THE CONSTITUTIONALITY OF MANDATORY SEAT BELT USE LEGISLATION

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(A Report Prepared by the Virginia Highway Research Council Under the Sponsorship of the Highway Safety Division of Virginia)

Virginia Highway Research Council
(A Cooperative Organization Sponsored Jointly by the Virginia Department of Highways and the University of Virginia)

Charlottesville, Virginia

December 1972
VHRC 72-R15

ABSTRACT

A number of trends indicate that mandatory seat belt use legislation is to be expected within the near future. The constitutionality of such self-protective legislation has been the subject of recent speculation. Constitutional challenges may be expected to come in the areas of due process, equal protection, and right to privacy. Recent decisions dealing with motorcycle helmet legislation form a basis for discussion of the constitutional issues involved. These decisions illustrate principles upon which the courts could sustain mandatory seat belt use legislation as constitutionally valid.

SUMMARY

(1) In order to withstand a due process attack on mandatory seat belt use legislation, it is necessary to demonstrate that the legislation serves some public interest, as opposed to the interests of the individual or class of individuals. Two theories appear persuasive in light of the motorcycle helmet decisions. The most persuasive theory is that once automobile accident and fatality data evidence a grave threat to society itself, correction of the problem can no longer be regarded purely as a matter of personal prerogatives, and that governmental intrusion is therefore permissible. Also persuasive is the "secondary impact" theory, whereby the seat belts, by keeping the driver in position behind the wheel after an initial impact, aid the driver in retaining control of the vehicle and thus help prevent secondary impacts with other members of the motoring public. Less persuasive is the highway use as a privilege theory, and theories which analogize seat belt use legislation to anti-suicide and smallpox vaccination statutes.

(2) An allegation that mandatory seat belt legislation is violative of equal protection appears tenable only in the situation where the requirement that vehicle occupants utilize seat belts applies only to occupants of vehicles that are equipped with belts as standard equipment — occupants of older vehicles being exempt. The issue then becomes whether there is a rational basis for the underinclusiveness. The economic burden imposed by requiring owners of older vehicles to retrofit their vehicles with a restraint system might serve as a sufficient justification for the differential treatment. Alternately, the courts might utilize the familiar rhetoric that a legislature may proceed piecemeal in seeking solutions to large social problems.

(3) Although seat belt legislation is susceptible to a challenge that it infringes on the individual's right to privacy, use of the highways would hardly appear to be a matter within the constitutionally protected zone of privacy. Motorcycle helmet decisions emphasize the inappropriateness of such a right in the context of travel on the highway system.

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BACKGROUND

While occupant restraint systems have been standard equipment in aircraft for more than half a century, the use of seat belts in automobiles is a relatively recent phenomenon. Prior to 1955, there were only a few isolated examples of seat belt use in automobiles. For example, in the 1908 New York to Paris around the world race, the left front seat of the winning 1907 Thomas Flyer utilized a leather strap to keep the mechanic from being pitched out as the vehicle traveled over the rough roads of that era. It is further reported that Barney Oldfield first used a lap belt in a racing car in 1922. It was not until 1955 that Ford and Chrysler first offered lap belts as optional safety equipment; however, public acceptance was limited. In 1962, Wisconsin was the first state to require that seat belt anchorages be provided on all new vehicles sold in the state. Within the next two years, a number of states passed similar legislation. However, in 1964 most U. S. automobile manufacturers began voluntarily installing two lap belts in the front seat as standard equipment. By 1966, all U. S. manufacturers were voluntarily installing four lap belts per car. In January 1968, standards issued by the National Highway Safety Bureau (now National Highway Traffic Safety Administration) required that lap belts be installed for each seating position in the vehicle and that upper torso restraints be installed for the front outboard seating positions.[1] Additionally, shoulder belt anchorages must be provided for the rear outboard seats; although there is no requirement that shoulder belts be actually installed in those positions. Warning belt devices are now required on vehicles manufactured after January 1, 1972.

All manufacturers are now utilizing some version of the lap belt and single diagonal torso restraint, with the exception of Shelby-American. (The Mustang Cobra GT 350 and GT 500 used the double-shoulder Y-yoke with an inertia reel device.) The effectiveness of such restraint systems in reducing vehicular accident morbidity and mortality is now well documented. Several recent studies illustrate this. For example, in a recent study by Cornell Aeronautical Laboratory,[2] data were collected on rural Utah automobile crashes involving 14,261 occupants. Among these occupants, 16.5% were wearing a lap belt at the time of the crash. The researchers found that unbelted occupants were injured substantially more frequently and more severely than belted ones. In rounded figures,

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1 32 Fed. Reg. 2408 (1967).

2 Donald F. Huelke and William A. Chewning, Comparison of Occupant Injuries With and Without Seat Belts, presented at the International Automotive Congress, Detroit, Michigan, January 13-17, 1969.

the researchers calculated that the failure to use seat belts increased injury risks as follows:

Of immediate death or severe injury — by 100%

Of more than trivial injury — by 70%

Of any injury — by 40%.

At least one-fourth of this risk differential was attributed to the fact that the use of seat belts prevented ejection from the vehicle. (Ejection has been found to be the leading cause of death in automobile accidents.[3]) The remaining three-fourths of the risk differential was attributed to the effect of seat belts in (1) preventing injury entirely, and (2) alleviating injury sustained in the vehicle.

