THE REBIRTH OF BICYCLING LAW?

Christopher Waters*

This article sketches the "law of wheelmen" as it developed in the late 19th century and suggests that, with the renaissance of cycling in North America, it is time to renew focus on the legal issues of cyclists. A comprehensive analysis of cycling's legal needs across a range of issues – from legislation to enforcement and infrastructure – is in order and this article suggests an agenda for undertaking this analysis. For health, environmental and cultural issues, cycling is growing and the law and legal actors need to grapple with this means of active transit in a way that has not been done since before the automobile era.

Cet article présente dans les grandes lignes le « droit des cyclistes » tel qu'il s'est développé à la fin du XIX^e^ siècle. Il y est suggéré qu'avec le regain d'intérêt pour le cyclisme en Amérique du Nord, il est opportun de se pencher de nouveau sur les questions juridiques dans ce domaine. Il importe ainsi d' effectuer une analyse complète des besoins juridiques liés au cyclisme à travers une série de questions allant des infrastructures à la législation et à son application. Cet article suggère un ordre du jour pour entreprendre cette analyse. Pour des raisons de santé, environnementales et culturelles, le cyclisme est en plein essor. Le droit et ses acteurs doivent en découdre avec ce moyen de transport actif, tout comme cela a été le cas du temps où ce moyen de transport était roi.

1. Introduction

In the late nineteenth and early twentieth centuries, bicycling law, or "the law of wheelmen" as it was known at the time, was a distinct subject. This area of practice and research had its own doctrines, texts and actors. Rather than being an esoteric topic, many of the causes championed by "wheelmen" in the legislative, policy or social arenas placed cyclists on the cutting edge of how Canadians at the time defined progress. Cycling had an important role to play in Canada's development on several fronts, from the development of the countryside, to new manufacturing methods, to

* Faculty of Law, University of Windsor. I am grateful to Bill Bogart, Stephanie Console, Albert Koehl, Pamela Robinson, Anneke Smit, Thomas Timmins, Kristof van Assche, the staff of the Paul Martin Law Library and my colleagues on the Windsor Bicycle Committee for their assistance in various ways. The support of the Law Foundation of Ontario is acknowledged. All views expressed are my own.

increased mobility for women. With the advent of the automobile, however, the importance of bicycling law declined alongside the perceived decline of the importance of cycling as a means of transportation and recreation. Following mass ownership of automobiles, sustained by a car-oriented infrastructure and culture, bicycles began to be seen as toys for children and tools for the poor. While bicycle use increased into the first decades of the twentieth century, cycling had lost its cachet and social position around the turn of the century. Law followed the social trends, and, to the extent that cyclists were legal subjects in legal doctrine and imagination, they were so as a footnote of motor vehicle law. The purpose of this article is to explore briefly the law of wheelmen era and then to suggest that we are witnessing a revival of the notion that cycling has distinct legal needs which require renewed attention. This legal revival follows the renaissance of cycling in North America in recent years spurred on by environmental, health and urban trends. In light of what has been termed the "new bicycle culture" of North America,[1] this article asks, from an admittedly advocacy-oriented perspective, what a new or renewed legal response to cycling should look like. In doing so, it sketches an agenda for developing the law and legal scholarship on cycling in Canada along several axes. Some of these axes are squarely legal, including the need for new legislation and approaches to enforcement. Others, notably planning and infrastructure, implicate law in a more interdisciplinary context.

2. The Law of Wheelmen

Before turning directly to the law of wheelmen, a brief foray into the "wheelmen era" is in order. Though "hobby horse" bicycle prototypes were developed in Europe as early as 1817, which involved pushing a two-wheeler along with the feet, these never gained serious consumer attention and, at any rate, appear never to have made it to Canada. The first real bicycles using cranks and pedals which gained any kind of following were developed and produced in Paris in the early 1860s.[2] The first bicycles or velocipedes in Canada probably appeared in the late 1860s. For example, in March 1869 the mayor of Woodstock rode roughly 27 miles to display his bicycle in front of Stratford's city hall.[3] The subsequent rise of the bicycle in Canada was, however, far from linear or even. While the first bicycles were used at riding schools ("academies") and occasionally on the streets of Toronto, Montreal and Halifax, these were dangerous and

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1 Amy Walker, ed, *On Bicycles: 50 Ways the New Bike Culture Can Change Your Life* (Novato, CA: New World Library, 2011).

2 David V Herlihy, *Bicycle: The History* (New Haven: Yale University Press, 2004) ch 3 at 53ff.

3 Glen Norcliffe, *The Ride to Modernity: The Bicycle in Canada, 1869-1900* (Toronto: University of Toronto Press, 2001) at 3-5, 9.

uncomfortable contraptions. Called "boneshakers" for the effects of their wooden wheels and iron tires, they failed to attract sustained interest. Not until 1878, when "highwheelers" (often known today as "penny farthings") began appearing more regularly, did cycling in Canada start to attract a larger following.[4] This interest rose to a zenith across North America in the 1890s as bicycle designs improved and began to resemble the bicycle frames we use today.[5] These new "safety bicycles", as they were called, were also more comfortable (especially as a result of the use of pneumatic tires) and affordable. While cycling during the 1890s was concentrated in central and eastern Canada, there was cycling in pockets across the country including, surprisingly, in the Klondike during the Gold Rush.[6]

There is a great deal written on the technological as well as sporting history of cycling.[7] Less attention has been paid to the social history of cycling and here some debate exists as to precisely how important a role the bicycle played in development of Europe and North America.[8] What is clear, however, is that socially and culturally in the late nineteenth century – somewhere between the train and automobile eras – bicycles were at the cutting edge of consumer and social trends. French historians have regularly pointed to the wheelmen era in France as modernizing and "opening up" the countryside,[9] and similar claims have been made about the role of the bicycle in Canadian social history. The leading scholar on the subject, Glen Norcliffe, suggests that cyclists were in the *avant garde* of Canadian society in the last decade or two of the nineteenth century and that cycling "was a harbinger of many of the technical and social changes that manifested in the twentieth century."[10] These changes, he suggests, included manufacturing methods (with Canadian bicycle factories using early assembly line techniques), the development of the countryside (including, for the first time, widespread road signage), and increased mobility and practical clothing for women as they took up cycling in

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4 Ibid at 30.

5 See generally Herlihy, supra note 2, ch 11 at 251ff (on the "Bicycle Boom" of the 1890s).

6 Norcliffe, supra note 3 at 216.

7 See e.g. William Humber, *Freewheeling: The Story of Bicycling in Canada* (Erin, ON: Boston Mills, 1986).

8 See also Herlihy, *supra* note 2 (an excellent technical account of the bicycle which is nonetheless embedded in social context).

9 See e.g. Jean-Noel Mouret, *Il ya a un siècle…le vélo* (Rennes : Editions Ouest-France, 2005) at 28; Eugen Weber, *Politics, Culture, Myth* (Cambridge, Mass: Belknap Press, 1991) (who called the bicycle "that incomparable harbinger of progress and emancipation" at 11). *C.f.* Anita Rush, "The Bicycle Boom of the Gay Nineties: A Reassessment" (1983) 18 Material History Review 1.

