that the cyclist had run a red light.¹⁶⁹ Through a Freedom of Information Act request, the cyclist was able to get video footage, which showed very clearly that the light was green and that the cyclist bore no fault at all for the accident:

I returned to the . . . police station, where a supervisor told me that only the officer who wrote the report and the ticket could change it. He asked me to tell my story again.

165. *Le Moullac v. Daylight Foods Inc.*, 2014 WL 7653991, *2–3 (Cal. Super. 2014); Bryan Goebel, *No Charges for Driver in Death of Bicyclist Amelie Le Moullac*, KQED (May 13, 2014) <https://www.kqed.org/news/135694>.

166. *Id.*

167. *Id.*

168. Zach Teutsch, *"It Must Have Been Your fFault. C'mon. You Are A biker."* GREATER GREATER WASHINGTON (June 27, 2013), <https://ggwash.org/view/31600/it-must-have-been-your-fault-cmon-you-are-a-biker>.

169. *Id.*

“Wait, you mean, you were biking and you want a ticket canceled?” he said, incredulous. “We all know how bikers behave. It must have been your fault. C’mon. You are a biker.”

When I suggested that he review the video, he refused. The supervisor said he’d contact the officer but that I shouldn’t expect anything to come of it, as I was a bicyclist.¹⁷⁰

The police’s lack of interest in investigation meant that Teutsch had to appeal the citation, and then sue the driver, before he could get his record cleared.¹⁷¹ Teutsch explains the lessons learned:

From this experience, I learned two things. One is that police officers need substantially more training in different types of bicycle-automobile crashes. A driver turning left into oncoming bike traffic is a common form of collision, and that driver is usually at fault. Officer Carter botched the incident report by not asking the right questions.

...

Second, I learned that if you get hit by someone while bicycling, check for cameras. Without them, you’ll have to fight against the assumption that you were operating in an unsafe way, no matter what the driver did.¹⁷²

As illustrated in the admittedly anecdotal examples above, the police, like the public in general, appear to be predisposed to assign blame to cyclists.¹⁷³ It is a legal and social burden familiar to many unpopular minorities in society: they are prejudged and inevitably suffer in the

170. *Id.* The link includes the video clip, which is compelling; however, the police could not be persuaded to look at it.

171. *Id.*

172. *Id.*

173. Police routinely have to exercise discretion, but the routine of siding with the motorist often goes entirely unexplained. *See, e.g.*, Robert Annis, *Why Did Police Ignore This Violent Assault on a Cyclist?* BICYCLING (April 11, 2018), <https://www.bicycling.com/news/a19695490/driver-assaults-cyclist-breaks-jaw-portland/> (detailing a road rage incident where the bicyclist was punched in the face by the driver, breaking his jaw in two places, and the police not only refused to file a police report on the assault, but defended the driver, saying: “‘Maybe that’s just how [the driver] settles arguments’ and ‘You’re lucky he didn’t have a gun’”; the bicyclist continued, “When I requested a police report so I could get [the driver] to pay my medical bills, [the police officer] asked me if I was just trying to get money out of him. I couldn’t believe it. I felt like I’d been assaulted twice.”).

societal spaces where authority figures are entitled to exercise discretion.

Cyclists can avoid this bias and prejudice completely, however, by ceasing to be cyclists, so it should not surprise us to see bicycling on the decline among certain demographics.¹⁷⁴ However, there are compelling reasons why society needs cyclists, so we should be careful not to let these types of predispositions get in the way of realizing the benefits of a bike-friendly society.

V. WHAT NEEDS TO CHANGE IN THE LEGAL REALM?

One of the key changes needed is investment in bicycle-friendly infrastructure—bicycle lanes and routes, bridges, and tunnels that will allow cyclists to navigate cities and countryside without being terrorized by cars that assume and assert ownership of the roadways. However, this approach—the model established by the Netherlands¹⁷⁵—can be too easily dismissed by policymakers as expensive and impractical. While the concept of bicycle-friendly roads is largely unobjectionable, it is unlikely to be viewed as a priority in the fierce competition for the limited public fisc.

