INTRODUCTION

On June 5, 1985, Governor Kerrey signed Legislative Bill 496 ("L.B. 496")1 into law,2 and Nebraska joined the bandwagon of seventeen other states that have enacted mandatory seat belt laws.3 The intense debate on the bill involved a confrontation between those senators seeking to reduce deaths and injuries on the state's roads and those senators who, although acknowledging the law's noble objectives, nonetheless opposed the law as an improper governmental intrusion into the realm of individual decisionmaking.4 As enacted, the law raises the fundamental issues of the proper scope of the state's police power and the nature of the relationship between government and the individual. With similar legislation pending before other state legislatures, these issues are important not only for Nebraska, but also for the nation.

This Comment examines Nebraska's mandatory seat belt law. The Comment first reviews the "means" and the "ends" of the law by surveying each provision of L.B. 496 and the evils that each was intended to remedy.5 Second, the Comment probes the important constitutional and public policy issues presented by so-called "self-protective" legislation.6 Finally, the Comment analyzes L.B. 496 in terms of how well its provisions do or do not advance the law's objectives.7

1. L.B. 496, 89th Leg. 1st Sess., 1984-85 Neb. laws 966 (codified at NEB. REV. STAT. §§ 39-6,103.04 to -6,103.08 (Supp. 1985)).
2. 2 NEB. LEG. J., 89th Leg., 1st Sess. 2710-12 (1985).
4. Those seventeen states were: California, Connecticut, the District of Columbia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, and Texas. Id.
5. See notes 27-41 and accompanying text infra.
7. See notes 98-133 and accompanying text infra.
L.B. 496: THE SEAT BELT LAW

L.B. 496 is composed of seven major sections. It requires that a federally approved seat belt be worn by drivers and front seat passengers for whom one is provided by the manufacturer. Persons over the age of sixteen are impliedly made responsible for their own violations; however, section one does make the driver responsible for ensuring that children between the ages of four and sixteen wear a seat belt and that children under the age of four are restrained in accordance with the separate mandatory child restraint law.

Section two outlines Nebraska's point system for traffic violations. Violations of the seat belt law are included among those violations to which point penalties do not attach.

8. L.B. 496, 89th Leg., 1st Sess. §§ 1-7, 1984-85 Neb. Laws 966-69 (codified at NEB. REV. STAT. §§ 39-6,103.04 to -6,103.08 (Supp. 1985)). Although the law, as codified, does not retain the same numbering system as the legislative bill, the essential structure remains unchanged.

9. L.B. 496, § 1, 1984-85 Neb. laws at 966 (codified at NEB. REV. STAT. § 36-6,103.04 (Supp. 1985)). The statute provides:

Any driver and front seat passenger of a motor vehicle operated on a street or highway in this state shall wear a safety belt, except that the number of front seat passengers required to wear a safety belt shall not exceed the number of safety belts which were installed in the front seat of such motor vehicle by the manufacturer. Any driver transporting a child who is four years of age or more but is less than sixteen years of age shall be responsible for securing such child in a safety belt if the child is riding in the front seat of the motor vehicle. All safety belts so worn shall be properly adjusted and fastened and shall (1) be of a type which meets the requirements of 49 C.F.R. section 571.208 as such regulation currently exists or as the regulation existed when the safety belts were originally installed by the manufacturer or (2) if the safety belts have been replaced, be of a type which meets the requirements of 49 C.F.R. section 571.208 that applied to the originally installed safety belts or of a more recently issued version of such regulation. Requirements for a child under the age of four are provided in sections 39-6,103.01 to 39-6,103.03. As used in sections 39-6,103.04 to 39-6,103.08, motor vehicle shall mean a vehicle required by section 39-6,171 to be equipped with safety belts.

10. Id.

11. Id. The mandatory child restraint law provides in part:

Any person, who resides in Nebraska and drives any motor vehicle which has or is required to have safety belts, shall ensure that all children under the age of four being transported in such vehicle use a [federally approved] child passenger restraint system . . . or use a safety belt for children over age one.


13. Id. § 2(13), 1984-85 Neb. Laws at 968. The statute states as follows:

In order to prevent and eliminate successive traffic violations, there is hereby provided a point system dealing with traffic violations as disclosed by the files of the Director of Motor Vehicles. The following point system shall be adopted: . . . (13) All other traffic violations involving the operation of motor vehicles by the operator, for which reports to the Department of Motor Vehicles are required under sections 39-669.22 and 39-669.23, not including violations for not wearing a safety belt as prescribed in section 39-6,103.04, parking
Section three designates the motor vehicles to which the seat belt installation (and therefore use) requirements apply. It requires that all motor vehicles, beginning with the 1973 model year, be equipped with two federally approved seat belts in the front seat. If the belts have been removed, the owner must replace them. Furthermore, section three makes the sale of motor vehicles without the minimum two front seat belts a class V misdemeanor.

Section four provides that a law enforcement officer may not stop a vehicle strictly for enforcement of the seat belt law. Rather, enforcement is allowed only as a secondary action to detention for some other violation.

Section five prescribes the penalty for violation of the law. It makes a violation a traffic infraction and imposes a fine of twenty-five dollars. However, this section provides that no court costs shall be assessed and reiterates that there shall be no assessment of points against a violator's driving record.

