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CONSTITUTIONALITY OF MANDATORY MOTORCYCLE HELMET LEGISLATION

INTRODUCTION

The decade of the 1960's has witnessed a unique phenomenon—the Motorcycle Explosion. During these years, the motorcycle has been widely accepted as a means of economical transportation as well as exciting outdoor recreation. With this acceptance has come a vast proliferation of motorcycles in this country as evidenced by the increase in registrations from one-half million in 1960 to almost two million in 1967.¹ Unfortunately, this sharp increase in use has brought about a corresponding rise in motorcycle accidents and resulting injuries.² Due to the inherent vulnerability of the rider and the potential for high speed, motorcycle accidents result in a large number of deaths. The ratio of motorcycle fatalities to motorcycle registrations is approximately twice as great as the fatality-registration rate for automobiles.³ Head injury, particularly concussion, is the prime cause of motorcycle fatality.⁴

In response to the growing carnage on the nation's highways, Congress in 1966 authorized the Federal Government to initiate a major campaign to increase highway safety. Fundamental to this campaign was the Highway Safety Act⁵ which established a three year federal highway safety program and required the formation of similar programs on the state level. To encourage state participation, Congress provided that failure by any state to implement such an approved program by December 31, 1968, would terminate all federal funds for the program and reduce the state's federal

1. Motorcycle registrations in 1960 numbered 575,500. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1961, at 559 (82d ed. 1961). The number registered in 1967 was 1,953,000. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, at 553 (89th ed. 1968).

2. A study initiated at the request of the New York Department of Motor Vehicles stated in a memorandum to the legislature:

The number of accidents involving motorcycles is increasing rapidly. In fact, motorcycle accidents increased by 105% in 1965 as compared to 1964, while the total registrations of these vehicles increased by 83%. Fatalities increased by 63.6% and personal injury accidents by 100%.

MCKINNEY'S 1966 SESSION LAWS OF NEW YORK 2961-62 (1966).

3. The fatality rate for automobiles in 1967 was 5.3 deaths per 10,000 vehicle registrations. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1968, at 560 (89th ed. 1968). The motorcycle fatality rate for 1966 in Michigan was 12.8 deaths per 10,000 cycle registrations. Mich. State Police, Michigan Motorcycle and Motorscooter Data 1962-1966 (April 12, 1967).

4. "A summary of Department statistics indicates that 89.2% of the motorcycle accidents result in injury or death and that almost all fatalities occurring as a result of such accidents involve head injuries." MCKINNEY'S 1966 SESSION LAWS OF NEW YORK 2962 (1966), cited in *People v. Carmichael*, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee City Ct. 1968) and *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968).

5. Highway Safety Act of 1966, 23 U.S.C.A. § 401-404 (Supp. 1967).

highway appropriation by ten per cent. The National Highway Safety Bureau was charged with implementing the highway safety program.⁶ One of the Bureau's initial proposals was to make the wearing of protective helmets by motorcycle riders mandatory. This proposal was incorporated by Congress into its formulation of National Uniform Standards for Highway Safety Programs.⁷ The concern for safety in conjunction with the threatened loss of highway funds was evidently sufficient to induce state action on these recommendations. At present, thirty-four states have enacted statutes requiring that helmets be worn,⁸ and two states have laws that require that they be carried with the bike as equipment, but need not be worn.⁹

These helmet statutes have produced much litigation in the past two years challenging their constitutionality. The two recent cases of *People v. Carmichael*,¹⁰ upholding the validity of such a statute, and *American Motorcycle Association v. Davids*,¹¹ finding a similar statute unconstitutional, illustrate the conflicting results reached by the state courts. The questions raised in these recent challenges to the constitutionality of such statutes are whether this type of requirement is a valid exercise of the police power of

6. 15 U.S.C.A. § 1404 (Supp. 1967).

7. H.R. Doc. No. 138, 90th Cong., 1st Sess. 2-3 (1967) states: The program shall provide as a minimum that: each motorcycle operator wears an approved safety helmet . . . [e]ach motorcycle passenger wears an approved safety helmet. . .

8. ALA. CODE tit. 36, § 138 (Supp. 1967); ARIZ. REV. STAT. ANN. § 28-964 (Supp. 1968); COLO. REV. STAT. ANN. § 13-5 (Supp. 1968); CONN. GEN. STAT. ANN. § 14-289e (Supp. 1968); FLA. STAT. ANN. § 317.981 (Supp. 1968); GA. CODE ANN. § 68-1673 (1967); HAWAII REV. LAWS § 311-23 (Supp. 1967); IDAHO CODE ANN. § 49-761A (1967); ILL. ANN. STAT. ch. 95½, § 189c (Smith-Hurd Supp. 1967); IND. ANN. STAT. § 47-2246 (Supp. 1968); KAN. STAT. ANN. § 8-574b (Supp. 1967); KY. REV. STAT. ANN. § 189.285(2) (Supp. 1968); ME. REV. STAT. ANN. tit. 29, § 1371 (Supp. 1967); MASS. GEN. LAWS ANN. ch. 90, § 7 (Supp. 1968); MINN. STAT. ANN. § 169.974 subd. 4 (Supp. 1967); MO. ANN. STAT. § 302.020 (Supp. 1967); N.H. REV. STAT. ANN. § 263:29b (Supp. 1967); N.J. STAT. ANN. § 39:8-1 (Supp. 1968); N.M. STAT. ANN. § 64-18-55.1 (Supp. 1967); N.Y. VEH. & TRAF. LAW § 381 subd.6 (Supp. 1968); N.C. GEN. STAT. § 20-140.2 (Supp. 1967); N.D. CENT. CODE § 39-21-48 (Supp. 1967); OHIO REV. CODE ANN. § 4511.53 (Baldwin Supp. 1967); OKLA. STAT. ANN. tit. 47, § 40-105 (Supp. 1967); ORE. REV. STAT. § 483.443 (1967); PA. STAT. ANN. tit. 75, § 625.1 (Supp. 1968); R.I. GEN. LAWS ANN. § 31-10.1-4 (Supp. 1967); S.C. CODE ANN. § 46-631 (Supp. 1967); TENN. CODE ANN. § 59.944 (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 6701c-3 (Supp. 1967); VT. STAT. ANN. tit. 23, § 1256 (Supp. 1968); WASH. REV. CODE ANN. § 46.37.-1 (Supp. 1967); WIS. STAT. ANN. § 347.485 (Supp. 1968); NEB. LEG. BILL 798-7 (1967).