The Dutch were willing to make enormous investments to remap their streets and highways, mustering the necessary political support because a change was viewed as necessary to protect the lives of Dutch children. In the United States, however, children are protected by strapping them into car seats and driving them everywhere. Despite the fact that chauffeuring children is neither fuel efficient nor time efficient (because it imposes enormous time demands on parents), Americans do not perceive the problem in such grave terms. Unlike the Dutch situation, this problem cannot be characterized as one of carnage in the streets.¹⁷⁶

New planning and new developments should include cycling routes as a standard requirement, and we do see some attention being given to such issues.¹⁷⁷ If cyclists can be accommodated when an area

174. See Edmondson, *supra* note 148 and accompanying text (noting a sharp decrease in ridership among children in particular, but among women as well).

175. See *supra* Section III.A.

176. If the public ever came to terms with the degree to which children die in car accidents, perhaps the public would view the problem as carnage in the streets. But, for whatever reasons, Americans accept the risks associated with automobile transportation as normal and acceptable.

177. See, e.g., Ryan Seher, Comment, *I Want to Ride My Bicycle: Why and How Cities Plan for Bicycle Infrastructure*, 59 BUFF. L. REV. 585, 614–18 (2011) (describing the bike-friendly policies in state of Oregon as well as its capital, Portland).

is initially developed, the costs of such accommodations may be minimal. At least the expense should be far less than projects to rip up our existing streets to create medians, bike lines, and new traffic patterns. But even for new developments, we see the perpetuation of automobile supremacy.¹⁷⁸ Indeed, many of the new residential developments, particularly in high-end gated communities, include neither sidewalks nor bicycle routes, although they do include roads for motor vehicles.¹⁷⁹ The infrastructure itself is, at taxpayer expense, effectively subsidizing automobile driving and penalizing its alternatives.

But much can be done to alter incentives and improve safety without ripping up the existing streets or building bicycle routes to parallel every road and highway. In particular, the legal framework for cyclists can and should be revisited.

A. *Liability Rules for Car-on-Cyclist Accidents*

Deterrence theory suggests that fear of liability will affect behavior.¹⁸⁰ Economists have analyzed which liability rules create incentives to invest in efficient levels of precaution. Strict liability, in the standard analysis, creates efficient incentives for the strictly liable party to take precaution—much better incentives than would be created by a negligence regime—but does not create good

178. Most new homes have sidewalks but not bicycle lanes. Paul Emrath, *Walking and Biking More Common in New Homes*, NAHB (2014) (citing 2013 American Housing Survey), <http://eyeonhousing.org/2014/12/walking-and-biking-more-common-in-new-homes/>.

179. Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 *YALE L. J.* 1934, 1954 (2015) (discussing how lack of sidewalks and bike paths in upscale neighborhoods may be intentional, omitted in an effort to promote exclusion of those “of lower social and racial status” from the neighborhood (quoting JAMES W LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 254–55 (2006)); Malcolm Kenton, *Ask GGW: Is There Any Reason Not to Have a Sidewalk?* GREATER GREATER WASHINGTON (Jan. 21, 2015) <https://ggwash.org/view/37058/ask-ggw-is-there-any-reason-not-to-have-sidewalk>. “Roughly one-quarter of walking trips today take place on roads without sidewalks or shoulders. Bike lanes are available only about 5 percent of bike trips.” 150 *CONG. REC.* 12987 (June 18, 2004) (statement of Sen. Tom Harkin); see also Bill Wilkinson, *Urban Sprawl Causes Waistline Sprawl*, *URBAN DEVELOPMENT* (Aug. 2, 2003), <https://www.djc.com/news/co/11149501.html> (“Sprawling development patterns not only increased trip distances, they became a reason to eliminate sidewalks from new developments. Longer trips argue for higher motor vehicle speeds, making streets and highways less friendly to bicyclists and pedestrians.”).