Section six exempts two categories of individuals from the purview of the law: (1) persons who possess a written verification from a physician that they are unable to wear a seat belt for medical reasons; and (2) United States Postal Service rural letter carriers performing their duties between their first and last delivery points.
Section seven addresses the important issue of the viability of the "seat belt defense" in Nebraska. Specifically, evidence that a person was not wearing a seat belt is not admissible on the issues of liability and proximate cause. However, this evidence is admissible as to the issue of mitigation of damages, but may not reduce a plaintiff's total recovery by more than five percent.

BACKGROUND

CONCERNS OF L.B. 496

Part of the impetus behind the current widespread state consideration of mandatory seat belt laws came from the United States Department of Transportation ("DOT"). On July 11, 1984, the DOT issued a ruling requiring the installation of automatic restraints in all new cars beginning with the 1990 model year. However, the ruling provided that this requirement for automatic occupant restraints would be rescinded if states comprising at least two-thirds of the United States population passed mandatory seat belt laws before April 1, 1989. Following this directive, many state legislatures began to consider the issue of seat belt laws, reasoning that air bags are a more expensive and a less effective alternative to seat belts.

While the DOT ruling was undoubtedly an underlying factor, it was not the primary concern of the seat belt legislation. By requiring the driver and front seat passengers to wear seat belts, L.B. 496 was aimed primarily at reducing the human and economic costs of traffic accidents. Some understanding of the magnitude of these concerns...
must guide any inquiry into the issues presented by the mandatory seat belt law.

The entire chain of a traffic accident’s far-reaching personal and societal consequences is set in motion by the “second collision,” the collision that occurs between an unrestrained occupant and a vehicle’s interior after the “first collision” between the vehicle and some other object. These second collisions produce shocking statistics of human tragedy. In fact, automobile accidents have killed more persons in this country than have our modern wars. For example, in 1983 alone, automobile accidents killed 42,584 people nationwide, 255 of them in Nebraska. That annual nationwide figure amounts to almost three-quarters of the number of persons killed during the entire eight-year period of the Vietnam War. For individuals between the ages of fifteen and twenty-four, auto accidents are the number one cause of death.

But the price exacted by auto accidents does not stop at fatalities. Two million nonfatal but disabling injuries are heaped on top of the staggering number of road deaths which occur each year. Overall, road trauma constitutes this country’s fourth most serious public health problem. It produces “more paraplegics and quadraplegics each year in the United States than all other causes combined and it is a leading cause of new cases of epilepsy.”

In addition to the undeniable personal tragedy, deaths, and injuries, auto accidents translate into staggering economic costs to society. These monetary costs arise from the myriad series of events the second collision sets into motion. Ambulance personnel must respond to the scene of an accident. The victims are often treated at public hospitals. Federal health insurance programs may assist with payments for treatment and rehabilitation. Private insurance programs are almost always used to defer costs. Prolonged hospitalization may result in some form of salary compensation and or welfare payments for the support of the victim and his family. In addition,
the victim's employer must absorb the hidden costs of the victim's absence from the job such as rescheduling, temporary replacements, and the loss of the victim's unique talents. The general idea is that everyone pays the price of auto accidents in the form of increased taxes, insurance premiums, and prices of goods and services. Although estimates vary, the National Highway and Traffic Safety Administration ("NHTSA") sets the total cost of traffic fatalities and injuries at $31,418,000,000 for the entire country, and $199,000,000 for the state of Nebraska, in 1983.

Ironically, much of this destruction could be prevented if people would simply wear their seat belts. According to NHTSA:

Safety belts and child safety seats ... are estimated to be 50-60 percent effective in preventing serious or fatal injuries to persons involved in highway vehicle crashes. Use of the protection devices by all occupants last year could have saved 15,000 to 18,000 lives and avoided more than 200,000 moderate-to-severe injuries. ... The monetary implications of this are astounding as it would result in an estimated savings of billions of dollars due to lives saved and injuries avoided or reduced.

In light of these grim statistics and the potential benefits of increased seat belt usage, it is not surprising that the mandatory seat belt law issue receives so much attention. Indeed, one wonders what took so long.

CONSTITUTIONAL AND PUBLIC POLICY ISSUES

Perhaps because of either their relatively short existence, or a general acceptance of their purpose and only minor resultant inconvenience, there are few reported cases in which the constitutionality of mandatory seat belt laws has been challenged. However, this is


40. *HIGHWAY USERS FED'N & AUTOMOTIVE SAFETY FOUND., supra* note 33, at Table 1.


42. Nebraska's mandatory seat belt law may eventually be challenged in the Nebraska Supreme Court. The Citizens Against Mandatory Seat Belts filed a lawsuit in Lancaster County District Court seeking an injunction to halt enforcement of the law on the grounds that it violates due process rights and that it is vague. Omaha World Herald, Oct. 8, 1985, at 17, col. 3. The district court denied the plaintiff's request for a temporary injunction because the plaintiff had failed to meet its burden of proof. The court stated that, "In view of the strong presumption in favor of the constitutionality of statutes, as well as the broad scope of the state's police power, there is not sufficient evidence . . . to demonstrate the likelihood of plaintiff's ultimate success on the merits." Cashoili v. State, No. 398-255 (Dist. Ct. Lancaster County, Nebraska, Oct. 16, 1985)
an important question to raise because the government’s authority should always be confirmed in any case involving its infringement of the individual’s power to make decisions for himself, no matter how beneficent or innocuous such infringement may appear.\footnote{43}

