

The Great Schism: The CPSC Bicycle Safety Rules and the Unraveling of American Bicycle Planning (excerpt).

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Glossary

- BIA - Bicycle Institute of America (before about 1974, the industry trade group)
BMA - Bicycle Manufacturers' Association (prior to 1974, a subunit of BIA, afterwards, the primary industry trade group)
CPSA – Consumer Product Safety Act (The CPSC's enabling legislation)
CPSC – Consumer Product Safety Commission
FDA – Food and Drug Administration
FHSA - Federal Hazardous Substances Act (The enabling act for the FDA's toy banning order)
NCPS - National Committee on Product Safety (Temporary predecessor to the CPSC)

Chapter 1: Post-War Bicycle Tariffs and the Revitalization of the Adult Market

World War Two left the British economy devastated. After years of anguish kept hidden behind the closed doors of 10 Downing Street and Whitehall, in 1949, Britain's Chancellor of Exchequer, starved for hard currency, devalued the pound from \$4.03 to \$2.80.¹ That year, Gabriel Hauge, the new President Eisenhower's economic advisor, summoned the executives of the Bicycle Institute of America (BIA) to Washington, including Norman Clarke, president of the Westfield Manufacturing Company, makers of the 70-year old Columbia bicycle.² (Clarke would soon change the firm's name to Columbia as well.) Hauge told the group about England's need for dollars. Before the war, Britain's bicycle industry had been the world's largest, and most cycle factories had escaped largely

¹ Jay Pridmore and Jim Hurd, *The American Bicycle* (Osceola, WI: Motorbooks International, 1995): 133.

² Interview with Norman A. Clarke, April 5, 1998, North Chatham, Massachusetts: 33-34. This interview was transcribed by the author in 1998-99 from audiotape. The original tapes are on deposit at the American Bicycling Museum, New Bremen, OH. Hardcopies of the transcript can be purchased from the Pedaling History Museum, Orchard Park (Buffalo), NY. After World War II, the Bicycle Institute of America (BIA) served as the umbrella group for the bicycle trades. It was comprised of four subsidiaries: the Bicycle Manufacturers Association (BMA); the Bicycle Wholesale Dealers Association (BWDA); the Cycle Parts and Accessories Association (CPAA); and the Merchant Bicycle Dealers Association (MBDA). About 1975, the BIA (but not its subsidiary organizations) was dissolved amid restraint of trade concerns raised by the Federal Trade Commission. The BMA then became the most visible group, representing the entire industry in matters of overall advocacy and promotion. For the purposes of this paper, the BIA and the BMA are synonymous, and both terms are used largely to retain consistency with those used in contemporary documents. In the 1960's, Schwinn left the BMA because of anti-trust concerns raised in a Department of Justice lawsuit over the control of its distribution network that lasted from 1957 to 1967, but Schwinn continued to support and work very closely with the BIA/BMA. Judith Crown and Glenn Coleman: *No Hands, The Rise and Fall of the Schwinn Bicycle Company* (New York: Henry Holt, 1996): 60-61; 77-80; 322-323

undamaged. Developing a viable import market for British cars would take a decade and cost millions, but a thriving bicycle sector could be cobbled together in months. “The President believes you can do other things,” Hauge told the assembled executives. Clarke remembers him finishing with a chillingly blunt summation: “you are expendable.” The import duty on bicycles was cut from 30 to 7.5 percent. Imports quickly increased from 67,000 units in 1950 to 595,000 in 1953. On the other hand, the Americans were crippled: sales dropped almost 50 percent.³

The BIA bitterly fought back, and after a bruising round of hearings in 1954, the federal tariff commission voted to raise duties from 7.5 to 15 percent. Eisenhower was required to accept, reject or modify the commission’s action within 60 days. Sixty-four days later he knocked the tariff down from 15 to 11.25 percent. “We asked the attorneys in Washington, can he do that?” recalled Clarke. “They said no, but nobody sues the President.”⁴

The industry soon decided that the only way to offset its shrinking slice of the market was to expand the entire pie by cultivating a thriving adult market. Clarke, for one, had no illusions about why the industry needed adults: “Volume! Good God!” In addition to sheer numbers, increasing the proportion of adults would also allow firms to escape the intensely seasonal production cycle that had plagued the industry since 1910. “Christmas became just another day,” said Clarke, “it wasn’t the same. We didn’t do 40 percent of our business for Christmas anymore.” Columbia had never quit making a lightweight, multi-gear adult bicycle, and in the early 1960s Clarke was approached by one of his young engineers, Harold Maschin, who asked if he could look into some new technology coming out of Europe. Maschin subscribed to several European cycling magazines and through them learned about a “10-speed gear, actually an 8-speed, which Huret was making in France,” Clarke recalled. Derailleurs had been around for many years, but the new Huret was an early entry in the market for a simple, rugged, relatively inexpensive alternative to Sturmey-Archer’s internal hub gears. Clarke bought several sets, which Maschin rebuilt into 10-speeds. The factory made several prototype bicycles and Clarke “kept them in my garage and let the neighbors ride them to see what happened.” Unfamiliar with the new derailleur gears, the neighbors

³ “Interview with Norman A. Clarke,” 16-17; “Bicycle Makers Seek Tariff Help,” *New York Times* (22 August 1954): F1.

⁴ The tariff rate was 11.25% on bicycles up to 36 lbs. and 22.5% on heavier models. These rates remained in place until 1968. “Two Wheel Drive,” *Barron’s* 47: 50 (11 Dec. 1967): 11; “Interview with Norman A. Clarke,” 10-11, 28-29; Roger Lloyd-Jones and M.J. Lewis, “Culture as Metaphor: Company Culture and Business Strategy at Raleigh Industries, 1945-60,” *Business History* 41, 3 (July, 1999): 93;

blew up several, and using this simple but effective testing system Columbia “found certain shortcomings we had to fix,”⁵ before Clark could put the 10-speed into production in 1962 or 1963.

To build up the adult market, the BIA decided it had to become involved in governmental planning efforts to support bicycle use. CalTrans engineer Harold Munn once observed that “just about everyone seems to believe that an arrangement that will physically separate bicycles is absolutely necessary,” and it while it does seem to have been a basic assumption in American bicycle planning from the start that “bicycle planning” meant bicycle *facilities* planning, Munn was incorrect that this always equated to spatial segregation.⁶ The first coordinated effort at some sort of bicycle planning in the United States appears to have been on the municipal level, in the small city (25,000) of Homestead, Florida, about twenty-five miles south of Miami. Between 1961 and 1963 Homestead designated and signed a network of thirty-four “bikeways,” which today would be described as bicycle routes or Type III facilities. These were described at the time as “secondary, lightly traveled streets,” intended to connect residential areas with “schools, playgrounds, shopping centers, ball parks, and other centers of activities.” They were not intended to divert “the experienced cyclist, capable of riding long distances,” for whom “escaping the clutch of the city and finding enjoyable byroads is not a critical problem,” but were, instead, meant for “the newcomer, the weekend cyclist, the family with children.”⁷ City planners admitted that the Homestead experiment worked largely because of the town’s unique demographics: “more bikes per capita than most towns, many quiet untracked streets, and a small, resident population” comprised of employees of, or retirees from, an adjacent air base. When Chicago tried to copy the idea, it needed to install separate off-street bike paths to close breaks in the network, and a 64-mile system installed in 1965-67 in the affluent Milwaukee suburb of Waukesha was entirely comprised of paved, off-road trails.

The Waukesha facility was typical of many built during this era: separated from the roadway system, usually running through a park or along a watercourse, with little transportation potential. However, this was less the result of any theoretical or ideological presumption than a matter of money. In 1965 Congress created the Land and Water Conservation Fund (LCWF), and it quickly became the most prolific source of money for

⁵ “Interview with Norman A. Clarke”: 23-24.

⁶ Harold Munn, “Bicycles and Traffic,” *Traffic Engineering Journal* 101:TE4 (7 November 1974): 753-762. Munn disagreed with this viewpoint.

⁷ E. Peter Hoffman, “200,000 Miles of Bikeways” in Harley M. Leete (ed.) *The Best of Bicycling* (New York: Trident Press, 1970). The article was reprinted from the August, 1968 issue of *Bicycling* magazine.

municipal bicycle engineering activities. However, its purpose was to promote recreational resources, so many funding requests were rejected by the Bureau of Outdoor Recreation because they overly emphasized transportation uses.⁸ Many in the bicycle industry hoped the Federal Highway Act of 1973, which, for the first time, allowed states to use a portion of their roadway funds for pedestrian and bicycle facilities, would rectify this. This, however, did not happen, as highway departments were loath to divert funds from motor vehicle projects unless they were specifically set aside these purposes, which didn't occur until 1991. The expiration of the LCWF led to the cessation of most new large-scale bike path projects after 1975.⁹

The BIA responded to the LCWF initiative by surveying local parks and recreation departments to determine their recommended best practices for construction and maintenance, then compiled and edited these as *Bike Trails and Facilities—A Guide to Their Design, Construction and Operation*, probably the first bicycle planning document published in significant numbers in the United States.¹⁰ Norman Clarke recalled that he and Horace Huffman, president of Huffy Corp., a leading manufacturer of modest-priced bicycles for department stores, were the BIA members who most strongly worked to promote the funding and installation of new bike paths and lanes. Columbia actually paid to complete a Boston path near the Charles River, apparently because of a lack of LCWF money.¹¹

A parallel effort in bicycle planning originated in Davis, California, about 50 miles east of the San Francisco bay area. It had long been the site of the agricultural research station for the University of California at Berkeley, but the crush of post-World War II G.I. Bill students overwhelmed Berkeley, so Davis was upgraded to a separate UC campus and put on a crash construction program. Unusually spread out (a legacy of its agricultural station days) and lacking an adequate campus transportation system, the university's first chancellor, Emil Marak, paved campus roads a little wider than usual, restricted cars to peripheral lots, and urged everyone to use bicycles.¹² The Davis bikeway movement began

⁸ Bruce Epperson, "Bicycle Planning, Growing Up or Growing Old?" *Bicycle Forum* 35 (January 1994): 2-5.

⁹ John B. Corgel and Charles Floyd, "Toward A New Direction in Bicycle Transportation Policy," *Traffic Quarterly* 33: 2 (April 1979): 297-310

¹⁰ W. L. Cook, *Bike Trails and Facilities—A Guide to Their Design, Construction and Operation* (New York: Bicycle Institute of America, 1969). This may be a later edition, as Peter Hoffman, in his August, 1968 *Bicycling* article, refers to a late 1967 or early 1968 BIA report that appears to be this document.

