

Juror Conduct Drawing Upon "Common Sense and Everyday Experience" Held Not Improper Even Though It Includes Outside Observations Material to Issue in Point at Trial

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problem, which already has been used in another state,¹⁶¹ is a system that increases the state's role in monitoring and supplementally financing local educational expenditures.¹⁶² It is suggested that such a reform would account for the constitutional significance of the right to education and would alleviate the practical difficulties that the current financing scheme has failed to remedy.

Joanne Dantuono

DEVELOPMENTS IN NEW YORK LAW

Juror conduct drawing upon "common sense and everyday experience" held not improper even though it includes outside observations material to issue in point at trial

Traditionally, evidence of the conduct and statements of a juror during the course of deliberations is not admissible to impeach a duly rendered verdict.¹⁶³ This rule has yielded, however, when-

N.Y.S.2d at 656-59 (Fuchsberg, J., dissenting); Board of Educ. v. Nyquist, 94 Misc. 2d at 490-94, 518-19, 408 N.Y.S.2d at 617-18, 634; see also Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 316-17 (1969). Though the *Nyquist* Court seemingly recognized that significant inequities exist in the current educational financing scheme, see 57 N.Y.2d at 38, 439 N.E.2d at 363, 453 N.Y.S.2d at 647-48, its decision may be attributable to the fact that it has been the general "judicial practice to refuse to enter decrees" that would meet with "excessive cost or risk of crisis" in their enforcement. Carrington, *supra* note 117, at 1252. Furthermore, it has been noted that, with regard to equal protection attacks on property-based educational funding schemes, "it would be difficult to imagine a case having a greater potential impact on our federal system . . ." 411 U.S. at 44. Thus, it is suggested that the *Nyquist* Court's application of the rational basis standard partially was based on its hesitancy to disrupt the status quo.

¹⁶¹ See *infra* note 162.

¹⁶² See *Robinson v. Cahill*, 69 N.J. 449, 467-68, 355 A.2d 129, 139 (1976). In *Robinson*, the New Jersey Supreme Court upheld the constitutionality of a statutory public school financing scheme that complied with the mandates of the education clause contained in the state constitution. *Id.* at 458-68, 355 A.2d at 133-39. This funding system generally increased the state's role in public educational finance by permitting it to monitor local expenditures, detect inadequacies and, where necessary, either increase budgets beyond the amounts locally determined or increase state aid to supplement insufficient local budgets. *Id.* at 458-67, 355 A.2d at 133-38. Such a system grants broad discretionary power to the commissioner and board of education. *Id.* It also entails individual consideration of the specific needs and circumstances existing in the various school districts. *Id.* Although this scheme provides for flat state grants per pupil, the element of the New York system challenged in *Nyquist*, it does create an effective detection system to locate and remedy inadequacies in the functioning of these grants. *Id.*

¹⁶³ See *McDonald v. Pless*, 238 U.S. 264, 269 (1915); *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785). In *Vaise*, the rule excluding testimony of jurors that tends to impeach their

ever an overt act of a juror has influenced the deliberations in such a manner as to prejudice a criminal defendant's sixth amendment rights.¹⁶⁴ A verdict may be overturned, for example, on the ground

own verdict was first recognized. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 68, at 148 n.80 (E. Cleary 2d ed. 1972); see 99 Eng. Rep. at 944. The court in *Vaise* concluded that testimony relating to juror misconduct is admissible only when a third person observed the particular conduct. *Id.* Similarly, the United States Supreme Court has stated that a new trial may not be secured by using the testimony of jurors to impeach their own verdict. *McDonald v. Pless*, 238 U.S. at 269. In *Dalrymple v. Williams*, 63 N.Y. 361 (1875), the New York Court of Appeals adopted the common-law rule, holding that affidavits "to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of the verdict and intended something different" are not admissible. *Id.* at 363. See generally E. FISCH, FISCH ON NEW YORK EVIDENCE § 305, at 204 (1977 & Supp. 1981-82); C. McCORMICK, *supra*, § 68, at 148; W. RICHARSON, EVIDENCE § 407, at 398-400 (J. Prince 10th ed. 1973); Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920-27 (1978).