9. ARK. STAT. ANN. § 75-1703(2)a (Supp. 1967); MICH. STAT. ANN. § 9.2358 (Supp. 1968) as amended Pub. Act. No. 141 (June 2, 1968).

10. 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee Cty. Ct. 1968).

11. 9 Mich. App. 655, 158 N.W.2d 72 (Ct. App. 1968).

the state to protect the public welfare, as opposed to an unreasonable infringement of individual liberty and the right to the free use of one's property; and, whether the standards set in such statutes are too vague and indefinite to be enforceable. If either of the above challenges to this type of statute is valid, then fundamental rights are being denied by the states without due process of law as provided for in the ninth¹² and fourteenth amendments¹³ to the United States Constitution.

In analyzing the controversy presented by these statutes and cases, this Comment will consider the following questions: What are the traditional limits of the police power of the state; whether in this instance such limits have been exceeded; whether, under our system of constitutionally limited governmental power, there is not some fundamental point at which only the individual himself can decide what course of conduct he will follow in his own protection; and finally, whether individual conduct which affects no other person but the actor can be said to affect the public welfare.

The value of protective headgear to the individual rider or passenger, in case of an accident, is generally recognized. There is, nevertheless, some conflict as to whether a state can demand upon penal sanctions that helmets be worn. An ever widening range of human activity is becoming regulated by all levels of government as it becomes increasingly obvious that only government has the ability to effectively deal with the complex problems of modern living. The area of safety on the highways is eminently qualified for some degree of governmental control; in this instance, however, it may be that the traditional limits of the police power have been unjustifiably over-extended in an attempt to achieve a beneficial result.

Because the police power of a state is used to protect the public welfare, it is the least limitable of the powers of government.¹⁴ Such limits as apply to its exercise can be determined only in the context of the subject matter over which the power is being exercised.¹⁵ The police power of the state is the power vested in the legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with or with-

12. U.S. CONST. amend. IX provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

13. U.S. Const. amend. XIV, § 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

14. See cases cited at 16 AM. JUR. 2d *Constitutional Law* § 263 n.12 (1964).

15. *Panhandle Co. v. Highway Comm'n.*, 294 U.S. 613, 622 (1935); *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917); *Hadacheck v. Los Angeles*, 239 U.S. 394, 410 (1915); *Sligh v. Kirkwood*, 237 U.S. 52, 58-59 (1915).

out penalties, not repugnant to the Constitution, as they shall judge to provide the greatest welfare of the State.¹⁶ Regulation to promote the public welfare is not confined to the suppression of what is offensive, disorderly, or unsanitary, but extends to the protection of public safety, public health, public morals and the insuring to each individual an uninterrupted enjoyment of the rights and privileges conferred upon him by law.¹⁷ "Insofar as the police power is utilized by a State, the means employed to effect its exercise can be neither arbitrary nor oppressive, but must bear a real and substantial relation to an end which is public."¹⁸

The ancient maxim *sic utere tuo ut alienum non laedas* (so use your own that you do not injure that of another) has often been cited as one of the essential bases of the police power.¹⁹ In this regard, the protection of the public welfare through past applications of the police power had been limited to instances where one individual's conduct adversely affected others. The helmet statutes, if valid, represent an extension of the limits of the police power to include the regulation of an individual's conduct where he alone could be adversely affected.

HELMET STATUTES

An investigation of state highway safety laws indicates legislative concern with three basic areas of motorcycle safety: prescribing required conduct of the individual motorcyclist regarding helmets; setting of standards which the helmets must meet; and establishing the consequences for failure to comply. The conduct most frequently required is wearing a protective helmet while the motorcycle is in operation.²⁰ This provision usually applies to both the rider and passenger. Certain states have, however, qualified this requirement by making it applicable only to restricted licensee classes, for example, minor operators,²¹ or by

16. *Treigle v. Acme Homestead Ass'n.*, 297 U.S. 189, 197 (1936); *Liggett Co. v. Baldrige*, 278 U.S. 105, 111-12 (1928); *McKinley v. Reilly*, 96 Ariz. 176, 393 P.2d 268, 270 (1964); *Elfbrandt v. Russell*, 94 Ariz. 1, 381 P.2d 554, 559 (1963).