180. See STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 292 (2009).

incentives (or any incentives at all) for the party that is not strictly liable to take precaution.¹⁸¹

If, as suggested above, bicyclists are presumed to be at fault and routinely blamed for the accident, we may be living in a de facto strict liability regime, with the bicyclists bearing the liability. Against this backdrop, we cannot expect drivers to take reasonable precautions against hitting cyclists. They know that it will be easy to blame the cyclist for the accident, if one occurs. And the driver is unlikely to suffer serious personal injury from such an accident; rather, it is the bicyclist whose life is on the line. Perhaps this reality is the source of much of our difficulty in the United States—cyclists are hit and harmed with impunity because the drivers suffer little or no consequences, either physically or legally. No one wants to hold the drivers responsible.¹⁸²

With this understanding, it makes sense to follow the Dutch model¹⁸³ and assign a presumption of liability, or even strict liability, against drivers who strike cyclists. As discussed above, relieving cyclists of liability for accidents with cars is unlikely to dilute their own precautionary behavior, because the bicyclist risks death if an accident occurs, quite regardless of fault or legal liability.¹⁸⁴ Any additional deterrent effect that comes with assigning legal liability to the cyclist is arguably unnecessary and likely ineffective. At the same time, assigning something akin to strict liability to drivers is likely to inspire drivers to be especially careful, to watch out for children and others astride bikes, to give cyclists wide berth on the road, etc.¹⁸⁵

181. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 201–04 *et seq.* (6th ed. 2012). Cooter and Ulen explain that under negligence or strict liability, the tortfeasor will invest in an appropriate (i.e., efficient) level of precaution, where the marginal cost of the precaution equals the marginal benefit of such precaution. *Id.* at 203. But only under strict liability will the tortfeasor have an incentive to adopt an efficient activity level. Under a negligence regime, once the reasonable precaution is taken, the tortfeasor escapes liability for his actions, even if those actions expose others to risk. Under this analysis, a negligence regime should prompt car drivers to take reasonable care when driving, but they will all drive too much. Indeed, they will not be internalizing the costs of the harm their driving does to others (e.g., cyclists) and will not take that cost into account when deciding whether and how much to drive. The drawback for the strict liability regime is that the potential victim, who knows he will be compensated for any harm done, has no economic incentive to take precautions of his own.

182. See Duane, *supra* note 23.

183. See BICYCLE DUTCH, *supra* note 15.

184. See *supra* text accompanying note 63.

185. The findings that drivers give wider berth to un-helmeted cyclists would reinforce this conclusion. See Baird, *supra* note 141; Walker, *supra* note 125. The fear

Historically, strict liability has been restricted to the types of torts against which victims are not well-suited to protect themselves, such as harms from blasting or from wild animals kept as pets.¹⁸⁶ Because cyclists who abide by all the laws and do everything right are still at great risk of being hit by inattentive or distracted drivers (and whose inattentiveness will not result in findings of negligence),¹⁸⁷ the strict liability regime makes sense in this context as well.

Of course, a strict liability regime may be difficult to sell politically for all the reasons, articulated above, that society favors drivers and denigrates cyclists. No one likes the idea that a cyclist could do something crazy and stupid (like cut across a freeway) and that a driver who hit the cyclist would be strictly liable for the harm caused. But it may be enough to simply create a presumption of liability: if a driver hits a cyclist, the law would presume liability on the part of the driver, placing the burden of persuasion on the driver to show that the fault was actually that of the cyclist. If drivers know that they will need to make their case in order to avoid liability, they will almost certainly be more aware of and sensitive to the cyclists around them.

