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NOTES

CONSTITUTIONAL LAW—POLICE POWER—Michigan Statute Requiring Motorcyclists To Wear Protective Helmets Held Unconstitutional

"They that can give up essential liberty to obtain a little safety deserve neither liberty nor safety."

—Benjamin Franklin

"When asked what he would take to let himself receive a blow on the head, he said, 'A helmet.' "

—Diogenes Laertius

The burgeoning use of motorcycles in the United States[1] has given rise to a great problem of safety. The fatality rate among motorcyclists is substantially higher than the rate for the drivers of all other motor vehicles, with head injuries the most frequent cause of death.[2] In response to this situation, the legislatures of at least thirty-four states have passed special laws regarding motorcycle safety; of these states, thirty have regulations that require the wearing of helmets.[3] These helmet regulations have given rise to a great deal of controversy, and the constitutionality of such statutes has been challenged on the ground that they unduly restrict the individual cyclist's freedom without benefiting the community.

A recent Michigan case, *American Motorcycle Association v. Davids*,[4] confronted the issue directly. In a proceeding instituted by the Association, the Michigan court of appeals held unconstitutional a statute which required a person operating or riding on a motorcycle to wear a crash helmet of a type approved by the department of state police.[5] The decision was based primarily on a finding that the statute was intended only for the protection of the individual motorcyclist—not for the safety and well-being of the general public

1. CYCLE WORLD, July 1968, at 50, says that motorcycle registrations in 1967 increased 43,800 from the previous year.

2. *See* American Motorcycle Assn. v. Davids, 158 N.W.2d 72, 75 n.9 (1968), where the court quotes a Michigan state police report for the period 1962-1966 showing a mortality rate of 10.6 for 10,000 registrations of motorcycles, as compared with 5.2 per 10,000 for all vehicles in the same period.

3. CYCLE WORLD, July 1968, at 50. Among the states which have laws requiring helmets are: Arkansas, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, and Texas. These helmet requirements appear to have been effective, for despite increased cycle use, motorcycle deaths in 1967 in the thirty states that had such requirements decreased as much as 50% (in New York), while California, which leads the nation in motorcycle registrations but has no protective helmet law, saw a 9% increase in motorcycle fatalities.

4. 158 N.W.2d 72 (1968).

5. MICH. STAT. ANN. § 9.2358(d) (Cum. Supp. 1968), *amending* MICH. COMP. LAWS § 257.658(d) (1948).

—and that it thus went beyond the permissible scope of the state's police power.

The Michigan decision is representative of the initial reaction by various courts to such statutes. In early 1967, two New York cases held that the New York law requiring the wearing of helmets[6] was unconstitutional. In *People v. Smallwood,*[7] a local level trial court held that such a statute takes from the individual his right to exercise his judgment in the use of personal adornment, a right which, according to the court, cannot be waived. In *People v. Carmichael,*[8] another local court defined the police power of the state as the power to regulate the conduct of one person so that his actions do not unreasonably restrict the rights of or endanger others. Concluding that a helmetless driver or rider would not endanger the safety of others, the court found in the New York statute an attempt to enlarge the state's police power beyond federal constitutional bounds. In *Everhardt v. City of New Orleans*[9] the Louisiana court of appeals held unconstitutional a city ordinance requiring helmets to be worn by all motorcyclists; this court found that the requirement was a denial of due process and equal protection.

The majority trend, however, has been to hold helmet statutes constitutional. The New York courts appear to have changed their view, and three recent local court cases—*People v. Bielmeyer,*[10] *People v. Schmidt,*[11] and *People v. Newhouse*[12]—have held that the state has the right to regulate how riders and passengers of vehicles susceptible to special dangers should protect themselves on public property. In February of 1968, an intermediate appellate court in New York reversed the *Carmichael* decision, holding that the helmet requirement is valid because it furthers the state's interest in maintaining a strong and viable citizenry by keeping the cyclists safe.[13] In *State ex rel. Colvin v. Lombardi,*[14] the Supreme Court of Rhode Island denied defendant cyclist's motion to dismiss on the grounds of unconstitutionality of the helmet statute and found that the law bears a reasonable relationship to highway safety and thus does not constitute an improper exercise of police power. In the most recent reported decision, *Commonwealth v. Howie,*[15] the Supreme Judicial Court of Massachusetts followed *Lombardi* and upheld the validity of a helmet statute.

6. N.Y. VEH. & TRAF. LAW § 381(6) (McKinney Supp. 1966).
7. 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (Town Ct. of Irandequoit 1967).
8. 53 Misc. 2d 584, 279 N.Y.S.2d 272 (Town Ct. of Oakfield 1967).
9. 208 S.2d 423 (1968).
10. 54 Misc. 2d 466, 282 N.Y.S.2d 797 (City Ct. of Buffalo 1967).
11. 54 Misc. 2d 702, 283 N.Y.S.2d 290 (County Ct. of Erie County 1967).
12. 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (City Ct. of Ithaca 1968).
13. 56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee County Ct. 1968).
14. 241 A.2d 625 (1968).
15. 238 N.E.2d 373 (1968).