¹¹ Pridmore and Hurd, *The American Bicycle* : 101, 105;

¹² Robert Sommer, "Bikeway Research at the University of California-Davis in the 1960's," in Andrew Ritchie (ed.) *Cycle History 16: Proceedings of the 16th Annual Cycle History Conference*, September 2005 (San Francisco: Van der Plas Publications, 2005): 47-51; Ted Buehler and Susan Handy, "Fifty Years of Bicycle Policy in Davis, CA," paper presented at the Transportation Research Board Annual

in 1963, when UC-Davis faculty members Frank and Eve Child returned from a sabbatical in the Netherlands at almost exactly the same time the city police were implementing a crackdown on errant cyclists and the city council was enacting several new get-tough laws on cyclists. Reinforced by Dale and Donna Lott, who arrived from Seattle in 1965, the Childs made bicycle use an important “quality of life” issue in municipal elections in 1964 and 1966, with an openly sympathetic slate of candidates elected in 1966. A sympathetic city public works director turned to the university for advice on implementing the new commission’s mandate, and the Lotts, Robert Sommer, Melvin Ramey, Bonnie Kroll and William Adams, among others, created an informal research group to evaluate bicycle use and the design of facilities. Their work was highly experimental. “The city streets became our laboratory,” recalled Sommer many years later. Donna Lott agrees: “Much of what we did was trial-and-error. We put things down. We took them up. We improved it and tried again.” Nevertheless, it is clear that the university study group looked to European, particularly Dutch, techniques as a template. These stressed the complete separation of bicycles and motor vehicles, even if this meant placing bicycle lanes behind parked cars, or utilizing closely-parallel, sidewalk-style bike paths. While these improved most cyclists’ perceived comfort in mid-block, they frequently created problems of visibility and added new motorist-cyclist conflict points at intersections.¹³ The practicing engineers who had to live with these designs were not always as enthusiastic as the researchers. “To a man, they commented about the intersection problems,” wrote Dale Lott and Robert Sommer about the Davis public works department.¹⁴ To the researchers, such problems were easily addressed by further restricting motorized traffic, including eliminating on-street parking, converting streets to one-way operation, or inserting separate traffic-signal phases just for bicycles.

On the other hand, Harold Munn, the CalTrans engineer, thought these type of remedial measures were utopian fantasies: “the pressure to provide additional capacity for motor vehicles has been unrelenting [and] until very recently, reserving space on the roadway for bicycles was the last thing on anyone’s mind . . . Can the traffic engineers and

Conference, January 2008 (while this paper contains many valuable facts, it should be read skeptically, as it is quite hagiographic); Telephone interview with Donna Lott, November 19, 2007;
¹³ For example, although the “sandwich” bike lane, placed between the row of parked cars and the curb, was later disavowed by Davis officials as a “well-intentioned but ill-fated design,” (David Takemoto-Weerts, Evolution of a Cyclist-Friendly Community in Andrew Ritchie (ed.) *Cycle History 16: Proceedings of the 16th Annual Cycle History Conference*, September 2005 (San Francisco: Van der Plas Publications, 2005): 11-15), Sommer and Lott’s 1971 *Congressional Record* article identified these as a “newer” design, suggesting that Davis engineering work may have been evolving along a path different from that which later (c.1974) became adopted as the consensus standard.

¹⁴ Robert Sommer and Dale F. Lott, “Bikeways in Action: The Davis Experience” *Congressional Record* Vol. 117 Pt. 8 (92nd Cong. 1st Session): 10830-10833 (April 19, 1971).

public officials provide for, then persuade the motoring public to accept, some minimum provision for bicycle use of the public roads? The possibilities at present are very limited.”¹⁵ The problem is that Munn himself didn’t have much of an alternative to offer: “There is a risk to the bicyclist when he competes with the motor vehicle that no amount of education, enforcement, or engineering can eliminate. All that can be done is to reduce the risk,” mostly by improving cyclists’ skill level and vigorously enforcing the rules of the road.¹⁶ Robert Sommer, disdained this, seeing it as little more than “a Darwinian perspective, with the road as a test of survival for the fittest.”¹⁷

The work of the UC-Davis research group resulted in a stridently pro-facility, pro-separation report published in an April 1971 issue of the *Congressional Record*. Sommer later said that the BIA arranged for its insertion into the *Record* because it did not have the money to print and distribute it. This is likely, as it was entered at the request of the representative from New York, Alexander Pirine, where the BIA was headquartered at this time.¹⁸ Despite the claim of several of the Davis researchers that the *Congressional Record* report formed the basis of American bicycle planning, a more plausible candidate is an April 1972 report, *Bikeway Planning Criteria and Guidelines* prepared by the Transportation Institute at UCLA for the California Department of Transportation.¹⁹ It blended established European and newer American engineering practices into a synthesis that created designs far less rigidly segregating than the Dutch model. These looked much more like those in use today than the type of facilities the Davis group had originally proposed.²⁰ Much of the UCLA information was absorbed into an interim nationwide study completed the following year by Delew, Cather and Associates. That document, finalized into a 1975 Federal Highway Administration Report entitled *Safety and Locational Criteria for Bicycle Facilities* probably should be considered the first “modern” comprehensive American bicycle planning study.²¹ Of the Davis group, only Donna Lott, who later joined CalTrans as a planner, stayed active in

¹⁵ Munn, “Bicycles and Traffic,” 759.

¹⁶ *Ibid.*, 757

¹⁷ Sommer, “Bikeway Research at the University of California-Davis in the 1960’s: 50.

¹⁸ Lott and Sommer, “Bikeways in Action”; Sommer, “Bikeway Research at the University of California-Davis in the 1960’s: 51.

¹⁹ Institute of Transportation and Traffic Engineering. *Bikeway Planning Criteria and Guidelines*. (Los Angeles: University of California, Los Angeles, April 1972).

²⁰ Davis soon adopted the CalTrans/FHWA standards. Takemoto-Weerts, “Evolution of a Cyclist-Friendly Community”: 14.

²¹ Smith, Daniel T. *Research on Safety and Locational Criteria for Bicycle Facilities* (No location: Delew, Cather and Assoc., 1973). *Safety and Locational Criteria for Bicycle Facilities: Final Report*. (Washington: Federal Highway Administration, 1975) Report FHWA-RD-75-112.

the field of bicycle planning; the others eventually returned to what Donna Lott said were “more or less traditional areas of academic research.”²²

Norman Clarke later estimated that by 1965, a third of Columbia’s total production of 650,000 had become some form of multi-gear bicycle: “3-speeds and 5-speeds, some 10-speeds.” Between 1970 and 1972, during the great American bicycle boom, domestic production increased from 4.9 million units to 8.7 million, and total sales—domestics and imports—shot up from 6.9 million to 13.9 million.²³ Clarke insists that the bicycle boom was not just something that happened: “Oh, no—we worked like hell for it.”²⁴ But the decision to simultaneously fight imports and aggressively cultivate adult riders was one that would have enormous unintended consequences.

Chapter 2: The early regulations

In 1970, the Bicycle Manufacturers’ Association issued a set of voluntary industry standards, called BMA/6, to govern the design and construction of all bicycles with wheels 20 inches or more in diameter, or bicycles designed for riders over 100 lbs.²⁵ The standards were likely issued in anticipation of a report the federal government’s National Committee on Product Safety (NCPS) had been working on for some three years. When it came out later that year the NCPS report sharply criticized the bicycle industry for not developing product safety standards in general, and in particular more stringent requirements for lights and reflectors.²⁶ Fred DeLong, technical editor of *Bicycling* magazine, noting that “Bikes have

²² Author’s Interview with Donna Lott, November 19, 2007. Other than the Lotts, the last publication from the original Davis research group appears to be article co-authored by Mel Ramey in *Transportation Engineering Journal* in 1977.

²³ “Interview with Norman A. Clarke”: 9; Frank J. Berto, “The Great American Bicycle Boom,” in Hans Erhard Lessing and Andrew Ritchie (eds.) *Cycle History 10: Proceedings of the 10th International Cycle History Conference* (San Francisco, Van der Plas Publications, 1999): 133-141. I thank Frank, who provided me with many of the *Bicycling* and *Bike Word* articles dating between 1973-76 that are cited in this article. Frank does not necessarily agree with all my conclusions or opinions.

²⁴ “Interview with Norman A. Clarke”: 15. The best statistical overview of the bike boom of the early 70’s is Berto’s “The Great American Bicycle Boom”.

²⁵ *Bicycle Standard BMA/6: Safety Standards for Regular Bicycles* (New York: BMA, August 1970). The definition of a “sidewalk” bike (not covered by BMA/6) was changed on 8 March 1974 to eliminate the 100 lbs. specification. As a result, *all* bicycles with wheels less than 20 inches in diameter were considered sidewalk bicycles not covered by BMA/6 after that date.

²⁶ *National Commission on Product Safety, Final Report to the President* (Washington, Government Printing Office, 1970): 1:18-20; Ross D. Petty, “The Consumer Product Safety Commission’s Promulgation of a Bicycle Safety Standard,” *Journal of Products Liability* 10 (1987): 25-50. I thank Ross, who supplied me with most of the background material on the CPSC bicycle safety standards used here. For more background, consult his articles “The Impact of the Sport of Bicycle Riding on Safety Law,” *American Business Law Journal* 35 (Winter, 1998) 185-224; and his paper “The Bicycle’s Role in the Development of Safety Law” in *Cycle History 4: Proceeding of the 4th International Cycle*

been designed to attract the fancies of children, and sound engineering has often been disregarded,” applauded BMA/6’s prohibition of such dangerous fads as steering wheel-shaped handlebars and chopper forks after July, 1971.²⁷ Echoing a recent French regulation, BMA/6 also mandated the addition of white pedal reflectors and a white front reflector to the traditional red rear reflector.

In March 1972 the U.S. Food and Drug Administration (FDA), which had jurisdiction over children’s toys under the 1969 Child Protection and Toy Safety Act amendments to the Federal Hazardous Substances Act (FHSA), issued its own report on bicycle accidents, one that contained a review of BMA/6.²⁸ Among other conclusions, it also recommended increasing standards for nighttime conspicuity, suggesting that reflective systems should not only make bicycles visible at night, but should also make them readily identifiable in outline as a bicycle.

In May 1973 the FDA published a proposed “banning order” under the FHSA covering any bicycle intended for use by children under age 16. Based very loosely on BMA/6, the regulation in effect prohibited all “hazardous” children’s bicycles, then established minimum criteria a bicycle must meet to avoid being considered hazardous.²⁹ The regulation did not specify how a bicycle “intended for use by children” would be differentiated from one meant for adults, but the proposed order did contain sections covering quick-release wheel hubs and derailleur gear systems, strongly suggesting the FDA had more than mere sidewalk bikes in mind. Four days later, all authority over these regulations were transferred to a new agency, the Consumer Product Safety Commission (CPSC), that Congress created the year before under legislation drafted in response to the 1970 NCPS final report. The staff of the Senate Commerce Committee, which drafted the CPSC’s enabling legislation, had been highly critical of the FDA’s rulemaking procedures, which it found “marked by too much timidity and inordinate delay.”³⁰ However, due to a quirk in the old 1969 Child Protection and Toy Safety Act amendments, the CPSC legislation actually had more *stringent* rulemaking

History Conference (San Francisco: Bicycle Books, 1994): 137-143. Ross also does not necessarily agree with all opinions.