The fundamental question raised by laws intended to promote public safety, such as mandatory seat belt laws, is whether they constitute a valid exercise of the state’s police power.\footnote{44} The term “police power” refers to the broad, inherent power of a legislative body to make laws that promote the public health, safety, and welfare.\footnote{45} Determining what constitutes the public health, safety, and welfare is a uniquely legislative function to which courts traditionally grant a highly deferential standard of review.\footnote{46} Laws are presumed to be constitutional, and courts will not hold otherwise as long as there is some reasonable relation to the public welfare.\footnote{47}

Despite this deferential standard of review, the legislature’s power is by no means boundless. While recognizing the need for deference to legislative judgments, the United States Supreme Court ar-
articulated definite limits to the police power in Lawton v. Steele:\textsuperscript{48}

[A] large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests . . . . To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose.\textsuperscript{49}

The parameters of the police power are thus defined by a two-part test: First, any law must address a "public" need, as distinguished from a law directed at a particular class of individuals with no impact on the general public and, second, the law's provisions must be reasonably related to the accomplishment of the public purpose.\textsuperscript{50}

Therefore, in order for a statute to be within the state's police power, its provisions must be reasonably related to the public health, safety, and welfare. This is the benchmark against which the mandatory seat belt law must be measured.

In applying this test to the seat belt law, it is important to begin by correctly framing the issue. At issue is not whether mandating seat belt use will reduce traffic fatalities and injuries. The statistics are sufficiently convincing to eliminate that point as a serious issue.\textsuperscript{51}

Rather, the nagging question concerns the first part of the test, the requirement of a "public" purpose. The issue should be framed in terms of whether requiring persons to protect themselves by buckling up really protects the health, safety and welfare of the public, or whether the decision to wear a seat belt is truly an individual one which affects no one but the individual decisionmaker. Although statistics prove the safety benefits of seat belt use, the question centers upon the legislature's authority to require such use.

Because of their analogous purposes, the body of case law concerning the constitutionality of mandatory motorcycle helmet laws constitutes a useful analytical tool for evaluating the possible public purposes advanced by the seat belt law.\textsuperscript{52}

Mandatory motorcycle hel-

\textsuperscript{48} 152 U.S. 133 (1894).
\textsuperscript{49} Id. at 137 (citations omitted).
\textsuperscript{50} Id.
\textsuperscript{51} See notes 31-41 and accompanying text supra.
met laws have been upheld in almost every case in which their constitutionality has been challenged.\textsuperscript{53} Courts upholding helmet laws typically found that they advance one or a combination of the following: (1) minimizing the economic consequences of motorcycle accidents; (2) protecting other highway users; and (3) regulating highway use.\textsuperscript{54}

Reducing the economic consequences of motorcycle accidents has often been held to constitute a "public" purpose supporting the constitutionality of mandatory helmet laws.\textsuperscript{55} The rationale is that an individual motorcyclist's decision not to wear a helmet harms others and thus goes beyond private conduct because the costs of his aggravated injuries which a helmet might have prevented or lessened are ultimately paid for by the general public in the form of increased insurance premiums, taxes, and costs of goods and services.\textsuperscript{56}

Typical of cases recognizing this argument is \textit{Love v. Bell},\textsuperscript{57} in which a class action suit sought a declaratory judgment on the constitutionality of Colorado's helmet law.\textsuperscript{58} The plaintiff contended that an individual should be able to take whatever foolish risks he wishes, free of state interference, so long as he does not endanger anyone else in the process.\textsuperscript{59} The trial court agreed with the plaintiff's argument that the law only served to protect the individual from his own imprudence and that such a purpose, therefore, fell outside the state's police power because it did not relate to the welfare of the general public.\textsuperscript{60} However, the Colorado Supreme Court reversed

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\bibitem{55} \textit{Note, Motorcycle Helmets}, \textit{supra} note 54, at 370-72.

\bibitem{56} \textit{Id.} at 370.

\bibitem{57} 171 Colo. 27, 465 P.2d 118 (1970).

\bibitem{58} \textit{Id.} at ---, 465 P.2d at 120.

\bibitem{59} \textit{Id.} at ---, 465 P.2d at 121.

\bibitem{60} \textit{Id.}
the lower court,\textsuperscript{61} explaining that the fiscal impact of accidents involving nonhelmeted cyclists had public ramifications:

It is, of course, part of romantic tradition that an individual ought to be able to lead an adventurous and swash-buckling existence without regard to his own safety and without interference from the king. But when that individual as a result of this free-wheeling activity seriously injures or kills himself, the ultimate result is unfortunately not always borne by him alone. Today our society humanely accepts as one of its functions the responsibility for relieving the economic suffering of its members . . . . Persons often become public charges because of their prolonged hospitalization for serious injury, and families are often required to be supported by public welfare as a result of the death of their breadwinner.\textsuperscript{62}

Following this rationale, the court ruled that the helmet law served a public purpose and thus constituted a legitimate police power enactment.\textsuperscript{63}