It is settled constitutional doctrine that a state's police power can be properly exercised only when there is a reasonable relationship to the public health, safety, morals, or welfare.[16] Accordingly, in 1905 the United States Supreme Court upheld a law requiring all people to be vaccinated because the law was related not only to the health of the individual, but also to the protection of the public against the spread of disease.[17] Conversely, if the courts can find no relationship between the statute in question and the public health, safety, morals, or welfare, the statute is unconstitutional.[18] Thus, the Supreme Court has held invalid a statute requiring every parent or guardian of a child between the ages of eight and sixteen to send that child to a public school in the district where he resided since it did not promote the health, safety, peace, morals, education, or general welfare of the people and therefore was an unreasonable interference with the liberty of parents and guardians in raising their children.[19] The basis for this and similar decisions is the due process clause of the fourteenth amendment: if there is no benefit flowing to the public from the enforcement of a statute which restricts individual freedom, there is a denial of liberty without due process of law.[20]

16. *E.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Van Oster v. Kansas, 272 U.S. 465 (1926); Pacific Gas Co. v. Police Ct., 251 U.S. 22 (1919).

It can be argued that the statute prohibiting a cyclist from riding helmetless is similar to statutes in many states which make it a crime to attempt suicide. These suicide statutes protect an individual from himself, generally without affecting the public welfare in any way except by maintaining a viable citizenry. The suicide situation, however, can be distinguished, for the shocking nature of the act and the long tradition of its criminality make it different from the new and indirect helmet regulations. To prohibit people from killing themselves directly is one thing, but to prohibit them from *risking* their lives indirectly is quite another.

17. Jacobson v. Massachusetts, 197 U.S. 11 (1905). Similarly, before the passage of the eighteenth amendment, the Court found that a state prohibition on the manufacture and sale of intoxicating liquors did not deprive the citizen of his constitutional freedom because the law protected the public against the harmful conduct of one whose behavior toward others is affected by the use of alcohol. Mugler v. Kansas, 123 U.S. 623 (1887).

18. *See* Griswold v. Connecticut, 381 U.S. 479 (1965), in which a divided Court invalidated a Connecticut law prohibiting the use of contraceptives, even by married couples.

19. Pierce v. Society of Sisters, 268 U.S. 510 (1925). *See also* Meyer v. Nebraska, 262 U.S. 390 (1923).

20. *See* Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927); Atkin v. Kansas, 191 U.S. 207 (1903); Minnesota v. Barber, 136 U.S. 313 (1890); Mugler v. Kansas, 123 U.S. 623 (1887).

The Michigan court of appeals offered another basis, purportedly independent of the due process argument, for holding the helmet statute unconstitutional: the maxim of John Stuart Mill that "the individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself." J. MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 201 (A. Lindsay ed. 1950). The Michigan court cited four decisions which it clained were based upon this philosophy. These citations include *Smallwood* and the first *Carmichael* decision, neither of which mentioned the maxim and both of which suggested its content as only one of a number of arguments on which the respective courts based their decisions. *See* text accompanying notes 7 & 8

Such a conclusion rests on a substantive interpretation of the fourteenth amendment's due process clause: that the rights protected by that clause from interference by the states include rights not specifically enumerated in the first eight amendments. It is uncertain, however, due to the many conflicting opinions in *Griswold v. Connecticut*,[21] whether the Supreme Court still follows such an interpretation so far as the fourteenth amendment is concerned.[22] Nevertheless, according to one scholar, *Griswold* is

supra. The Michigan court also cited an opinion by the attorney general of New Mexico which did not mention the maxim, though it did employ Mill's philosophy. *See* N. MEX. OP. ATTY. GEN. No. 66-15, at 19 (1966). The question immediately arises whether Mill's maxim is, in fact, incorporated in the Federal Constitution. The Supreme Court has considered the due process clause to permit the state to restrain an individual's actions only to further the common welfare, and, conversely, to guarantee a citizen the right to act as he pleases so long as his actions do not adversely affect others. *E.g.*, Grosjean v. American Press Co., 297 U.S. 233 (1936); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). *Cf. Ex parte* Drexel, 147 Cal. 763, 82 P. 429 (1905). *But see* Lochner v. New York, 198 U.S. 45, 74 (1905) (dissent of Justice Holmes). In this view, the due process limitation on police power is simply an embodiment of Mill's premise. To quote his maxim is only to state the reasonable-relationship test in the converse; thus Mill's maxim was not really an independent ground for the court's decision.