²⁷ Fred Delong, “New Bicycle Safety and Performance Standards, *Bicycling* (December 1970): 26-27.

²⁸ Food and Drug Administration, *Staff Analysis of Bicycle Accidents and Injuries*, (Washington: National Technical Information Service, 24 March 1972). NTIS No. PB-207-665. Child Protection and Toy Safety Act: Pub. L. No. 91-113, Sec. 2(c), 83 Stat. 187.

²⁹ *Federal Register* (10 May 1973): 12300 to 12313.

³⁰ Teresa M. Schwartz, “The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade,” *George Washington Law Review* 51, 1 (November 1982): 32-95, quote at 38.

provisions when it came to toys and other children's products, a fact that would not come to light for years.³¹

The first major article on the new regulations appeared in the July 1973 issue of *Bicycling* magazine.³² Based on interviews with Paul Hoffman, a CPSC attorney, and BIA staffer James Haynes, the article reached three conclusions: first, a modified version of the banning order would soon be issued by the CPSC; second, it would make no distinction between adult and children's bicycles; and third, the BIA was in favor of this. "We have found no biker as yet who supports it," the authors wrote, "only the Bicycling Institute of America has stood out in support." They quoted the BIA's Haynes as saying "It is fine as far as it goes, but it doesn't go far enough."

The last two conclusions were unfounded. It would have been impossible for Hoffman to know that the CPSC had already decided to sweep adult bicycles into the banning order, as this was still an active point of contention between CPSC lawyers and the Commissioners themselves at this time. As late as February 1974—seven months *after* the article--CPSC Assistant General Counsel David Schmeltzer was still sending legal opinions to the Commission chairman concluding that it was "questionable" whether "a regulation applicable to all bicycles, without any distinction made between children's and adult bicycles, could sustain a court challenge." Schmeltzer wrote he personally believed "a court would rule that a regulation issued under the [FHSA] covering all bicycles is illegal."³³ Second, the BIA was clearly *not* in favor of the FHSA banning order. In June, a month *before* the *Bicycling* article appeared (but, in all fairness, possibly after it was written), the BIA petitioned the CPSC to

³¹ *Forester v. CPSC*, 559 F.2d 774, n.11, n.22. Under the Child Protection Act (15 U.S.C. § 1262(e)) rulemaking for toys presenting a mechanical hazard were subject to the informal procedures of 5 U.S.C. § 553. However, rules issued under the Consumer Product Safety Act were governed by the procedural requirements of 15 U.S.C. §§ 2058 & 2060, which require public hearings and express findings of need. Thus, while most regulations issued under the old FHSA had to follow procedures that were equal to, or more stringent than, those required under the new act, the old requirements were actually *less* stringent in the case of toys presenting a mechanical hazard. Moreover, the new legislation did not eliminate 15 U.S.C. § 1262(e), creating a conflict of laws.

³² April and Don Stockard "Bike Law: Our Rights and Reasons," *Bicycling* (July 1973): 41-42. At this time the BIA was in the process of being phased out, with most functions taken over by the BMA, and the BMA offices removed from New York to Washington, D.C. *Author's interview with Bill Wilkinson* (former BIA Executive Director), 22 July 2008.

³³ "Comments and Recommendations of the Schwinn Bicycle Co.," *Hearings on H.R. 5361 and H.R. 6107 Before the House Committee on Interstate and Foreign Commerce, April 21-24, 1975* (94th Congress, first session) (Washington, U.S. Government Printing Office, 1975) (Serial No. 94-30): 36-37. However, a November 1974 Advisory Opinion from the CPSC general counsel stated that "the Commission declined to determine that the FHSA provisions were not sufficient to reduce those risks addressed by the bicycle regulations . . . Future risks, however, might well support a section 30(d) finding that would enable the regulation of bicycles under the provision of the CPSA." "Letter from Michael A. Brown (CPSC) to Lew A. Martin, 4 November 1974 (Advisory Opinion 148), Freedom of Information Act access library, CPSC. This alternative was apparently never acted upon.

junk the original FDA-FHSA proposal and start over again under the CPSA. The CPSA enabling legislation allowed the Commission to continue down the FHSA procedural road for any rule already begun by the FDA, but whether it was *required* to do so would later become a source of contention.

Because the draft order had been issued four days before the transfer of authority to the CPSC, the original adoption procedure could continue, but the BIA wanted it dropped for three reasons. First, since neither the FDA nor the CPSC had yet to define the difference between a child's bicycle (or using BMA/6 terminology, a "sidewalk" bicycle) and an adult bicycle (which BMA/6 called a "regular" bicycle), the issue threatened to become a regulatory nightmare for the industry. The BMA believed that if the CPSC tried to cover adult bicycles under the FHSA, those provisions would almost certainly be struck down. The BMA/BIA lawyer, Thomas Shannon, told a Congressional subcommittee that the act "only governs toys or other articles *intended* for use by children."³⁴ The BIA also believed the CPSC wanted some sort of standard for adult bicycles, so if the commission went ahead with the banning order, the BMA believed that its *best* possible outcome would be two sets of rules: the banning order for children's bicycles, and the industry's BMA/6 for adult bicycles. The *worst* possible outcome would occur if the CPSC refused to adopt the 20-inch/100 lbs. method of differentiating between children's and adult bicycles--potentially *three* different regulations: the FDA banning order for children's bicycles; a future set of CPSC product safety standards for adult bicycles, and the industry's own BMA/6 still covering all bicycles with wheels 20-inches or larger, regardless of whether intended for a child or an adult. Naturally, the BIA thought it would be far better to have one uniform set of rules based on an expanded BMA/6 and the only practical way to do that was through the CPSA.

A second reason the BIA wanted the proposed FDA regulations scrapped is because banning orders were not product safety standards—they only defined a "hazardous bicycle," and the industry wanted a full set of safety specifications to protect itself from product liability lawsuits. "It is, at best, legally questionable whether the [FHSA] enables the promulgation of complex, highly technical product standards," cautioned BIA attorney Shannon, "nowhere in the act or in the legislative history did Congress indicate any intention to grant authority to set prescriptive standards such as those now proposed for the bicycle industry."³⁵ Shannon did not of course admit that lawsuits were the concern—he instead maintained that misapplying

³⁴ "Statement Thomas F. Shannon," *Hearings before the Senate Committee on Commerce on S. 644 and S. 1000*, 21-28 February 1975, Serial 94-12 (Washington, Government Printing Office, 1975): 146.

³⁵ *Ibid.*

the banning order created an “all-or-nothing” situation where flexible mitigation measures such as repairs, upgrades or partial replacements were not permitted. However, the industry had rarely resorted to such measures in the past, and their use was highly speculative. Product liability shielding was the real trophy.

Product liability, as opposed to simple negligence, is an almost uniquely American branch of law. It is complex, allowing an injured party to sue everyone in the “stream of commerce” from the manufacturer to the retailer if an allegedly defective product is improperly designed or built to adequately undertake those tasks “for which it was reasonably intended.” One of the best ways for a manufacturer to show that it has properly designed and built the product, or to assert that the user has operated it unreasonably, is to prove that it conforms to government regulations or industry “best practices” standards. BMA/6 was just such a standard, and a set of CPSC product safety standards for all bicycles based around BMA/6 would be even better. On the other hand, the FDA banning order, because it was so limited in scope and purpose, was far less useful.

Third, and most importantly, the bicycle industry needed preemption. To prevent a manufacturer from having to meet one set of product safety standards in one state, and another in a second state, Congress determined that once the CPSC issued its standards, those rules took precedence over state laws, regardless of whether the state statutes were more stringent or lax. The old FDA banning orders did not have preemptive effect. The BIA was especially concerned about rules for nighttime conspicuity. After the original 1972 FDA report calling for enhanced reflectivity, the 3M Corporation developed reflective tire sidewalls for bicycles. It wanted these included as mandatory equipment in BMA/6, but that was rejected as too expensive, costing some five dollars per bike at the factory. Instead, the BIA came up with a “10-reflector system” with front, rear, wheel and pedal reflectors that cost about a dollar per bicycle, and this was very near what the FDA subsequently proposed.³⁶

Around this time, 3M approached the National Committee on Uniform Traffic Laws and Ordinances (NCUTLO), the organization that maintains the model Uniform Vehicle Code for use by the states. “3M wanted reflective sidewalls on all bicycles and Schwinn and the others didn’t want it,” recalls Morgan Groves, who was then executive director of the League of American Wheelmen. 3M was the world’s largest maker of reflective materials for traffic signs and Groves says they “had a heavy hand in its [NCUTLO] rulemaking.”³⁷ To keep 3M

³⁶ *BMA/6 Standards for Regular Bicycles*: section 6; “Testimony of Jay Townley, John Baer and Thomas Shannon,” *Hearings on H.R. 5361 and H.R. 6107*: 26.

³⁷ Author’s telephone interview with Morgan Groves, 12 November 2007.

from pushing either NCUTLO or state highway departments into favorable legislation, Schwinn and the BIA became increasingly strident about getting the CPSC to pull the original banning order and replace it with true product safety standards. At a Congressional hearing, Jay Townley, vice president of Schwinn, outlined the problem:

We have three demonstration bicycles to illustrate the conflict we face . . . the first bicycle complies with [CPSC rules] . . . however, this bicycle cannot be sold in Rhode Island now; in New York after May and in Nebraska after January . . . The second bicycle, we will call our Rhode Island unit . . . but this bicycle cannot be sold in California now; New York after May, Nebraska after January, and Illinois now . . . This third bike, we call our New York unit because it complies with the current regulation there for reflectorized tires, but it cannot be sold in California . . . all three of these bicycles do meet the federal regulations.³⁸

The BMA's July 1973 petition caught the attention of a San Francisco-area statistical analyst named John Forester.³⁹ He had become a local cycling advocate in 1972 when the City of Palo Alto enacted a mandatory sidepath law along his favored commuting route, restricting travel to an adjacent sidewalk. His campaign for the total elimination of all bike paths and lanes hadn't gained many adherents, and an anti-bikepath article in the February 1973 issue of a regional magazine, *Bike World*, had gone largely unnoticed.⁴⁰ "He was an arcane technical kind of guy without much in the way of persuasive skills," explained Morgan Groves. But a second *Bike World* article, "Toy Bike Syndrome," published the following October, did get a lot of attention when Forester alleged a vast conspiracy between the government and American bicycle manufacturers to use bike paths and safety regulations to shut out high-quality imported European bicycles, force proficient cyclists off the roads, and create a monopoly for cheap, department-store bikes. Claiming that he spoke for the "true cyclist," Forester cried that "We are driven off the roads, forced to drive dangerously, and will soon be compelled to ride toy bicycles." He called the CPSC "ignorant bureaucrats," the BMA member firms "cycling's old enemies, the American manufacturers of toy bicycles," and the

³⁸ "Testimony of Jay Townley," *Hearings on S. 644 and S. 1000*: 128.