10 Norcliffe, *supra* note 3 at 35.

increasingly greater numbers.[11] Perhaps the most lasting legacy of wheelmen was their contribution to the good roads movement. Through lobbying efforts seen across North America, wheelmen's associations were at the forefront of road improvement associations, resulting in some of the first smooth (or "macadamized") roads seen on the continent.[12] An obvious irony here is that this good roads movement literally paved the way for the rise of mass automobile use, a trend which would eventually see cyclists shunted to the curb; but it is also worth noting that even in these early days of cycling, successful lobbying (and sometimes cyclist associations' own money) saw the construction of dedicated cycle paths in some cities, such as Winnipeg, at the edge of roads and sidewalks.[13]

As is the case today, cycling was a contested activity. Conflicts between horse riders or streetcar operators and cyclists on the streets, and between cyclists and pedestrians on the sidewalks, were common and disputes sometimes ended up in injury or court or both. Cyclists used both the courts and the legislatures to further their activity. A key early issue was whether cyclists even had the right to ride on highways. Although far from a linear evolution, over time courts were responsive to the growing pressures of cyclists on the roads, establishing that a bicycle was analagous to a carriage and therefore entitled to a place on the highway, with the usual rights and responsibilities of other vehicles.[14] The Canadian jurisprudence on the bicycle as vehicle is thinner than the English and American equivalents, but an 1870 case from the Upper Canada Queen's Bench constitutes one of the earliest legal precedents on cycling in the common law world. The Court in *R v Plummer* held, albeit indirectly, that bicycles belonged on the road and not the sidewalk for the purposes of a London,

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[11] See Norcliffe, *ibid* ch 1 at 3ff; but see Ellen Gruber Garvey, "Reframing the Bicycle: Advertising-Supported Magazines and Scorching Women" (1995) 47 American Quarterly 66 on a conservative reaction to women on bicycles.

[12] Gregory C Lisa, "Bicyclists and Bureaucrats: The League of American Wheelmen and Public Choice Theory Applied" (1995) 84 Geo LJ 373. See also Michael Taylor, "The Bicycle Boom and the Bicycle Bloc: Cycling and Politics in the 1890s" (2008) 104 Indiana Magazine of History 213 (who argues that cyclists formed an important political force which went beyond the good roads movement).

[13] John C Lehr and H John Selwood, "The Two Wheeled Workhorse: The Bicycle as Personal and Commercial Transport in Winnipeg" (1999) 28 Urban Hist Rev 1 at 7-8.

[14] See especially *Taylor v Goodwin* [1879] 4 QBD 228 [*Taylor*] (conviction of cyclist for "furious" driving of a device analogous to a carriage); *State v Collins* (1888) 17 A 131, 16 RI 371 (Sup Ct RI) (bicycle, like carriage or wagon, must be driven to right side of road in face of oncoming traffic); *Mercer v Collins* (1889) 20 NE 132, 117 Ind 450 (Sup Ct Ind) (bicycle a vehicle prohibited from sidewalks). But see *William v Ellis* [1880] 5 QBD 175 (bicycle held not to be a carriage for purposes of paying toll).

Ontario bylaw.[15] Alongside English precedent, *Plummer* was cited with approval over two decades later in another sidewalk riding case in Ontario, *R v Justin*, where Rose J said:

> Referring … to Worcester's unabridged dictionary I find that a "vehicle" is defined as being that "in which anything is carried, a carriage, a conveyance." I have no doubt that a bicycle is a vehicle within the meaning [of the *Consolidated Municipal Act*, SO, 1892] and I think one would fail to give full effect to the fair meaning and object of the sub-sec, and of the by-law, if any other construction were placed upon the word.[16]

Even after the right to cycle on highways was fairly established, courts had to deal with hostile interactions between cyclists and other road users. One Toronto judge said to a horse driver who habitually attempted to block a cyclist on the latter's rides to work: "You thought the bicyclist had no rights on the road, did you? When this court has done with you, you will know differently. I suppose you have no idea that this young man's life is not worth that of your horse."[17]

There was also activity on the legislative front. At the end of the nineteenth century, some Winnipeg citizens attempted to restrict the "bicycle nuisance" through a city-bylaw, which would have banned cyclists from sidewalks and parks and imposed a speed limit of eight miles per hour on city roads.[18] The bike paths noted above were created partly as a response to this proposed bylaw. Furthermore, cyclists successfully sought protection at the provincial level. In 1901 the Manitoba legislature passed a bill creating a Bicycle Paths Board for Winnipeg with a mandate to create a network of bicycle paths both inside and outside of the city.[19] The Board, which was comprised of six cyclists and three city councilors, was empowered to raise money through a bicycle licensing scheme.[20] Norcliffe reports that by 1903 the Bicycle Paths Board – the first of its kind in North America – was administering roughly twelve miles of trails

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15 *R v Plummer* [1870] 30 UCQB 41 at 42 [*Plummer*] ("[a] velocipede… may be an obstruction or encumbrance on a sidewalk").

16 *R v Justin* (1894), 24 OR 327 at 329 (CA). See also *Rowan v Toronto Railway* (1899), 29 SCR 717 (by the end of the 1890s, the right of the bicycle to the road was taken as a given by Canadian courts such that an appellant cyclist "had a perfect right to ride on a bicycle either between the rails on either line, or on the strip between the two lines of rails; this was only that ordinary use of the highway to which the public are entitled of common right" at para 9).

17 "Another Road Hog and What Befell Him," Cycling 1(24) (11 November 1891) at 287, as cited by Norcliffe, *supra* note 3 at 214.

18 Lehr and Selwood, *supra* note 13.

19 *The Winnipeg Bicycle Paths Act*, SM 1901, c 53.

20 *Ibid*, ss 4 and 7.

linking the downtown to recreational areas close to the city.[21] Other provincial legislation passed at the behest of the cycling lobby included amendments to the *Municipal Act* in Ontario in 1897. Among other things, the Act was changed to penalize persons who rode their horses or drove their wagons along designated bike paths.[22] While provinces had the power to regulate vehicles upon the highways as "local works and undertakings" within the meaning of section 92 of the British North America Act, there was also some activity at the federal level. For example, the Canadian Wheelmen's Association, founded in 1882 and today named the Canadian Cycling Association,[23] lobbied Parliament to pass legislation requiring railway companies to carry bicycles as baggage.[24] Interestingly, most of the issues noted here which were raised by cyclists in the late nineteenth century – dedicated bicycle paths, the nuisance of sidewalk riding, conflict between road users, a right to cycle on certain roads, and even compelling public transit authorities to provide for bicycles – remain live ones today.

The judicial and legislative developments were accompanied by a legal scholarship which reached its zenith in the 1890s. Texts were published in both Britain, such as Dalzell Chalmers' *The Law As It Affects Cyclists*,[25] and the US, notably George Clementson's, *The Road Rights And Liabilities Of Wheelmen*.[26] Interestingly, there appears to be cross-over between books written for jurists and legal guides for the cycling community.[27] There were also numerous law journal articles on bicycling law in Britain and the US with – as is typical for the day – a far less extensive Canadian literature.[28] The legal literature dealt with the right to

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21 Norcliffe, *supra* note 3 at 174.