The common-law doctrine prohibiting impeachment of a verdict through juror testimony relating to juror misconduct pervades the American judicial system, see 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 606(03), at 22 (1981), and presently is embodied in rule 606(b) of the Federal Rules of Evidence, see FED. R. EVID. 606(b). Five policy considerations have been advanced to account for the popularity of the common-law rule. See *Government of Virgin Islands v. Gereau*, 523 F.2d 140, 148 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). In *Gereau*, the court supported its preference for the common-law doctrine by observing that it "(1) discourag[es] harassment of jurors by losing parties eager to have the verdict set aside; (2) encourag[es] free and open discussion among jurors; (3) reduc[es] incentives for jury tampering; (4) promot[es] verdict finality; [and] (5) maintain[s] the viability of the jury as a judicial decision-making body." *Id.* at 148; see *McDonald v. Pless*, 238 U.S. at 267-68; *People v. De Lucia*, 20 N.Y.2d 275, 278, 229 N.E.2d 211, 213, 282 N.Y.S.2d 526, 529 (1967).

¹⁶⁴ *E.g.*, *People v. Brown*, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979); *People v. Crimmins*, 26 N.Y.2d 319, 323, 258 N.E.2d 708, 710, 310 N.Y.S.2d 300, 302 (1970); see U.S. CONST. amend. VI. The sixth amendment of the federal constitution states, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be confronted with the witnesses against him" *Id.*; see *United States v. Beach*, 296 F.2d 153, 160 (4th Cir. 1961).

Overt acts of a juror may be the subject of inquiry if "they are accessible to the knowledge of all the jurors . . ." *Id.* (quoting *Perry v. Bailey*, 12 Kan. 415, 419 (1874)). It has been contended, however, that a distinction should be drawn between the conduct of jurors during the course of deliberations, whether inside or outside the jury room, and "influences which are called into play by outside forces and which are extraneous to their deliberations." *People v. De Lucia*, 20 N.Y.2d 275, 282, 229 N.E.2d 211, 216, 282 N.Y.S.2d 526, 532 (1967) (Van Voorhis, J., dissenting). Nevertheless, although inquiry into the mental process employed by a juror in arriving at his conclusion is prohibited, FED. R. EVID. 606(b); see Mueller, *supra* note 163, at 936-940 nn.64-86, both the federal rules and the proposed New York rules of evidence permit a juror to testify regarding any outside influence "improperly brought to bear upon any juror." FED. R. EVID. 606(b); NEW YORK PROPOSED CODE OF EVIDENCE 606(b); see *Mattox v. United States*, 146 U.S. 140, 149 (1892). For example, the Supreme Court, considering the prejudicial effect of a newspaper article read to the jury by a bailiff, observed that juror testimony regarding "any extraneous influence" is admissible as long as inquiry is not made "as to how far that influence operated upon his mind." *Id.*; see *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966). The Court held, therefore, that the bailiff's

that a juror's conduct revealed material evidence that was not produced at trial.¹⁶⁵ Recently, however, in *People v. Smith*,¹⁶⁶ the Appellate Division, First Department held that a verdict is not tainted if a juror draws upon everyday observations made during deliberations, notwithstanding that his observations "were material to an issue at trial and apparently colored his views."¹⁶⁷

In *Smith*, several police officers observed the defendant and his companions hurriedly entering a "gypsy" cab in a high crime area.¹⁶⁸ The officers later testified that, after they had pulled their unmarked car behind the taxicab, they noticed the defendant sitting in the back seat of the cab brandishing a gun.¹⁶⁹ In order to assess the officers' credibility, a juror, at various times during the course of jury deliberations, looked into the rear windows of