21. 381 U.S. 479 (1965). *See* note 18 *supra*. Another basis for holding the helmet laws unconstitutional, unrelated to the due process clause, was advanced by the Louisiana court in *Everhardt* when it concluded that the ordinance in question denied equal protection of the laws to motorcyclists by imposing undue and unnecessary restrictions upon one limited class of the motoring public. 208 S.2d at 426. The Constitution, however, requires only that the classification be reasonable and be based upon substantial differences having a reasonable relationship both to the objects or persons dealt with and to the public purpose sought to be achieved by the legislation involved. *E.g.*, Walters v. City of St. Louis, 347 U.S. 231 (1954); Old Dearborn Distrib. Co. v. Seagram Distillers Corp., 299 U.S. 183 (1936); International Harvester Co. v. Missouri, 234 U.S. 199 (1914). Even assuming that the ordinance has no relation to the safety of others, the classification itself would nonetheless be reasonable because the distinctions between cyclists and other motorists are clear and substantial, and because it is those very differences that suggest the need for special legislation to protect the former which would be unreasonable if imposed on others. Whether the purpose of the helmet restriction relates to the public or the individual, and is valid or invalid, that purpose relates directly to the unique situation of a motorcyclist, and thus the regulation is not an unreasonable classification violative of the equal protection clause.

22. It is interesting to note that the Michigan court of appeals relied in part on Justice Goldberg's concurring opinion in *Griswold*—an opinion which invoked the ninth amendment in support of the fundamental rights theory. The ninth amendment, said Justice Goldberg, is an acknowledgement that liberty is not restricted to the freedoms enumerated in the Bill of Rights, but that there are inherent rights which exist independently of the explicit wording of the first eight amendments. As applied to the states through the fourteenth amendment, the ninth amendment shows that it was the intent of the original authors of the Bill of Rights that fundamental personal rights cannot be violated by the state merely because they were not enumerated in the first eight amendments. 381 U.S. at 486-99. Since the effect of Justice Goldberg's ninth-amendment argument is additional support for the fundamental-rights theory rather than a substitute for it, the Michigan court's reliance upon it adds nothing new to the basic analysis of the problem. *See* P. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental, and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 254 (1965).

> a reaffirmation by a majority of the Court of the fundamental [or substantive] rights theory—both in the sense that only fundamental rights derived from the Bill of Rights are incorporated into the fourteenth amendment and in the sense that the due process clause is a source of rights apart from the specifics of the Bill of Rights.[23]

Thus, assuming that this interpretation is correct, the fundamental question is whether the helmet statutes bear a reasonable relationship to the public welfare.

The courts which have declared helmet statutes invalid have been unable to find a sufficient relationship between the helmet requirement and the welfare of the community at large. As indicated earlier, the Michigan court saw the statute in question only as a protection of the cyclist from severe head injuries; the court felt that any other interpretation was "a strained effort to justify what is admittedly wholesome legislation."[24] The Louisiana court declared that "[t]he only function of the helmet requirement we are able to discern is to minimize the extent of injury to the individual cyclist involved in an accident, and not to contribute to the safety of the motoring public at large."[25] On the other hand, those courts which have upheld the helmet laws advance various arguments to support the necessary relationship to the public welfare. The justification recently offered by the New York courts was the state's interest in a viable citizenry. According to this argument, the state can prevent its citizens from pursuing a course of conduct that could cause their dependents or themselves to become public charges.[26] Moreover, it is argued that "[i]t is to the interest of the state to have

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23. *Id.* at 249-50. Professor Kauper adds that the *Griswold* case

> is not inconsistent with cases that have reduced economic liberty to a minimum of judicial protection. Freedom of the legislature to determine economic policy in the public interest is much greater than its freedom to determine social policy by means that intrude on personal liberty and essentially private conduct. In the case of restrictions on economic liberty, a simple rationality test applies, but when the legislature impinges upon fundamental non-economic liberties of an essentially personal character, as in *Griswold*, a more exacting judical test is applied.

The Court apparently sees a hierarchy of values protected by the Constitution and recognizes that the degree of judicial scrutiny and protection varies in direct proportion to the importance of the right. Thus, assuming that the majority does follow the substantive interpretation of the due process clause of the fourteenth amendment, the right infringed in any given case would have to be important enough to be ranked as "fundamental" in order to be protected by that clause against state regulation. The right abridged by the helmet laws is the freedom to wear whatever one chooses so long as that action affects no one but the individual himself; whether that right is fundamental enough to be a substantive due process right has of course never been discussed by the Supreme Court. *See* note 40 *infra*.

24. 158 N.W.2d at 75. The court adds: "This statute has a relationship to the protection of the individual motorcyclist from himself, but not to the public health, safety and welfare." 158 N.W.2d at 76.

25. 208 S.2d 423, 426 (1968).