22 *Municipal Act*, RSO 1897, c 223, s 640(1).

23 Canadian Cycling Association, "History," online: <http://www.canadian-cycling.com>.

24 Norcliffe, *supra* note 3 at 175.

25 Dalzell Chalmers, *The Law As It Affects Cyclists: With The Principal Cases On The Subject, An Appendix Of French Law, And A Complete Index* (London: Butterworth, 1899).

26 George Clementson, *The Road Rights And Liabilities Of Wheelmen: With Table Of Contents And List Of Cases* (Chicago: Callaghan, 1895).

27 See e.g. (1899-1900) 25 Law Mag or Quart Rev Juris 110 at 166 (describing Chalmers' book, *supra* note 25, as providing "good practical, as well as legal, advice").

28 See e.g. "The Law of Bicycles and Tricycles" (1881) 16 LJ 492; "Negligence – Bicycle-Riding – Law of the Road" (1889) 29 Cent LJ 410; WW Thornton, "Bicycle and Velocipede Law" (1891) 33 Cent LJ 262; "Bicycles and the Law of the Road" (1893) 13 Can L Times 261; Malcolm Taylor, "The Bicycle in Court" (1895-1896) 1 Va L Reg 646; Lindsay Russell, "Legal Status of the Bicycle in Michigan" (1897) 6 Mich LJ 101; WC Rodgers, " The Rights, Duties and Liabilities of Bicyclists" (1898) 32 Am L Rev 221; AE Whitehouse, "Negligence and Contributory Negligence by Cyclists" (1898) 43 Cent LJ

cycle on highways and the applicability of established rules of the road regarding "passing and repassing" as well as questions such as whether cyclists must pay tolls and the appropriate response to fast ("scorching" as it was known) or dangerous cycling. Some of the literature was advocacy-oriented, as conceded by one author writing in 1893 in the *Canadian Law Times*:

> [T]he writer has a strong bias in favour of the cyclist. He must confess it, and further, that he approaches the subject as an advocate for the wheelsman; and that it is his purpose to convince, if any care to read, that wheelsmen have rights which others using the road must respect, while, at the same time, they are subject to stringent laws to which they must conform.[29]

While, as discussed above, courts gradually established that cyclists had a right to travel on the highways as any other "carriage," and that the rules of the road applied to cyclists and those who met them on the highways,[30] there continued throughout the 1890s to be legal fault-lines over road sharing. For example, the same author writing in the *Canadian Law Times* caustically criticised an Ontario County Court judge for deciding (or so we are told) that "a person riding a bicycle has no rights as against a person driving a carriage, and consequently that the driver of the carriage or waggon was not in the wrong, and not liable for damages, in keeping on the wrong side of the road and thereby running down the driver of the bicycle."[31] The author suggests that the judge could not have been a cyclist or been aware of the hazards of cycling and adds:

> His Honour …. spoke of bicycles as being more easily managed and guided than a horse and carriage, and more rapid in their movements, and concludes therefore that they should give way in all cases and at all times to horses and carriages. By the same reasoning, a person driving a tame old horse should always give way to a person driving an unmanageable brute.[32]

Legal advocacy was also carried on in the pages of cycling magazines and the popular press. In particular, writers defended the "good name" of most cyclists and applauded court decisions which protected cyclists; they also

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363; Lee Max Friedman, "Bicycles and the Common Carrier" (1898-1899) 12 Harv L Rev 119; Frank S Grant, "The Law Governing the Use of the Bicycle" (1900) 50 Cent LJ 205.

29 "Bicycles and the Law of the Road," *ibid* at 263.

30 See e.g. *Taylor, supra* note 14.

31 "Bicycles and the Law of the Road," *supra* note 28 at 263

32 *Ibid*.

implored rogue cyclists to carry lights, not threaten pedestrians and generally obey the rules of the road.[33]

As suggested above, however, legal scrutiny and interest trailed off with the rise of the automobile. The cachet or perceived modernity of cycling was now transferred to automobiles, in both North America and Europe: "[D]e chic et snob, la bicyclette devient populaire et utilitaire."[34] The attention of lawyers and legal scholars followed the social and cultural trend. Indeed the speed and enthusiasm with which some legal scholars embraced automobiles (although others argued that they were dangerous inventions which should be banned from the public highways) are striking. In the Preface to his 1906 *The Law of Automobiles*, Xenophon Huddy wrote:

> Very true, many of the cases merely have called for the application of established rules of law, in dealing with the motor vehicle; but there have been decided numerous points of special application to the special application to the automobile and its operation on the public avenues of travel, of which the up-to-date layman, lawyer, and judge should be cognizant if he is to keep abreast with the progress of scientific inventions which are bound to figure in litigation and to occupy a prominent place in our jurisprudence…The encouragement given to the author in his undertaking to compile this work by gentlemen prominently interested in automobiling has strengthened his belief that a work of this kind will be welcomed.[35]

The early treatises on motor vehicles did address cycling and other antecedents to the automobile. Indeed, like the bicycle, a car was seen as a sort of carriage and therefore subject to the common law of highways.[36] After the First World War, however, motor vehicle law began to treat cars as the start and end of highway transportation, relegating bicycles to a footnote. To the extent bicycles were addressed at all in these texts it was often with a view to analyzing interactions between cyclist and motorist. For example, in one of its few mentions of cyclists, a 1920 Canadian text on the Ontario *Motor Vehicle Act* stated:

> A person operating an automobile and one riding a bicycle owe each other a duty to avoid a collision. The bicycle rider must be vigilant under all circumstances, and keep proper lookout for automobiles, and he may be guilty of contributory negligence in approaching a much travelled intersecting city street, and looking only once for

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33 "A Just Decision," Bicycling 1(1) (26 November 1890) at 4.

34 Mouret, *supra* note 9 at 21.

35 Xenophon P Huddy, *The Law of Automobiles* (Albany: Matthew Bender & Co, 1906).

36 See also *Taylor*, *supra* note 14.

> approaching vehicles, where had he exercised more care he might have seen, in time to avoid, the automobile which struck him…[37]

Not much has changed with respect to reference works on highway law today. Bicycles in North America are ignored or considered secondary legal subjects. For example, the *Canadian Abridgment* makes only brief reference to bicycles under the heading "Motor Vehicles." Bicycles receive similar treatment in the *Canadian Encyclopedic Digest*.[38] I do not want to overstate this point. For example, in the late 1960s and early 1970s, there was a mini-bicycle boom in North America spawned by interest in 10-speed bicycles, which led to some legal writing.[39] That bicycle law was the poor cousin to car law in twentieth century legal scholarship is clear, however.