Even greater safety benefits were claimed for the seat belt in a study of 12,797 occupants involved in 4,571 accidents investigated by the Ohio State Highway Patrol and the Mansfield, Ohio Police Department during August 1969.[4] Of the entire 12,797 vehicle occupants, 8,372, or 65%, had some type of restraint available; however, only 31% of those having restraints available were using them (2,624, or 20%, of the entire sample). Based on accident data, the researchers computed the risk of death to be 4.06 times as great for passenger car occupants who were not wearing seat belts as for those using seat belts. The relative risk of sustaining either a fatal or a severe injury was calculated to be 1.95 times as great. The authors proceeded to apply the risk ratios to the 55,200 deaths and 2,000,000 disabling injuries resulting from traffic injuries in the United States in 1968. They concluded that if the 31,400 front seat passengers killed in 1968 and not wearing belts had worn them (risk ratio of 5.36:1), between 14,335 and 25,540 lives would have been saved. As for the 1,024,590 disabling injuries to front seat passengers without belts, between 230,335 and 512,295 could have been prevented. As a consequence of these data, the Highway Safety Foundation endorses mandatory seat belt use.

More conservative estimates of the role of seat belt use in reducing vehicular crash loss were found by a 1971 study by Levine and Campbell.[5] Data for the study were extracted from a pool of accident reports from vehicles involved in crashes in North Carolina in 1966 and 1968. The authors calculated that seat belt use can reduce serious injury by 43% overall and 49% for high speed crashes (significant at the .01 level of confidence).

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3 D. F. Huelke and P. W. Gikas, Ejection — The Leading Cause of Death in Automobile Accidents, presented at the 10th Stapp Car Crash Conference, December 1967, p. 12.

4 A Study of Seat Restraint Use and Effectiveness in Traffic Accidents (Highway Safety Foundation, January 1970).

5 Donald N. Levine and B. J. Campbell, Effectiveness of Lap Seat Belts and the Energy Absorbing Steering System in the Reduction of Injuries (University of North Carolina Highway Safety Research Center, Chapel Hill, N. C., November 1971.)

Despite these rather impressive statistics, the overall seat belt utilization rate remains rather low. Campbell, Waller, and Council[6], in a 1967 study based on 709 observations collected by four observers as they traveled around the state of North Carolina, reported an overall lap belt utilization rate of 32%. The observers also found that males were more likely to wear the belts than females, and that out-of-state drivers (presumably on longer trips) were more likely to wear the belts than their in-state counterparts. Similar results (35.8% utilization rate) were found in a follow-up study by Council in 1969.[7]

More recently, Anderson[8] conducted a series of 1,707 field observations of drivers moving in traffic in North Carolina to determine the rate of shoulder belt utilization. He reported a utilization rate of 10.06% in rural areas and 6.41% in urban areas to arrive at an overall rate of 8.26% for those cars equipped with the device. Use was related to a number of parameters. Males were more likely to wear the shoulder belt than females; drivers of foreign vehicles were more likely to wear it than drivers of domestic vehicles; and young drivers were more likely to wear it than older drivers.

Attempts have been made to determine why seat belt usage remains low despite extensive public information and educational programs to promote the use of occupant restraint systems. One such study[9] was based on the results of 1,750 personal interviews with drivers aged 16-64 years and owning automobiles fitted with lap belts. Seat belt use was found to be related to the length of the trip, speed, rising educational attainment, having taken a driver education course, and a generalized tendency to avoid physical injury. The study also identified personality traits likely to be present in persons who always use seat belts: not fatalistic, unconcerned with putting up a good front, methodical, not claustrophobic and acceptive of technological innovations. Among the reasons given for not wearing seat belts were: Never formed the habit, belts too confining, doubt value of belts as a safety measure, and belts too uncomfortable.

Another possible factor is fear in injury from the belt itself. This fear is not entirely without basis. The possibility of different, though less serious, injuries produced by lap belts is fairly well documented.[10] Most cases describe a distinctive pattern of

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6 B. J. Campbell, P. F. Waller, and F. M. Council, Seat Belts: A Pilot Study of Their Use Under Normal Driving Conditions (University of North Carolina Highway Safety Research Center, Chapel Hill, N. C., November 1967).

7 F. M. Council, Seat Belts: A Follow-Up Study of Their Use Under Normal Driving Driving Conditions (University of North Carolina Highway Safety Research Center, Chapel Hill, N. C., October 1969).

8 Theodore E. Anderson, Shoulder Belt Utilization (University of North Carolina Highway Safety Research Center, Chapel Hill, N. C., February 1971).

9 Pettersen Marzoni, Jr., Motivating Factors In The Use Of Restraint Systems, prepared for NHTSA (September 1971).

10 See R. C. Schneider, "Lap Seat Belt Injuries, The Treatment of the Fortunate Survivor," 67 Michigan Medicine 171 (1968).

injury due to impingement of the belt itself upon flexion of the upper body over the belt. Additionally, the single diagonal shoulder belt (without the lap belt) may produce the most serious injuries by allowing the occupant to rotate out of the belt in a torque-like motion. The exact type of injury depends on a variety of physical factors, i.e., impact direction and velocity, sex, age, and physique of the occupant.[11] However, the disadvantages shown by the few cases where seat belts resulted in injuries are by far outweighed by their advantages.[12] While seat belts may contribute to injury in specific cases, they have never been shown to worsen injury and have been shown to have prevented more serious, albeit different, injury.[13] Additionally, many of the present hazards are reduced significantly when the seat belt is properly installed and properly worn, and the trauma resulting from flexion of the upper torso can be eliminated through use of a shoulder belt in combination with a seat belt.[14] Even in the case of a pregnant female and her fetus, data indicate that the use of the seat belt prevents more serious injury.[15] The prevention of occupant ejection as well as the reduction of contact with interior structures achieved through seat belt use simply outweighs any injury that results from impingement of the abdominal area. As Dr. Richard G. Snyder has remarked: "The seat belt, properly installed and properly worn still offers the single best protection available to the automobile occupant exposed to an impact."[16]