comment on the guilt of the defendant constituted an outside influence on the jury that violated the criminal defendant's sixth amendment rights. *Mattox*, 146 U.S. at 149. For other examples of outside influences that have been held to be prejudicial, see *Rideau v. Louisiana*, 373 U.S. 723, 731-33 (1963) (television broadcast of the filmed interrogation of defendant); *People v. Durling*, 303 N.Y. 382, 384-85, 103 N.E.2d 336, 336-37 (1952) (communication by jurors with prosecution witnesses through open windows of juryroom); *People v. Marrero*, 83 App. Div. 2d 565, 565, 441 N.Y.S.2d 12, 13 (2d Dep't 1980) (discussion of evidence with alternate jurors); *People v. Whitmore*, 45 Misc. 2d 506, 515-20, 257 N.Y.S.2d 787, 799-809 (Sup. Ct. Kings County 1965) (unfavorable media publicity creating a hostile environment), *rev'd on other grounds*, 27 App. Div. 2d 939, 278 N.Y.S.2d 706 (2d Dep't 1967). It is interesting to note that the Court of Appeals has permitted impeachment of a verdict on the theory that the ethnic prejudice exhibited in a juror's statements made him ineligible to be a juror in the first instance and, thus, his vote was a nullity. *People v. Leonti*, 262 N.Y. 256, 258, 186 N.E. 693, 694 (1933). Such a broad approach appears to circumvent any consideration of the sixth amendment issue.

¹⁶⁵ See *People v. Brown*, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979); *Mueller*, *supra* note 163, at 944-46 nn.100-108; see also *Durr v. Cook*, 589 F.2d 891, 893 (5th Cir. 1979) (juror attempted to recreate events described in testimony); *Gafford v. Warden*, 434 F.2d 318, 319-20 (10th Cir. 1970) (juror independently verified the closing time of a late show and the business hours of a gas station); *Stiles v. Lawrie*, 211 F.2d 188, 189-90 (6th Cir. 1954) (driver's manual used by jurors in negligence case); *People v. Crimmins*, 26 N.Y.2d 319, 322-24, 258 N.E.2d 708, 709-10, 310 N.Y.S.2d 300, 301-02 (1970) (jurors made an unauthorized visit to alleged crime scene); cf. *People v. Harris*, 84 App. Div. 2d 63, 104-05, 445 N.Y.S.2d 520, 545-46 (2d Dep't 1981) (jurors were invited by both prosecution and defense to conduct tests in the jury room that were designed to verify trial testimony).

¹⁶⁶ 87 App. Div. 2d 357, 451 N.Y.S.2d 429 (1st Dep't 1982).

¹⁶⁷ *Id.* at 361, 451 N.Y.S.2d at 432.

¹⁶⁸ *Id.* at 357-58, 451 N.Y.S.2d at 430.

¹⁶⁹ *Id.* at 358, 451 N.Y.S.2d at 430. The four officers observed the defendant, for various periods of time, brandishing a silver-plated gun in his raised hand. *Id.* After pulling the patrol car in front of the cab, all four officers alighted from the car and approached the cab. *Id.* One of the officers, upon reaching the cab, noticed that the defendant was holding a gun. *Id.* After the officer identified himself, the defendant dropped the gun on the floor of the taxicab, and the officer retrieved it. *Id.*

cars.¹⁷⁰ Although this juror had voted for acquittal throughout the first day of deliberations, he changed his position after making such observations.¹⁷¹ Without a hearing, the trial court denied the defendant's motion to set aside the verdict on the ground of juror misconduct, concluding that the juror was merely drawing upon an everyday experience to verify the police officers' testimony.¹⁷²

On appeal, the Appellate Division, First Department affirmed.¹⁷³ Justice Sullivan, writing for the majority,¹⁷⁴ initially acknowledged that a verdict may be set aside on the ground of improper influence even if it is "well-intentioned juror conduct" that introduces evidence not contained in the record.¹⁷⁵ The court then observed, however, that this juror's behavior should not be classified as a calculated and contrived test of the credibility of a witness,¹⁷⁶ but rather as a mere random observation typical of the kind of everyday experience upon which a juror is expected to draw.¹⁷⁷ Thus, Justice Sullivan reasoned, because the juror "saw what every other juror could have seen," he did not become an unsworn witness nor place otherwise inadmissible evidence before the jury.¹⁷⁸ The court reached this conclusion despite its recogni-

¹⁷⁰ *Id.* at 359, 451 N.Y.S.2d at 431.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 361, 451 N.Y.S.2d at 432.

¹⁷⁴ Justice Sullivan was joined by Presiding Justice Kupferman and Justice Markewich. Justice Milonas filed a dissenting opinion.