The concept of imposing a presumption of liability on the driver works not just in tort law, but also in criminal law. Drivers who hit cyclists should expect to be cited. This presumption is likely to be effective in combatting the predisposition of police and others to attribute blame to the cyclist. The law will force them to start by assuming the blame is elsewhere; that start will give cyclists a fighting chance in a system otherwise stacked against them.

The ultimate goal, of course, is to have fewer accidents, so bicycling becomes a safer and more attractive transportation option. Until better bike routes and dedicated bike paths are built, nothing short of deterring drivers from careless or distracted driving will protect cyclists. Abiding by the law does not protect cyclists from getting hit; helmets do not protect them from getting hit; profound caution does not protect them from getting hit.¹⁸⁸ Their safety depends not so much on their own actions, but on the actions of drivers. A

of consequences *can* prompt them to change their behavior and take additional precautions in favor of cyclist safety.

186. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 255–63 (2010).

187. See the example of Ross Dillon, *supra* note 1 *et seq.*, as well as the examples of Evan Wilder, Amelie St. Moullac, and Zach Teutsch, *supra* notes 161–68 and accompanying text.

188. See *supra* note 1 *et seq.*; see also *supra* notes 161–68 and accompanying text.

change in the liability rules may help shift the culture on the roads so that drivers exercise more care.

B. The Rules for When Cyclists Should Have to Comply with Laws and Traffic Control Measures Designed for Cars

The default presumption that cyclists should be complying with the same laws that apply to motorists appears to have little basis in logic or safety. Nonetheless, that presumption appears to be uncritically accepted as appropriate. After all, why should a bicyclist get away with coasting through a right turn when the cars have to stop?

The answers are not so elusive. If a bicyclist is riding on the shoulder anyway, there may be little reason to make him or her hesitate before making a right turn onto the shoulder of the cross street. Unlike a car, the bicycle that stays on the shoulder need not merge with the cross-traffic.¹⁸⁹ The upshot is that a false equivalency between bicycles and cars has prompted a nonsensical legal approach. The Idaho laws are a compelling counter-example. The data clearly shows that cycling in Idaho did not become more dangerous when the new laws were adopted.¹⁹⁰

Allowing cyclists to merely yield at a stop sign, and to cross against a red light, enables them to maintain more comfortable distances from the vehicles that threaten them. In contrast, requiring them to make their left turn only when masses of heavy vehicles are also turning left merely keeps the cyclists in a danger zone for far more of the time.¹⁹¹

189 Similarly, if the reason a car is never allowed to pass a stopped school bus is because a moving car is likely to be deadly to a schoolchild alighting from the bus, it is harder to justify such an absolute rule against a cyclist. After all, the cyclist is likely to be moving far slower and is likely to be far more maneuverable than the car (so it would be much easier to avoid a collision). Even if a collision did occur, the accident is likely to do far more harm to the cyclist than to the driver (so the cyclist already has a self-preservation incentive to exercise due care), and the cyclist is likely to do far less harm to the child than a car would.

190 See Holzer, *supra* note 90 and accompanying text (citing a 14.5% decrease in cyclist fatalities in Idaho after adoption of the new “Idaho Laws” governing cyclists), and Tekle, *supra* notes 93–94.

191 See Holzer, *supra* note 90. The article articulates the benefits of the Idaho laws with greater specificity, including, but not limited to the following:

- Cyclists get in front of traffic and increase their visibility to motorists, which in turn allows motorists to operate their vehicles more prudently;
- Having cyclists “clear” an intersection before the light turns green

Speed limits are important for cars because it is so easy for a driver to let the speed of her vehicle creep up to unsafe levels. Cyclists are not vulnerable to that temptation because speed typically comes only with significant effort, and even the most gifted athlete cannot ride a bicycle at speeds that would rival a car's. Moreover, cars are required to have speedometers, making it easier to hold them to a particular limit. Holding bicycles to the same limit is arguably unfair to the cyclist, who is likely to be unaware of the actual speed she is traveling at any given moment. A cyclist's self-preservation instinct and limited strength are likely to serve as an effective check on her speed anyway.¹⁹²

Moreover, holding bicyclists strictly to traffic laws designed for cars may frustrate traffic flow in ways that harm everyone on the

-
- reduces the potential for collisions in the intersection;
 - The Idaho Stop reduces the costs to government by eliminating the need to pay for extra sensing equipment to detect bicycles at intersections;
 - Because bikes are through intersections more quickly, the overall flow of traffic improves;
 - Making bicycling easier and safer encourages people to choose this eco-friendly method of transportation. . . .