26. *See* People v. Carmichael, 288 N.Y.S.2d 931, 935 (1968). *See also* State *ex rel.* Colvin v. Lombardi, 241 A.2d 625, 627 (Sup. Ct. R.I. 1968).

strong, robust, healthy citizens capable of bearing arms, of self-support, and of adding to the resources of the country,"[27] and that, as long as the means are reasonable, the legislature can protect individuals from themselves to further that interest. Thus, the helmet regulations promote the public welfare not only by tending to prevent cyclists from becoming wards of the state because of disabling head injuries, but also by tending to keep members of the community healthy and productive.[28]

The Michigan court specifically rejected the "public charges" argument, stating that it could lead to unlimited paternalism.[29] Once it can be said that protecting an individual from himself bears a reasonable relationship to public welfare, the argument runs, there is nothing to prevent the state from requiring all motorists to wear crash helmets, from forbidding smoking, or from requiring everyone to go to bed at 10:00 p.m. Such laws would be conducive to healthier citizens and thus to a "viable citizenry."[30] It is significant that the courts which *upheld* the helmet statutes on the basis of the public interest in a viable citizenry cited no authority to support their argument. Surely the Michigan court was correct in stating that the "public charges" argument proves too much, since such reasoning would give the legislature the power to regulate almost every aspect of individual conduct in a society "so complex that there are very few things that cannot be said to affect some other person or the public treasury."[31] The limitations on the police power would disappear if the states were permitted to regulate individual conduct on the basis of the attenuated "public charge" rationale.

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27. 288 N.Y.S.2d at 935.

28. It was argued by the state in the Michigan case that the helmet statute could also be justified under the doctrine of *parens patriae,* the specific relationship of the state to youth. This is the power of the state that justifies laws such as those making it illegal for minors to smoke. The Michigan court correctly rejected this contention because the application of the helmet statute was not limited to youth. 158 N.W.2d at 75.

29. 158 N.W.2d at 75. It is consistent with Michigan's view of the general welfare that suicide is not a statutory crime in Michigan.

30. 158 N.W. at 76. People v. Carmichael, 53 Misc. 2d 584, 588-89, 279 N.Y.S.2d 272, 277 (1967). A possible answer to this objection is that even if the courts would otherwise uphold such regulation of individual conduct in the interest of viable citizenry, they will not do so because of a reasonableness test which applies in cases of this sort. This test balances the state's interest against the individual's. A helmet requirement is found to be reasonable because it is only a slight infringement on the individual's freedom as he travels on a public highway, but an extreme law—for example, a requirement that a cyclist wear a suit of armor, a prohibition of smoking, or a requirement that people to go to bed at 10:00 p.m.—would be unreasonable, and therefore unconstitutional, because it would infringe too greatly on personal liberty.

The reasonableness test, however, is unsatisfactory because the fact that a court can use it to limit grossly infringing regulations does not make up for the inability of that test to deal with infringements which are "reasonable" because relatively moderate, but nonetheless repugnant to ordinary concepts of personal liberty.

31. People v. Carmichael, 53 Misc. 2d 584, 589, 279 N.Y.S.2d 272, 277.

A second justification offered to demonstrate a reasonable relationship between helmet laws and the public welfare is that the crash helmet may prevent certain types of accidents—specifically situations in which the cyclist could be propelled off the road or into the opposing lane, causing damage to other vehicles or property, or injuries to other motorists or pedestrians. For example, loose stones kicked up by passing vehicles, or other flying objects—against which the driver of an automobile has some protection—could strike the helmetless motorcyclist in the head, causing him to lose control of his vehicle.[32] One answer to this argument was given by the Michigan court:

> If the purpose [of the helmet regulations] truly were to deflect flying objects, rather than to reduce cranial injuries, a windshield requirement imposed on the manufacturer would bear a [more] reasonable relationship to the objective and not vary from the norm of safety legislation customarily imposed on the manufacturer for the protection of the public rather than upon the individual.[33]

But the court's answer is specious because it is not the function of the judiciary to decide whether the means adopted by the legislature are the best means possible to attain the end sought.[34] Except when the regulations chosen are in themselves unconstitutional, courts should defer to the legislative selection of methods. Thus, even if a windshield regulation would provide more effective protection for public safety, the helmet requirement is still constitutional as long as it tends in some degree to protect public safety. But while the legislature need not choose the best means to an end, it is clear that it cannot choose a method that violates the fundamental liberties of an individual if the end can be achieved without infringement of those liberties.[35] The Supreme Court stated this directly in

32. People v. Bielmeyer, 54 Misc. 2d 466, 469, 282 N.Y.S.2d 797, 800 (1967):

> Cyclists generally keep to the right of the road where stones and gravel are found which could be propelled by the delicately balanced wheels into the head of the cyclist or passenger, causing distraction and loss of control.
>
> Far more than with an automobile or a truck the very nature of a mortorcycle requires that a rider be able to control his vehicle at every second . . . . [This] means that the rider must always wear the recommended clothing and equipment for his protection as well as the protection of others.

33. 158 N.W.2d at 75.

34. McLean v. Arkansas, 211 U.S. 539, 547 (1909):

> The legislature being familiar with local conditions is primarily the judge of the necessity of such enactments. The mere fact that the court may differ with the legislature in its views of public policy or that judges may hold views inconsistent with the propriety of legislation in question affords no ground for judicial interference . . . .

See also Old Dearborn Distrib. Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936); Standard Oil Co. v. City of Marysville, 279 U.S. 582 (1929); St. Louis Southwestern Ry. v. Board of Directors of Miller Levee Dist. No. 2, 207 F. 338 (8th Cir. 1913).