A similar declaratory judgment was sought in \textit{Simon v. Sargent}.\textsuperscript{64} The plaintiff in Simon contended that the Massachusetts helmet law violated the fourteenth amendment due process clause because its purpose was beyond the reach of the state's police power.\textsuperscript{65} The district court, however, ruled that even assuming that an individual does have a right to incur risks that involve only himself, the risks in that case were not so limited, stating:

While we agree with plaintiff that the act's only realistic purpose is the prevention of head injuries incurred in motorcycle mishaps, we cannot agree that the consequences of such injuries are limited to the individual who sustains the injury . . . . [T]he public has an interest in minimizing the resources directly involved. From the moment of the injury, society picks the person up off the highway; delivers him to a municipal hospital and municipal doctors; provides him with unemployment compensation if, after recovery he cannot replace his lost job; and if the injury causes permanent disability, may assume the responsibility for his and his family's subsistence. We do not understand a state of mind that permits plaintiff to think that only himself is concerned.\textsuperscript{66}

Although most jurisdictions have held minimization of the fiscal

\textsuperscript{61} Id. at _, 465 P.2d at 123.
\textsuperscript{62} Id. at _, 465 P.2d at 121.
\textsuperscript{63} Id. at _, 465 P.2d at 123.
\textsuperscript{65} Id. at 278.
\textsuperscript{66} Id. at 279.
impact of motorcycle accidents to constitute a valid public purpose,\textsuperscript{67} a small minority have disagreed.\textsuperscript{68} Illustrative of the reasoning of these courts is \textit{State v. Betts}.\textsuperscript{69}

In \textit{Betts}, a cyclist charged with violating Ohio's helmet law defended on fourteenth amendment grounds claiming that the law could not be justified as an exercise of the state's police power because it lacked a public purpose.\textsuperscript{70} The court stated the police power test as: "A public need must exist for the enactment of a police measure. Without some reasonable public necessity for the restriction or regulation of an individual, the restriction or regulation is unwarranted and invalid and is not a proper exercise of the police power."\textsuperscript{71} Applying this test, the court first concluded that a person's "liberty" encompasses the freedom to be as reckless as he wishes, so long as he does not thereby endanger others.\textsuperscript{72} The court went on to determine that others are not endangered by individual helmet nonuse and that the law could not, therefore, qualify as a valid exercise of the police power.\textsuperscript{73} "Included in man's 'liberty' is the freedom to be foolish . . . as he may wish, so long as others are not endangered thereby. The State of Ohio has no legitimate concern with whether or not an individual cracks his skull while motorcycling; that is his personal risk."\textsuperscript{74}

A second public purpose identified in the helmet law cases is that of protecting other persons on the road because unprotected motorcyclists are more vulnerable to flying objects which might cause them to lose control and crash into others. This purpose was relied upon by the court in \textit{State v. Lombardi}.\textsuperscript{75} In \textit{Lombardi}, a cyclist convicted under the Rhode Island law challenged the statute as being \textit{ultra vires} of the state's power for lack of a public purpose.\textsuperscript{76} However, the Rhode Island Supreme Court used the "flying objects" rationale

\textsuperscript{67} See note 55 and accompanying text \textit{supra}.


\textsuperscript{69} 21 Ohio Misc. 175, 252 N.E.2d 866 (1969).

\textsuperscript{70} \textit{Id.} at —, 252 N.E.2d at 867.

\textsuperscript{71} \textit{Id.} at —, 252 N.E.2d at 872.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{Id.}


\textsuperscript{76} \textit{Lombardi}, 104 R.I. at —, 241 A.2d at 626.
in concluding that the statute served a public purpose and thus qualified as a valid exercise of the police power; "It does not tax the intellect to comprehend that [flying objects] could so affect the operator of a motorcycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highway."77

An alternative argument supporting the constitutionality of motorcycle helmet laws focuses on the state's interest in controlling access to and use of its highways. This rationale was utilized by the court in the recent case of Commonwealth v. Kautz.78 In Kautz, a motorcyclist convicted of violating the Pennsylvania helmet law challenged the law's constitutionality on the grounds that it exceeded the scope of the police power.79 The court stated the applicable legal test as follows: "It is axiomatic that the [police] power can be rightfully exercised over a member of a civilized community, against that person's will only to prevent harm to other members of the community."80 The court acknowledged the problems with the "fiscal impact"81 and "flying objects"82 arguments and instead found an alternative way to decide the case.

The court stated that "[t]he legislature has the power to regulate the manner and circumstances under which vehicles may be operated upon the highways."83 From this proposition, the court concluded that access to the highways is a privilege, not a right,84 that the statute is subject to a lesser standard of review, and thus "survives on the strength of arguments too attenuated to withstand a more rigorous scrutiny."85

APPLICABILITY OF RATIONALES SUPPORTING HELMET LAWS TO THE SEAT BELT LAW

Although the argument that the seat belt law will prevent harm to others by maximizing a driver's control over his vehicle has some logical appeal, there is a paucity of empirical data to support that contention. An air bag may aggravate loss of control by hindering vi-

77. Id. at —, 241 A.2d at 627.
79. Id. at —, 491 A.2d at 865.
80. Id.
81. Id. at —, 491 A.2d at 866. Regarding the fiscal impact argument, the court stated: "Courts hesitate before the stated purpose of the statutes . . . . This reluctance to endorse the state's interest in the welfare of its citizenry reflects, perhaps, a fear of 'Big Brother' and the concomitant potential for abuse." Id.
82. Id. at —, 491 A.2d at 865. The court noted: "In [an earlier helmet law case], this court followed the lead of other jurisdictions finding, however attenuated, a basis for public benefit [in the flying objects rationale]." Id.
83. Id. at —, 491 A.2d at 867.
84. Id.
85. Id.
sion and mobility, yet there are no police power statutes prohibiting airbags.