17. *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429 (1935); *Nebbia v. New York*, 291 U.S. 502 (1934); *Sligh v. Kirkwood*, 237 U.S. 52, 58-59 (1915); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306, 318-19 (1905).

18. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 39, 88th Cong., 1st Sess. 1090 (1964).

19. See cases cited at 16 AM. JUR. 2d *Constitutional Law* § 267 n.10 (1964).

20. Statutes cited note 8 *supra*.

21. N.M. STAT. ANN. § 64-18-55.1 (Supp. 1967).

exempting its application when the motorcyclist is riding on private trails²² or in a police permitted parade or exhibition.²³ Two states have chosen to approach the problem by requiring that the motorcycle be equipped with helmets which need not be worn.²⁴ Still other statutes require that ownership of a protective helmet be proved in order to obtain a motorcycle operator's license²⁵ and provide that any motorcycle rider may be stopped and detained by law enforcement personnel for the purpose of determining whether his helmet meets minimum standards of safety.²⁶

Formulating these helmet safety standards is the second area on which the legislatures have focused. Legislation has taken two approaches; the first is aimed at the manufacturers of motorcycle helmets and the second at the individual rider. State regulations setting minimum standards for helmets, when applied to dealers or manufacturers, appear to pose no constitutional problems. It has always been within the police powers of the state to tell one individual that he must perform certain requirements or follow specified standards where his conduct affects the safety or welfare of another individual.²⁷ In this situation, the conduct of manufacturers and dealers clearly affects the safety of the motorcyclist who relies on the helmet to protect his life. This approach is similar to that by which states have regulated industrial safety standards for the protection of the workers.²⁸ State regulation of automobile safety devices such as lights, horns, and shatter-proof windshields is another example of requiring a manufacturer to conform to stated standards for the protection of the public.²⁹

The second approach which has been used is the setting of standards for helmets which apply to the individual rider. Such standards may be established either directly by the legislature in a statute or by an administrative agency in a regulation. Unfortunately, only a very few states set down in a statute addressed to

22. OKLA. STAT. ANN. tit. 47, § 40-105 (Supp. 1967).

23. N.Y. VEH. & TRAF. LAW § 381 subd. 6 (Supp. 1968); N.D. CENT. CODE § 39-21-48 (Supp. 1967).

24. ARK. STAT. ANN. § 75-1703(2)a (Supp. 1967); MICH. STAT. ANN. § 9.2358 (Supp. 1968) *as amended* Pub. Act No. 141 (June 12, 1968). The original Michigan enactment required wearing of a helmet. The present form was adopted after the *American Motorcycle Ass'n.* case was decided.

25. ALA. CODE tit. 36, § 138 (Supp. 1967).

26. TEX. REV. CIV. STAT. ANN. art. 6701c-3 (Supp. 1967).

27. *DeCarlo v. Jefferson County Board of Health*, 6 Div. 628, 150 So. 2d 374, 384 (Ala. 1963); *In re Adoption of Rules and Regulations Relative to Driver Training Schools*, 165 N.E.2d 834, 837 (Ohio C.P. Franklin Cty. 1958); *Burks v. Poppy Const. Co.*, 20 Cal. Rptr. 609, 370 P.2d 313, 317 (1962).

28. *W.H.H. Chamberlin, Inc. v. Andrews*, 159 Misc. 124, 286 N.Y.S. 242, *modified*, 271 N.Y. 1, 2 N.E.2d 22, *aff'd*, 299 U.S. 515, *rehearing denied*, 301 U.S. 714 (1936). *See, e.g.*, N.Y. CONST. art. 1, § 18; N.Y. LABOR LAW § 200 (1965); N.Y. LABOR LAW § 376 (1965); PA. STAT. ANN. tit. 43, § 25-2 (Supp. 1967).

29. *See, e.g.*, N.Y. VEH. & TRAF. LAW §§ 375-384 (Supp. 1968); PA. STAT. ANN. tit. 75, §§ 801-847 (Supp. 1967).

the motorcyclist complete specifications and standards that the helmet is required to meet.³⁰ This would be the most desirable method since it adequately meets the problem of giving the affected individuals notice of what is expected of them. Some states have statutes enumerating isolated specifications such as the helmet's having a neck or chin strap,³¹ being reflectorized on the sides,³² or bearing an identification of the make and model designation.³³

The approach more frequently adopted in the statutes requires that helmets either meet the standards established by, or are of a type approved by, a designated administrative agency or official.³⁴ Of the twenty-seven states that have adopted this administrative approach, only nine have adopted the additional requirement that the list of specifications established or helmets approved be published and made available to the motorcycling public.³⁵ Other

30. ALA. CODE tit. 36, § 139 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 40-105 (Supp. 1967).

31. ALA. CODE tit. 36, § 139 (Supp. 1967); N.H. REV. STAT. ANN. § 263:29b (Supp. 1967); N.Y. VEH. & TRAF. LAW § 381 subd. 6 (Supp. 1968); OHIO REV. CODE ANN. § 4511.53 (Baldwin Supp. 1967); OKLA. STAT. ANN. tit. 47, § 40-105 (Supp. 1967); S.C. CODE ANN. § 46-631 (Supp. 1967); VT. STAT. ANN. tit. 23, § 1256 (Supp. 1968); WASH. REV. CODE ANN. § 46.37-1 (Supp. 1967).

32. N.Y. VEH. & TRAF. LAW § 381 subd. 6 (Supp. 1968); R.I. GEN. LAWS ANN. § 31-10.1-4 (Supp. 1967); VT. STAT. ANN. tit. 23, § 1256 (Supp. 1968).