35. This principle is supported by the general rule, stated in People v. Armstrong, 73 Mich. 288, 41 N.W. 275 (1889), that the state can impose restraints on the individual only to that extent which is required or necessary for the protection of public health, safety, or welfare. This seems to imply that if a statutory restriction is not

Schneider v. State,[36] in which it invalidated an ordinance which banned all distribution of handbills on public streets. Although the ordinance's purpose—to keep the streets clean and neat—was legitimate, it was insufficient to justify an abridgement of the individual's right of free speech. There were other reasonable methods available to prevent littering which did not interfere with personal freedom—for example, punishment of those who actually throw papers on the streets. Similarly, in both *Shelton v. Tucker*[37] and *Dean Milk Co. v. City of Madison*,[38] the Supreme Court held laws which limited personal freedom unconstitutional because there were adequate non-infringing means to achieve the same end.[39] Thus, it might be argued that if the end which justifies the helmet requirement is the protection of the public from cyclists careening out of control because of a blow on the head by a flying object, that requirement should be invalid because a regulation on the manufacturer to install a windshield would accomplish the same goal without any infringement of personal liberty.

This argument, however, raises several problems. Unlike the rights that were restricted in *Schneider* and similar cases, the right to wear what one wishes on a public street, allegedly infringed by the helmet laws, is not a strong or well-established one.[40] Furthermore, the effectiveness of the noninfringing alternative here is uncertain—it is not clear that a windshield will do the same job as

necessary or essential—that is, if there is another method to the same end that does not infringe on individual liberty—the restriction is invalid.

36. 308 U.S. 147 (1939).

37. 364 U.S. 479 (1960).

38. 340 U.S. 349 (1950).

39. The Court in *Shelton* held unconstitutional an Arkansas statute requiring every teacher, as a condition of employment, to file an annual affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years.

> There can be no doubt of the right of a state to investigate the competency of those whom it hires to teach in its schools . . . . [but] 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.

364 U.S. at 485, 488. In *Dean Milk Company*, an ordinance forbidding the sale of milk in a city under a "pasteurized" label unless the milk had been pasteurized and bottled at an approved plant within five miles of the city was declared unconstitutional. The Court made it clear that "even in the exercise of its unquestioned power to protect the health and safety of its people, [a municipality may not erect an economic barrier against competition] if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interest, are available." 340 U.S. at 354.

40. The rights abridged in *Schneider*, *Shelton*, and *Dean Milk Co.* were the right of free speech, the right of free association, and the guarantee of equal protection of the laws, respectively. All of these are liberties deeply rooted in the traditions of the United States, guaranteed from the beginnings of its history, and upheld time and time again by its courts. Although there are isolated cases in which courts have held that an individual has the right to choose his own attire [People v. O'Gorman, 274 N.Y. 284, 8 N.E.2d 862 (1937)], that right has certainly been recognized much less frequently

a helmet in protecting the cyclist's head. Thus, it is difficult to see how the existence of an alternative and less restrictive method would by itself in these circumstances render the helmet requirement unconstitutional. The ultimate question then is not whether there is an alternative noninfringing method to the end. Rather, since the opposing courts agree that some form of reasonable-relationship test is proper,[41] the determinative question should be simply whether flying objects do, in fact, constitute such a danger to helmetless motorcyclists that those cyclists could adversely affect the safety of the general public.

The evidence which has arisen in response to this question is Delphic. The New York, Rhode Island, and Massachusetts courts, asserting that the danger is real, support their conclusion with such general statements as "one hears or reads about instances where cyclists have been hit with hard-shelled beetles or bees and have lost control of their bikes, causing damage and injuries to others."[42] Accepting these statements, it might seem that the helmet regulations can be justified by the protection they afford to the general public even though their original purpose was the protection of individual cyclists.[43] But the courts which have claimed that the danger of flying objects is genuine cite no cases or studies and offer no *specific* evidence to support their conclusion.[44] Moreover, the legislatures which have enacted helmet statutes make no mention of any studies or reports which show that flying objects present such a danger to cyclists as to cause accidents. A New York legislative memorandum did cite an extensive study showing that most motorcycle fatalities could have been avoided by wearing the proper helmet,[45] but neither the memorandum nor the study said anything

41. The courts do not differ in their determination of the proper test to apply here, but differ rather in their view of the intent and effect of the helmet statute. Whereas the Michigan and Louisiana courts saw the law as affecting only individual safety, the New York, Rhode Island, and Massachusetts courts saw a reasonable relationship between it and the safety of others. Thus, all the courts agree that an individual is master of his fate so long as his actions concern only himself, but disagree as to whether the action of a cyclist in not wearing a helmet could directly affect the welfare of others.

42. People v. Bielmeyer, 54 Misc. 2d 466, 469, 282 N.Y.S.2d 797, 800 (1967). *See also* note 32 *supra;* State *ex rel.* Colvin v. Lombardi, 241 A.2d, 625, 627 (R.I. 1968).

It is also interesting that in a telephone interview, the Ann Arbor, Michigan, police stated that it is very likely that flying objects could cause a motorcyclist to lose control of his machine. However, they were unable to cite specific statistics or to recall any concrete instances in which a flying object had actually been the cause of a motorcycle accident.