See Holzer, *supra* note 90; see also, Tekle, *supra* note 19 at 553–58.

192. See Schofield, *supra* note 61, at 39.

Utah law . . . provides that bicycles may not operate at speeds greater than reasonable and prudent. See UTAH CODE ANN. § 41-69-1106(4) (2005). The bike statute contains no specific prohibition that bicycles have to keep the speed limit. The law does state, however, that automobile laws apply to bicycles where “applicable.” The law states that an automobile may not be operated at a speed greater than is reasonable and prudent, and then states that the speed limit is *prima facie* evidence of what is reasonable and prudent. See *id.* § 41-69-601(1)-(3). Yes, bicycle riders have to stop at stop lights, etc., but obviously don't have to wear a seatbelt, because the seatbelt laws would not be “applicable” to a cyclist. So, we argued that the posted speed limits, just like the seat-belt laws, are not applicable to bicycles, because unlike an automobile (which must have a working speedometer, annual safety inspections, etc.), there is no requirement that a bicycle have a functioning speedometer. . . . Thus, we argued the speed limit should not be evidence as to what is a reasonable and prudent speed for a bicyclist; rather the cyclist simply should be left to his or her own judgment as to what is a reasonable and prudent speed. Indeed, why would a cyclist exceed what is a reasonable and prudent speed when he or she is essentially wearing nothing but his underwear?

Schofield, *supra* note 61, at 39 (footnotes omitted).

roads. The San Francisco “civil obedience” protest presented a powerful example of the potential frustration.¹⁹³

Accordingly, it is difficult to see why rules designed to promote safety and order for motor vehicles would similarly promote safety and order when applied to cyclists. It should be a relatively straightforward legislative change, one largely without fiscal impact and without partisan baggage, to adopt the Idaho laws and to rescind or scale back the legal presumption that motor vehicle laws apply *equally* to bicycles. Any package of legal reform that attempts to promote cycling should include these provisions. They are important not only to promote cyclist safety, but also to make bicycling a more efficient and more attractive alternative to driving.

C. Other Rules that Burden or Otherwise Impose Costs on Bicycle Transportation

For reasons articulated above, taxes that target cyclists and cycling should also be repealed. Because cycling benefits everyone, even drivers who choose not to ride, taxes that punish cycling are bad public policy.

Mandatory helmet laws deserve a reexamination as well. As noted above, they are undermining urban bike-sharing programs and discouraging young people from riding at all.¹⁹⁴ The suggestion that a helmeted cyclist is more likely to survive an accident than a non-helmeted one, even if true,¹⁹⁵ is hardly a sound basis for imposing legal requirements on the cyclist. As suggested above, we do not require the drivers and passengers of cars to wear helmets, even though hundreds of thousands of persons in car accidents suffer head injuries, many resulting in death.¹⁹⁶ We do not require people to wear

193. See *supra* note 62 and accompanying text.

194. See *supra* notes 124–26 and accompanying text; see also *supra* note 127 and accompanying text (discussing statistics on dramatic drop in children’s bicycle use after mandatory helmet laws were adopted in Australia and in the United States).

195. This point is contested as to neck injuries and rotational head injuries, which arguably are worse for a helmeted cyclist than for one who rides sans helm. See Walker, *supra* note 125 and Knaup, *supra* note 127. The data from the Netherlands also indicates that, for whatever reason, helmeted cyclists are far more likely to end up in the hospital than non-helmeted ones. *Why are Dutch Cyclists More Likely to be Injured if They Wear Helmets?* *supra* note 145.