The argument that the state can regulate highway use also applies to the question of the seat belt law's validity. This argument maintains that the seat belt law is nothing more than an additional traffic regulation among the many others that already exist. It can be argued, however, that the purpose of these other traffic laws, such as speed limits and stop signs, is to protect people from the improper and careless acts of others. The purpose of traffic laws is to keep people from running into each other. The seat belt law, however, can only mitigate the effects of collisions, it cannot prevent them.

In light of the weaknesses of these two possible supporting rationales, it appears that the fiscal impact argument is the strongest argument supporting the seat belt law. In the case of L.B. 496, the fiscal impact argument also appears to be the argument primarily relied upon by the law’s proponents. Despite this reliance and the overwhelming acceptance of this rationale by courts considering motorcycle helmet laws, the fiscal impact argument presents serious public policy questions.

The grave problem with the fiscal impact argument comes in determining where the line will be drawn between beneficent governmental regulation and individual sovereignty. There must be some point at which only the individual can decide what steps to take in his own behalf, otherwise government could control every aspect of decisionmaking. Following the logic of the fiscal impact argument, however, it is hard to see where that point would lie as the fiscal impact argument could be used to justify practically any law. For example, heart disease and cancer cause far more deaths and carry a much greater economic impact than do automobile accidents. The very same fiscal impact argument advanced in support of the seat

87. Hearings, supra note 4, at 39 (statement of Sen. Morehead). Senator Morehead stated: “I do not view this legislation as an infringement on persons’ liberties, but rather an additional regulation among many. Speed limits, shatterproof windshields, emission controls are some examples which we require for the safe operation of motor vehicles.” Id.
89. See, e.g., Public Works Comm., Introducer’s Statement of Intent: L.B. 496, at 1 (1985) (outlining the purposes sought to be accomplished by L.B. 496 and mentioning only the expected economic savings). See also Hearings, supra note 4, at 39 (statement of Sen. Morehead). Senator Morehead stated: “Society has a responsibility to . . . make sure that those of us who crash don’t become unnecessarily heavy burdens on those of us who don’t.” Id.
90. See Hartunian, Smart, & Thompson, The Incidence and Economic Costs of Cancer, Motor Vehicle Injuries, Coronary Heart Disease and Stroke: A Comparative Analysis, 70 AM. J. PUB. HEALTH 1249, 1250 (1980).
belt law could also justify the government intruding into such personal decisions as diet, smoking, and exercise habits in an effort to achieve the otherwise noble goal of reducing heart disease and cancer deaths. The fiscal impact argument would allow an unlimited spectrum of paternalistic "Big Brother" controls over innumerable private decisions.91

The danger of such "creeping paternalism" inherent in the fiscal impact argument was predicted in some of the decisions upholding helmet laws:

The difficulty is that if the obliteration of individual rights is permissible whenever there is any possibility, even indirect or remote, of injury to the public, then the line of demarcation as to the permissible intrusions of law, and its implementing functionaries, into conduct which should be one's private and personal concern becomes blurred almost to the vanishing point . . . . The statute here under consideration joins the onward march of the ever-increasing volumes of regulatory laws concerning which it is extremely questionable whether the benefits outweigh the burdens in the loss of personal freedoms and the expanding bureaucracy involved in their enforcement. I have interposed this dissent as an objection to what appears to be a limitless process of spreading tentacles of control into what ought to be matters of personal and private conduct. There ought to be a halt somewhere, and in my judgment this law reaches that point.92

These concerns should not be casually dismissed, because as society becomes increasingly complex, there will be fewer things which could not be argued to have some economic impact on the general public.

A possible answer to the concerns over the shrinking sphere of individual autonomy might focus upon the limited facts of the seat belt issue itself, and avoid its broader implications. The mandatory seat belt law represents a very mild intrusion against an individual's freedom to choose. The decision to wear a seat belt is not the type of

91. Floor Debate on L.B. 496, supra note 4, at 38-87 (1985) (statement of Sen. Peterson). Senator Peterson stated:

If we're going to go ahead and mandate using seat belts, then I think it behooves us to come in with legislation to mandate that we outlaw smoking . . . . [S]moking kills seven times more people than automobile accidents . . . . We can state that on booze too . . . . I just wonder when Big Brother is going to come into our bathrooms and check and see whether we brushed our teeth three times a day.

Id.

decision that one would typically associate with the concept of the individual. Here the government is only telling someone to wear a seat belt, it is not dictating decisions such as where to live, who to marry, or what occupation to pursue. Furthermore, the mandatory seat belt law operates in an already heavily regulated area, in which the individual might be said to have a diminished expectation of autonomy. This argument would thus contend that the mandatory seat belt law constitutes a nonintrusive regulation in an already heavily regulated activity, enacted to address a grave problem, and that the line can easily be drawn in the case of mandatory seat-belt use.