Perhaps inadequate knowledge of the factors contributing to lack of seat belt use accounts for the rather limited success which campaigns to promote such use have enjoyed. Despite the use of millions of dollars of public service television time and space in the newspapers, results have not been encouraging. An illustration of the failure of mass media campaigns to increase seat belt use is seen in a recent study sponsored by the Insurance Institute for Highway Safety.[17] The seat belt usage rate of viewers exposed to a series of six messages over a nine month period was compared to that of a control group whose members were not exposed to the messages. It was possible to expose only one group to the messages due to the availability of a dual cable television system. It was estimated that had the public service time been purchased, costs would have run approximately $7 million. At the end of the exposure period, the researchers concluded that the campaign had had no effect whatsoever on safety belt use. There was neither a significant difference in seat belt use between the experimental cable and control cable groups nor between the cable groups and non-cable viewers. The authors found these results to be additional evidence that behavior modification approaches are inefficient and often ineffective means

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11 Richard G. Snyder, "The Seat Belt As A Cause of Injury," 53 Marquette Law Review 211, 222 (1970).

12 Id. at 223.

13 Id.

14 Huelke and Chewning, supra note 2.

15 Snyder, supra note 11, at 224.

16 Snyder, supra note 11, at 211.

17 Leon S. Robertson, et al., A Controlled Study of the Effect of Television Messages on Safety Belt Use (Insurance Institute for Highway Safety, June 1972).

of reducing highway losses. Thus, they say "passive" approaches (those which reduce accident loss without the voluntary cooperation of the driver, such as energy absorbing steering wheels and air bags) show more promise.

However, even if the automobile industry should be successful in developing the air bag as standard equipment for 1975, this development will not supercede the need for seat belts.[18] The belt should still be worn to prevent either overshooting or submarining the bag. Belts offer protection against injuries from side impacts and roll-overs where air bags would be ineffective. Belts offer protection against air bag failure and at deceleration levels below that at which the air bag is inflated.[19]

Trends in recent years show increasing compulsion to use seat belts. The city of Brooklyn, Ohio, has had an ordinance since 1966 which requires persons riding in a motor vehicle operating within the city to make use of available seat belts. Legislation which would require mandatory seat belt use has been introduced in a number of states, although no state legislature has yet enacted such a statute. However, the failure to utilize seat belts has been termed contributory negligence so as to bar recovery in a number of jurisdictions.[20]

The federal government has become increasingly active in requiring use of seat belts. As early as 1955, specifications for government automobiles included provisions for seat belt installation. More recently, however, the Federal Highway Administration has taken steps to compel drivers of vehicles operating in interstate commerce to wear seat belts. On July 8, 1970, the agency released regulations requiring installation of seat belts at the driver's seats of all buses, trucks, and truck tractors built after July 1, 1971, and used in interstate commerce. Older vehicles must be retrofitted by July 1, 1972.[21] Regulations now provide for the mandatory use of belts by drivers of such vehicles.[22] Even more recently, the federal government has proposed changes in U. S.

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18 Richard A. Bowman, "Practical Defense Problems — The Trial Lawyer's View," 53 Marquette Law Review, 191, 195 (1970).

19 Id.

20 See Bentzler v. Braun, 34 Wis.2d 362, 149 N.W.2d 626 (1967); Sams v. Sams, 247 S.C. 467, 148 S.E.2d 154 (1966); Cf. Romankewiz v. Black, 16 Mich. App. 119, 167 N.W.2d 606 (1969); Lawrence v. Westchester Fire Ins. Co., 213 So.2d 784 (La. App. -2d Cir. 1968); Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Cierpisz v. Singleton, 247 Md. 215, 230 A.2d 629 (1967).

21 See John J. Kircher, "The Seat Belt Defense — State of the Law," 53 Marquette Law Review 172, 174 (1970).

22 Motor Carrier Safety Regulation §392.16 provides: "A Motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly."

highway safety standards which would require states to pass legislation mandating seat belt use by drivers and passengers.[23]

The concept of the civil penalty (a small fine or license suspension in lieu of payment of the fine, but no jail sentence) finds expression in the recent endorsement of the National Safety Council of mandatory seat belt use legislation:

> The Board of Directors of the National Safety Council endorses laws requiring drivers to use at least lap-type safety belts in any motor vehicle operated on the highway. Such laws should apply only to a motor vehicle in which the driver's seating position is equipped with a lap belt, and that civil penalties apply for non-compliance.

Members of the Council felt that it might be easier for legislators to impose a fine or a license revocation rather than a jail sentence for what might be a matter of principle (exp. the driver refuses to wear seat belts because he thinks seat belts are dangerous.)[24]

It has also been announced that Ford Motor Company will support state legislation making safety belt use compulsory. According to company president, Lee A. Iococca: "The time has come to exert every effort to get drivers and passengers to use their safety belts and legislation appears to be the only realistic means of achieving this."

The experience of Australia after passage of a mandatory seat belt law supports the contention that although enforcement of mandatory use statutes would be difficult; nevertheless, many individuals would voluntarily comply out of respect for the law. The state of Victoria was the first to pass such a law (December 22, 1970). All states in Australia adopted the mandatory seat belt use statute by January 1, 1972. In a recent study in Victoria it was found that 76.2% of the drivers and 76.8% of the passengers wore seat belts when they were available. Additionally, during the first three months of enforcement of the Victoria law, the number of deaths and injuries to drivers and outboard front seat passengers dropped by 20%. Additionally, casualties fell from 3,841 to 3,064, according to the report of the Road Safety and Traffic Authority.