196. See Jacob Masters, *Car Accidents and Traumatic Brain Injury*, BRAIN INJURY SOCIETY (Oct. 27, 2014), <http://www.bisociety.org/car-accidents-traumatic-brain-injury/> (“286,000 TBIs [Traumatic Brain Injuries] result from car crashes

helmets when they use a bathroom, despite the fact that hundreds of thousands of emergency room visits each year originate from bathroom-related accidents.¹⁹⁷ Making helmets mandatory imposes burdens on all cyclists, frightens potential riders away from cycling, undermines the effectiveness of bike-sharing programs, and generally discourages bicycle use.

D. Enforcement of Existing Laws that Protect Cyclists and Better Training for Law Enforcement

As noted above, drivers who fail to use turn signals pose one of the key dangers to cyclists.¹⁹⁸ This common violation is, however, rarely enforced,¹⁹⁹ which inevitably encourages drivers to think that turn signal use is relatively unimportant. In the past, legislatures wanting to “crack down” on particular behaviors have enacted mandatory minimum punishments.²⁰⁰ Perhaps a law that removes an officer’s discretion to ignore a turn-signal violation and imposes a mandatory minimum fine would garner everyone’s attention.²⁰¹

Other laws require that cars passing cyclists give them adequate space. Most states require that the car come no closer than three feet from the cyclist it is passing.²⁰² Pennsylvania requires four feet of space.²⁰³ South Dakota requires three feet if the speed limit is thirty-

annually. The actual number may be much higher, because brain injuries aren’t always immediately obvious after an accident.”).

197. Mikaela Conley, *CDC Report Shows Bathroom Injuries Cause Thousands of Visits to ER*, ABC NEWS (June 9, 2011), <http://abcnews.go.com/Health/cdc-report-shows-bathroom-related-injuries-thousands-visits/story?id=13802036> (reporting that there are 234,000 emergency room visits every year came from bathroom injuries).

198. See Ponziani, *supra* note 157.

199. See Vallet, *supra* note 158.

200. See generally Judith Greene, *Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments*, published in CYRUS TATA & NEIL HUTTON, *SENTENCING AND SOCIETY: INTERNATIONAL PERSPECTIVES* (2002), <https://pdfs.semanticscholar.org/514e/0bb2ab8f695e9e6fc28a82b545e8743f6876.pdf> (discussing crack downs on violence crime).

201. Clearly the officers are aware of these common violations. See YOUTUBE, <https://www.youtube.com/watch?v=dTFHCyNVBtk> (a humorous PSA video done by an Indiana State Trooper, highlighting the existence of turn signals, as if his viewers were entirely unaware of them).

202. See *Safely Passing Bicyclists Chart*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 28, 2016), <http://www.ncsl.org/research/transportation/safely-passing-bicyclists.aspx>.

203. *Id.* (citing 75 PA. CONS. STAT. § 3303).

five miles-per-hour or less and six feet if the speed limit is higher than thirty-five miles-per-hour.²⁰⁴ These provisions are important safeguards for the preservation of a cyclist's life and limb, but they are effective only to the extent they are enforced. In practice, these laws see little application unless and until a cyclist is hit, and even then it is often the cyclist's word against the motorist's (or, when the cyclist is dead and unable to testify, the motorist's self-serving testimony goes uncontested).²⁰⁵ Increased enforcement of these laws is likely to have a huge impact on the deference that drivers give to cyclists on the shoulder, with a corresponding impact on the safety of those riders. The eleven states without such laws should certainly consider enacting them.²⁰⁶