All of the policy arguments opposing the mandatory seat belt law, however, seem to have a common theory as to the proper function of government, and how government should relate to the individual. John Stuart Mill described his theory of the proper relationship between government and the individual as follows:

[T]he only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over his own body and mind, the individual is sovereign. The principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow, without impediment from our fellow creatures, so long as what we do does not harm them, even though they think our conduct foolish, perverse or wrong.93

Thus, it can be argued that the proper function of government is to protect individuals from each other, not to protect them from themselves.94 If one accepts that this is the proper function of government, the validity of the seat belt law would hinge on the question of how an individual harms others by not using a seat belt. As previously discussed, the possible harms are a driver's being knocked away from the wheel and losing control,95 and the possible economic burdens generated by his aggravated injuries.96 However, the former argument is too tenuous, and the latter knows no bounds. Furthermore, the state's right to control highway use does not apply because traffic laws are intended to prevent accidents, which the seat belt law cannot do.97 The otherwise noble objectives of the law cannot alter this conclusion.

93. J. MILL, ON LIBERTY 36 (1859) (emphasis added).
95. See notes 75-77 and accompanying text supra.
96. See notes 55-74 and accompanying text supra.
97. See notes 78-88 and accompanying text supra.
ANALYSIS

Section one provides that only the driver and front seat passengers are required to wear a seat belt; those in the back seat are not. This exclusion of back seat passengers is obviously inconsistent with the law's primary objective of safety. If safety is the goal, it makes no sense to leave back seat passengers unrestrained, particularly when one of the possible arguments supporting the law is based upon preventing injuries caused by unrestrained occupants hitting one another. By limiting its application to front seat occupants, the law simply does not go far enough. Despite the apparent illogic of ignoring back seat passengers, other states' seat belt laws also are limited to drivers and front seat passengers. Nonetheless, it is difficult to understand the rationale behind such provisions.

The most likely explanation for the exclusion of back seat passengers lies with the minimum criteria for state seat belt laws promulgated by the DOT. These standards require only that each state's law mandate seat belt use by front seat occupants. Furthermore, it was argued during the debate over the adoption of L.B. 496 that back seat passengers would be “encouraged” to buckle-up by virtue of the fact that front seat passengers are required to. However, if “encouragement” was deemed sufficient to promote increased seat belt use, there are less intrusive means of encouragement, such as intensified public education efforts. To be consistent, the Unicameral should have extended the rule to all vehicle occupants in the interests of maximized safety, rather than routinely following the DOT standards and previously enacted state seat belt laws.

Section two specifically excludes noncompliance with the seat belt law from the traffic violation point system. This provision also weakens the law's purpose of increased safety. Attaching a point penalty would tend to deter seat belt nonuse which would, in turn, increase safety. With point penalties removed, violation of the law

98. See notes 9-11 and accompanying text supra.
100. See notes 27-29 and accompanying text supra.
101. See note 28 supra.
102. Hearings, supra note 4, at 38 (statement of Sen. Morehead). Senator Morehead stated: “I personally believe that it is important that those persons in the back seat also use safety belts, but it is my hope that with the increased awareness and usage by front seat passengers, those in the bank seat will voluntarily use them also.” Id.
103. Perhaps the legislature considered the exclusion of back seat occupants an acceptable provision because the back seats are, statistically, less frequently used and less dangerous than the front seats. See 49 Fed. Reg. 28,964 (1984).
carries only the twenty-five dollar fine imposed under section five.\textsuperscript{105} Thus, the law's enforcement system does not sufficiently encourage compliance.

By surveying the types of traffic violations which do and do not carry point penalties,\textsuperscript{106} an argument can be made that violation of the seat belt law ought not to carry a point penalty because the point system is directed at conduct which directly threatens others,\textsuperscript{107} such as drunk driving and speeding, as opposed to conduct which presents no such direct threat, such as parking and muffler violations.\textsuperscript{108} Accepting this argument, however, necessitates contradicting the central argument that an individual's nonuse of a seat belt harms others. For example, if a purpose of the seat belt law is to prevent unrestrained occupants from losing control of the car or flying about and injuring one another, then violation should carry a point penalty because of the threat posed to others. Thus the nonassessment provision fails to support the law's purpose, and contradicts one of the rationales underlying the law itself.

Section four states that a law enforcement officer cannot stop a car solely to determine compliance with the seat belt law.\textsuperscript{109} Instead, the law allows enforcement only as a secondary action to detention for some other reason.\textsuperscript{110} The states which have enacted mandatory seat belt laws are split on this issue.\textsuperscript{111}

The wisdom of the legislature's decision to allow only secondary enforcement should be carefully scrutinized because it directly affects the primary purpose of the seat belt law, that of saving lives and preventing injuries. Seat belts save lives and prevent injuries only if they are used. Thus, if the law is to fully achieve its primary purpose, it can do so only by bringing about an increase in seat belt use. The extent of increase in use will be directly affected by the extent of enforcement because the frequency with which people will buckle-up depends upon their personal perceptions of how vigorously the law will be enforced.\textsuperscript{112} Following this reasoning, an argument can be made that the secondary enforcement provision defeats the very

\begin{itemize}
  \item \textsuperscript{105} See note 21 and accompanying text supra.
  \item \textsuperscript{106} Point penalties attach to such violations as driving while intoxicated, failure to stop and to render aid, and negligent driving; point penalties do not attach to minor infractions such as parking violations and driving without a license. Nev. Rev. Stat. \S 39-669.26 (Supp. 1985).
  \item \textsuperscript{107} See id.
  \item \textsuperscript{108} See id.
  \item \textsuperscript{109} L.B. 496, \S 4, 1984-85 Neb. Laws at 968 (codified at Nev. Rev. Stat. \S 39-6, 103.05 (Supp. 1985)).
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Seamonds, Seat Belt Laws Aren't Deflating Those Air Bags, U.S. News & World Rep., Oct. 21, 1985, at 55, 55.
  \item \textsuperscript{112} See notes 116-20 and accompanying text infra.
\end{itemize}
purpose of the law, rendering it ineffective, contradictory and internally inconsistent.