33. ALA. CODE tit. 36, § 139 (Supp. 1967).

34. ARK. STAT. ANN. § 75-1703(2) (Supp. 1967); CONN. GEN. STAT. ANN. § 14-289e (Supp. 1968); GA. CODE ANN. § 68-1673 (1967); IDAHO CODE ANN. § 49-761A (1967); ILL. ANN. STAT. ch. 95½, § 1189c (Smith-Hurd Supp. 1967); IND. ANN. STAT. § 47-2246 (Supp. 1968); KAN. STAT. ANN. § 8-574b (Supp. 1967); KY. REV. STAT. ANN. § 189; 285(3) (Supp. 1968); ME. REV. STAT. ANN. tit. 29, § 1371 (Supp. 1967); MASS. GEN. LAWS ANN. ch. 90, § 7 (Supp. 1968); MICH. STAT. ANN. § 9.2358 (Supp. 1968); MINN. STAT. ANN. § 169.974 subd. 4 (Supp. 1967); MO. ANN. STAT. § 302.020 (Supp. 1967); N.H. REV. STAT. ANN. § 263:29b (Supp. 1967); N.M. STAT. ANN. § 64-18-55.1 (Supp. 1967); N.Y. VEH. & TRAF. LAW § 381 subd. 6 (Supp. 1968); N.C. GEN. STAT. § 20-140.2 (Supp. 1967); N.D. CENT. CODE § 39-21-48 (Supp. 1967); OHIO REV. CODE ANN. § 4511.53 (Baldwin Supp. 1967); ORE. REV. STAT. § 483.443 (1967); PA. STAT. ANN. tit. 75, § 625.1 (Supp. 1968); R.I. GEN. LAWS ANN. § 31-10.1-4 (Supp. 1967); S.C. CODE ANN. § 46-631 (Supp. 1967); TENN. CODE ANN. § 59.944 (Supp. 1967); VT. STAT. ANN. tit. 23, § 1256 (Supp. 1968); WASH. REV. CODE ANN. § 46.37.-1 (Supp. 1967); WIS. STAT. ANN. § 347.485 (Supp. 1968).

35. CONN. GEN. STAT. ANN. § 14-289e (Supp. 1968); IDAHO CODE ANN. § 49-761A (1967); KY. REV. STAT. ANN. § 189.285(3) (Supp. 1968); N.H. REV. STAT. ANN. § 263:29b (Supp. 1967); N.Y. VEH. & TRAF. LAW § 381 subd. 6 (Supp. 1968); OHIO REV. CODE ANN. § 4511.53 (Baldwin Supp. 1968); S.C. CODE ANN. § 46-631 (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 6701c-3 (Supp. 1967); WASH. REV. CODE ANN. § 46.37.-1 (Supp. 1967).

statutes purport to adopt Federal Government standards,³⁶ either as set by the Department of Transportation or as stated in the Highway Safety Act.³⁷ However, since there really are no standards set down in that act,³⁸ this type of provision fails to inform the rider of what type helmet is expected.³⁹ One statute requires that the helmet conform to the federal standards "and to the extent there are no such federal standards, to the safety standards promulgated by the United States of America Standards Institute."⁴⁰

The third area of legislation is establishing the consequences for failure to comply with the provisions of the statutes. All of these laws impose penal sanctions, but in most states violation is punishable only as a summary offense for which a specified fine may be levied. Five states consider violation of the statute a misdemeanor.⁴¹ One state deems the failure of an individual to take steps to protect himself from injury so serious an infraction that it bears a penalty of up to 180 days in jail or at hard labor.⁴² Three states have provided that failure to comply with the helmet requirement is not to be considered negligence or contributory negligence per se and that violation of the requirement is not to be used as evidence in any resulting civil action.⁴³

ARGUMENTS SUPPORTING STATUTES

A. *Public Welfare Threatened*

The arguments favoring these statutes are based on the contention that the public welfare is endangered by the unhelmeted rider. Courts upholding helmet statutes have relied on one or a combination of propositions based on this theory. In *State v. Lombardi*,⁴⁴ the court suggests that the injured rider will become a burden on society and holds that the legislature is not "powerless to prohibit individuals from pursuing a course of conduct which could conceivably result in their becoming public charges."⁴⁵ In

36. FLA. STAT. ANN. § 317.981 (Supp. 1968); ILL. ANN. STAT. ch. 95½, § 189c (Smith-Hurd Supp. 1967); ORE. REV. STAT. § 483.443 (1967).

37. 23 U.S.C.A. §§ 401-404 (Supp. 1967).

38. *Id.* § 404(b)(2) reads in part: The National Highway Safety Advisory Committee . . . is authorized . . . to review, prior to issuance, standards proposed to be issued. . . .

39. See discussion p. 114 accompanying note 89 *infra*.

40. ORE. REV. STAT. § 483.443 (1967). The U.S.A.S.I. Standard Z-90.1 is not a testing operation. Helmets can meet the standard specified, but cannot be Z-90 approved. The standard requires a double impact procedure with both blows applied at the same location of the helmet.

41. ALA. CODE tit. 36, § 141 (Supp. 1967); KAN. STAT. ANN. § 8-574c (Supp. 1967); N.C. GEN. STAT. § 20-140.2 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 40-105 (Supp. 1967); TEX. REV. CIV. STAT. ANN. art. 6701c-3 (Supp. 1967).