³⁹ Interview with Dorris Taylor, November 5, 2007; City of Palo Alto Resolution 4441 (April 19, 1971); Ordinance 2652 (April 24, 1972); City of Palo Alto Traffic Department "Streets by Functional Classification, Lanes and Traffic Counts [Map]," 1970 and 1974. The mandatory sidepath requirement in ordinance 2652 was repealed on February 11, 1974: City of Palo Alto Ordinance 2771.

⁴⁰ Palo Alto City Ordinance 2652 (24 April 1972); rescinded by Ordinance 2771 (11 February 1974); John Forester, "What about Bikeways?" *Bike World* (February 1973): 36-37.

new bike-boom era cyclists “the intellectually dissatisfied middle classes” that “have a basic aversion to machines.”⁴¹

Forester’s article was not deeply researched and several of his points were muddled. Raleigh of America, a wholly-owned subsidiary of British Raleigh, the *Chambre Syndicale du Cycle*, the French cyclemakers’ association, and the *Syndicate des Fabricants d’Equipments et de Pieces Pour Cycle et Motocycles*, the association of French cycle parts manufacturers supported the Schwinn-BMA petition. Raleigh stated that it “specifically supports Schwinn’s primary recommendation that the [FHSA] be repealed in its entirety and that concurrently all existing regulations issued under that Act be transferred to the authority of the [CPSC].”⁴² The French associations wrote that the BIA/BMA concerns “accurately portray the difficulties presently encountered by bicycle manufacturers as a consequence of state regulations.” They added that “the difficulties are compounded for foreign manufacturers that confront language, communication and transportation problems beyond those borne by domestic manufacturers.”⁴³ Even *Bike World*’s own managers felt compelled to distance themselves from Forester’s overwrought article, stating in an accompanying editorial that “we have no right to accuse the government of collusion with the Bicycle Manufacturer’s Association . . . it is no use writing sarcastic words about supposed sneaky tricks between the BMA and the Federal government.”⁴⁴

However, Forester was not the only one then asserting a conspiracy to drive out foreign bicycles. In 1975, Dick Teresi, an avid cyclist and managing editor of the widely respected journal *Science Digest*, wrote that he had learned in 1973 the BIA was trying to use the CPSC to change the packaging requirements for bicycles. Allegedly, most American bicycle manufacturers then shipped their bicycles with both wheels installed.⁴⁵ To reduce size, cost, and breakage, all European and Japanese makers shipped their bikes to the United States with their front wheels unattached. Teresi stated that the BIA pressured the CPSC to write a requirement into the banning order mandating that the front wheel of bicycles be installed at the factory before shipment. While the BIA insisted it was a safety

⁴¹ John Forester, “Toy Bike Syndrome,” *Bike World* 2, 5 (October 1973): 24-27.

⁴² Letter from William H. Lucking, attorney for Raleigh of America, to the House Subcommittee on Consumer Protection and Finance, 25 April 1975, in *Hearings on H.R. 5361 and H.R. 610*: 266.

⁴³ Letter from Stephen J. Pollak and Louis M. Kauder, attorneys for the *Chambre Syndicale du Cycle*, and the *Syndicate des Fabricants d’Equipments et de Pieces Pour Cycle et Motocycles*, to the House Subcommittee on Consumer Protection and Finance, 9 May 1975, in *Hearings on H.R. 5361 and H.R. 610*: 267-269.

⁴⁴ “The F.D.A. Versus You,” *Bike World* (October 1973): 3.

⁴⁵ This does not appear to have been true for adult bicycles. Photos taken inside the Columbia factory in 1983 show the front wheels of 10-speeds being taken off prior to boxing. Harold Roth, *Bicycle Factory* (New York: Pantheon, 1985).

measure, the CPSC staff quickly saw through it as an attempt to increase shipping costs for foreign makers and refused to consider it. Teresi went so far as to quote CPSC Chairman Simpson as complaining that “The bike industry has pressed for the provision because it would freeze out imports.” Although Teresi claimed this incident was reported at the time in the business press, no article has been found, and the BIA’s supposed recommendation appears on none of its petitions or comments.⁴⁶

“Toy Bike Syndrome” became the seminal article. Coming immediately after Ralph Nader’s expose of corporate greed and rapacity in the auto industry, and the increasingly lurid theories spun around the death of President Kennedy by Mark Lane and Harold Weisburg, Forester’s article successfully turned the “bikeway issue” from a rather arcane municipal engineering spat into American cycling’s version of the Dreyfus Affair and propelled him from an obscure neighborhood activist into a nationally recognized author, speaker and expert witness.⁴⁷

In July 1974, the CPSC promulgated what it hoped was the final version of the bicycle regulations. Rejecting the BIA’s petition to scrap the banning order and start over, it announced it would continue under the FHSA. However, arguing that any product that could foreseeably be regularly *used* by children was a product *intended* for children, it announced that the banning order now applied to *all* bicycles. The Commission said that it would accept comments until August, but later extended this period until March 1975.⁴⁸ Reviewing a working draft of the rules from the previous December, *Bicycling’s* DeLong, noted that “a standard Fuji, Raleigh Professional, Schwinn Paramount or Peugeot PX-10 with reflectors added would pass the specifications.” Forester, looking at the same document (and

⁴⁶ Dick Teresi, *Popular Mechanics Book of Bikes and Bicycling* (New York: Hearst Corporation, 1975): 30-32. Teresi claimed the incident was reported in *Business Week*, but I have found no such article during either 1973 or 1974. Comments received by CPSC regarding assembly requirements in response to 10 May 1973 notice: 29 *Federal Register* (16 July 1974): 26100-26103.

⁴⁷ In 1976, Brookings Institution researchers Nina Cornell, Roger Noll and Barry Weingast, citing only Forester’s article, asserted that the bicycle regulations were an “egregious example” of a trade association’s attempt to restrict foreign competition. This statement, in turn, was cited by several subsequent authors. Reviewing this literature in 1987, Ross Petty found “little evidence to support the allegation” because “because most foreign-made bicycles readily could be modified to satisfy the standard.” Nina Cornell, Roger Noll and Barry Weingast, “Safety Regulation” in Henry Owen and Charles L. Schultze, *Setting National Priorities: The Next Ten Years* (Washington: Brookings Institution): 457-508; Petty, “The Consumer Product Safety Commission’s Promulgation of a Bicycle Safety Standard”: 36-37.

⁴⁸ Darryl Skrabak, “Bike Law: The CPSC Regulations Go to Court,” *Bike World* (April 1976): 23, 56-61

neglecting to tell readers that he was relying on a draft over six months old) wrote in *Bike World* that he was already on his way to the courthouse to file suit.⁴⁹

The CPSC claimed they couldn't scrap the old FDA procedure because section 30(d) of the Consumer Product Safety Act required them use the FHSA unless it was inadequate to sufficiently eliminate or reduce the risk of injury.⁵⁰ The BIA/BMA countered that the lack of state law preemption hamstrung the effectiveness of banning order so badly that it could never work, but the CPSC responded that this couldn't be used as a factor in making its evaluation. "Congress said 'you must first look to the [FHSA] and you must regulate under that act unless you lack sufficient authority to get the job done,'" explained CPSC Chairman Richard Simpson, "Well, we had the authority to ban, to write a standard. We had the authority to enforce. We had the authority to do something."⁵¹ However, as always, there were hidden agendas.

The CPSC, supposedly the model for a new generation of fast, cheap, and efficient federal rulemaking, was getting politically killed. New regulations on swimming pool slides required 570 days, matchbooks, 974; and lawnmowers, 1,670. The CPSC administrators were under a great pressure to promulgate standards efficiently without watering them down. Chairman Simpson complained to Congress that:

We have encountered what we believe, at least what many believe, to be undue delay. There is due process and there is "never." Some of these procedures seem like they end up being "never." We are not suggesting you should remove the due process procedures, but we have some that we are following on bicycles and fireworks that look like they might never be ended.⁵²

The procedure did seem endless. In mid-August, Schwinn, the BMA, Bendix, Raleigh and Shimano submitted formal, written objections to the July final rules, invoking their right to a public hearing. The CPSC, citing the highly streamlined procedures available under the FHSA exclusively for children's toys, denied the request. Explaining to a congressional committee why the bicycle makers thought they should have had a hearing, Chairman Simpson pointed to "differing provisions, rulemaking provisions, that we must follow under the FHSA if a product is other than a toy which are very long and cumbersome."

⁴⁹ *Federal Register*, (16 July 1974): 26,100 to 26,111; Fred DeLong, "Editor's Notes: CPSC Standards," *Bicycling* (April 1974): 6; John Forester, "The Final Bicycle Safety Draft," *Bike World* (February 1974): 3.

⁵⁰ *Forester v. CPSC*, 559 F.2d 774, n.11.

⁵¹ "Testimony of Richard O. Simpson," *Hearings on H.R. 5361 and H.R. 610*: 181.