¹⁷⁵ 87 App. Div. 2d at 360, 451 N.Y.S.2d at 431 (citing *People v. Brown*, 48 N.Y.2d 388, 393, 399 N.E.2d 51, 53, 423 N.Y.S.2d 461, 463 (1979)).

¹⁷⁶ 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432; *see People v. Brown*, 48 N.Y.2d 388, 395, 399 N.E.2d 51, 54, 423 N.Y.S.2d 461, 464 (1979). In *Brown*, a police detective testified that he identified the defendant by looking through the passenger side window of a police van into the driver's side of the adjacent car. *Id.* at 391, 399 N.E.2d at 52, 423 N.Y.S.2d at 462. During the trial, a juror conducted a "test," using her own van, in order to verify the detective's testimony, and she reported her findings to the jury. *Id.* at 392, 399 N.E.2d at 52, 423 N.Y.S.2d at 462-63.

¹⁷⁷ 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432. Justice Sullivan noted that jurors constantly are exposed to stimuli that "affect the perspective from which they view the world." *Id.*; *see People v. Brown*, 48 N.Y.2d 388, 393, 399 N.E.2d 51, 53, 423 N.Y.S.2d 461, 463 (1979). Judge Wachtler, writing for the majority in *Brown*, recognized that jurors "do not live in capsules" and are not expected to "cripple their cognitive functions." *Id.* Indeed, the *Brown* court stated that "the application of a lay jury's collective intelligence and experience [in] . . . sifting evidence and reaching a verdict is regarded as a hallmark of our judicial system." *Id.*; *cf. C. McCORMICK, supra* note 163, § 329, at 762 ("[j]ury may consider, as if proven, facts within the common knowledge of the community"). *See generally* R. McBRIDE, *THE ART OF INSTRUCTING THE JURY* § 3.13, at 69 (1969); 1 J. DOWSEY, *CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE* § 2, at 6 (1968).

¹⁷⁸ 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432.

tion of the material impression that the observations made upon the juror.¹⁷⁹

Dissenting in part, Justice Milonas noted that the juror's conduct conceivably did not involve an "application of everyday experience."¹⁸⁰ Additionally, the dissent contended, a substantial risk of prejudice might exist even if only one juror is swayed by the unauthorized test.¹⁸¹ Justice Milonas stated, therefore, that in view of these circumstances, the defendant was entitled to a hearing to discern the precise character of the juror's conduct.¹⁸²

It is submitted that the analysis employed by the *Smith* court is inconsistent with the established method of examining juror misconduct. In *People v. Brown*,¹⁸³ the Court of Appeals enunciated a three-prong test to be applied in determining whether juror misconduct gives rise to reversible error. It appears, however, that the *Smith* panel misinterpreted the *Brown* standard by focusing upon the commonplace character of the juror's conduct,¹⁸⁴ rather than upon the resultant prejudice to the defendant.¹⁸⁵ The unex-

¹⁷⁹ *Id.*; see *supra* text accompanying note 167.

¹⁸⁰ 87 App. Div. 2d at 363, 451 N.Y.S.2d at 433 (Milonas, J., dissenting).

¹⁸¹ *Id.* (Milonas, J., dissenting).

¹⁸² *Id.* (Milonas, J., dissenting).

¹⁸³ 48 N.Y.2d 388, 399 N.E.2d 51, 423 N.Y.S.2d 461 (1979); see *supra* note 176. In *Brown*, a police officer testified that, immediately prior to a robbery, he observed the defendant driving what later turned out to be the getaway car. 48 N.Y.2d at 391, 399 N.E.2d at 52, 423 N.Y.S.2d at 462. During the trial, a juror, who owned a Volkswagen van, tested the range of visibility from its passenger seat. *Id.* at 392, 399 N.E.2d at 52, 423 N.Y.S.2d at 462. Before a verdict was reached, she told the other jurors that the officer may, indeed, have seen the defendant's face from his position in the van. *Id.* Reversing the defendant's conviction, the Court of Appeals, enunciating a three-part test to assess juror misconduct, stated that the juror's conduct was a "conscious, contrived experimentation," that "the 'test' was directly material to a point at issue in the trial," and that there was "a substantial risk of prejudice to the rights of the defendant by coloring the views of the other jurors as well as her own." *Id.* at 394, 399 N.E.2d at 53-54, 423 N.Y.S.2d at 463-64.