42. ALA. CODE tit. 36, § 141 (Supp. 1967).

43. GA. CODE ANN. § 68-1673 (1967); N.C. GEN. STAT. § 20-140.2 (Supp. 1967); OHIO REV. CODE ANN. § 4511.53 (Baldwin Supp. 1967).

44. 241 A.2d 625 (R.I. 1968).

45. *Id.* at 627; *accord* *People v. Smallwood* (N.Y. Monroe Cty. Ct.

addition to being a potential case for public economic assistance, the disabled rider will be unable to add his fair share to the productivity of society. On this point, the court in the *Carmichael* case⁴⁶ stated: "It is to the interest of the state to have strong, robust, healthy citizens capable of self-support, of bearing arms, and of adding to the resources of the country."⁴⁷

It is suggested in *Bisenius v. Karns*,⁴⁸ a Wisconsin helmet law case, that "[t]he state has an interest in the health and welfare of each of its citizens, no matter how reckless he may be."⁴⁹ The courts relying on this proposition cite the reasoning of the United States Supreme Court in *Holden v. Hardy*,⁵⁰ a case upholding the validity of a maximum work hour law for miners, which states: "The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the state must suffer."⁵¹

Similar reasoning has been used to justify common law and statutory attempts to prohibit suicide.⁵² Other courts find the public welfare threatened by the burden that the injured rider places on his family and his employer.⁵³ Finally, the courts hold that the increased severity of injury due to failure to wear helmets will be reflected in rising insurance rates for all motorists.⁵⁴

B. Direct Benefit to Others

In contrast to those benefits accruing to the individual cyclist and thus to the whole of society, some courts have found in helmet statutes a legislative intent to confer direct benefits to certain classes of citizens, specifically, highway users. Since the rider is in

April 25, 1968); *People v. Newhouse*, 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (Ithaca City Ct. 1968); *Bisensius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968).

46. *People v. Carmichael*, 56 Misc. 2d 388, N.Y.S.2d 931 (Genesee Cty. Ct. 1968).

47. *Id.* at 391, 288 N.Y.S.2d at 935.

48. No. 124423 (Wis. Cir. Ct. May 14, 1968).

49. *Id.* at 3; accord *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968).

50. 169 U.S. 366 (1897).

51. *Id.* at 397.

52. See, e.g., WASH. REV. CODE ANN. § 9.80.020 (1961); *North Carolina v. Willis*, 255 N.C. 473, 121 S.E.2d 854 (1961). For a general discussion see Schulman, *Suicide and Suicide Prevention: A Legal Analysis*, 54 A.B.A.J. 855 (1968).

53. *City of Hutchison v. Silvey*, No. CR 8081 (Kan. Dist. Ct. Dec. 11, 1967); *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968); *Bisensius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968).

54. *Bisensius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968).

an exposed position, it is often suggested by the courts that flying stones or bugs might strike the unhelmeted rider's head causing loss of control thereby endangering pedestrians or other motorists.⁵⁵ Since some states require reflectorization, it is also contended that wearing a helmet makes the rider more visible to other highway users and thereby less of a menace to them.⁵⁶ Finally, a helmet requirement is said to directly protect motorists who might become involved in auto-motorcycle accidents from being charged with negligent homicide.⁵⁷

C. *Power to Control Use of Highways*

The position that the use of the public highways is a privilege not a natural right is a third justification for the helmet laws as a valid exercise of the state's police power.⁵⁸ Even though the use of the highways may be only a conditional privilege subject to state control, the state cannot exercise this power arbitrarily.⁵⁹ The legislature must still determine that the public welfare is endangered and must reasonably exercise the police powers to meet that public need.⁶⁰ The mounting death toll on the highways, probably in part due to an increase in cycle use, is cited as a reason for legislative action.⁶¹ Such action is needed, the argument

55. *People v. Schmidt*, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 292 (Erie Cty. Ct. 1967); *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968); *People v. Bielmeyer*, 54 Misc. 2d 466, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967); *People v. Newhouse*, 55 Misc. 2d 1064, 287 N.Y.S.2d 713, 715 (Ithaca City Ct. 1968); *State v. Lombardi*, 241 A.2d 625, 627 (R.I. 1968); *Bisensius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968).

56. *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968).

57. *Brief for Appellee at 8, American Motorcycle Ass'n. v. Davids*, 9 Mich. App. 655, 158 N.W.2d 72 (Ct. App. 1968).

58. *City of Hutchison v. Silvey*, No. CR 8081 (Kan. Dist. Ct. Dec. 11, 1967); *Commonwealth v. Howie*, Mass., 238 N.E.2d 373, 374 (1968); *State v. Edwards*, No. 582370 (Minn. Minneapolis Mun. Ct. Aug. 10, 1968); *People v. Schmidt*, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 293 (Erie Cty. Ct. 1967); *People v. Bielmeyer*, 54 Misc. 2d 466, 283 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967); *Bisensius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968).

59. *See Schechter v. Killingsworth*, 93 Ariz. 273, 380 P.2d 136 (1963); *Wall v. King*, 206 F.2d 878 (1953), *cert. denied*, 346 U.S. 915 (1953); *Berberian v. Lussier*, 139 A.2d 869 (R.I. 1958). *See also State v. Moseng*, 254 Minn. 263, 95 N.W.2d 6 (1959); E. FISHER, *VEHICLE TRAFFIC LAW* 71-74 (1961).