3. The Renaissance of Cycling (and the Rebirth of Cycling Law?)

While uneven, there has been a renaissance in cycling in North America in the last decade or two.[40] There are numerous reasons to cycle and promote cycling. In terms of the environment, from climate change to smog and acid rain, bikes are cleaner and more sustainable than cars. As the US Environmental Protection Agency has put it, "driving a car is probably a typical citizen's most 'polluting' daily activity."[41] This is especially true if the creation and disposal of cars is factored in. While public transit has received attention as the primary method to wean people off cars, bikes are of course greener still.[42] Furthermore, in light of the rise in obesity and related health problems such as diabetes in North America, the need for increased activity is apparent. Active transit – walking, roller blading and

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37 Hon Judge Charles Widdifield, *Motor Vehicle Act and the Highway Travel Act* (Toronto: Carswell, 1920) at 34. See generally MRR Davies, *The Law of Road Traffic* (London: Shaw & Sons, 1954) (an example of the sparse treatment of cyclists during previous eras).

38 CED (Ont) "Motor Vehicles" II.2 at § 16. Bicycles do have a slightly more prominent place in Halsbury's.

39 See e.g. William C Cramer and John D Hadacek, "A Survey of Ohio Bicycle Law" (1975) 2 Ohio Northern U L Rev 524.

40 This renaissance has also been noted in France, the birthplace of cycling, where, although long popular as a sport, utilitarian cycling had been on the decline; see e.g. Jérôme Hourquet, *Vélo en Ville* (Paris : Hachette Pratique 2010). As this recent guide to urban cycling put it at 27: "Il convient pour commencer de tordre le coup à une idée reçue : faire du vélo en ville n'est pas une activité irresponsable!"

41 EPA Transportation, *On the Road*, online: US Environmental Protection Agency <http://www.epa.gov>.

42 See e.g. Edward Glaeser, *Triumph of the City* (London: Penguin, 2011) (which, incidentally makes no reference to cycling).

so on – is seen to be an important plank of any improvement in that regard. Health advocates have looked at the close connections between our built environment and human health and concluded that, among other things, the urban sprawl of North American cities poses a health risk in terms of encouraging driving and discouraging every day physical activity. Without health-oriented urban planning and facilities (in the broadest sense – from bike racks to bike paths to sidewalks for pedestrians) to encourage active transit, human health suffers. As Frank, Engelke and Schmid put it,

> … [M]ost of the communities where Americans live are important contributors to current public health problems. Simultaneously, they can be the source of important solutions to these problems. Communities can be designed to make physical activity in them possible and even desirable. [43]

Other reasons to promote cycling include speed of travel in urban areas and the costs of cycling compared to driving.[44] The costs of driving are not only internal (vehicle financing, insurance, registration, gas, parking and so on) but external as well. The latter involve costs not charged to the user, such as subsidized roads and subsidized parking and congestion, environmental degradation, and collision costs, all of which are imposed on others. As one author puts it, "People who do not drive face degraded walking and cycling conditions, reduced public transportation and taxi services, and the same challenges and costs of sprawling development."[45] Indeed, along with public transportation and walkability, bicycling can form an important part of the transportation piece of the population intensification – or "smart growth" – puzzle.[46]

In addition to making cycling a more significant part of the transportation mix, there is a (self-declared at least) cultural change afoot. The "new bike culture" stresses the "freedom" of bike use, the chance to make new urban connections and reduce social isolation, livability in urban areas and the fun of riding. The new bicycle culture also has spawned bicycle art, blogging, magazine and book publishing and events. Critical Mass – a monthly, loosely organised reclaiming of the streets by

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43 Lawrence Frank, Peter Engelke amd Thomas Schmid, *Health and Community Design: The Impact of the Built Environment on Physical Activity* (Washington: Island Press, 2003) at 8-9.

44 A side-benefit is that when more people switch from cars to bikes, congestion for motorists – with its attendant environmental impact – is reduced.

45 See Todd Litman, "Cycling for Health, Wealth and Freedom" in *On Bicycles*, *supra* note 1, 24 at 27.

46 See Pierre Filion and Anna Kramer, "Urban Intensification Models in Toronto: Their Potential for Implementation and their Expected Impacts" (Paper delivered at Private Property, Planning and the Public Interest conference, Windsor, 11-12 March, 2010) [unpublished, copy on file with the author].

cyclists which occurs in many cities – is perhaps the best known event, but there are others, including "Ciclovia" or celebrations of car free streets, and bicycle festivals such as Pedalpalooza.[47] The bicycle economy – from the production of craft bikes, to increased delivery by cargo bikes, to bike repair shops to cycle tourism – has benefited from this renewed interest.[48]

Not surprisingly, the size and effectiveness of cycling advocacy has also grown and of course contributed to the changes described above. It has in the last decade or so also become a more mainstream activity. The acceptance of bicycle advocacy as a legitimate activity is recent. As Jeff Mapes, in his brief history of bike advocacy, puts it:

> By the late 1980s, people who wanted to make cycling a mainstream transportation choice in North America were in a tough spot. Local bicycle advocacy groups in cities across the United States and Canada were largely moribund as cheap oil fueled another rapid spurt of suburbanization, and the roads became clogged with SUVs and minivans…Politicians and transportation agencies were focused on building massive highways and traffic engineers gave little thought to the idea that anyone astride a bicycle had much to contribute to mobility. Perhaps most grimly, it was no longer common to see children riding their bikes to school.[49]

In the US, a breakthrough was achieved in 1991 with passage of the *Intermodal Surface Transportation Efficiency Act* (*ISTEA* – pronounced "Ice Tea").[50] For the first time, the US government diverted funds from gas taxes to projects that promoted biking and walking. [51] Lobby groups – most notably the Alliance for Biking and Walking – together with support from the public health establishment also led to a gradual recognition that the built environment had effects on health. A symbolic victory was achieved when the US Surgeon General noted this link in in 1996.[52]

Canadian bicycle advocacy groups had fewer "big bangs" in the 1990s, but, where they were organized and found allies on city council and

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[47] See Amy Walker, "Sharing Biking through Culture" in Walker, *supra* note 1, 193.

[48] See Sarah Mirk, "Bikes Work: The Development and Impact of Small Bicycle Businesses," in Walker, *supra* note 1 at 261, and Amy Walker, "Bike Businesses and the Bike Craft Boom" in *ibid* at 269.

[49] Jeff Mapes, "A History of Bike Advocacy" in *ibid* at 282.

[50] *Intermodal Surface Transportation Efficiency Act of 1991*, Pub L No 102-240 (codified as 23 USC § 101).

[51] See Mapes, *supra* note 49 at 283 (on the struggle for and impact of this legislation).

[52] US, Department of Health and Human Services, *Physical Activity and Health: A Report of the Surgeon General* (Atlanta, Georgia: US Department of Health and Human Services, 1996).

in city transportation departments, they made important strides. Achievements include the fact that many Canadian municipalities now have bicycle use master plans and have significantly improved bicycle facilities and promotion.[53] A "complete streets" approach to accommodating active transit, public transit and vehicular use, as well as multimodal iterations of these modes of travel, have been accepted, in theory at least, as good planning practice.[54] Cycling and bicycle advocacy are the subject of disinterest or even ridicule in many suburbs, smaller cities and rural areas but there are some strong contra examples as well. In Ontario, for example, the Share the Road Coalition has designated several smaller or suburban communities as "bicycle friendly."[55] And, in cities like Toronto, Montreal and Vancouver, or US cities such as Portland (to give an extreme example), cycling advocacy has achieved a degree of prominence and legitimacy. Some of the advocacy organisations based in these cities have strong membership bases and professional leadership.[56] Of course, there is backlash even in those large cities against "bike riding pinkos," to quote television personality Don Cherry's speech at the inauguration of Toronto Mayor Rob Ford in December 2010.[57] Ford himself is unabashedly hostile to improving Toronto's cycling facilities and Canada's most populous city has its share of cyclist-motorist collisions and confrontations,[58] but cyclists and their advocates have successfully claimed both a portion of the streets and the public discourse.