In situations where it is "simply impossible to determine the extent to which [a constitutional] error damaged the defendant's chances for acquittal," one commentator views the error inherently prejudicial and as requiring automatic reversal. Mause, *Harmless Constitutional Error: The Implications of Chapman v. California*, 53 MINN. L. REV. 519, 541 (1969). This conclusion is based upon the rule that an appellate court must be convinced that a constitutional error is "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1966). With respect to juror misconduct, the Court of Appeals has classified only unauthorized visits to the crime scene as "inherently prejudicial." See *People v. Crimmins*, 26 N.Y.2d 319, 323, 258 N.E.2d 708, 710, 310 N.Y.S.2d 300, 302 (1970). *But cf.* *Alford v. Svontek*, 53 N.Y.2d 743, 745, 421 N.E.2d 831, 833, 439 N.Y.S.2d 339, 341 (1981) (authorized visit and test by juror not inherently prejudicial in civil case).

¹⁸⁴ See *People v. Smith*, 87 App. Div. 2d at 361, 451 N.Y.S.2d at 432; *supra* note 177.

¹⁸⁵ See *United States v. Howard*, 506 F.2d 865, 869 (5th Cir. 1975); *United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973), *cert. denied*, 416 U.S. 982 (1974); *Simon v. Kuhl-*

ceptional nature of the juror's conduct is merely one factor to be considered in determining the extent of prejudice, and not a threshold inquiry that forecloses evaluation of the remaining factors.¹⁸⁶

The *Smith* scenario, it is further suggested, presents a deceptively mundane example of juror misconduct. Although this particular juror apparently was well intentioned, his conduct may have substantially prejudiced the sixth amendment rights of the defendant.¹⁸⁷ Such a consequence, together with the traditional reluctance of the judiciary to examine juror conduct,¹⁸⁸ suggests that a preventive approach to the problem of juror misconduct would be prudent. Thus, just as jurors are instructed specifically neither to visit the scene of a crime nor to read outside accounts of the

man, 488 F. Supp. 59, 67 (S.D.N.Y. 1979); *People v. Brown*, 48 N.Y.2d 388, 394-95, 399 N.E.2d 51, 53-54, 423 N.Y.S.2d 461, 463-65 (1979).

¹⁸⁶ See *People v. Brown*, 48 N.Y.2d 388, 393-94, 399 N.E.2d 51, 53-54, 423 N.Y.S.2d 461, 463-64 (1979). In *Brown*, the Court examined the nature of the juror's conduct, its materiality to the issues at trial, and the resulting risk of prejudice to the defendant, see *supra* note 183 and accompanying text, in order to assess the extent of prejudice suffered by the defendant. See 48 N.Y.2d at 393-95, 399 N.E.2d at 53-54, 423 N.Y.S.2d at 463-64. It appears, however, that the *Brown* Court classified the factor relating to the nature of the juror's conduct neither as a threshold consideration nor as the critical inquiry in juror misconduct cases.

¹⁸⁷ Cf. CPL § 330.30(2) (1971). Section 330.30 provides that a verdict may be set aside or modified if

(2) during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict.

Id. But cf. United States ex rel. Owen v. McMann, 435 F.2d 813, 816-17 (2d Cir. 1970) (since it is impossible to insulate the jury from "external factors," it is meaningless to label a juror an unsworn witness once he "passes a fraction of an inch beyond the record evidence"), *cert. denied*, 402 U.S. 906 (1971). Notably, it has been stated that a juror's experiment is harmless only when evidence of the defendant's guilt is overwhelming. See *United States v. Welch*, 377 F. Supp. 367, 369 (D.S.C. 1973), *aff'd*, 496 F.2d 861 (4th Cir.), *cert. denied*, 419 U.S. 857 (1974); see also *Chapman v. California*, 386 U.S. 18, 25-26 (1967) (even with strong circumstantial evidence against the defendant, the Court could not conclude, absent the particular prejudicial error, that the jury would have found the defendant guilty). In this regard it is significant to note that in New York, the vote of one juror is critical, since a unanimous verdict is necessary to convict a criminal defendant. See *People v. Light*, 285 App. Div. 496, 497, 138 N.Y.S.2d 262, 264 (4th Dep't 1955); *People v. Sanabria*, 42 Misc. 2d 464, 469, 249 N.Y.S.2d 66, 71 (1st Dep't 1964); CPL § 310.80 (1971).