43. *See* note 45 *infra.*

44. This is, of course, not conclusive proof that such dangers do not exist. It may indicate only that there have been no studies or reports on this subject; and, indeed, exhaustive research has revealed no such studies.

45. *See* N.Y. SESSION LAWS 2961 (McKinney 1966) (citing the results of that study):

> The number of accidents involving motorcycles is increasing rapidly. In fact, motorcycle accidents increased by 105% in 1965 as compared to 1964. . . . Fatalities

about protecting people other than the cyclist himself. Indeed, although there is substantial evidence that helmets have prevented individual cyclists from being injured in accidents,[46] none could be found to show that the use of helmets had ever prevented the *occurrence* of an accident, or even to show that accidents had been caused by flying objects hitting a helmetless rider in the head. It is an unsatisfactory resolution of the fundamental issue merely to take judicial notice of what "one hears or reads about"[47] when there is as yet no evidence to support that contention and when several courts have disputed existence of the "fact" which is being judicially noticed.

It is unclear whether the state must come forward with any evidence of a reasonable relationship between a police power regulation and the public welfare in order to resist a challenge to the law's constitutionality. It may be that the challenger is required to prove that there is in fact no reasonable relationship to public welfare. Support for this approach to the burden-of-proof problem raised in these cases might be found in the presumption of constitutionality that attaches to all legislative enactments.[48] In *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, the Supreme Court stated:

> As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute . . . . The action of the legislature . . . indicates that such evils did exist [for which this statutory provision was an appropriate remedy].[49]

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increased by 63.6% and personal injury accidents by 100%. A summary of the 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 involved head injuries. Most of these fatalities could have been avoided, or the severity lessened, by the use of a proper helmet.

The helmet requirement, continues the memorandum, "should go far in protecting the *drivers and passengers* on motorcycles." *Id.* (emphasis added).

46. *See* notes 3 and 45 *supra*.

47. *See, e.g.*, text accompanying note 42 *supra*.

48. Davies Warehouse Co. v. Bowles, 321 U.S. 144 (1944); Toombs v. Citizens Bank, 281 U.S. 643 (1930); Home Tel. & Tel. Co. v. City of Los Angeles, 211 U.S. 265 (1908).

49. 282 U.S. 251, 257-58 (1931). In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964), the Court held that Title II of the Civil Rights Act of 1964 preventing racial discrimination in public accomodations was a valid exercise of congressional power under the commerce clause as long as Congress had a rational basis for finding that racial discrimination by those establishments affected interstate commerce. By analogy, it can be argued in the helmet cases that, since the legislature has passed the law, it has determined that there is a reasonable relationship between it and the public welfare and that that determination cannot be overturned in the absence of a showing by complainant that no such reasonable relationship exists.

However, the *Heart of Atlanta* and *McClung* cases are inapposite here because they dealt with the congressional power over commerce—a broad, enumerated power of Congress—rather than with the police power. Moreover, in those cases there were congressional hearings about the effect of the prohibited activity upon interstate commerce: "[T]he record of [the Act's] passage through each house," says the Court in

If the law is that the state has no burden to offer any evidence to support its contentions, the Michigan court's decision in *Davids* would appear to be incorrect since the defendant did not disprove that a reasonable relationship existed between the regulation and the public welfare.[50] However, such an interpretation of the law relating to the burden of proof requires the challenger, in effect, to offer evidence that there is no evidence of a reasonable relationship.[51] How is one to prove lack of evidence other than by merely stating that fact and by challenging the opposition to offer some evidence to controvert it? To require the challenger to prove a negative fact seems unreasonable. It appears more sensible—at least in cases where the challenger asserts in his pleadings that there is no evidence to demonstrate a reasonable relationship between the statute and the public welfare—to place the initial burden of going forward with the evidence upon the state. Once the state has offered *any substantial* evidence to support the statute,[52] the burden would immediately shift to the challenger and it would be up to him to disprove that evidence. The meaning here of "substantial evidence" is the one advanced by the Supreme Court as the standard for judicial review of administrative action:

> Evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred . . . . It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.[53]

Heart of Atlanta, "is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce." 379 U.S. at 252. *See also* Katzenbach v. McClung, *supra*, at 304: "[F]or the evidence presented at the hearings fully indicated the nature and effect of the burden on commerce which Congress meant to alleviate." But in the helmet situation there is no evidence that the legislatures ever gave any thought to the effect of the statutes on the safety of others. Indeed, there is evidence to the contrary; *see* note 45 *supra*.

50. The Michigan court's opinion is devoid of any reference to evidence which tended to demonstrate factually and conclusively that helmets did not prevent accidents or that flying objects did not cause them.

51. Statistics are seldom compiled on events that do not happen or accidents that do not occur. It would be far easier for the state to offer evidence that such accidents caused by flying objects do, in fact, occur.