The concept of mandatory seat belt use legislation has not gone uncriticized, however. For example, the American Automobile Association, which claims to represent 14.5 million motorists, opposes such legislation on constitutional grounds. According to

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23 Proposed Highway Safety Program Standard §242.5(c) provides: "Each state shall enact a statutory provision providing for mandatory wearing of seat belts, including both lap and shoulder belts, in any vehicle required by Federal or State law or regulation to be equipped with such seat belts either at the time of its manufacture or while the vehicle is in use." 37 Fed. Reg. 15608 (1972).

24 Phone conversation with Mr. Paul Hill, Assistant General Manager, National Safety Council, on June 28, 1972.

AAA's public relations director, J. Kay Aldous, such laws would infring on the "rights and personal privileges" of motor vehicle occupants.[25] At the time this claim was made, no supporting memorandum of law had been developed by the AAA. It is,therefore, the purpose of this memorandum to evaluate such claims in light of prevailing constitutional principles.

DISCUSSION

Due Process

Since no state has passed mandatory seat belt use legislation, and thus no court has had the opportunity to rule on the constitutionality of such legislation, it is necessary to discuss the constitutional issues involved by principle and analogy, rather than by controlling judicial precedent. Perhaps the closest analogy to mandatory seat belt use legislation lies in the recent enactment of motorcycle helmet legislation in numerous states following promulgation of this requirement in Highway Safety Program Standard #303 (Motorcycle Safety) under the authority of the Highway Safety Act of 1966. The analogy is based on the fact that both types of legislation require individuals to take steps to protect themselves from the consequences of accident involvement, and thus involve rather important questions about the scope of the legislature's authority under the police power to enact what has been termed self-protective legislation.

The police power of a state is usually described in terms of the inherent power of the legislature to prescribe regulations which promote the education, health, safety, peace, morals, and general welfare of the community. The police power has been described as being least capable of limitation; yet courts have imposed certain preconditions to a valid exercise thereof. The U. S. Supreme Court, in the so-called "classic statement" of the rule, has defined the requisites to a valid exercise of the police power:

> . . . a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. [citations omitted] To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for accomplishment of the purpose, and are not unduly oppressive upon individuals. . . .[26]

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25 Status Report, Insurance Institute for Highway Safety VII, No. 11 (June 12, 1972), 7.

26 Lawton v. Steele, 152 U.S. 133, 136-37 (1894); described as a "classic statement" in Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

The majority of challenges to legislative enactments under the police power have dealt with the second requirement — that the means be reasonably necessary for the accomplishment of the purpose.[27]

However, this requirement would appear to be easily satisfied with respect to both motorcycle helmet and seat belt legislation. In the case of mandatory helmet legislation, the motorcyclists themselves have generally conceded that the method chosen lessens the potential for personal injury and death and thus enhances safety. Even should this concession be withheld in the case of mandatory seat belt use legislation, the findings of numerous studies such as those previously discussed would provide a sufficient basis for a legislature to conclude that the means chosen (required use of seat belts) is reasonably necessary for accomplishment of the purpose of the legislation (reduce highway accident morbidity and mortality). Thus the debate over the constitutionality of motorcycle helmet and seat belt use legislation is somewhat unusual in that it focuses on the first requirement for a valid exercise of the police power — that the interests of the public, as opposed to the interests of the individual or class of individuals, require such interference.

The notion that some public interest must be identified in order to justify exercise of the police power by the legislature is an idea which finds expression in the ancient maxim "sic utere tuo ut abenum non laedas" (so use your own that you do not injure that of another.)[28] The concept is further expressed in the theory of the social compact as espoused by John Stewart Mill and other 18th century social commentators whose writing so influenced the framers of the constitution. The idea of the social compact is that natural man, in forming an organized society, relinquishes certain of his naturally endowed rights for the common good. Those rights unessential to the common good are retained by the individual.[29] Thus, helmet legislation critics argue (and seat belt critics would argue) that since not wearing the safety equipment could not possibly harm anyone other than the motorcyclist himself (or driver-passenger in the case of seat belts) in any immediate realistic manner, then the cyclist should be free to act according to his own prerogatives in the selection of safety equipment. Failure to accord this discretion is said to constitute a denial of due process within the meaning of the 14th Amendment.

While a few courts have seemingly ignored this issue, most courts have recognized the problem and have proceeded to identify the public interest which justifies the exercise of the police power. In raising the various arguments justifying helmet

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27 Note, "Motorcycle Helmets and the Constitutionality Of Self Protective Legislation," 30 Ohio State Law Journal 355, 360 (1969).

28 Comments, "Constitutionality of Mandatory Motorcycle Helmet Legislation," 73 Dickinson Law Review 100, 103 (1968). See also American Motorcycle Assoc. v. Davids, 11 Mich. App. 357, 158 N.W. 2d 72, (1968).

29 "Motorcycle Helmets and the Constitutionality of Self Protective Legislation," supra note 27, at 362.

legislation, a recitation of the fact that such statutes are initially clothed with a presumption of constitutionality frequently appears.[30] This presumption is strengthened when the impetus for state legislation stems from federal sources.[31]

However, it should be noted that a presumption serves only as an initial allocation of the burden of persuasion, and thus is far from decisive of the issue. As the court in Davids noted, the initial presumption of constitutionality does not serve as the basis for courts to abdicate their responsibility.[32]

In the search for a precise public interest which would justify exercise of the police power, several theories have been consistently utilized.