As in the US, cycling is on the public health agenda in Canada, with numerous local health boards encouraging cycling though activities such as helmet distribution to children, public service announcements and

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53 But see City of St John's "Cycling Master Plan" (10 February 2009) online: http://www.stjohns.ca at i) prepared by Hatch Mott MacDonald (latecomers to this trend include St John's, Newfoundland which, as of 2009, had "no official cycling facilities in the City").

54 See e.g. Urban Transportation Showcase Program, "Complete Streets: Making Canada's Roads Safer for All," online: Transport Canada <http://www.tc.gc.ca> at 1("complete streets are designed to be safe, convenient and comfortable for every user, regardless of transportation mode, physical ability of age").

55 "Bicycle Friendly Communities" online: Share the Road Cycling Coalition <http://www.sharetheroad.ca>.

56 See e.g. Cycle Toronto, online: <http://cycleto.ca>; Vélo Québec, online: <http://www.velo.qc.ca>.

57 Kelly Grant, "Don Cherry slams pinkos in the left wing media during Ford inauguration" The Globe and Mail (7 December 2010) online: <http://www.theglobeandmail.com>.

58 Jason Margolis, "Cyclists accuse Toronto mayor Ford of 'war on bikes'" BBC News Magazine (2 May 2012), online: BBC <http://www.bbc.co.uk/news> [Margolis].

training on bike handling and the rules of the road.[59] A significant push with respect to bicycle safety in Canada came when a coalition of advocacy groups convinced Ontario's Chief Coroner to conduct an inquiry into cycling deaths in the province. The 2012 report, which received a good deal of media exposure (unfortunately focusing on the helmet issue, as discussed below), concluded that all the deaths it reviewed between 2006 and 2010 were preventable and made concrete recommendations regarding improving bicycle safety.[60] These approaches are a far cry from the assumptions prevalent in the 1980s and 1990s that an injured or killed cyclists probably "had it coming." As one observer put it, "even when the motorist was obviously at fault in a crash, the view persisted that the cyclist would not have been injured had he or she not been on the road in the first place."[61]

Despite the renaissance of cycling, the growing success of bicycle advocacy groups in pressuring for cycling facilities and public awareness of cycling, however, legal reform and legal scholarship have lagged behind in Canada. For the most part, proposed legislative changes to improve cycling safety have either failed or been halting, enforcement of traffic laws has been unhelpful in large measure, a cycling bar is only now starting to appear and there is little scholarship on the subject.[62] None of this is inevitable. For example, as the experience in several jurisdictions around the world show, legislative changes are achievable and can be

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59 See Ministry of Health, Ontario Public Health Standards (2008) online: <http://www.health.gov.on.ca>. See also OMA, "Enhancing Cycling Safety in Ontario" (August 2011) online: Ontario Medical Association <http://www.oma.org> (medical professional associations have also weighed in in favour of increased cycling and cycling safety).

60 Office of the Chief Coroner for Ontario, Cycling Death Review (June 2012) online: <http:/www.mcscs.jus.gov.on.ca>. See also "Cycling death review calls for helmets," (19 June 2012), online: CBC <http://www.cbc.ca> (a typical media treatment of the report).

61 David Hay, "The Individuation of the Cyclist: Working with the Law to Attain Perfect Consciousness" in Walker, *supra* note 1, 275 at 276; see also Margolis, *supra* note 58 (it would be wrong to suggest that the "had it coming" view has disappeared as then Councilor Rob Ford put it in 2010, just prior to his election as Mayor of Toronto: "And every year we have dozens of people that get hit by cars and Trucks. Well, no wonder: roads are built for buses, cars, and trucks, not for people on bikes ... My heart bleeds for them when I hear someone gets killed, but it's their own fault at the end of the day").

62 But see Gillian Eckler, "The Law of Bicycling in Ontario," (2011) 37 Advocates' Q 21 (an excellent review of the rules of the road pertaining to bicyclists as they currently stand and some helpful insights into insurance and other issues); Martin Porter, online: The Cycling Lawyer <http://thecyclingsilk.blogspot.fr> (example of cycling bar in UK); "David W Hay," online: Richards Buell Sutton LLP <http://www.rbs.ca> (example of cycling bar in Canada); Bob Mionske, online: BicycleLaw.com <http://www.bicyclelaw.com> (an example of cycling bar in US).

important. In the next section I sketch an agenda for reviving the law of cycling for twenty-first century purposes.

4. A Cycling Law Agenda

The research agenda suggested below is not meant to be exhaustive. For example, no mention is made of the particular legal needs of bike share programs. Rather the purpose of this section is to briefly sketch some broad categories for future analysis. These categories are: legal history; "bicycle space;" legislation; education; enforcement; infrastructure; and, comparative and international perspectives.

First, the legal history perspective is ready to be mined in much greater depth than the brief sketch provided above. The law of wheelmen era is interesting for the light it sheds on the relationship between law and technology, between law and social change and the rise and fall of legal disciplines and categories. It is also helpful as a starting point for the automobile era in which we now live and contend with its consequences. When the first automobiles rolled off the assembly line they did so quite literally on bicycle tires and were constructed using assembly line techniques developed during the wheelmen era. The same is true for bicycle law which set the stage for cars to be seen as just another mode of using the highway, like bicycles. The law of wheelmen era is largely unexplored by legal historians,[63] especially in Canada. Some work dealing with bicycles and the law has been done by social historians, including those associated with the International Cycling History Conference, but this remains a largely untapped area.[64] Furthermore, as suggested above, many of the issues cyclists face today were raised over a century ago, and some innovative solutions tried then – such as bicycle path boards – may be instructive now.

Second, civic humanist or social justice approaches to cycling and the law can be taken. Some of these are suggested in the preceding contextual discussion about the motives for a renewed interest in cycling, such as environmentalism, health and even co-presence or co-existence in community on "democratized" streets. Like the extensive civic humanist/social justice legal literature on walking and sidewalks,[65] a

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63 But see Ross D Petty, "The Impact of the Sport of Bicycle Riding on Safety Law" (1998) 35 Am Bus LJ 185; Lisa, *supra* note 12.

64 See International Cycling History Conference, online: <http://www.cycling-history.org>.

65 See generally Nicholas Blomley, *Rights of Passage: Sidewalks and the Regulation of Public Flow (Abingdon*: Routledge, 2011) ch 2 at 21ff (for a literature review on "Civic Humanism and the Sidewalk").