52. To allow the state to meet its burden of going forward with the evidence by offering merely a "scintilla" of evidence to support a reasonable relationship does not solve the problem. For example, the state could present one isolated incident in which a flying object striking a helmetless cyclist had caused an accident, and the challenger would still have the burden of proving that that incident was the only one of its kind. Thus, requiring the state to offer some substantial evidence would appear to be a better proposal.

53. NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939). According to the Court in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), this definition continues as the authoritative guide to the meaning of "substantial evidence."

Under the substantial evidence test, a statute cannot be striken down unless the

This proposal is generally consistent with the presumption of constitutionality since the ultimate burden of proof will usually remain upon the challenger. Under the proposal suggested in this Note, which would put the initial burden of going forward with the evidence upon the state, the Michigan court would appear to have decided correctly since the state failed to offer any evidence to support a reasonable relationship between the helmet statute and the public welfare.[54]

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court has a firm conviction that it is unreasonable. Thus, such a test would result in upholding more state regulations than if the state judged the statutes on a "clearly erroneous" basis. The Supreme Court has stated that "a finding [or a statute] is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and *firm conviction that a mistake has been committed.*" United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (emphasis added). A firm-conviction-of-mistake test is closer to a substitution of judicial or legislative judgment than is a firm-conviction-of-unreasonableness test, which is necessary to upset a finding or a statute under the substantial-evidence test; consequently it is more difficult to invalidate a statute under the substantial-evidence test than under the clearly-erroneous test. When applied to helmet laws which are challenged as unreasonable, the proposal suggested in the text would require the state to come forward with enough evidence to meet the substantial-evidence test and thus to overcome the contention of unreasonableness. But as long as the statute is not unreasonable, that is, as long as there is enough evidence in its favor to justify a refusal to "direct a verdict" against it, then the challenger still has the burden of going forward even if the claim of a reasonable relationship is seen by the court as "clearly erroneous."

54. None of the courts which have dealt with the issue has gone to the basic actual and evidentiary question regarding the actual existence of a reasonable relationship or to the even more fundamental question concerning who has the initial burden of offering evidence. Instead, the courts have become involved in a balancing process between the interests of the individual and those of the state. To the courts striking down the helmet laws, the state's interest is too remote to be given weight. To the courts upholding the laws, however, the individual cyclist's interest is small, for wearing a helmet would hardly seem to be an oppressive burden, while the interest of the state in public highways and highway safety is great enough to justify regulation of even the most attenuated threat. People v. Bielmeyer, 54 Misc. 2d 466, 468-69, 282 N.Y.S.2d 797, 800 (1967) ("It has long been recognized that the power to regulate and control the use of public roads and highways is primarily the exclusive prerogative of the states."). Furthermore the right to wear what one wishes on a public street may not be considered fundamental enough to be protected by the fourteenth amendment even under the substantive-rights interpretation of the due process clause. *See* notes 23 and 40 *supra*. Thus, because helmet laws are merely a minor abridgement of individual liberty and because the right on which they impinge has not been definitely recognized as a fundamental one, these courts have been willing to grope to find a relationship between the regulations in question and the public welfare. Despite Benjamin Franklin's admonitions against those who would put safety over freedom, these courts seem willing to resolve all doubts in favor of the state without demanding any concrete evidence that unhelmeted cyclists are likely to harm others or even considering the burden of proof question at the crux of this entire controversy.

Yet the argument for constitutionality, if convincing at all, would appear to be persuasive only in regard to the operator of the cycle. The relationship between the requirement that a passenger on a cycle wear a helmet and the safety of others appears to be more attenuated. That requirement is supported in the case authority only by a statement in *Bielmeyer* that "passengers are just as susceptible to injuries as operators and a head injury to a passenger could sufficiently distract a driver to create a danger to other users of the highway." 54 Misc. 2d at 469-70, 282 N.Y.S.2d at 801. While such an event is conceivable, to view it as likely requires great imagination,

The ramifications of the helmet cases are for the most part yet unknown. In Michigan, one immediate effect of the *Davids* decision was the passage of a new statute by the Michigan legislature.[55] This statute requires that all motorcycles carry, when in operation, a number of crash helmets equal to the number of persons riding on the bike. Such a regulation is even more unlikely to promote public safety than the previous requirement, since merely having a helmet on the motorcycle in no way prevents the cyclist from being distracted or hurt. It is difficult to see what purpose this requirement serves other than encouraging the cyclist to wear a helmet; it is very awkward for him to carry it.[56] The new law appears to be merely an attempt to circumvent the court's ruling. Since the Supreme Court has indicated that indirect means to achieve unconstitutional ends are just as objectionable as the most direct form of regulation,[57] the new Michigan statute should also be declared unconstitutional.

The Michigan decision in the instant case may have an effect on the somewhat analogous problems connected with seat belt regulations. The Michigan courts, if they follow *Davids*, could not uphold a legislative requirement that all motorists wear safety belts.[58] Such a regulation would bear even less relation to the safety and welfare of others than the helmet laws do,[59] for it is inconceivable that the failure to wear a seat belt could cause an accident,[60] or even pose the threat of one.