The Missile Hazard Theory

Under this theory, the motorcyclist is theorized to be particularly vulnerable to injuries about the head and face from rocks, bugs, and other flying debris, any one of which could cause him to lose control of his cycle and thereby crash into some innocent party. Thus, the theory goes, it is justifiable to require the motorcyclist to wear headgear to protect other members of the public from sudden losses of control; i.e., a public interest. Perhaps the most picturesque statement of this theory is that found in People v. Bielmeyer, in which the court stated:

> The old joke about the happy motorcyclist — "the one with the bugs on his teeth" — is not too funny when one hears or reads about instances where cyclists have been hit with hard-shelled beetles or less and have lost control of their bikes, causing damage and injuries to others.[33]

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30 See State v. Anderson, 275 N.C. 168, 166 S.E.2d 49, 50-51 (1969); American Motorcycle Association v. Davids, 11 Mich. App. 351, 158 N.W.2d 72, 76 (1968); Everhardt v. City of New Orleans, 253 La. 285, 217 So.2d 400, 401 (1968); People v. Carmichael, 56 Misc.2d 388, 288 N.Y.S.2d 931, 934 (Genesee Cnty. Ct. 1968); People v. Newhouse, 55 Misc.2d 1064, 287 N.Y.S.2d 713, 714 (City Ct. Ithaca 1968). Accord, United States v. Carolene Products Co., 304 U.S. 144, 154 (1938).

31 As part of the uniform standards for highway safety programs established pursuant to the Highway Safety Act of 1966, Standard #303 directed each state to institute a motorcycle safety program and to require at a minimum that each driver and passenger wear an approved motorcycle helmet. As to mandatory seat belt use legislation, see Proposed Highway Safety Program Standard §242.5(c), note 23 supra.

32 Davids at 76.

33 People v. Bielmeyer, 54 Misc.2d 466, 282 N.Y.S.2d 797, 800 (Cty. Ct. 1967).

Although the missile hazard principle is perhaps the theory most frequently utilized in constructing an identifiable public interest, it nevertheless suffers from a lack of credibility in that there are few data supportive of the proposition that the frequency of such chance occurrences is so great as to constitute an actual danger to the public. As the court in Davids said in holding unconstitutional the Michigan amendment requiring motorcyclists and riders to wear crash helmets: ". . . such reasoning is obviously a strained effort to justify what is admittedly wholesome legislation."[34] Despite its tenuous character, the missile hazard theory is usually prominent amongst the varying theories used by the courts in sustaining the helmet legislation.[35]

Should a court find itself favorably inclined toward mandatory seat belt use legislation, a theory similar to the missile hazard theory is available. For convenience, this theory may be termed the "secondary impact" theory.[36] Loosely stated, the theory is that the seat belt, by keeping the driver in position behind the wheel after an initial crash, helps to keep the driver in control of the vehicle after impact and thus lessens the chance of an out-of-control vehicle crashing into other vehicles or pedestrians, i.e. secondary impacts. By this reduction of the potential danger to innocent parties, the public interest is served.

Although the theory is certainly logical, it too suffers from a lack of supportive documentation. The nature of the situation simply does not easily lend itself to estimations of the damage prevented through the increased control resulting from seat belt use. However, since lack of documentation was of little importance to courts using the missile hazard theory, perhaps the lack of data as to secondary impacts prevented through seat belt use does not constitute a major defect. Perhaps explanatory of why the lack of supportive data is not fatal to the theory is the relation of the judiciary and legislative branches. Data gathering is a peculiarly legislative task, and the court will seldom try to second guess the legislature as to the wisdom of the enactment. More often, the court confines its inquiry to whether there is any state of facts that can

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34 American Motorcycle Association v. Davids, 11 Mich. App. 351, 158 N.W.2d 72, 75 (1968).

35 State v. Albertson, 92 Idaho 640, 470 P.2d 300, 303 (1970), Bisenius, v. Karns, 42 Wis.2d 42, 165 N.W.2d 377, 380-81 (1969); State v. Fetterly, 456 P.2d 996 (Ore. 1969); State v. Anderson, 275 N.C. 168, 166 S.E.2d 49, 52 (1969); State v. Craig, 19 Ohio App.2d 29, 249 N.E.2d 75, 78 (1969); State v. Odegaard, 165 N.W.2d 677, 679 (N.D. 1969); Colvin v. Lombardi, — R.I. —, 421 A.2d 625 (1968); People v. Newhouse, 55 Misc. 2d 1064, 287 N.Y.S.2d 713, 715 (Cty. Ct. Ithaca 1968); People v. Bielmeyer, 54 Misc.2d 466, 282 N.Y.S.2d 797, 800 (Cty. Ct. 1967); State v. Mele, 103 N.J.Super. 353, 247 A.2d 176, 178 (Hudson Cnty. Ct. 1968); People v. Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 293 (Cty. Ct. 1967).

36 Bowman, supra note 18; Snyder, supra note 11, at 224.

reasonably be conceived that would justify the legislature in making the choice that it did.[37] Thus, unless the premise on which the legislation is based is wholly illogical, complete documentation is unnecessary. Of course, the case for the state is much stronger if data to support the theory are readily available.

A court considering the constitutionality of mandatory seat belt use legislation is by no means confined to the secondary impact theory however, for the helmet cases provide a number of other theories to justify exercise of the police power.

The Public Welfare Theory

Within the ambit of the public welfare theory there are several possible justifications for exercise of the police power. One such ground is the asserted interest of society in preventing injured motorcyclists from becoming a burden on society.[38] In addition to the rise in welfare costs resulting from motorcycle injuries, there is the cost of providing police, ambulance, and other emergency personnel at the accident scene.[39] The problem with such reasoning is that almost any human activity can be found to be dangerous and unless there are data to show that injured cyclists add significantly to the costs of welfare and emergency medical care, then the precedential consequences of such decisions are seemingly without limit. Unless supportive data are required or a limiting principle formulated, almost any restriction on human activity would appear justifiable on this ground.