⁵² *Ibid.*

Unfortunately, the CPSC was mistaken--provisions within the CPSA invalidated the “toy exception,” thus making the denial of BIA’s sought-for public hearing a statutory violation. It is unclear whether the CPSC staff knew at this point whether they were wrong. Some later actions suggest that they may have.⁵³

Chapter 3: The Lawsuit

The CPSC regulations were originally scheduled to take effect on 1 January 1975. John Forester sued first, filing in San Francisco to try to keep the litigation in his backyard. He was followed by James Berryhill and the Atlanta-based Southern Bicycle League (filing jointly), and eight industry plaintiffs, including the BMA; Schwinn; Hedstrom (a maker of sidewalk bikes); Raleigh; Bendix; Union (a German parts maker); Shimano (a Japanese parts maker); and the Chambre Syndicale of French parts makers.⁵⁴ Afterward, Schwinn’s Jay Townley said his firm filed only to meet evidentiary and procedural requirements. Asked if the firm planned to challenge the legality of the regulations, Townley responded with a flat “no”.⁵⁵ After meeting with industry representatives, CPSC staffers realized further work was needed and in December 1974 postponed the effective date of the rules indefinitely.⁵⁶ From January through April, CPSC staff held open meetings with the industry to iron out differences. Much of the information filtering back to cycling community at this time came from Forester and Berryhill, who stuck to a strident and obstructionist strategy. Berryhill complained that the meetings received inadequate prior notice. In fact, only the 9 September 1974 meeting was noticed at all—the others, while not closed to the public, were internal working meetings not requiring prior *Federal Register* announcements. Forester admitted attending a CPSC informational meeting in San Francisco in early 1976 primarily to help disrupt it, later reporting his exploits in *Bike World*.⁵⁷

There was an underlying element of animosity between the two cycling magazines, *Bicycling*, already the “establishment” magazine, and *Bike World*, the edgy upstart. Fred DeLong, *Bicycling*’s technical editor, sat on the technical advisory group of the American

⁵³ 39 Federal Register (3 September 1974) 31943 to 31944; “Testimony of Richard O. Simpson,” *Hearings on H.R. 5361 and H.R. 610*: 181; *Forester v. CPSC*, 559 F.2d 774, n.22. The CPSC did hold a fully noticed meeting on 9 September 1974, but it was not a hearing, and the objections submitted were considered petitions (i.e. requests) for changes, not legal challenges. 39 Federal Register (3 September 1974): 31943-44; 40 Federal Register (16 June 1975): 25480-85.

⁵⁴ *Forester v. CPSC*, 559 F.2d 774, 775.

⁵⁵ *Hearings on S. 644 and S. 1000*: 132-133.

⁵⁶ 39 Federal Register (16 December 1974): 43436.

⁵⁷ Skrabak, “CPSC Regulations Go to Court”: 60-61; John Forester, “Logic Lost in CPSC Ruling,” *Bike World* (July 1976): 7.

National Standards Institute (ANSI) and was the American liaison to the bicycle committee of the International Standards Organization (ISO). He had been working, with financial support from Schwinn, as a technical liaison between the industry and the CPSC, and between foreign and domestic manufacturers, to work out acceptable CPSC rule language, subjecting him to criticism from Forester and *Bike World*, who insisted on nothing less than a total defeat of any federal regulation. (In this, Forester's public position was at odds with the legal arguments he was simultaneously preparing for the lawsuit, as will be explained later.) In October 1974, Joe Kossak, a *Bike World* editor, reported that DeLong had reached a "gentlemen's agreement" back in late 1973 to exempt racing, touring and other specialized adult bicycles from the final rules, but that the CPSC brought in a new legal team, who ignored the agreement. "I have it at second hand that Mr. DeLong feels the problems of getting bicycle laws fit to live with will probably require legal action."⁵⁸

This was wrong, probably knowingly wrong, and the "second hand source" was likely either Berryhill or Forester. Six months earlier, in April 1974, DeLong told *Bicycling* readers that "in respect to the American domestic standard, a change in personnel assigned to the task has been made since our January meeting. Contact is being made with the newly assigned people to confirm our agreements," which he described, not as a blanket exemption for pricey bikes, but as a "verbal agreement [that] had been obtained for re-wording many of the controversial provisions to avoid possible mis-interpretations." This was same article in which he reassured readers that a standard Schwinn, Peugeot, or Raleigh racing bike would meet the CPSC rules if reflectors were added, a statement that later proved accurate. As for DeLong's supposed disillusionment, this is flatly contradicted in a letter he sent to the CPSC's Joseph Fandey in July 1978, after the *Forester v. CPSC* court decision had been handed down:

Mr. Ken Edinger informs me that you will continue to work on Bicycle Safety Standards, and are considering Technical Guidelines to replace those portions of the CPSC regulations that were remanded by the court decisions. Having worked with the Commission previously to try to present the viewpoint of the user as well as the serviceman, I would be glad to offer any assistance you might wish . . . You will find that any comments I make will be in a constructive, not destructive, aggressive manner.⁵⁹

⁵⁸ Joe Kossak, "Hatboro Wizard Speaks," *Bike World* (October 1974): 10.

⁵⁹ Letter from A. Fred De Long to Joseph Fandey (CPSC), 4 July 1978, background file, Advisory Opinions 207 and 207A, Freedom of Information Act access library, CPSC.

However, even the normally conservative editors at *Bicycling* occasionally let unsupported statements slip through. In April 1976, Darryl Skrabak reported that during the 1975 fiscal year (October 1974 to October 1975), CPSC staff met 37 times with industry representatives, but not once with a consumer group. Skrabak apparently did not realize that in response to the Commission's June 1975 request for comments, John Forester was the only consumer submitting a comment.⁶⁰ Consumers no longer cared. The proposals had been so heavily reworked that for virtually all performance cyclists, they were now irrelevant. Fred DeLong had hit the nail on the head: if a standard European racing bicycle was only affected to the extent that it had to be delivered with ten cheap, quickly removable reflectors, the rules were a dead issue for club cyclists.

In addition to his antagonism to the 10-reflector standard, Forester was also seemed especially piqued by the CPSC regulations for brakes. This time, he was on the side of most of the industry, which preferred the standards developed by the Paris-based ISO. Forester, however, couldn't care less about ISO standards. The CPSC rules required caliper brake pads to survive being cooked in a 250-degree F. oven for 30 minutes. Forester wanted coaster brakes subject to a "similar" heat test. By "similar," he didn't mean baking them at 250 degrees (a meaningless exercise), but rather that a coaster brake had to withstand the same calorific load as a bicycle would need to generate to heat its four caliper brake pads to 250 degrees for 30 minutes. This would require heating the coaster brakes to over 900 degrees F. Since he knew no coaster brake could do that, he was essentially demanding that coaster brakes be banned. (Neither the CPSC or ISO standards were tests of maximum energy dissipation. They were merely intended to ensure that a brake pad would not melt at a low temperature.)

He argued his case in a lengthy March 1974 *Bike World* article in which he gleefully burned up a couple of coaster brakes on downhill runs while denigrating the CPSC, but admitted in passing that "the government formula is essentially right" and, on a series of test runs, got caliper-brake block temperatures within 50 degrees of CPSC estimates. He stated in his opening brief in *Forester v. CPSC* that the only reason for the brake standards was "to favor domestic over superior foreign bicycles."⁶¹ He forgot to mention that during this period he had a professional conflict of interest: he had been hired as an expert witness to testify against the Bendix Corporation, the nation's largest seller of coaster brakes, in an import-

⁶⁰ Skrabak, "CPSC Regulations Go to Court": 60; 40 Federal Register (13 November 1975): 52815 to 52835.

⁶¹ John Forester, "Safe Brakes that Burn Up," *Bike Word* (March 1974): 16-17; *Forester v. CPSC*, 559 F.2d 774, 792 and n.24.

tariff controversy over whether they should be placed in the same tariff classification as the far more expensive hub-disc brakes.⁶²

Throughout the first half of 1975 the bicycle regulations plodded simultaneously through the administrative, judicial and legislative processes. In April the eight separate lawsuits were combined in Washington, D.C. Forester, who had filed his brief *pro se* (without a lawyer) continued to plead his own case; Berryhill and the Southern Bicycle League pooled their resources and hired an attorney. Congress held hearings on various facets of the Consumer Product Safety Act, and the domestic industry testified, pleading their case for scrapping the banning order and moving everything to the CPSA. Preemption was still the primary reason. “Why do you want to be regulated by a Federal agency?” responded Schwinn’s Jay Townley to one Senator’s question, “the answer clearly, as he [Chairman Simpson] pointed out in his testimony, is the problem of preemption and conflicting state regulations. If we don’t have one good national standard, quite honestly in these times there are manufacturers that will go out of business.”⁶³ As a substitute, the CPSC proposed adding a preemption clause to the Hazardous Substances Act so that banning orders would also block state laws, but even Chairman Simpson acknowledged that this could be too little, too late: “they would be faced with another problem, that the standard itself may be stricken,” he told the Senate committee, “there are some suits currently pending which challenge the legality of the regulation as covering all bicycles . . . so I think they have two problems.”⁶⁴ Ultimately, Congress, in May 1976, settled on the compromise: it granted state law preemption to banning orders. The law also gave the CPSC greater discretion to discontinue FHSA carry-over rulemaking and start anew under the CPSA, but the Commission, under heat from consumer advocacy groups for dragging its feet and mired in the *Forester v. CPSC* case, soldiered on.⁶⁵

The last final version of the bicycle rules were published in November 1975 with an effective date in May 1976, about eighteen months later than that originally proposed by the CPSC back in 1974. In December, Schwinn, the last of the industry plaintiffs, withdrew from *Forester v. CPSC*, leaving only Forester, Berryhill and the Southern Bicycle League. David Schmeltzer, of the CPSC legal staff, explained that the industry plaintiffs had either been seeking extensions to the effective date or refinements to the standards, and in almost every

⁶² *Bendix Corporation v. United States*, 79 Cust. Ct. 108 (1977).

⁶³ “Testimony of Jay Townley,” *Hearings on S. 644 and S. 1000*: 133.

⁶⁴ “Testimony of Richard O. Simpson,” *Hearings on S. 644 and S. 1000*: 303.

⁶⁵ Public Law 94-284 [S.644], *U.S. Code Congressional and Administrative News*, 90 Stat. 503 and 1003-05 (11 May 1976).

case these were “granted or ironed out.”⁶⁶ Satisfied that the November draft was the best they were going to get, the industry, both foreign and domestic, generally withdrew, leaving the field to the advocates for whom they had little empathy.

Apparently looking for a second opinion, *Bike World* asked Paul Hill, a lawyer, researcher at Omaha’s Creighton University Law School, avid cyclist, and later a widely published author in bicycle law, to review the case. He concluded that “as far as the average rider is concerned, the only rule of consequence to him apparently will be the reflectors requirement” and recommended that “we stop quibbling over it. He cautioned that “we may be past the point of CPSC rules or nothing. We may instead have CPSC rules or bizarre and conflicting state and local laws.” Accurately drawing a distinction between a FHSA banning order for toys and a set of CPSC product safety specifications, Hill concluded that “I do not think the CPSC is as vulnerable on this point as some cyclists feel.”⁶⁷

One problem that many dealers and distributors focused on was the regulation’s meaning of an exempt “one of a kind” bicycle. Forester attended a May 1976 CPSC meeting in which he claimed staff members refused to precisely define what a “one-of-a-kind” bicycle was. In fact, the Commission had already issued two *written* advisory opinions clarifying the term.⁶⁸ All bicycles are shipped to retailers in some degree of disassembly, but some high-end bicycles are assembled on a made-to-order basis from a frame and components individually selected by the customer. Although neither the frame nor parts may be individually tailor-made, the resulting bicycle, as a whole, is a unique creation. The CPSC was concerned that importers would attempt to circumvent the regulations by simply shipping stock bicycles with a bare frame in one box and all the parts in the other, so they predicated their definition on what they labeled an “individuality” requirement. Unless “the assembly process is unique by individual order and substantially involves non-stock components” a bicycle was stock.⁶⁹ Forester claimed this meant the CPSC would exempt only utterly unique bicycles made from scratch. However, he ignored an earlier advisory opinion explaining that “imported frames . . . are not covered by our regulation because they are not fully assembled or ready-for-assembling bicycles, but merely parts of bicycles . . . [and] the finished bicycles you build on those frames are not covered because they are classified as ‘one-of-a-kind

⁶⁶ Skrabak, “CPSC Regulations Go to Court”: 59.