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since the passenger is shielded by the operator from most flying objects and since he is not in control of the cycle. If there is no evidence to show that flying objects striking the operator actually cause accidents, it is unlikely that there is any to support an even more remote possibility. Even for a court searching for reasons to justify the law, such a highly unlikely argument as that used in *Bielmeyer* should probably be outweighed by the passenger's right to individual freedom.

55. MICH. STAT. ANN. § 9.2358(d) (1968).

56. The statute was evidently passed with the feeling that the new regulation was similar to the ones requiring seat belts to be installed in cars and, as such, should be allowed. However, the seat belt requirements are imposed upon the manufacturer and do not regulate individual conduct; in this case, the individual cyclist must buy and carry a helmet.

57. *See* Louisiana v. United States, 380 U.S. 145 (1965).

58. It is significant that at the present time no state has such a law on the books.

59. Even the New York courts, which have allowed a reasonable regulation of individual safety in the interest of a productive community, would probably find such a law unreasonable on the grounds that it is too great an infringement upon personal freedom. *See* note 30 *supra*. According to the court in Miller v. Miller, 160 S.E.2d 65, 69 (N.C. 1968), the scant use which the average reasonably prudent motorist makes of seat belts indicates that such a regulation would be too great an infringement. On the other hand, even where there is no requirement, most motorcyclists wear helmets in the interests of personal safety. Thus, helmet laws might be reasonable where seat belt laws would not.

60. Yet some states require seat belts for registration of a car manufactured after a certain year. *See* CAL. VEHICLE CODE § 27309 (Supp. 1967); GA. CODE ANN. § 68-1801 (Supp. 1966); MASS. ANN. LAWS ch. 90, § 7 (1967); MICH. REV. STAT. § 9.2410(2) (Supp. 1965); NEB. REV. STAT. §§ 39-7, 123.05 (Supp. 1967); N.J. REV. STAT. § 39.3-76.2 (Supp. 1967); N.Y. VEH. & TRAF. LAW § 383(a) (McKinney Supp. 1966); N.C. GEN. STAT. § 20-135.2 (1965); OKLA. STAT. ANN. tit. 47, § 12-413 (Supp. 1967); ORE. REV. STAT.

The effects of the helmet decisions on the law in general may be substantial. On the one hand, if a helmet statute is held constitutional, inroads could be made upon personal liberty; the legislature might rely on similar strained and unproved relationships to the general welfare in order to justify regulations impinging upon other areas of individual conduct.[61] On the other hand, to hold such a statute unconstitutional may require the judiciary to interfere unreasonably with the legislature's conception of public welfare. In light of these considerations, courts dealing with challenges to such regulations in the future should pay closer attention to the difficult factual questions underlying the reasonable relationship test; they must also attempt to answer the basic questions surrounding the burden of proof and the burden of going forward with the evidence in these cases.

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§ 483.482 (1965); R.I. GEN. LAWS ANN. § 31-23-39 (Supp. 1966). In the case of such a regulation, just as in the helmet situation, the burden of installation is on the individual owner and he himself is regulated for his own protection. Thus, Michigan courts would probably not uphold such a law, for the requirement that the individual have belts in his car bears less relation to public welfare than a requirement of wearing them, and much less relation than a helmet requirement. This is analogous to the present Michigan law that helmets be carried on cycles—a law which cannot be reconciled with the *Davids* decision, unless by the argument that the owner is thereby making seat belts available to anyone who should drive or ride in his car and is thus protecting people other than himself.

The federal standards issued by the Secretary of Commerce are different, for under them the burden is on the manufacturer, not the owner, to install safty belts. National Traffic and Motor Vehicle Act of 1966, 15 U.S.C. §§ 1391-425 (Supp. II, 1967), and Initial Fed. Motor Vehicle Safety Standards, 23 Fed. Reg. 2408, tit. 23, ch. II, part 255 (1967).

Congress has declared the scope of the federal standards. *See* National Traffic and Motor Vehicle Act of 1966, 15 U.S.C. § 1391(1) (Supp. II 1967):

> Motor vehicle safety means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents or injuries occurring as a result of the design, construction or performance of motor vehicles.

The standards, therefore, regulate the manufacturer in order to protect the public from unnecessary risks, and they do not directly restrict the individual owner's freedom. Thus, the federal seat belt standard would seem to meet no constitutional difficulties.

Some argue that a duty of due care to wear the belts can be derived from the federal seat belt regulations. The argument runs that statutes requiring mere installation of seat belts impliedly require their use, and that any ruling to the contrary undermines any possible value inhering in legislation. There is a notable absence of legislative history supporting this contention. *See* Note, *Seat Belt Legislation and Judicial Reaction*, 42 ST. JOHN'S L. REV. 371 (1968). As to the argument that the regulations are meaningless unless construed to *require* use, an equally likely construction is that they are designed to *encourage* use. In this connection, *see* Note, *Seat Belt Negligence in Automobile Accidents*, 1967 WIS. L. REV. 288 (1967).

61. *See* text accompanying note 31 supra.