¹⁸⁸ See *supra* note 163 and accompanying text. *But see Simon v. Kulhman*, 488 F. Supp. 59, 67-68 (S.D.N.Y. 1979) (evidentiary hearings should be conducted to ascertain the nature and extent of juror experiments); *People v. De Lucia*, 20 N.Y.2d 275, 280, 229 N.E.2d 211, 214, 282 N.Y.S.2d 526, 530 (1967) (case remanded to establish the actual occurrence of a juror visit to the crime scene).

trial,¹⁸⁹ so too should they be admonished to refrain from independent experimentation that might affect, in any way, their perception of material issues.

Brenda Eng Hom

Plaintiff's failure to use available seatbelt may be considered as evidence of contributory negligence when the nonuse allegedly causes the accident

Three general approaches have been developed to determine the effect that nonuse of an available seatbelt has upon a plaintiff's recovery in an action for personal injuries suffered in a motor vehicle accident.¹⁹⁰ New York has taken the position that although

¹⁸⁹ CPL § 270.40 (1971). Section 270.40 mandates that preliminary instructions relating to jury misconduct be given to the jury. *Id.* The statute provides that [s]uch instructions must include, among other matters, admonitions that the jurors may not converse among themselves or with anyone else upon any subject connected with the trial; that they may not read or listen to any accounts or discussions of the case reported by newspapers or other news media; that they may not visit or view the premises or the place where the offense or the offenses charged were allegedly committed or any other premises or place involved in the case; and that they must promptly report to the court any incident within their knowledge involving an attempt by any person improperly to influence any member of the jury.

Id. It is suggested that the statute be amended to include express references to independent juror experimentation and juror conduct that reasonably may bear upon material issues.

¹⁹⁰ *Spier v. Barker*, 35 N.Y.2d 444, 450, 323 N.E.2d 164, 167, 363 N.Y.S.2d 916, 920 (1974). One of the three approaches to the seatbelt defense is the negligence per se approach, which posits that in a personal injury action arising out of an automobile accident, in a jurisdiction that has enacted a seatbelt installation statute, the plaintiff who failed to use a seatbelt will be considered contributorily negligent as a matter of law. *See* Comment, *The Seat Belt Defense: A New Approach*, 38 FORDHAM L. REV. 94, 97 (1969) [hereinafter cited as Fordham Comment]; Comment, *The Seat Belt Defense—A Valid Instrument of Public Policy*, 44 TENN. L. REV. 119, 122 (1976). Notably, no jurisdiction has accepted the negligence per se approach, *see, e.g.,* *Remington v. Arndt*, 28 Conn. Supp. 289, 291, 259 A.2d 145, 146 (Super. Ct. 1969); *Cierpisz v. Singleton*, 247 Md. 215, 227, 230 A.2d 629, 635 (1967); *Miller v. Miller*, 273 N.C. 228, 230, 160 S.E.2d 65, 68 (1968), since there exists no installation statute which mandates that seatbelts be worn, Comment, *supra*, at 122 & n.16; *see* N.Y. VEH. & TRAF. LAW § 383 (McKinney 1970) (requires that seatbelts be installed in every automobile manufactured after 1967, but does not require their use).

Another approach to the seatbelt defense is common-law contributory negligence, which is premised upon the belief that a reasonably prudent automobile occupant would exercise reasonable care for his own safety, and thus would use an available seatbelt. *See* Fordham Comment, *supra*, at 97. The contributory negligence approach has been adopted by a small number of jurisdictions. *See, e.g.,* *Harlan v. Curbo*, 250 Ark. 610, 612, 466 S.W.2d 459, 460-61 (1971); *Truman v. Vargas*, 275 Cal. App. 2d 976, 981, 80 Cal. Rptr. 373, 377 (Ct. App. 1969); *Bentzler v. Braun*, 34 Wis. 2d 362, 385, 149 N.W.2d 626, 639 (1967). Of the courts