Other arguments put forth by the state that appear to fall within the public welfare theory are the asserted interest of the state in the continuing viability of the citizen[40] and the interest of the state in solving any problem which has reached the proportions of a public disaster.[41] These same interests are reflected in those decisions which begin

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37 See U.S. v. Carolene Products Co., 304 U.S. 144, 154 (1938); Everhardt v. City of New Orleans, 253 La. 285, 217 So.2d 400, 402 (1968); People v. Bielmeyer, 54 Misc.2d 466, 282 N.Y.S.2d 797 (City Ct. 1967).

38 State v. Odegaard, 165 N.W.2d 677, 679 (Sup. Ct. of N.D. 1969.) People v. Newhouse, 55 Misc.2d 1064, 287 N.Y.S.2d 713, 715 (N.Y.Cty.Mun.Ct. 1968); Colvin v. Lombardi, ____ R.I. ____, 241 A.2d 625 (1968).

39 State v. Albertson, 93 Idaho 640, 470 P.2d.300, 303 (1970).

40 People v. Carmichael, 56 Misc.2d 388, 288 N.Y.S.2d 931, 935 (Genesee Cnty. Ct. 1968); State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968). Also see the suggestion in West Coast Hotel v. Parrish, 300 U.S. 379 (1937): "The State still retains an interest in his welfare, however reckless he may be the whole is no greater than the sum of its parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer." (Quoting Holden v. Hardy, 169 U.S. 366, 397 (1897).

41 Ex parte Smith, 441 S.W.2d 544, 547 (Ct. of Crim.Appeals of Texas, 1969).

with a recitation of the safety problem created through an increase in motorcycle use and the injuries and fatalities resulting from head injuries to motorcyclists.[42] If one can abstract from these concerns a constitutional justification for the infringement on the motorcyclist's prerogatives, it is that once a problem reaches such dimensions as to threaten the very fabric of society, it is no longer a personal and individual matter, but one which justifies governmental action to rectify the situation. The theory also reflects the fact that questions of constitutional protection of individual rights cannot be resolved in the abstract, but rather that the scope of the police power changes with changing circumstances.

Though morbidity and mortality data are strongly supportive of governmental intrusion in the case of mandatory motorcycle helmet usage, the evidence is even stronger in the case of seat belt usage in automobiles. For example, motor vehicle accident data for 1970 show 54,800 deaths and 2,000,000 disabling injuries,[43] with costs estimated at a staggering $13,600,000,000.[44] Motor vehicle accidents are the leading cause of accidental death, and follow only heart disease, cancer, and stroke in the total number of deaths caused thereby.[45] These data lend impressive support to the proposition that the state is justified on both humanitarian and economic grounds in seeking to reduce the consequences of motor vehicle accident involvement by requiring motorists to use seat belts. Despite one court's allegation that the state's interest in the viability of its citizens to keep them healthy and self-supporting can only lead to "unlimited paternalism,"[46] the arguments put forth on these grounds appear to have realistic content. If the state does not have the power to require motorists to take steps to protect themselves from the consequences of their own carelessness in a situation where the crash loss statistics evidence a substantial danger to society, it is difficult to rationalize other instances where exercise of the police power has been held valid. Although the interest of society in its own preservation and productivity appears to be an argument without bounds, it is submitted that this, as well as most constitutional questions, is a matter of degree. Ultimately, the court must balance the loss of individual liberty with the interests of the state, and it is questionable whether the right to operate a motor vehicle without the added bother of buckling up looms very large when compared with the loss of life and limb which results from an automobile crash.

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42 State v. Albertson, 93 Idaho 640, 470 P.2d 300, 301 (1970); State v. Also, 11 Ariz. App. 227, 463 P.2d 122, 125 (1969); People v. Carmichael, 56 Misc.2d 388, 288 N.Y.S.2d 931, 935 (Genesee Cnty. Ct. 1968); People v. Bielmeyer, 54 Misc.2d 466, 282 N.Y.S.2d 797, 800 (Cty. Ct. 1967).

43 National Safety Council, 1971 Accident Facts 40.

44 Id. at 5. "The total includes the $8,900,000,000 estimated cost of injuries and insurance administrative costs shown in the table below and the above estimate of $4,700,000,000 property damage. Not included are costs of certain public agency activities such as police, fire, and courts; damages awarded in excess of direct cost; indirect costs to employers, etc."

45 Id. at 8.

46 Davids at 75.

Highway Use As A Privilege Theory

A third justification for helmet laws has been that the use of the public highways is a privilege and not a natural right and therefore the state may impose preconditions to use of the roads.[47] Despite the fact that regulation of traffic on the public roads has traditionally been viewed as an incident of the state's police power, the use of the privilege theory to sustain either helmet legislation or seat belt legislation is subject to severe criticism. First of all, even if driving be termed a privilege, traffic regulations are still not exempt from the requirements of due process. Secondly, the use of such a conclusory label as "privilege" is no answer to a claim that legislation is violative of due process because there is no ascertainable public interest. Such an argument represents logic chopping at its worst.