"bicycling space" perspective invites a discussion of what we want from spaces where people cycle: how do we deal with exclusion, citizenship, mobility "rights", and non-violent insurgency in these spaces. The research that deals with protests on sidewalks, from union pickets to the Occupy movement, could be extended to bicycle protests. The latter include "die ins," memorial rides and the placement of "Ghost Bikes" (bikes painted white and left near crash sites) in honor of cyclists who have been killed or injured, as well as "bike swarm" protests against police action and reclaiming the streets movements such as "Critical Mass."[66] However, there is a caveat to be noted here about putting the "socio" horse too far ahead of the legal studies cart. As Nicholas Blomley suggests in his recent analysis of pedestrianism, the primary purpose of sidewalks is the ability of pedestrians to circulate on foot.[67] In calling for legal scholars to not ignore the technicalities of law in understandings of pedestrianism, he writes, "[T]he successful sidewalk is one that facilitates pedestrian flow and circulation. Rather than seeking to promote and enhance a Habermasian public sphere that is distinct from the state's, pedestrianism views the sidewalk as a form of unitary municipal property, held in trust for an abstract public."[68] Similarly, lawyers need to take the issues of flow and circulation – the technical issues – seriously. These technical issues include those raised in the Ontario Chief Coroner's report – legislation, education, infrastructure and enforcement – each of which I will now touch on.

With respect to legislation, one prominent Canadian bicycle lawyer suggests that the next decade will be crucial for the continued growth of cycling and that in this period "[g]overnments need to make progressive changes in law and infrastructure that acknowledge the needs and status of cyclists."[69] The Chief Coroner's report deals with three of the "hot" legislative issues requiring consideration by jurists, politicians and the public. The first is the suggestion of mandatory helmet legislation for all cyclists.[70] The arguments here have broken down along now-predictable lines in both the cycling and popular press, and indeed among the members

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66 See generally "Critical Mass (cycling)," online: Wikipedia <http://en.wikipedia.org> (fittingly, the best overview of bicycle protest movements). See also Cesar Hernandez and Garcia Cuauhtemoc, "Ready or Not, the Velorution has Arrived: Critical Mass – an Exercise in Democracy" (2007) 8 Loy J Pub Int L 133 (a rare legal analysis of bicycle protest); Albert Koehl, "Why we mourn fallen cyclists" Globe and Mail (10 December 2012), online: <http://www.theglobeandmail.com>.

67 Blomley, *supra* note 65.

68 *Ibid* at 4.

69 Hay, *supra* note 61 at 279.

70 Chief Coroner, supra note 60 at 23. See also *Highway Traffic Act*, RSO 1990, c H.8, s 104(2.1) (mandatory helmet legislation for children already exists in Ontario). Some provinces, including Quebec, have no mandatory helmet legislation for children or adults.

of the Coroner's expert panel. While no one who examines the data can disagree with the notion that helmets save lives and prevent brain injuries in individual cases, and that helmets are therefore advisable, a mandatory requirement raises problems. The primary concern is that it is a disincentive to cycling. It adds expense to cycling, poses problems for bike-share programs, and detracts from larger issues about cycling safety, notably the need for infrastructural improvements. Unfortunately, as noted earlier, many of the press summaries of the Coroner's report focused on helmets, taking away attention from the infrastructural and other changes recommended. The single best way to improve cycling safety is to have more cyclists on the roads, and, so the argument goes, anything that poses a disincentive to bicycle use is counter-productive from a safety point of view. It may also be counter-productive from a public health point of view, since it is clear that overall rates of morbidity due to physical inactivity pose a far greater threat than the failure to use helmets.[71] Thus for example, rates of obesity and morbidity in places where cycling is highest – even where helmets are not generally worn such as in the Netherlands – are far lower than in jurisdictions with low cycling rates but mandatory helmet laws. Others suggest that with the rise in popularity in cycling in major urban areas, previous research suggesting a link between mandatory helmet use and a decline in cycling should be seen as suspect. As an article in *Toronto Life* put it, people would "rather bike to work in 10 minutes than simmer in gridlock for half an hour, and they're not about to get back behind the wheel just because they have to wear a lid."[72] Other recommendations of the Ontario Coroner are for reduced speed limits in community safety zones and legislation to introduce a one-meter rule; namely, motorists must leave a one-meter space between their vehicles and cyclists they are attempting to pass. Given that many of the deaths in the Coroner's survey involved motorists attempting to pass cyclists, a specific safe distance rule makes sense in my view. Although the rule was unsuccessfully introduced in the Ontario legislature in 2010 via a private member's bill, it has been adopted in several jurisdictions, including in the US.[73]

David Hay suggests that legislative clarifications or changes to existing traffic laws are also needed on other fronts as well:

> When can a cyclist pass on the right? What is the nature of a cyclist's right-of-way while riding in a bike lane? Do motorists have a higher duty of care on designated bike

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71 Piet de Jong, "The Health Impact of Mandatory Bicycle Helmet Laws," (2012) 32 Risk Analysis 782 (a recent actuarial study of these arguments).

72 Philip Preville, "Heads Will Roll" Toronto Life (November 2012) 39 at 40.

73 Bill 74, *Highway Traffic Amendment Act (Safe Passing Bicycles),* 2nd Sess, 39th Leg Ontario, first reading May 18, 2010.

> routes?...Should the laws be modified to allow cyclists to ride side by side? Should there be a reverse onus of proof so that drivers who collide with cyclists would have to prove they were not negligent?[74]

To this list could be added any number of questions. Some of these are discrete. For example, do fixed gear bicycles – strictly speaking brakeless – contravene highway traffic codes?[75] Other questions are more fundamental and ask to what extent the law should change the current hierarchy of movement on our roads and recognize that there are inherent differences between cycling and driving. For example, should the "Idaho stop" (which allows cyclists to treat stop signs as yield signs) be imported to Canada?[76] This "rolling stop" law recognizes the comparative dangers of the respective modes of transportations and the greater disruption to flow for cyclists than motorists of a full stop. At the time of writing, one important piece of proposed legislation appears to have the support of all parties in the Ontario legislature. A private member's bill would require any secondary highway in the province to include a one-meter paved shoulder whenever repaving is carried out.[77] A similar policy in Quebec has resulted in a significant drop in cyclist deaths in that province.[78] Ideally, a review of legislation affecting cycling in every province would result in a coherent and comprehensive legislative response to the need to reduce deaths and injuries and promote cycling.[79] The Cycling Strategy launched by the Ontario government in September 2013, its first in 20 years, promises a comprehensive review of relevant legislation as well as support for cycling on other fronts including infrastructure and education.[80] It is hoped that this review will indeed be comprehensive as

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74 Hay, *supra* note 61 at 279. *C.f.* s 193(1) of the *Highway Traffic Act*, RSO 1990, c H.8 s 193(1) (it should be pointed out that the reverse onus already exists in some jurisdictions); *MacLaren v. Kucharek*, 2010 BCCA 206, 286 BCAC 199 (to some extent, courts are clarifying the rules of the road in the absence of comprehensive legislation, for example, on the need for cyclists to "take a lane" in some circumstances).