The reason that the Unicameral opted for secondary instead of direct enforcement appears to be based upon simple political compromise. The legislative history of L.B. 496 suggests that the secondary enforcement provision helped to soften opponents' "Big brother" objections. Indeed, one could argue that the Nebraska law, with secondary enforcement, does somewhat reconcile governmental interference with an individual's free choice by leaving to the individual the choice of whether he or she will wear a seat belt and simply take the chance of not being stopped for some other reason.

Despite any superficial appeal this argument may have, the secondary enforcement provision was not the best choice. First, it raises important policy questions of whether the legislature should be in the business of passing such irresolute, semienforceable laws. More importantly, it directly undermines the law's objectives of saving lives and preventing injuries. The argument was made that the law, as enacted, would automatically produce high use rates because people are generally law abiding and would buckle-up simply because it was a law, irrespective of how strictly the law was enforced. However, as statistics from other jurisdictions suggest, that may not be true. An observation survey conducted by the Insurance Institute for Highway Safety analyzed use rates in New York (a direct enforcement state) and New Jersey (a secondary enforcement state). This study revealed that during the New York law's first month, compliance ranged from forty-three percent in Watertown to eighty-one percent in Syracuse, compared to pre-law rates of eight percent to thirty percent. For New Jersey, the use rate was lower, ranging from a low of twenty-five percent in Atlantic City to a high of sixty-two percent in Union, as compared to pre-law use rates of eight per-

113. Floor Debate on L.B. 496, supra note 4, at 25 (statement of Sen. DeCamp that secondary enforcement lessens degree of governmental intrusion).
114. Interview with Senator Morehead, Representative of Legislative District 30, in Lincoln, Nebraska (Sept. 12, 1985).
116. Id. at 12 (statement of Sen. Morehead). Senator Morehead stated: "We believe that this is partially self-enforcing. We have passed a lot of other laws that we can't always necessarily enforce either. If every law we passed we passed only because we could enforce it a hundred percent, we probably wouldn't be passing any laws here at all." Id.
118. Id.
cent to twenty-four percent.119 This data would appear to suggest that people in New York buckle-up more because of the stricter law.

Statistics from Canada suggest that there tends to be a decline in compliance over time.120 For example, the province of Ontario enacted a mandatory seat belt law in 1976. Two months after enactment, seat belt use was up to seventy-one percent as compared to a use rate of twenty-one percent immediately before enactment. However, after this initial surge, seat belt use declined to forty-eight percent only six months after the law's enactment.121 This may quite possibly be the trend in Nebraska. Those who did not use seat belts before the law's enactment will soon catch on that they are very unlikely to ever be ticketed for noncompliance, and even if they are the penalty is relatively slight. Thus, the end result will be that the seat belt law may fail to achieve its intended purpose.

Section seven's provisions for "civil penalties" are important because they dictate how evidence of a person's nonuse of a seat belt can and cannot be used in a lawsuit.122 Negligence cases basically involve two primary issues: (1) the issue of liability; and (2) the issue of damages, i.e., establishing a dollar figure for the plaintiff's injuries if the defendant is found liable.123 Nebraska's seat belt law provides that evidence of seat belt nonuse is not admissible regarding the first issue, that of liability.124 Thus, a defendant cannot attempt to argue contributory or comparative negligence on the part of the plaintiff for not wearing a seat belt. Evidence of seat belt nonuse is admissible, however, as to the second issue, that of determining the dollar amount of the plaintiff's damages.125 The law specifies that evidence of the plaintiff's failure to wear a seat belt is admissible to mitigate the damages, but the law puts a 5% "cap" on such mitigation.126 Thus, a defendant can attempt to prove that the plaintiff would have suffered less serious injuries had he been wearing a seat belt, but the jury is not allowed to reduce the plaintiff's recovery by more than 5%, if they see fit to do so at all.

The various state legislatures which have passed seat belt laws have reached divergent conclusions as to what effect seat belt nonuse

119. Id.
120. Id.
121. Id.
122. See notes 24-26 and accompanying text supra.
124. L.B. 496, § 7, 1984-85, Neb. Laws at 969 (codified at NEB. REV. STAT. § 39-6,103.08 (Supp. 1985)).
125. Id.
126. Id.
should have on a plaintiff’s ability to recover for his injuries.127 This same issue has spawned considerable litigation in the courts, with a resultant divergence of conclusions.128

The argument against allowing mitigation of damages essentially maintains that the plaintiff’s nonuse of seat belts did not cause the accident and that mitigation would thus constitute an unjust windfall for the defendant.129 The mitigation provision was apparently placed in L.B. 496 to accomplish an “end-run” around the DOT minimum standards that require that each state’s seat belt law have provisions for “civil penalties.”130 With the 5% cap, the legislature was able to meet the technical requirements of the DOT ruling and still avoid

127. See, e.g., Act of June 27, 1985, Pub. Act No. 85-429, § 1, 1985 Conn. Acts 435, 436 (Reg. Sess.) (providing that failure to wear a seat belt does not constitute contributory negligence and is inadmissible); N.Y. VEH. & TAF. LAW § 49-1229-c (McKinney 1985) (providing that evidence of noncompliance may be introduced to mitigate damages without limitation).