⁶⁷ Paul Hill, “Bicycle Laws and Regulations,” *Bike World* (February 1976): 28-31.

⁶⁸ John Forester, “Logic Lost in CPSC Ruling,” *Bike World* (July 1976): CPSC Advisory Opinion No. 140 (11 October 1974); CPSC Advisory Opinion No. 186 (10 March 1975).

⁶⁹ Letter from C. Smith (Mel Pinto Imports) to CPSC, 5 February 1975; Letter from Michael A. Brown (CPSC) to C. Smith, 10 March 1975 both background file, CPSC Advisory Opinion No. 186, Freedom of Information Act access library, CPSC.

bicycles.” Thus, there was no need to agonize about whether components were “stock” if the frame they were going on was individually made or imported and the “assembly process” was thus “unique by individual order.” Forester hoped he could use the meeting to bully the CPSC into a verbal interpretation that would open the “two-box” loophole, but by now the CPSC staff knew him well enough not to give him a straight answer on anything he proposed.⁷⁰

Initial briefs were filed in *Forester v. CPSC* in December 1975. Oral arguments were heard ten months later, in October. Ironically, many of the plaintiff arguments were those originally raised by the BMA: 1) the FHSA allowed only outright product bans, not product specifications (Forester and Berryhill); 2) the FHSA permitted only the specification of prohibited features; it could not create positive rules defining what a good bicycle was (Forester); 3) the FHSA was limited to items intended for use by children and could not be used to regulate adult products (Forester); 4) the rulemaking process violated the plaintiffs’ Constitutional due process protections (Berryhill); 5) the sixteen rules were so technically flawed that they were ineffective in reducing cyclist injuries to a material extent (Forester).⁷¹

None of these arguments were presented or documented as strongly as they could have been. Berryhill argued against the tortured procedural history of the rules on Constitutional grounds, not as mere statutory violations.⁷² Constitutional breaches are devilishly hard to argue and prove, and even the court pointed to this as a strategic error. Although statutory deficiencies can be rectified by “rewinding the tape” and starting over, the odds of the CPSC doing this by now were small.⁷³ Forester’s strongest argument was that the FHSA’s “products intended for children” language couldn’t be stretched to cover bicycles clearly meant for adults, and thus the CPSC could only regulate small, cheap toy bicycles. However, he dissipated much of his time and effort on digressions.

For reasons hard to fathom, the 10-reflector rule became his bête noire, to the point where one must wonder if he was pursuing purely individual goals that were fundamentally different from those of his fellow plaintiffs. His position on nighttime conspicuity changed at least twice during the litigation. In the October 1973 “Toy Bike Syndrome” article, he

⁷⁰ Letter from James Pickering (Pickering Cycles, Tucson, AZ) to CPSC, 21 August 1974; Letter from Michael Brown (CPSC) to James Pickering, 11 October 1974, both background file, CPSC Advisory Opinion No. 140, Freedom of Information Act access library, CPSC.

⁷¹ Other issues pertaining to product labeling have been omitted for brevity.

⁷² This was probably done in an attempt to recover attorney’s fees and costs. See 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

⁷³ “It is unclear why these petitioners chose to rely on the Constitution rather than make than upon specific provisions of the Administrative Procedure Act” *Forester v. CPSC*, 559 F.2d 774, 788.

demanded no federal conspicuity standards at all, claiming that “we’d be better off neglected,” a position he still held a year later when he told *Bike World* readers that he was suing the CPSC “to have the whole sorry mess set aside as incompetent and illegal.”⁷⁴ However, in his opening brief in January 1975 he agreed the Commission had the authority to regulate children’s bicycles, but argued it should have adopted a front headlight rule instead of the all-reflector standard.⁷⁵ Forester thought it was much more likely the court would restrict the Commission to regulating children’s bicycles then void the rules completely.⁷⁶ Following this hunch, he apparently hoped he could convince the court to change the conspicuity requirement from reflectors to lights, and the more the better. He may have come closest to revealing his strategy in a 2002 memoir of the case when he wrote that “the manufacturers were terrified that they might be required to provide lighting systems,” and that “for the kind of bicycles that the BMA sold, provision of a lighting system that would continue to function under childish use would probably double the cost of the bicycle.”⁷⁷ Forester seemed to be aiming for a type of domestic bicycle tariff that would serve the dual purpose of driving the American makers of mass-market bicycles out of business and would make bicycles too expensive for the casual, occasional or indifferent cyclists he loathed so deeply. “In the U.S.,” he asserted in his first published *Bike World* article in 1973, “the bicycle didn’t exist from around 1920 to 1965 . . . adult cyclists were generally respected—there were too few to be a nuisance to auto drivers. Now we have 10 to 50 times as many cyclists—enough to be uncomfortably visible.”⁷⁸ Forester wanted to use the CPSC ruling to turn the clock back to an idyllic, pre-bike boom era. “Before 1970, cyclists were able to operate on the road in an appropriate manner, and do the right thing,” Forester’s then companion, Dorris Taylor, said, “government started making rules and regulations for a level of incompetence. John saw government catering to the least common denominator.”⁷⁹ However, in his last reply brief, Forester returned to his original position that the bicycle rules should contain no nighttime conspicuity standards at all, probably as a result of the BMA’s attempt to outflank him through the Uniform Vehicle Code.⁸⁰

⁷⁴ John Forester, “Hand-Me-Down-Standard,” *Bike World* (September 1974): 4.

⁷⁵ *Forester v. CPSC*, 559 F.2d 774, 797.

⁷⁶ “Agenda for NUTCLO Subcommittee on Operations Meeting, 22-24 February 1978,” at 83, background file, CPSC Advisory Opinion No. 269, Freedom of Information Act access library, CPSC.

⁷⁷ John Forester, “American Cycling From the 1940’s as I Remember It.” www.johnforester.com. Forester sometimes re-edits his on-line documents after they have been quoted or cited to his dissatisfaction; the version I used was dated 20 November 2002: I printed it in October, 2007.

⁷⁸ John Forester, “What About Bikeways?": 36.

⁷⁹ Author’s telephone interview with Dorris Taylor, 5 November 2007.

⁸⁰ *Forester v. CPSC*, 559 F.2d 774, 797.

Chapter 4: The NCUTLO Affair

The *Forester v. CPSC* case was extraordinarily drawn out. Initial filings were made in the fall of 1974. In April 1975 the various suits were combined in the District of Columbia. By December all the industry plaintiffs had withdrawn, leaving only the three consumer-advocates to file opening briefs, which were delivered in January 1976. Oral arguments were heard in October, but the court didn't hand down a ruling until eight months later, in June 1977.

In March, 1977, while everyone waited, Schwinn and the BMA submitted a proposal to the National Committee on Uniform Traffic Laws and Ordinances (NCUTLO) for consideration at the next meeting of its Subcommittee on Operations to be held in February, 1978. They asked for a change to the Uniform Vehicle Code (UVC) to eliminate the requirements for reflectors and brakes on small sidewalk bikes, a move that would make the UVC more consistent with the CPSC bicycle rules. "Any state mandating equipment which is not identical to the [CPSC] requirements will be preempted," asserted the lawyers, "no state can establish a requirement applicable to bicycle equipment to bicycle equipment regulated by the CPSC unless it is identical to the CPSC requirement."⁸¹ The specific amendment language submitted by the industry lawyers limited its scope to sidewalk bikes, but the supporting arguments appeared to make no distinction between sidewalk and regular bicycles.⁸²

In 1972, Schwinn's southern distributor had been sued in Georgia by the parents of a 12-year old boy struck and injured at night while riding his Stingray on a state highway.⁸³ The parents argued that Schwinn and the dealer were subject to various product liability torts because they did not equip the bicycle with a headlight. Schwinn countered that a bicycle without a headlight is adequate for the ordinary uses of a bicycle, and that a headlight is an accessory the user must add to mitigate the obvious peril of riding at night. Schwinn won, and the industry was now trying to codify the idea that if a bicycle met the CPSC standards it

⁸¹ "Agenda for NUTCLO Subcommittee on Operations Meeting, 22-24 February 1978," at 83, background file, CPSC Advisory Opinion No. 269, Freedom of Information Act access library, CPSC.

⁸² The Schwinn/BMA proposal amended four sections of the UVC. Sections 12-703 (rear reflectivity), 12-704 (side reflectivity), and 12-706 (requirement for brakes) received almost identical language exempting bicycles with maximum seat heights of less than 25 inches. A new subparagraph (b) was proposed for Section 12-701 (equipment on bicycles) explicitly stating that "nothing herein is intended to be, not shall be construed as being in conflict with the requirements of the Federal Bicycle Safety Standard . . ."

⁸³ *Poppell v. Waters*, 190 S.E. 2d 815 (Ga. App. 1972).

met all “equipment” mandates, and while states could impose other “use” requirements, these obligated only the owner/operator, not the maker or seller.⁸⁴

At best, the Schwinn-BMA argument was nebulous, and the attempt to affirmatively block states from adopting their own conspicuity or brake requirements for sidewalk bicycles that nevertheless found their way onto streets was fairly cynical. However, it didn’t do the one thing Forester claimed it did: prevent states from adopting headlight laws.⁸⁵ On the other hand, the supporting arguments submitted by the industry could easily give any reasonable lay person the impression that this was the intent. In fact, their ultimate goal may not have been completely decided. “Any state law mandating equipment which is not identical to the CPSC requirements will be preempted,” wrote the Schwinn-BMA lawyers “no state can establish a requirement applicable to bicycle equipment regulated by CPSC unless it is identical to the CPSC requirement.”⁸⁶ As was the case here, a clear use/equipment distinction did not always appear in the written arguments.