75 See generally Andrew Resor, "Riding without Brakes, Breaking the Law – The Current and Future Legal Outlook on Fixed Gear Bicycles in the United States" (2011) 7 DePaul J of Sports L & Contemp Problems 149 (on the US experience).

76 See Rick Bernardi, "Origins of Idaho's 'Stop as Yield' Law" BicycleLaw.com (7 March 2009), online: <http://www.bicyclelaw.com>.

77 Bill 9, *An Act to amend the Public Transportation and Highway Improvement Act*, 1st Sess, 40th Leg, Ontario, 2011.

78 Keith Leslie, "Ontario cyclists could get more paved shoulders on secondary highways" Globe and Mail (23 August 2012), online: <http://www.theglobeandmail.com>.

79 See Hourquet, supra note 40 at 29 ("[l]e code de la route a surtout été pensé pour régler la circulation des automobiles: il n'est pas toujours adapté aux spécificités de la circulation à vélo").

80 Ontario Ministry of Transportation, *Cycle On: Ontario's Cycling Strategy* (Toronto: Ontario Ministry of Transportation, 30 November 2013).

legislative changes – including in Quebec which generally leads the country in support for cycling – have resulted only in very minor changes to traffic laws.[81]

It is widely understood that good cycling habits need to begin early and that the rules of the road need to be taught to school children, ideally at school. By the same token, driver's education needs to stress matters such as the importance of watching for bicycles when opening doors and leaving cyclists with an adequate safety zone when overtaking. Some jurisdictions have introduced legislation or other forms of regulation to require one or both types of education.[82] One innovative method of delivering education to cyclists is a 2013 pilot project of Ontario's Ministry of Transportation which will provide purchasers of new bicycles with cycling safety information –including on the rules of the road – at the point of sale.[83] In terms of education, it may also be worth exploring how cycling and other forms of active transportation might be more integrated into the law school curriculum in relevant courses, such as environmental, planning, municipal, transportation and infrastructure law.

An important part of cycling safety is enforcement. However, before turning to the role of police and courts in enforcement, a legal pluralist perspective is important. As suggested above, the greatest indicator and driver of cycling safety is the number of cyclists on the road. One of the reasons for this is that in a critical mass of cyclists, courteous cycling becomes a norm. As one observer of cycling in Portland puts it, cyclists there tend to "stop at lights, yield at stop signs, stop to wave pedestrians across the street. It's not all 100% legal, but it's an emerging vernacular which seems to work for everyone."[84] There is perhaps a growing recognition among North American cyclists that it is dangerous and discourteous, "not rebellious and romantic to flout the rules of the road."[85] Having said that, there is a role for police and courts to play in suppressing dangerous driving and rogue cycling. One of the problems with respect to policing of bicycle safety is that the focus of police tends to be on cyclists

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81 See e.g. *Loi modifiant le Code de la sécurité routière du Québec*, Recueil annuel des lois du Québec, 2010, c 34, s. 91(1) (which empowers municipalities to implement contradirectional bicycle flow on one-way streets). But see Eckler, *supra* note 62 at 32 (there are of course limits to how different the laws for bicycles and motorists can or should be: "vehicles are much better able to co-exist on our roadways if they are governed by the same rules").

82 See e.g. *Cycling Strategy*, supra note 80 (since September 2009 accredited Driver Education companies must meet curriculum standards which include courteous driving around cyclists).

83 *Ibid*.

84 Elly Blue, "Safety in Numbers" in Walker, *supra* note 1, 292 at 297.

85 Deb Greco, "The Well-Tempered Cyclist" in Walker, *ibid*, 198 at 201.

rather than dangerous motorists, despite the fact that the size, scale and dangers posed by the two modes of transportation are radically different.[86] There is innovative practice which focuses on enforcement and sentencing as education – for example, law-breaking cyclists in Manhattan can be sent to remedial cycling classes – but to date enforcement approaches have disproportionality targeted cyclists and often focused on punishment.[87] Enforcement activities focused on protecting cyclists from dangerous driving and bicycle theft are relatively rare. Interestingly, enforcement receives only a moderate amount of attention in Ontario's new Cycling Strategy. In a sense this is a good thing, as the focus should remain on getting more cyclists on the road through infrastructural and other measures. At the same time, enforcement has a role to play with respect to cyclists who grossly flout the rules of the road or endanger pedestrians by riding on crowded sidewalks. It also has a role to play with respect to reckless motorists; as one author puts it, "The legal rights of cyclists to ride on roads must be clearly and convincingly conveyed to motorists and enforced by police and courts."[88]

Next, we come to infrastructure, the most important dimension to getting people on their bikes. As traffic engineering and planning studies have shown for some time, there is a positive correlation between the number and quality of cycling facilities – which can include a range of things from cycle lanes and paths, to traffic calming, to secure bicycle parking to bike racks on buses to promote intermodal transport and even bicycle-friendly facilities at workplaces – and the numbers of people who commute on their bicycles.[89] Particularly with respect to on-road infrastructure, this is not only about cyclists feeling safer; dedicated on-road cycling infrastructure is demonstrably safer.[90] Some infrastructural

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86 See e.g. email from Windsor Police Services to Windsor Bicycling Committee (29 November 2011) on file with author (in its first cycling safety "blitz" in 2011, Windsor, Ontario's police force issued 18 tickets or warnings, all of them to cyclists or e-bike riders).

87 J David Goodman, "Penalty for rule-breaking bicyclists: a remedial class" New York Times (23 July 2012) online: <http://www.nytimes.com>.

88 John Pucher, "Cycling Rights of Way" in Walker, *supra* note 1, 333 at 340.

89 See generally Nebiyou Tilahun, David Levinson and Kevin Krizek, "Trails, Lanes, or Traffic: The Value of Different Bicycle Facilities Using an Adaptive Stated Preference Survey" (2007) 41 Transportation Research Part A: Policy and Practice 287.

90 Kay Teschke *et al*, "Route Infrastructure and the Risk of Injuries to Bicyclists: A Case-Crossover Study" (2012) 102 Am J Public Health 2336 (among other things, the study found that cycle tracks physically separated from motorists radically improved safety and that on-road bicycle paths [with no parked cars beside them] roughly halved injury rates). Despite the available data, some cyclists hold the view that separate cycling infrastructure only serves to infantalise cyclists and that cyclists should focus on taking their lawful place on the road.

changes have a legislative basis.[91] The proposed Ontario legislation regarding paved shoulders for new highway projects has already been noted, but there are a variety of other ways in which law is implicated in the creation of a comprehensive, multi-modal transportation policy which takes active transit seriously. For example, Safe Routes to School (SR2S) legislation in the US directs monies to states to create bicycle facilities leading to and at schools.[92] More broadly, some jurisdictions mandate a complete streets perspective in planning. For example, New York legislation which came into effect in 2012 provides that all state, country and local transportation projects that receive state or federal funding "shall consider the convenient access and mobility on the road network by all users of all ages, including motorists, pedestrians, bicyclists and public transportation users through the use of complete street design features" when planning or reconstructing roads."[93] In Canada, rather than pass complete streets legislation, provinces have tended to steer planning policies at the regional and municipal levels through policy statements put in place pursuant to planning legislation. In Ontario, for example, the provincial "smart growth" plan for the "Golden Horseshoe" of the Greater Toronto and Hamilton areas, put in place pursuant to the 2005 *Places to Grow Act*,[94] calls for "a balance of transportation choices that reduces reliance upon any single mode and promotes transit, cycling and walking."[95] A number of municipalities in Canada adopt a complete streets approach in their planning documents (even if not using the term

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91 See e.g. Ryan Seher, "'I Want to Ride My Bicycle': Why and How Cities Plan for Bicycle Infrastructures" (2011) 59 Buff L Rev 585 (a look at bicycle infrastructure planning and the law in the US, as well as a taxonomy of the different types of bicycle facilities which have been implemented).