60. *See cases cited at 16 AM. JUR. 2d Constitutional Law* § 281 n.6 (1964).

61. *City of Hutchison v. Silvey*, No. CR 8081 (Kan. Dist. Ct. Dec. 11, 1967); *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968); *People v. Carmichael*, 56 Misc. 2d 388, 288 N.Y.S.2d 931, 935 (Genesee Cty. Ct. 1968); *People v. Schmidt*, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 292 (Erie Cty. Ct. 1967); *People v. Bielmeyer*, 54 Misc. 2d 466, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967); *Bisensius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968). *See generally* MCKINNEY'S 1966 SESSION LAWS OF NEW YORK 2961-62 (1966).

Total highway deaths rose from 38,000 in 1960 to 53,000 in 1966. U.S. BUREAU OF CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1968*, at 57 (89th ed. 1968).

continues, because the public in general has a tendency to minimize the danger involved in the use of any motor vehicle (the "it can't happen to me" attitude is all too prevalent in American today).⁶² Thus the courts feel that helmet statutes are valid since the legislatures, as guardians of the public interest, must act to lessen the severity of injury to even the foolhardy who otherwise would not act to protect themselves.⁶³ Considering the large proportion of *automobile* injuries which involve cranial damage, would it not seem logical that states also require auto drivers to wear protective helmets? No state, however, has imposed a penalty for an auto driver's failing to wear a helmet.⁶⁴

D. *Equipment Regulation*

The final contention favoring helmet laws sees them as simply equipment regulations, similar to those requiring seat belts and other safety devices, therefore no problem of individual liberty is involved.⁶⁵ While, however, nearly every state requires that new automobiles be equipped with seat belts,⁶⁶ no state has gone so far as to demand upon penal sanctions that they must be worn.⁶⁷ Requiring a manufacturer to equip the vehicles he produces with devices protective of the general motoring public is a traditionally valid exercise of the police power.⁶⁸ This requirement is substantially different from requiring an individual to do something

62. See *City of Hutchison v. Silvey*, No. CR 8081 (Kan. Dist. Ct. Dec. 11, 1967); Note, *Automobile Safety: A Diagnosis of an Epidemic*, 23 WASH. & LEE L. REV. 327 (1966).

63. *People v. Carmichael*, 56 Misc. 2d 388, 288 N.Y.S.2d 931, 936 (Genesee Cty. Ct. 1968); *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968).

64. See *State v. Eitel*, No. 68M-7013 (Fla. Magis. Ct. Palm Beach Cty. Aug. 27, 1968).

65. *City of Hutchison v. Silvey*, No. CR 8081 (Kan. Dist. Ct. Dec. 11, 1967). See also Defense Research Inst., *The Seat Belt Defense* (1968); American Seat Belt Council Inc., *Chronological History of Automobile Seat Belts* (1964).

A recent New York decision dismissing a helmet prosecution was based on the view that the statute was merely an equipment regulation. The defendant, a non-resident motorcyclist, had complied with the equipment and registration requirements of his state which had no mandatory helmet statute. The court, therefore, refused to apply the New York requirement. *People v. Driscoll*, 56 Misc. 2d 220, 288 N.Y.S.2d 158 (Nassau Cty. Dist. Ct. 1968).

66. See, e.g., CAL. VEHICLE CODE § 27309 (Supp. 1966); N.Y. VEH. & TRAF. LAW § 383 (Supp. 1968); WIS. STAT. ANN. § 347.48 (Supp. 1967).

67. See *State v. Babbs*, No. 80-330 (Fla. Martin Cty. Ct. Sept. 5, 1968); *State v. Eitel*, No. 68M-7013 (Fla. Magis. Ct. Palm Beach Cty. Aug. 27, 1968); *City of Seattle v. Zektzer* (Wash. Seattle Mun. Ct. 1967).

68. Statutes cited note 29 *supra*.

protective of his welfare alone. This distinction, it is suggested, is crucial and is the basis of the counter argument that the helmet laws are unconstitutional.

ARGUMENTS OPPOSING STATUTES

A. *Infringement of Individual Liberty*

The central argument challenges such statute's constitutionality on the grounds that only the individual and not the public welfare is endangered. Hence, the state should not invoke its police powers.⁶⁹ Is this not a restatement of one of the fundamental principles of democracy that the individual is to be the master of of his own fate? The court in *City of Seattle v. Zektzer*,⁷⁰ a recent Washington helmet case, held that:

Freedom of choice, if that choice does not affect the public welfare, includes the right to make what the majority believes to be the wrong or unintelligent choice, as well as the right or intelligent choice. For if the majority can set itself up to judge, in matters of individual welfare, between right and wrong, and enforce those judgments with criminal sanctions, then all areas of personal liberty will be jeopardized.⁷¹

Similarly, the court in *American Motorcycle Association v. Davids*⁷² claimed that to allow this type of regulation is to open the door to an unlimited benevolent paternalism of government which would surely be inimical to our democratic way of life and our constitutionally protected liberties.⁷³

In answer to the position that the public welfare is affected when a disabled individual is not able to contribute his share of

69. *State v. Babbs*, No. 80-330 (Fla. Martin Cty. Ct. Sept. 5, 1968); *State v. Eitel*, No. 68M-7013 (Fla. Magis Ct. Palm Beach Cty. Aug. 27, 1968); *Everhardt v. City of New Orleans*, 208 So. 2d 423 (La. Ct. App. 1968); *American Motorcycle Ass'n. v. Davids*, 9 Mich. App. 655, 158 N.W.2d 72 (Ct. App. 1968); *City of Seattle v. Zektzer* (Wash. Seattle Mun. Ct. 1967); *Op. Att'y. Gen., N.M.*, No. 66-15 (Feb. 1, 1966).