129. Lafferty v. Allstate Ins. Co., 425 So. 2d 1147, 1151 (Fla. Dist. Ct. App. 1982), rev’d, 451 So. 2d 446 (Fla. 1984). In Lafferty, the defendant introduced expert testimony that the plaintiff’s facial and knee injuries would not have occurred if she had been wearing the shoulder and lap belts which were available in her automobile. Id. at 1148. The trial court admitted the evidence and instructed the jury that the plaintiff’s failure to wear an available seat belt could be considered in establishing her recovery. Id. However, the appellate court reversed, citing the perceived unfairness of such a policy:

However trite it may be, we still hold to the basic concept that a tortfeasor takes his plaintiff as he finds him. . . . We also have great difficulty comparing the negligence of failing to buckle up with the negligence of causing an accident. The unbuckled plaintiff’s conduct seems mild and acceptable while sitting innocently at a stoplight when contrasted with a hypothetical speeding and intoxicated driver who is 100% at fault in the resulting rear end collision. Should such a reprehensively negligent person have an advantage because his victim would have been safer with a seat belt? We think not. Id. at 1150-51. Although the Florida Supreme Court reversed this holding, 451 So. 2d at 447, the argument eventually won out in the Nebraska Unicameral. Floor Debate on L.B. 496, supra note 4, at 14-31 (Apr. 3, 1985). The argument was so persuasive that the Unicameral amended the original bill, which had allowed for unlimited mitigation, to provide for a 5% cap. Id.

130. See note 28 supra.
the perceived unfairness of allowing a defendant to escape full responsibility for an accident caused by his negligence. As one Senator stated:

We do not want people who are injured at the hands of negligent drivers to lose all their damages because the injured party failed to wear the seat belt. That is just too harsh. This amendment is a responsible amendment because it keeps us in compliance with federal law, and in addition it protects the people of the State of Nebraska who are involved in serious automobile accidents.  

The counter argument maintains that a defendant should be responsible only for that which he proximately caused. Because the plaintiff has a duty to exercise ordinary care to protect himself from harm, the defendant is not liable for injuries which the plaintiff reasonably could have avoided by using an available seat belt.  

On the mitigation issue, the legislature's judgment is backed by respectable reasoning and represents a rational resolution of the issue. An otherwise innocent plaintiff should not go uncompensated when the accident would not have occurred but for the defendant's negligence. By including a five percent mitigation provision, the unicameral succeeded in complying with the technical demands of the DOT ruling with no practical damage to the rights of injured plaintiffs.

CONCLUSION

The mandatory seat belt law raises three complex issues. First is the issue of whether such a law constitutes a valid exercise of the state's police power. From the case law involving challenges of mandatory motorcycle helmet laws and the early challenges of the Nebraska and New York seat belt laws, it appears that the law will withstand constitutional attack. Apart from the question of whether the law is within the legislature's authority, there remain the intrigu-

133. RESTATEMENT (SECOND) OF TORTS § 465 comment c (1985). The Restatement rule provides:
Where ... there are distinct harms, or a reasonable basis is found for the division of a single harm, the damages may be apportioned, and the plaintiff may be barred only from recovery for so much of the harm as is attributed to his own negligence. ... Such apportionment may also be made where the antecedent negligence of the plaintiff is found not to contribute in any way to the original accident or injury, but to be a substantial contributing factor in increasing the harm which ensues.
Id.
134. See notes 44-88 and accompanying text supra.
ing questions underlying the concept of self-protective legislation. These are the public policy issues of whether the legislature should make decisions as to what individual safety measures people must follow when connections to the general public welfare appear uncertain.\textsuperscript{135} The arguments advanced to justify such governmental intervention are flawed in that they know almost no bounds and could be used to justify unlimited controls. Finally, there is the practical question of how well the Unicameral actually did what it set out do do.\textsuperscript{136} It appears that the many inconsistencies between the law's provisions and its purpose pose built-in barriers to the achievement of increased safety.

Mandatory seat belt laws promise to remain a controversial issue for the foreseeable future. A likely result of this entire process on a nationwide scale may be the coexistence of mandatory seat belt laws and air bags in our automobiles, because many states have passed mandatory seat belt laws which do not conform to DOT standards.\textsuperscript{137} Thus, if DOT standards remain firm, air bags will have to be installed in new cars beginning in 1990.\textsuperscript{138} Long after the mandatory seat belt law is yesterday's news, however, the tension between governmental regulation and individual autonomy will continue.

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\textsuperscript{135} See notes 89-97 and accompanying text supra.
\textsuperscript{136} See notes 98-132 and accompanying text supra.
\textsuperscript{137} Seamonds, supra note 111, at 55.
\textsuperscript{138} See notes 27-28 and accompanying text supra.