There is at least anecdotal evidence that law enforcement investigations of bicycle accidents are conducted with an anti-cyclist bias.²⁰⁷ Zach Teutsch's conclusion, from his own experience, that "officers need substantially more training in different types of bicycle-automobile crashes" resonates, as many of these cases seem to reflect the same problem.²⁰⁸ Cyclists are often hit by drivers turning left in front of them, who presumably do not notice (because they are not expecting or looking for) the cyclist coming the other way.²⁰⁹ Also common are accidents caused by drivers overtaking bicyclists who are on the shoulder and then turning right into the bike's path.²¹⁰ Officers writing incident reports need to be familiar with these typical scenarios. Indeed, they need to know what the likely causes of these accidents are, ask the right questions, and consult any available video, before jumping to the conclusion that the cyclist was to blame.

204. *Id.* (citing S.D. CODIFIED LAWS § 32-26-26.1).

205. To the extent there is an anti-cyclist bias at play in these cases—prompted, perhaps, by the popular notion that the roads belong to cars and that cyclists are the interlopers on the drivers' territory—the driver is likely to get the benefit of the doubt. This bias is why it is so important to create a presumption of driver liability, putting the onus on the driver to prove that he was *not* negligent when he hit the bicyclist. *See supra* Section IV.A.

206. *See Safely Passing Bicyclists Chart, supra* note 202.

207. *See supra* Section IV.C. on Double Standards in Policing.

208. Teutsch, *supra* note 168.

209. *See Mattheis, supra* note 157 (citing a study by the Pedestrian and Bicycle Information Center, which found that nearly half of bicycle-car crashes occur when a motorist hits a cyclist while making a left turn).

210. *See Mattheis, supra* note 157.

E. Driver Training

The greatest improvements to bicycle safety are likely to come when drivers begin to look for, see, and make allowances for the cyclists with whom they share the road. Some of the reforms advocated above—such as a driver liability presumption—are important precisely because they will prompt drivers to pay closer attention. Distracted driving is emerging as one of the greatest threats to highway safety,²¹¹ and cyclists are clearly in the crosshairs for this type of accident. At the same time, cyclists are at risk from drivers who give no thought to cyclists when they open the driver-side door of a parallel-parked car.

One of the simplest and most straightforward ways to educate drivers about bicycle safety is to put questions on the driver's licensing exam.²¹² Idaho recently tried this method after a horrible accident involving a five-year-old cyclist who was hit and dragged by a car.²¹³ The questions are likely to alert drivers to the laws with which they may be unfamiliar, including the minimum passing space they are required to give to cyclists.²¹⁴ And if these questions appear on the exam, drivers' training courses will have to start giving these topics and issues greater emphasis.

They may go so far as to adopt training ideas from the Dutch, who insist that drivers learn to check for cyclists before opening the driver's-side door of a parallel-parked vehicle. That level of awareness simply does not exist in the United States at present, and better

211. See generally Robert McCoppin, *Traffic Deaths on the Rise as Distracted Drivers Roam the Roads*, CHICAGO TRIBUNE (Aug. 24, 2016, 6:00 AM), <http://www.chicagotribune.com/news/local/breaking/ct-traffic-fatalities-up-met-20160823-story.html>.

212. When test takers know that they may have a question on the driver's test about bicycling safety, they are more likely to actually study that section of the handbook and be aware of safety practices.

213. Caitlyn Giddings, *Idaho Adds Bicycle Questions to Driving Tests: After a Driver Hit a Five-Year-Old on a Bicycle, the State has Ramped Up its Driver's Education*, BICYCLING (Dec. 29, 2015), <http://www.bicycling.com/news/advocacy/idaho-adds-bicycle-questions-to-driving-tests>; see also Aoife Glass, *Should Changes to the Driving Test and 'Close Passing' Practice be Adopted to Make Roads Safer?* BIKE RADAR, (May 2, 2017, 3:00 PM), <http://www.bikeradar.com/commuting/news/article/all-party-parliamentary-cycling-group-recommends-49815/>.