70. *Seattle Mun. Ct. Wash.* 1967.

71. *Id.* at 5. The court also quotes the following:

[T]he police power does not undertake to protect the individual against his own acts, partly because that would involve an inquisitorial control over private life and conduct both intolerable and unenforceable, partly because the police power ought not and is not intended to be a substitute for individual self-control and responsibility but finds its proper sphere in guarding against evils and dangers beyond the control of him whom they threaten. The right to choose one course of action even to the extent of incurring risks, where others are not concerned, is a part of individual liberty. . . .

E. FREUND, *THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* § 155 (1904).

72. 9 Mich. App. 655, 158 N.W.2d 72 (Ct. App. 1968).

73. 158 N.W.2d at 75; *accord*, *State v. Babbs*, No. 80-330 (Fla. Martin Cty. Ct. Sept. 5, 1968); *State v. Eitel*, No. 68M-7013 (Fla. Magis Ct. Palm Beach Cty. Aug. 27, 1968).

Such paternalism of government would be acceptable if limited to minors since the State has traditionally fulfilled the role of *parens patriae*.

productivity to society, it is argued that the state exists for the people and not vice versa.⁷⁴ The United States Supreme Court responded to the productivity argument in *Lochner v. New York*,⁷⁵ a case in which a regulation setting maximum work hours for bakers was found to be an unconstitutional exercise of police power:

It is also urged, pursuing the same line of argument that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power.⁷⁶

Two areas in which legislatures have apparently acted to protect the individual from himself are in labor laws setting maximum working hours for employees and in medical vaccination laws. The maximum working hour laws in dangerous industries, such as mining or smelting, have been suggested as a use of the police power to protect the individual rather than the public welfare analogous to the helmet laws.⁷⁷ While such labor statutes are addressed to both the employer and employee, the sanctions involved there have been applied only against employers.⁷⁸ Regulating individual, that is, the employer's conduct by such labor statutes is clearly distinguishable from the type of regulation sought to be imposed by helmet laws. The labor statutes involved the governing of individual conduct for the protection of the welfare of others, in this case, employees, which is precisely the purpose of the police power. The helmet laws, on the other hand, involve regulation of the individual for his own protection. Another analogy suggested in support of the mandatory helmet laws is the valid exercise of the police powers

74. See Declaration of Independence (July 4, 1776).

75. 198 U.S. 45 (1905).

76. *Id.* at 60.

77. *People v. Smallwood* (N.Y. Monroe Cty. Ct. April 25, 1968); *Bisenius v. Karns*, No. 124423 (Wis. Cir. Ct. May 14, 1968). See *Holden v. Hardy*, 169 U.S. 366 (1898); *In re Martin* 157 Cal. 51, 106 P. 235 (1910); *State v. Safeway Stores*, 106 Mont. 182, 76 P.2d 81 (1938); *Long Island R.R. v. New York Dep't. of Labor*, 256 N.Y. 498, 177 N.E. 17 (1931). *Contra*, *Lochner v. New York*, 198 U.S. 45 (1905); *In re Morgan*, 26 Colo. 415, 58 P. 1071 (1899); *State v. Henry*, 37 N.M. 536, 25 P.2d 204 (1933).

78. *American Motorcycle Ass'n. v. Davids*, 9 Mich. App. 655, 158 N.W. 2d 72, 76 (Ct. App. 1968); *Martinez v. Johnson*, 61 Nev. 125, 119 P.2d 880 (1942); *State v. Thompson*, 15 Wyo. 136, 87 P. 433 (1906).

to require compulsory vaccination.⁷⁹ However, that use of police power has been distinguished by the fact that the public health is sought to be protected by preventing spread of disease, and not just that of the individual who may be compelled against his wishes to submit to such treatment.⁸⁰

B. *Legislative Intent Solely to Protect Rider*

Courts which have struck down helmet laws find a clear and single legislative purpose in these statutes: to afford the rider an added degree of protection in case of mishaps. This view tends to deny that such statutes act to directly benefit other users of the highways. *State v. Babbs*⁸¹ suggests that the problem of loss of control due to flying stones or bugs was not intended to be met by these laws:

It is said that the wearing of a mask and helmet might well prevent a stone or bug from hitting a cyclist in the face, causing him to lose control of his cycle, swerve into the oncoming traffic lane and cause a grievous accident. This Court is of the opinion that to uphold the statute under such reasoning would torture logic beyond its limits.⁸²

In searching for legislative intent, Courts have no doubt realized that the goal of protecting the public could be achieved without helmet statutes. Requiring all motorcycles to be equipped with windshields would probably protect the rider from flying objects more effectively and with less infringement of personal liberty than the helmet requirement. Where a state is faced with choosing between two alternative methods of accomplishing a valid legislative purpose, in this case the loss of control problem, it must select the course that least restricts fundamental personal liberties.⁸³

Similar reasoning has been raised in answer to the contention

79. See *Zucht v. King*, 260 U.S. 174 (1922); *Daniel v. Putnam County*, 113 Ga. 570, 38 S.E. 980 (1901); *Stull v. Reber*, 215 Pa. 156, 64 A. 419 (1906).