92 See Safe Routes to School National Partnership, online: <http://www.saferoutespartnership.org> (information on US federal and state SR2S legislation). But see David Darlington, "Biking to School: Why Johnny Can't Ride" Bicycling (27 April 2012) online: <http://www.bicycling.com> (It would be wrong to give the impression that there are SR2S across the country; indeed, bicycle riding is banned at many US schools out of a misplaced sense of safety). See also Active & Safe Routes to School, online: <http://www.saferoutestoschool.ca> (on SR2S in Canada).

93 US, *An act to amend the highway law, in relation to enabling safe access to public roads for all users by utilizing complete street design principles*, 2011-2012, Reg Sess, NY, 2011, s 2. See also US, LS 6241, *A Local Law to amend the administrative code of the city of New York, in relation to bicycle access to office buildings*, 2009/052, NT, 2009, (enacted) (an example of New York City being an innovator with respect to bicycle parking).

94 SO 2005, c 13.

95 Ontario, Ministry of Infrastructure, *Places to Grow: Growth Plan for the Greater Golden Horseshoe, 2006* (Toronto: Ministry of Infrastructure, 2012) at 24. See generally Filion and Kramer, *supra* note 46. See also Government of Ontario, "The Big Move: Transforming Transportation in the Greater Toronto and Hamilton Area" (2008), online: Metrolinx <http://www.metrolinx.com> (in addition to "smart growth" plans,

consistently), but it remains the case that a) the complete streets policies often fail to use mandatory language and that b) at the implementation stage a complete streets approach often gets watered down in favour of transportation as usual.[96] There are some positive examples of a comprehensive approach to complete streets at the municipal level – Calgary's approach appears promising in this regard for example – but progress remains uneven across the country. In passing we should note here that there is a growing jurisprudence on what safety standards apply to the design, construction and maintenance of roads (with or without bicycle facilities) [97] and multi-use paths *vis à vis* cyclists.[98]

Finally, when tackling these cycling law questions, it is worth taking a comparative and international perspective. From a comparative perspective, it is perhaps an obvious point that Canada, like most other jurisdictions around the world, can learn from the Netherlands, Denmark and a few other northern European countries where laws and infrastructure are designed with the cyclist in mind and where there are high rates of commuter cycling.[99] Of course, there are also good practices from other parts of Europe and indeed around the world which can be a source of inspiration and legal borrowing. For example, Ciclovia, the regular car-free street celebration mentioned above, began in Bogota, Columbia, where it attracts roughly a million and a half individuals every week.[100] At the international level, there are at least two veins to follow, the relatively new interest in sustainable transport and the older push for road safety. In the UN context, the 2012 United Nations Conference on Sustainable Development (Rio + 20) placed sustainable transport squarely on the

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regional transportation plans may also address active transit, as in the case of this Golden Horseshoe regional plan).

96 See Kristen E Courtney, "Sustainable Urban Transportation And Ontario's New Planning Regime: The Provincial Policy Statement, 2005 and the Growth Plan for the Greater Golden Horseshoe" (2009) 19 J of Env L & Prac 71 at 87 (argues that the Golden Horseshoe Growth Plan, as well as its wider provincial equivalent made pursuant to the *Planning Act*, RSO 1990, c P.13, the *Provincial Policy Statement*, 2005, are sound but that at the municipal level "these policies are routinely ignored in transportation planning decisions"). See also Clean Air Partnership, "Complete Streets Gap Analysis: Opportunities and Barriers in Ontario" (2012), online: Toronto Centre for Active Transportation <http://tcat.ca>.

97 See e.g. *Repic v Hamilton (City)* (2009), 65 MPLR (4th) 17 (Ont Sup Ct) (consideration of vulnerable road users such as young cyclists).

98 See e.g. *Herbert v City of Brantford*, 2010 ONSC, 72 MPLR (4th) 108.

99 See e.g. Ministerie van Verkeer en Waterstaat, "Cycling in the Netherlands," onlie: <http://www.fietsberaad.nl> (a good starting place on the Netherlands' experience); "Dutch Cycling Embassy," online: <http://www.dutchcycling.nl>.

100 Jeff Mapes, "Ciclovia: A Celebration of Car-Free Streets" in Walker, *supra* note 1, 237 at 240.

sustainable development agenda.[101] The European Union has also taken initiatives in this regard.[102] With respect to road safety, the UN General Assembly and UN agencies, notably WHO, have been seized for several years with this topic and 2011-2020 has been designated a decade of action on road safety. In a 2012 resolution on road safety the General Assembly called on member states to pay "special attention to the needs of all road users, in particular pedestrians, cyclists and other vulnerable road users as well as issues related to sustainable mobility."[103] There is also a variety of bilateral cycling issues which can arise, particularly given the rise in cross-border cycle tourism. At present, for example, there is no way to cross the international border between Windsor, Ontario and Detroit, Michigan on bicycle, [104] although there appear to be plans to incorporate cycling in plans for the new bridge.[105] While we are perhaps far away from developing a "Universal Declaration of Cyclists' Rights", as suggested by one bicycling lawyer, bicycling does appear to be getting on the international agenda in an incremental manner.[106]

4. Conclusion

This article has briefly sketched the law of wheelmen as it developed in the late nineteenth century and suggested that, with the renaissance of cycling in North America, it is time to renew focus on the legal needs of cyclists. A comprehensive analysis of cycling's legal needs across a range of issues – from legislation to enforcement and infrastructure – is in order and this article has suggested some veins for exploring these issues. It has also suggested that this analysis take place with a comparative and international perspective in mind. For health, environmental and cultural issues, cycling is growing and the law and legal actors need to grapple with this means of active transit in a way that has not been done since before the automobile era.

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101 See Secretary-General Ban Ki-moon, "Secretary-General's Five-Year Action Agenda," online: United Nations <http://www.un.org> (reference to sustainable transport).

102 See European Commission, "Sustainable Transport," online: <http://ec.europa.eu>.

103 Improving Global Road Safety, UNGA, 66th Sess, A/66/L.43 (2012) at 4.

104 Arguably in contravention of Article 3(5) of the *Convention on Road Traffic*, 8 November 1968, 1042 UNTS 17, which requires that bicycles be permitted as "international traffic" in other states.

105 See M[ichigan]-Bike, "Biking and walking on the New Detroit bridge?," online: <http://www.m-bike.org>.

106 Hay, *supra* note 61 at 280.