Both Forester and Morgan Groves, previously with League of American Wheelmen, attended the Chicago meeting. Afterward, Forester claimed that the BMA lawyers warned the Committee that the 10-reflector rule already preempted state traffic laws that required bicycle head- and tail-lights. However, Morgan Groves says that the BMA lawyers insisted only that the 10-reflector standard prohibited the mandatory imposition of reflectorized sidewalls. The record appears to support Groves, as a month before the NCUTLO meeting, its staff wrote the CPSC requesting an advisory opinion as to whether the CPSC sidewalk bike exemption preempted state vehicle codes. That letter did not mention headlamps and discussed only sidewalk bicycles. The CPSC did not respond in time for the meeting. (In fact, it didn’t answer for another eight months.) The NCUTLO subcommittee tabled the proposal indefinitely. Afterward, Forester began criticizing Groves’s L.A.W. directorship (which had ended over a year before) as incompetent and corrupt, which Groves found disconcerting, as they had no previous interaction on League affairs, “just the NCUTLO.” A year later, Forester was voted

⁸⁴ The Poppell case was a thin reed to lean on, as the court’s decision strongly suggested that had the parents simply told the dealer the boy planned on nighttime use, selling it unequipped with a headlight would have amounted to selling an unfit product.)

⁸⁵ Although he later denied making such a categorical statement, Forester flatly stated in his comments to the NUCTLO (incorporated into the agenda of the 22-24 February 1978 meeting at p. 84): “When the CPSC regulations came into effect in May 1976 all requirements in state vehicle codes for bicycle brakes and nighttime protective equipment became theoretically null and void.” However, the proposed amendment did not change Section 12-701 requiring that “every bicycle in use [during darkness] shall be equipped with a lamp on the front . . .” Thus, it is very unlikely that the proposed amendment, had it been adopted, would have been interpreted in any court as preemptive.

⁸⁶ “Agenda for NUTCLO Subcommittee on Operations Meeting, 22-24 February 1978,” CPSC Advisory Opinion No. 269, Freedom of Information Act access library, CPSC.

onto the L.A.W.'s board of directors. The BMA and Schwinn withdrew their financial support from the league.⁸⁷

Chapter 5: Decision and Aftermath

The court rendered its opinion in June 1977. As seemed to be true for everything else, the stated issues weren't the real issues and the real outcome, it appears, had been determined months before. On paper, the CPSC won the most. The bicycle regulations were legal, they did apply to both children's and adult bicycles, and twelve of the sixteen rules were valid, while four were found to be "arbitrary and capricious" and were remanded back to the CPSC for further consideration. Both sides declared victory.

This is what actually happened. When the industry plaintiffs settled and withdrew in the fall of 1975, they took their highly knowledgeable and experienced lawyers and experts with them. They knew where the real Achilles' heel of the CPSC's case was, but because their clients no longer had any stake, it wasn't their place to meddle. However, Washington is a small town and once their clients withdrew, they were free to lunch with their colleagues on the CPSC legal staff and elsewhere, and soon the word got around.

There were two real issues, neither of which were directly argued by Forester, Berryhill or the Southern Bicycle League, and both of which were related. The first had to do with the correct procedure for promulgating the bicycle regulations. James Berryhill argued that the CPSC rule adoption procedures violated his Constitutional due process rights. He was wrong—they did not. They did, however, violate the law. As discussed earlier, the rulemaking procedures under the old FHSA were more demanding than those under the newer CPSA, with one exception—toys. The so-called "1262(e) exception" allowed for informal rulemaking without a formal public hearing and required challengers to already issued final rules to prove that they were "arbitrary, capricious and an abuse of discretion."⁸⁸ Rules issued under the Consumer Product Safety Act did require a public hearing, did require express findings of need, and permitted challenges based on a "substantial evidence on the record" standard. (At some risk of oversimplification, this required the CPSC to show, limited to the evidence contained in the formal record, that it was more probable than not that

⁸⁷ John Forester, "American Cycling From the 1940's as I Remember It"; Interview with Morgan Groves, 12 November 2007. There is disagreement here as well. Forester claims that he always believed it inappropriate for the industry to financially support the L.A.W. (one of his criticisms of Groves is that his salary was subsidized by Schwinn, Huffy, and Rollfast), while others maintain the industry withdrew support *because* of Forester's membership on the board.

⁸⁸ *Forester v. CPSC*, 559 F.2d 774, n. 22; "Testimony of Richard O. Simpson," *Hearings on H.R. 5361 and H.R. 610*:180-181.

the rule would meet the stated need.) The CPSC asserting that they only had to meet the 1262(e) requirements. They were wrong. Transfer language in the CPSA overrode the 1262(e) exemption. While the bicycle rules did not have to meet the extremely extensive FHSA requirements for non-toy hazardous products, it did have to go through the medium-level CPSA requirements. The Commission held a public meeting on the bicycle rules in September 1974, but it asserted at that time on the record that it was not a public hearing and that the objections lodged by the manufacturers did not constitute rule challenges requiring administrative adjudication. Instead, it considered them using the same informal petition process under which the BMA had sought to have the original May, 1973 banning order scuttled.⁸⁹ Also, the technical challenges Forester raised in his lawsuit were not required to meet an arbitrary and capricious standard, merely that based on a preponderance of evidence in the record, each rule wouldn't carry out its intended function. Forester's lengthy and arcane engineering discussions, which in virtually any other administrative law case would have been an utter waste of ink and paper, were suddenly vitally important.

Second, under the 1262(e) exception, the CPSC did not have to identify the risk that each rule sought to reduce, although it was a requirement of the CPSA. Forester asserted that the Commission was hiding behind 1262(e) because it couldn't meet the "identify the risk" requirement. That was an irrelevant argument, as it could easily meet the requirement. However, because 1262(e) was overridden, the CPSC did have to meet another standard, a requirement that it make a "concise general statement of purpose," which, legal niceties notwithstanding, was pretty darned close to an "identify the risk" requirement. Just like the "identify the risk" requirement, meeting the "concise general statement of purpose" was not a real problem, except that the CPSC didn't do it. In his brief, Forester had directly argued that the Commission had chosen to proceed under the FHSA because it couldn't meet the requirements of the CPSA. Again, that was wrong. It wasn't that the CPSC *could* not meet the standard, but that they *did* not meet the standard. However, Forester was close enough to the truth that it should have been addressed by the CPSC lawyers, who merely fluffed it off on the basis of 1262(e)—a mistake.

Both of these arguments share a common thread. Taken literally, they missed their mark. However, they were so close to their target that the CPSC lawyers should have made substantive responses, but they didn't, either because they were blissfully unaware they had made serious procedural errors (unlikely) or they did know it and didn't want to admit it for

⁸⁹ 39 *Federal Register* (3 September 1974): 31943

fear of opening a Pandora's box (probably). The CPSC lawyers were dancing around the truth, and believed they could get away with it because the heavy-hitters had pulled out and all they faced was a bunch of amateurs—especially Forester, who unwisely believed he could act as his own lawyer. Unfortunately for them, they got caught.

At this point, the case record gets murky. It appears that the court did not want to throw out the bicycle rules entirely and make the CPSC start over. It also appears that the court wasn't inclined to consider the cyclist's core argument that the CPSC could not regulate adult bicycles under a law meant only to cover products intended for children, because it believed another Federal court back in 1971 had adequately addressed that issue in a case dealing with lawn darts, and that the matter didn't warrant reconsideration.⁹⁰ On the other hand, it was very interested in clarifying what the phrase "unreasonable risk of personal injury or illness" meant, not because it was a critical part of this case, but because other cases in the lower courts were waiting for guidance on this issue. The Court didn't want the CPSC to get away with its disingenuous 1262(e) arguments (i.e. only informal rulemaking needed and only "arbitrary and capricious" challenges allowed), but on the other hand it didn't want to rule against the CPSC entirely because it wanted to approve the Commission's definition of "unreasonable risk" and how it is applied, and didn't want to wait for another case to work its way through the system.

So it appears the court told the CPSC to go back to the withdrawn plaintiffs (the foreign and domestic bicycle makers) and negotiate with them to reach a consensus on how many of the 16 rules would, based upon the lower "preponderance of evidence in the formal record" standard, they could all agree to. With a stronger bargaining hand, the industry forced the CPSC to throw out four of the 16. This is indicated by the fact that the four were all generally of greater concern to the foreign firms than the BMA makers. The caliper brake rules, which the industry had argued from the start should be covered by the European-based ISO standards, were struck, as was the protrusion rule (they could have blocked some front derailleurs and frame dropout styles), the handlebar width rule (may have blocked some models of Italian Cinelli and Japanese SR drop bars), and the pedal tread rule (may have blocked replaceable alloy cages on high-end racing pedals). Once consensus had been achieved, the court then reviewed the technical merit of each of the standards, ostensibly using an "arbitrary and capricious" standard, and remanded the four back to the CPSC.

⁹⁰ *R.B. Jarts, Inc. v. Richardson*, 438 F.2d 846 (2nd Cir. 1971) Lawn darts were oversized plastic and metal darts about a foot long that players attempted to arc over a distance of 50 to 100 feet into a 3-foot plastic hoop laid on the ground. The CPSC completely banned them.

The court then held, in keeping with the lawn darts case, that a product nominally intended by the manufacturer for adult use could be regulated under the toy act if it was “reasonably foreseeable that the product would be subject to more than incidental or exceptional use by children.” As to the issue the court wanted so badly to rule on (whether a precise statistical showing of the positive impact of any given rule was needed), it held that the CPSC was under no obligation to develop a “body count” of the injuries reduced by each individual rule. Forester had argued that the CPSC was required to show each standard would eliminate *entirely* a specifically defined hazard, a contention the court swept away with the admonition that “he has misread both the requirements of the FHSA and the relevant standard of review.”⁹¹

In July 1978, thirteen months after *Forester v. CPSC* was handed down, Fred DeLong wrote the CPSC to request an advisory opinion as to whether its bicycle rules preempted state traffic laws. “In my initial discussions with CPSC personnel before the regulations were finally promulgated,” he explained, “it was flatly stated to me that this not mentioning of lighting of the original text of the proposed regulations was not meant in any manner to preclude lighting.”⁹² The Commission had not yet replied to the earlier January letter from the NCUTLO staff asking if CPSC rules waiving requirements for brakes or reflectors for sidewalk bicycles preempted state highway laws requiring this equipment for such bicycles when used on their highways. On 12 September 1987, the CPSC responded to both letters simultaneously. Advisory Opinion 269 addressed the sidewalk bicycle issue and Advisory Opinion 270 responded to DeLong’s letter. In an unprecedented move, the CPSC staff placed both opinions before the Commission itself for its approval. Both responses relied heavily upon section 17 of the Consumer Product Safety Commission Improvements Act of 1976—the provision incorporating preemption into the Federal Hazardous Substances Act. This was the measure the bicycle makers fought so hard for in Congress in the spring of 1975 when it became apparent the CPSC staff would not scrap the banning order and move the bicycle rules under the aegis of the CPSA. The Improvement Act, which became effective on 11 May 1976 (by no coincidence, also the effective day of the CPSC bicycle rules) preempted any *new or existing* state law, but only if it was designed to protect against the same risk of illness or injury unless the regulation was identical to its federal counterpart.⁹³

⁹¹ *Forester v. CPSC*, 559 F.2d 774, 788.