Recent Supreme Court decisions indicate that there may be little viability to the privilege-right dichotomy insofar as being determinative of the requirements of due process. For example, two areas that have long been thought of as examples of the government affording a privilege to the citizen (welfare and driver licensure), have been the subject of decisions which tend to denigrate the viability of the privilege-right distinction.[48] Although the cases could perhaps be distinguished on the basis that they were concerned with the due process requirements of notice and opportunity to be heard rather than the precise issue at stake with respect to helmet and seat belt use legislation; nevertheless, the cases do illustrate that where a due process violation is alleged, the court will disregard the cliche that the activity to which due process requirements are asserted is a "privilege," and will proceed to analyze the relevant social and economic issues. Consequently, it is concluded, that the 'highway use as a privilege' theory is a poor response to an allegation that compulsory seat belt use has no relation to the public interest.

Analogical Approaches

(A) The Suicide Analogy

Upon the theory that suicide is not a legally protected right of individuals,[49] helmet laws are justified by analogy to the anti-suicide laws of various states. Presumably, the same analogy would apply in the case of mandatory seat belt use legislation. However, query just how relevant the suicide analogy is in the case of either

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47 Everhardt v. City of New Orleans, 253 La. 285, 217 So. 2d 400, 402 (1968); Commonwealth v. Howie, 238 N.E. 2d 373, 374 (Mass. 1968); People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S. 2d 797, 800 (Cty. Ct. 1967); People v. Schmidt, 43 Misc. 2d 702, 283 N.Y.S. 2d 290, 293 (Erie Cty. Ct. 1967); Hutchinson v. Silvey, No. CR 8081 (Kan. Dist. Ct., Dec. 11, 1967).

48 For an illustration in the area of welfare, see Goldberg v. Kelly, 397 U.S. 254 (1970); driver licensure, Bell v. Burson, 402 U.S. 535 (1971).

49 Bisenius v. Karns, 42 Wis. 2d. 42, 165 N.W. 2d. 377, 383 (1969).

seat belts or motorcycles. Although it can be shown that the failure to use either substantially increases the risk of death in case of accident involvement, nevertheless, there is lacking the immediate threat of imminent death that figures in the case of anti-suicide laws. The state is perhaps better off omitting this analogy.

(B) The Smallpox Vaccination Analogy

The fact that the U. S. Supreme Court has sustained a requirement that all people be vaccinated against smallpox[50] can arguably be cited for the broader proposition that the state can require the individual to protect himself, even against his will. However, there is still a clearly identifiable public interest present in that it is necessary to vaccinate everyone in order to prevent the spread of a contagious disease.

Cited for the same proposition as to the validity of self-protective legislation is Mugler v. Kansas, 123 U.S. 623, 8 S. Ct. 273, 31 L. Ed. 205 (1887), in which the court sustained a prohibition against the manufacture of intoxicating liquors for home use. However, given that there is a public interest in preventing the sale of moonshine whiskey, Mugler can be distinguished on that basis that to permit individual manufacture "would tend to cripple, if it did not defeat, the effort to guard the community." 123 U.S. at 662, 8 S. Ct. at 297. Hence neither the Jacobson nor the Mugler decisions lend sound support to the proposition that the police powers may be exercised without first precisely identifying the public interest involved.

In summary, the problem with respect to mandatory seat belt use legislation is to identify the precise public interest which the legislation is designed to institute. If no such interest exists, the exercise of the police power is invalid as violative of due process. Principles used in sustaining the validity of motorcycle helmet legislation are equally applicable to seat belt legislation. Perhaps the most persuasive rationale is that automobile casualities and fatalities have reached such alarming proportions as to constitute a threat to society, and that reduction of the human and property loss can no longer be regarded purely as a matter of individual prerogative. Also persuasive is the "secondary impact" theory whereby seat belts, by keeping the driver behind the wheel and in control of his vehicle, help prevent secondary impacts and the resulting injuries to other members of the public. Of less persuasion in finding a public interest are the highway use as a privilege theory, and theories which analogize mandatory seat belt use legislation to anti-suicide and compulsory smallpox vaccination statutes.

Even though seat belt use legislation could be sustained on principles analogous to those used to sustain motorcycle helmet legislation, and even though attacks on the

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50 Jacobson v. Mass., 197 U.S. 11 (1905).

constitutionality of motorcycle helmet legislation have rarely been successful[51], it may be anticipated that some courts which have sustained motorcycle helmet legislation would not do likewise with respect to seat belt legislation. Several courts have already expressed hostility to the notion of there being a public interest sufficient to justify mandatory seat belt legislation, although such language constituted only dictum.[52] Although it could be argued that the exposure of the motorcyclist to traffic hazards is greater than the situation with respect to automobile drivers, thereby justifying more intrusive measures, the automobile casualty and fatality figures nevertheless indicate a social problem of such magnitude as to warrant governmental intrusion. Given the similar policies operating with respect to both motorcycle helmet and seat belt use, it is difficult to reconcile how a court could logically sustain motorcycle helmet legislation and invalidate mandatory seat belt use legislation.

Equal Protection

Although raised less frequently than the due process challenge, motorcycle helmet laws have nevertheless been challenged as violative of the equal protection clause of the 14th Amendment. Motorcycle riders claim that they have been singled out as a class and required to wear self-protective gear which is not required of other highway users. They allege that such discrimination is violative of the equal protection clause as the class of highway users subject to the helmet requirement is underinclusive.