80. *Everhardt v. City of New Orleans*, 208 So. 2d 423, 426 (La. Ct. App. 1968).

81. No. 80-330 (Fla. Martin Cty. Ct. Sept. 5, 1968).

82. *Id.* at 2, *accord*, *State v. Eitel*, No. 68M-7013 (Fla. Magis. Ct. Palm Beach Cty. Aug. 27, 1968); *American Motorcycle Ass'n. v. Davids*, 9 Mich. App. 655, 158 N.W.2d 72 (Ct. App. 1968).

83. On this point, several helmet cases cite the language used by the United States Supreme Court in *Shelton v. Tucker*, 364 U.S. 479, 488 (1960): even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

That decision struck down a statute requiring teachers to list every organization, of any sort, to which they belong. It was felt that this was too drastic a means to accomplish the goal of a loyal teacher corps since loyalty oaths were valid for this purpose.

that reflectorized helmets make the rider more visible on the highway. If improved visibility is the desired goal of the legislature, such a result could be more legitimately accomplished by requiring that reflectorized markings be worn, but not necessarily on a helmet. That the purpose of these statutes is clearly and simply restricted to protection the rider is also urged to negate the idea that their purpose is to protect other motorists from charges of criminal negligence or from increased insurance costs.⁸⁴

C. *Detrimental Effect of Helmet*

The Court in *Everhardt v. City of New Orleans*⁸⁵ raises another point to invalidate a mandatory helmet law. Rather than being beneficial, it is contended that the wearing of a crash helmet tends to impair the rider's vision and hearing. This impairment makes the rider less aware of what is occurring around him and, therefore, more of a menace to others on the highways.⁸⁶

D. *Statutes Too Vague and Indefinite to be Enforced*

The final argument posed in opposition to helmet laws is that the statutory standards are too vague and indefinite to inform the cyclist of what is required of him.⁸⁷ It must be remembered that these statutes are penal in nature and must be strictly construed. If it can, therefore, be shown that the standards are not sufficiently clear or available to the motorcyclist, then conviction for violation of such a statute would constitute deprivation of liberty without due process of law.⁸⁸ The statutes that provide definitive helmet specifications are obviously not subject to such a challenge. It would appear just as obvious that those statutes which purport to take as their standards those of the Highway Safety Act are com-

84. *City of Seattle v. Zektzer* (Wash. Seattle Mun. Ct. 1967).

85. 208 So. 2d 423 (La. Ct. App. 1968).

86. *Id.* at 427-28.

87. *State v. Babbs*, No. 80-330 (Fla. Martin Cty. Ct. Sept 5, 1968); *State v. Eitel*, No. 68M-7013 (Fla. Magis. Ct. Palm Beach Cty. Aug. 27, 1968).

88. U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . .

"The effect of the clause entitling an accused to know the nature and cause of the accusation against him commences with the statutes fixing or declaring offenses. It adopts the general rule of the common law that such statutes are not to be construed to embrace offenses which are not within their intention and terms." THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. Doc. No. 39, 88th Cong., 1st Sess. 1004-05 (1964). See *United States v. L. Cohen Grocery Co.*, 264 F. 218 (E.D. Mo. 1920), *aff'd*, 255 U.S. 81 (1921).

pletely open to such a challenge; for, as was pointed out earlier, that act established a general program of highway safety but set no specific standards at all.⁸⁹ The usual provision is, however, to leave the standard setting to the administrative agency concerned with highway safety on the state level.⁹⁰ This statutory approach will meet the requirements of clarity and definiteness only if the administrative regulations establish complete and specific standards which are made available to motorcyclists.

CONCLUSION

Traditionally, the police powers of the state have only been applied when the public welfare was endangered. State exercise of these powers to regulate an individual's conduct when he alone is threatened is, at the least, unusual. If the legislature is allowed to usurp what is essentially a matter of individual concern, and if this usurpation is condoned by the courts would not a dangerous precedent be set thereby?

The traditional limits of the police power allow the state to regulate only that conduct of an individual which adversely affects others. These limits recognize that individual conduct which affects no other person but the actor cannot be said to endanger the public welfare, health, safety or morals and, therefore, such conduct is not properly regulated by the State under the police powers. Since the wearing or not wearing of a helmet constitutes conduct affecting only the individual motorcyclist, it is submitted that the police powers cannot validly be invoked to demand that helmets be worn. It is further urged that application of the police powers in this context is not just invalid but unconstitutional, since an individual has a fundamental right to determine for himself whether or not he wishes to act to protect himself—so long as he alone is endangered.

The same result, protection of the motorcyclist by wearing a helmet, could be accomplished by a more traditional use of the police power. Requiring motorcycle manufacturers and dealers to include and sell, as original equipment with the motorcycle, an approved helmet for the rider and any passenger, is an acceptable approach to the problem. Regulation of the manufacturer's conduct would be protective of the public welfare by providing the motorcyclist with a means to increase his safety. This approach is similar to various seat belt enactments and does not involve any infringement of individual liberty. While this method would not guarantee that the motorcyclist would wear his helmet, it would at least insure his having an opportunity to decide for himself whether or not he will act to protect himself.

BRUCE I. KOGAN

89. 23 U.S.C.A. § 404(b) (2) (Supp. 1967).

90. Statutes cited note 34 *supra*.