⁹² Letter from A. Fred DeLong to Mr. Joseph Fandey (CPSC), 4 July 1978, background file, CPSC Advisory Opinion No. 270 and 270-A, Freedom of Information Act access library, CPSC.

⁹³ U.S. Code Congressional and Administrative News, 94th Session (1976, Vol. 1): 90 Stat 503-511; pp. 993-96; pp. 1003-08.

Although Advisory Opinion 269 started off noting that “the Commission’s general policy is to have states and localities determine initially the preemptive effects of the Commission’s statutes and regulations,” the CPSC appeared to order preemption, ruling that “states are preempted from issuing non-identical braking or reflectivity requirements for sidewalk bicycles. Since the Commission’s regulation contains no such requirements, states are prohibited from issuing any, as well.”⁹⁴ However, the opinion was extremely ambiguous, probably intentionally. The CPSC acknowledged that the NCUTLO had specifically asked about the preemption of state laws requiring reflectors and brakes on small bicycles *when operated on the highway*. The CPSC explained that sidewalk bikes were exempted from these requirements “based on explicit findings that such requirements were not necessary to protect riders from an unreasonable risk of injury,” because these types of bicycles were “not meant for use after dark and on streets.” This implied that that any state laws governing highway use were, by their very nature, protecting against a different risk, even if the bicycles themselves were the same.

On the other, Advisory Opinion 270, the response to Fred DeLong, was clear and straightforward. Because the CPSC reflector regulations were meant to reduce the risks of injury from inadequate cyclist visibility to cars, but were not meant to reduce the risk of “obstacles in the road that may not be visible to a cyclist at night,” the Commission’s opinion was that “we believe that a state lighting requirement for bicycles ridden at night would not be preempted.”⁹⁵ Although not stated in the letter, the distinction between visibility to motor vehicles and the ability to spot roadway obstacles was consistent with CPSC findings going all the way back to the 1972 FDA Analysis of Bicycle Accident and Injuries report, which warned that the nighttime conspicuity requirements of BMA/6 were inadequate because they did not allow a motorist to rapidly identify a bicycle as a bicycle, and not as an indeterminate object in the roadway.

On 19 October attorneys for Schwinn and the BMA wrote a 19-page letter to the CPSC objecting that in Advisory Opinion 270 “the commission inexplicably responded by discussing a hypothetical proposition, namely whether a state provision dealt with a risk of

⁹⁴ Letter from Margaret A. Freeston (CPSC) to Edward F. Kearney (NUTCLO), 12 September 1978, (CPSC Advisory Opinion 269), Freedom of Information Act access library, CPSC.

⁹⁵ Letter from Margaret A. Freeston (CPSC) to A. Fred DeLong, 12 September 1978, (CPSC Advisory Opinion 207), CPSC Advisory Opinion No. 270 and 270-A, Freedom of Information Act access library, CPSC.

injury associated with an obstacle in the road.”⁹⁶ This was untrue. The CPSC letter stated that the Commission staff *itself* had come to the conclusion that lighting protects cyclists “against at least two risks of injury.” Again, this was consistent with the CPSC’s almost decade-long position that the risk of injury it sought to ameliorate was that resulting from the pre-CPSC (or pre-BMA/6/74)⁹⁷ reflector system’s inability identify a bicycle in outline. States continued to be free to address all other risks resulting from inadequate nighttime illumination.

The BMA/Schwinn letter never asserted that reflectors were as good as a headlight, only that both served the same purpose, that of making bicycles more visible to motorists. “Any bicycle light that would enable a bicyclist to see obstacles in the road ahead of him would likely utilize an extremely large light and heavy battery . . . most riders would find such a system unduly expensive, aesthetically displeasing and mechanically unsatisfactory.”⁹⁸ For once, Forester agreed, commenting on the makers’ concerns that “they might be required to provide lighting systems,” and that they would “probably double the cost of the bicycle.”⁹⁹ On the other hand Forester neglected to mention that the BMA’s now reactionary position had been made reasonable by his ongoing efforts to drive their customers off the road and put them out of business.

The BMA/Schwinn letter also complained that the CPSC should have stated that preemption would not pertain to a “use” requirement, but only to equipment requirements. This was a very weak argument. The CPSC simply had no jurisdiction over any aspect of a state’s use regulations, including defining what one was. The bicycle rules themselves stated that they were limited to regulating the condition in which a bicycle was offered for sale to a customer, or more generally, the condition in which a bicycle “enters the stream of commerce.”

In any case, the Schwinn-BMA letter was far-fetched, and probably moot. In the *Forester v. CPSC* decision, the circuit court had stated that “most states require use of headlights and rear reflectors when actually riding at night . . . the [CPSC] regulation is not inconsistent with these state statutes.” Amazingly, Schwinn and the BMA quoted this paragraph in their letter in a rather strained effort to support their argument that lights and

⁹⁶ Letter from Ronald King (attorney for BMA) and John R. F. Baer (attorney for Schwinn) to Susan B. King (CPSC) 19 October, 1978, background file, CPSC Advisory Opinion No. 270 and 270-A, Freedom of Information Act access library, CPSC.

⁹⁷ The 8 March 1974, third edition revision of BMA/6.

⁹⁸ Letter from King and Baer to Susan B. King 19 October, 1978, background file, CPSC Advisory Opinion No. 270 and 270-A, Freedom of Information Act access library, CPSC.

⁹⁹ John Forester, “American Cycling From the 1940’s as I Remember It”

reflectors addressed the same risk of harm, an unwise tactic as its plain language makes clear that the circuit court was reading the reflector rules with the assumption that state headlamp laws would not be preempted. Thus, even if the CPSC did admit that Schwinn and the BMA were right about the “same risk” argument, it could point to the court’s reasoning as justification that it would not approve preemption.

On 16 January 1979 the CPSC issued a revised Advisory Opinion 207-A. “While we are not withdrawing that opinion,” the Commission’s general counsel, Andrew Krulwich wrote, “we believe that further discussion of the question you raised is needed.”¹⁰⁰ It then followed this with an even broader finding than the one contained in its previous opinion:

Because the Commission’s regulation does not define how a consumer may or may not use a bicycle, the Commission believes that the Federal Hazardous Substances Act does not prohibit states or localities from issuing or enforcing a requirement that lighting be used on bicycles ridden at night.¹⁰¹

The CPSC revisited its bicycle reflectivity standards in 1996, and this time it was Forester who attempted to turn the “use/equipment” and “same risk” arguments to his advantage. He submitted a white paper for consideration by the CPSC’s “Bicycle Reflector Project” that acknowledged “any requirements that the CPSC may set must be applied up to the point of sale,” but that the states can “require different equipment to be used when any bicycle is operated at night.”¹⁰² (He also insisted the bicycle industry was arguing that the all-reflector system was adequate, which was not the case—the industry merely argued that it was the best practical *passive* system.)¹⁰³ This being the case, Forester argued that “the proper must produce two different effects of equal importance. It must get those bicycles used at night equipped with headlamp and rear reflector. It must also prevent those bicycles

¹⁰⁰ Letter from Andrew S. Krulwich (CPSC) to A. Fred DeLong, 16 January 1979 (CPSC Advisory Opinion 207-A), Freedom of Information Act access library, CPSC.

¹⁰¹ *Ibid.*

¹⁰² Log of Meeting: CPSC Bicycle Reflector Project Meeting, 13 March 1996, “Enclosure 6: Comments of John Forester, 1-2. This document can be found at www.cpsc.gov. Go to: FOIA library/ summaries of meetings between commission staff and the public/minutes for 1996/ Bicycle Reflector Project Meeting, March 13, 1996.

¹⁰³ Consumer Product Safety Commission: *Bicycle Reflector Project Safety Report: Final Report for ECOSA*. www.cpsc.gov/volstd/bike/BikeReport.pdf. Forester’s assertion that only a front headlight could enhance conspicuity in orthogonal approaches was disproven in testing for this report. Wheel reflectors were observed at an average distance of 139 feet, as opposed to the headlight’s 118 feet when at a displacement of 20 degrees from straight ahead. (p. 16).

not so equipped from being used at night.¹⁰⁴ While Forester agreed that “whether the type of their nighttime equipment actually tempts people to ride at night is dubious,” he nevertheless claimed that most inexperienced cyclists who did cycle at night believed the 10-reflector system was adequate, and for this reason wanted it repealed to actively discourage this category of users from riding at night.¹⁰⁵ However, he still advocated for a red rear reflector mandate, although this appeared to contradict his theory. Why the distinction? Forester wanted the “same harm” preemption created in CPSC Advisory Opinion 207-A: “the purpose of the required rear reflector is to reduce the frequency of nighttime car-bike collisions . . . therefore, no local authorities could require other or different reflectors at the time of sale.”¹⁰⁶ Apparently, “scary bikes” were a good idea, just as long as they didn’t result in a situation where local governments could inconvenience Forester’s performance cyclists. By now, he had clearly moved away from any pretense that he represented all cyclists: the only sensible policy answer for the problems posed by the great majority of cyclists was an active discouragement program. Where there used to be ten good riders, there were now 100 or 500 of indifferent to bad ability; but through wise governmental intervention there could, once again, be the ten.

The CPSC never reissued any of the four standards remanded by the *Forester v. CPSC* court, and the rest of the bicycle rules have remained largely unrevised, resulting in their obsolescence and irrelevance. Babson College professor Ross Petty, who has closely examined their safety impact, concluded in the 1980s and 90s that they had been ineffective in reducing bicycle accidents and injuries. The BMA disbanded in 1984, and the last of its former member firms, the Murray-Ohio Company, went out of business in 1988. In 1991, the Schwinn Bicycle Company fell into bankruptcy and was purchased by the Scott Sports Group, who acquired it only for the name. Scott itself disbanded in 2001 and Schwinn was sold to Pacific Cycles of Madison, Wisconsin. From that point on, all of its bicycles were made in China, and most were distributed and sold through department stores. The last American mass-production bicycle factory closed in 1991 and only very expensive high-end racing, touring and off-road machines are still made in America. (Even these firms contract with Asian makers for their lower priced models, those under \$2,000 dollars.) John Forester works as a consultant and lecturer, and in recent years has affiliated with a speaker’s bureau working with the Cato Institute.

¹⁰⁴ “CPSC Bicycle Reflector Project Meeting, Enclosure 6”: 4-5.

¹⁰⁵ *Ibid.*, 6-7.

¹⁰⁶ *Ibid.*, 7.