214. Colin Levitch, *You Get What You Give: The Golden Rule of Cycling*, BIKE RADAR, (July 26, 2017, 12:00 PM), <http://www.bikeradar.com/road/gear/article/the-golden-rule-of-cycling-50429/> ("Why not add cycling questions to the driver's test? How many riders do you know who don't have a driver's license or own a car?").

training and testing of drivers may be necessary before we can expect drivers to demonstrate such sensitivity to cyclists.

* * *

Indeed, for all the emphasis on helmets, it is not a cyclist's failures in those areas that cause accidents and injury. It is, in most cases, the driver who is not anticipating a cyclist, one who is distracted and unaware of the cyclist's presence, or, even more reprehensibly, one who is annoyed by a cyclist's presence and who crowds them or cuts them off on purpose.²¹⁵ As Eben Weiss put it in the title of his compelling opinion editorial in the *Washington Post*, "Don't make bicyclists more visible. Make drivers stop hitting them."²¹⁶ To accomplish that, we need to shift the focus from the bicyclists' behaviors to the drivers' behaviors, something which can be done with some relatively simple legislative changes.

CONCLUSION

Public policy and legislative attention on bicycling issues have been seriously skewed ever since the automobile industry asserted its dominance. Indeed, the car's seizure of America's roadways has threatened the viability of cycling and the safety of cyclists. And yet, the societal benefits of cycling are undeniable, going far beyond the interests of the cyclists themselves. Expanded use of cycling, as a safe and viable alternative to driving, should help to address a variety of social priorities: easing the burdens of poverty, improving public health, calming traffic, empowering our youth, and respecting our environment. The legal system needs to adapt in its approach to cycling to better promote these compelling aspects of public policy. The recent trends in legislation—mandatory helmet laws, special bicycle taxes, etc.—suggest that legislatures have misunderstood what is at stake and are moving in exactly the wrong direction.

Many of the changes that are needed are simple changes to legal rules that can be implemented at little or no cost. Powerful examples and success stories exist in the Netherlands and in Idaho; these

215. See, e.g., Evan Wilder's story *supra* notes 161–64.

216. Eben Weiss, *Don't Make Bicyclists More Visible. Make Drivers Stop Hitting Them*. WASH. POST (Apr. 15, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/15/dont-make-bicyclists-more-visible-make-cars-stop-running-them-over/?utm_term=.d7b8fcd53730.

should inspire further innovations elsewhere. But to do that, we need to overcome certain biases and perceptions in our society, starting with the automobile industry's propaganda campaign to privilege the automobile. We must also eliminate our own prejudices about bicyclists and their sometimes-unsympathetic image.

Adopting a presumption of liability—if not strict liability—for drivers in car-on-bicycle accidents will go a long way toward creating a culture on our roads conducive to safety. Crafting different rules of the road for cyclists than for cars, rules suited to the particular needs and safety concerns of cyclists, will not only avoid accidents, it will make cycling more attractive to more people. We can also ease the taxes and regulatory burdens on cycling, including mandatory helmet laws, replacing them with subsidies and more permissive rules appropriate to the broad public policy goals that cycling serves in society. Law enforcement can be incentivized to enforce turn signal laws and other laws important to cyclist safety and can be trained to do investigations of bicycle accidents that are better informed and less likely to reflect anti-cyclist bias. Finally, states can require that bicycle safety questions appear on the driver licensing exams to ensure that drivers are aware of these laws and know they are important. While some of these changes may be difficult to implement individually, they could be aggregated into a larger legislative package that has appeal on both sides of the political aisle.

In any case, history owes cycling a new hearing. We have favored cars for a very long time, and we are overdue to acknowledge and respect their alternatives. In many ways, cycling is a concept whose time has come, as it should address an array of public policy priorities—poverty, traffic, public health, youth empowerment and the environment. We need our legal system to respect it and promote it, not as an expensive sport for privileged people, but as a safe and viable transportation choice cutting across the demographic and socio-economic spectrum.