By and large, this facet of the attack on motorcycle helmet legislation has not been notably successful. Generally the courts have found a reasonable basis for the distinctive treatment accorded motorcycle riders.[53] A typical statement of the distinction is found in State v. Anderson:

> Valid reasons exist for requiring motorcycle operators to wear helmets. Motorcycle operators occupy positions of extreme exposure which are not shared by automobile

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51 Only a few courts have found motorcycle helmet legislation unconstitutional. Most of these have been reversed on appeal. e.g., American Motorcycle Assoc. v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968); People v. Carmichael, 53 Misc.2d 584, 279 N.Y.S.2d 272 (1967); People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149 (1969); People v. Smallwood, 52 Misc.2d 1027, 277 N.Y.S.2d 429 (1967); Everhardt v. City of New Orleans, 208 So.2d 423 (La.App.1967); State v. Albertson (D.Id. 1969). Everhardt, Carmichael, and Albertson were all reversed on appeal.

52 Davids at 76; State v. Mele, at 178.

53 State v. Albertson, 93 Ida. 640, 470 P.2d 300, 301 (1970); People v. Fries, 42 Ill.2d 446, 250 N.E.2d 149, 150 (1969); State v. Anderson, 275 N.C. 168, 166 S.E.2d 49, 53 (1969); Everhardt v. City of New Orleans, 253 La. 285, 217 So.2d 400, 403 (1968); People v. Carmichael, 56 Misc.2d 388, 288 N.Y.S.2d 931, 935 (Genesee Cnty. Ct. 1968).

> and truck drivers. The latter operate in closed vehicles protected by steel and shatterproof glass. Their vehicles have a minimum of four wheels and operate with more stability than two wheeled motorcycles, and very slight head or hand injury by gravel, small stones, or other objects thrown backward could easily cause a motorcyclist to veer from his course into the travel lane of other vehicles on the highway, or into the path of pedestrians on or near the highway.[54]

The question then arises as to whether a denial of equal protection could reasonably be asserted in the case of mandatory seat belt use. As to the general proposition, it appears unlikely that a claim of a denial of equal protection could be sustained since the class of potential motor vehicle drivers and passengers encompasses nearly every man, woman, and child in the United States. The number of road users who are not within the class to whom the seat belt requirement would apply is so small that it is difficult to see how an allegation of underinclusiveness could reasonably be sustained.

There is, however, one situation in which motorists required to use seat belts could allege a denial of equal protection. That situation would exist where the applicable statute required that only drivers and passengers in automobiles equipped with belts as standard equipment be required to use them — occupants of vehicles manufactured before belts became standard equipment being exempt. Under these circumstances, motorists who were subject to the seat belt requirement could well allege that the statute is underinclusive and therefore violative of equal protection because there is no difference in the risk to which both classes of vehicle occupants are exposed.

The question for the courts would again be whether there is a reasonable basis for differentiating between occupants of seat belt equipped vehicles and occupants of vehicles without such restraint systems. In this case, the economic burden that would be imposed by requiring owners of older vehicles to retrofit their automobiles with restraint systems might well constitute a reasonable basis for the differential treatment. Alternately, the court might rely on the familiar rhetoric used in sustaining an underinclusive statute that a legislature in seeking to alleviate a problem need not tackle all phases of the problem at once.[55]

In summary, an allegation that mandatory seat belt legislation constitutes a denial of equal protection does not appear tenable except in the case where the statute applies only to occupants of vehicles which have been equipped with restraint systems as standard equipment. In such a situation, the court would have to find a reasonable basis for the underinclusiveness. The economic burden that would be occasioned by requiring owners of older vehicles to retrofit their automobiles with seat belts might well constitute such a basis for the differential treatment. Alternately, the court might

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54 State v. Anderson, 275 N.C. 168, 166 S.E.2d 49, 53 (1969).

55 Railway Express Agency v. New York, 336 U.S. 106 (1949).

find that the legislature may proceed piecemeal in seeking solutions to large social problems.

Right to Privacy

Motorcycle helmet laws have been unsuccessfully challenged as infringing on the individual's right to privacy.[56] Presumably, mandatory seat belt use legislation is subject to the same challenge.

The sources of the so-called right to privacy include J. Goldberg's concurring opinion in Griswold v. Connecticut[57], as well as Justice Brandeis' famous dissent in Olmstead v. United States, in which he stated:

> The makers of the Constitution sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred as against the government, the right to be left alone — the most comprehensive of rights and the right most valued by civilized man.[58]

However, as with all constitutional questions, the doctrine cannot be applied in the abstract. For example, Griswold involved the appeal of two doctors who had given advice on contraceptive methods from a conviction under Connecticut's anticontraception law. According to Justice Goldberg, the right of marital privacy was fundamental and though not explicitly mentioned by the 9th Amendment, such a construction was supported by the language and history of that Amendment as applied to the states by the 14th Amendment. To determine which rights are fundamental, one is directed to "the traditions and collective conscience of the people" to determine which principles are so deeply rooted as to be ranked as fundamental.

If one were to look at the traditions in the United States, use of the highways would hardly appear to be a matter within the constitutionally protected zone of privacy. Regulation of the highway system has traditionally been viewed as a cornerstone of the state's police power.[59] By and large, the courts have refused to recognize the existence of a right to privacy with respect to travel on the public roads. A frequently cited view of the inappropriateness of a right to privacy in the context of travel on the highway

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56 e.g., State v. Albertson, 93 Idaho 640, 470 P.2d 300 (1970); Bisenius v. Karns, 42 Wis.2d 42, 165 N.W.2d 377 (1969); State v. Fetterly, 456 P.2d 996 (Ore. 1969).

57 381 U.S. 479 (1965).

58 Olmstead v. United States, 277 U.S. 438, 478 (1928).

59 Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); South Carolina v. Barnwell Bros. 303 U.S. 177 (1938).

system is Bisenius v. Karns, in which the Wisconsin Supreme Court stated:

> However, Justice Brandeis hardly intended [referring to his dissent in Olmstead] that such right to be left alone would include the right to camp on a cloverleaf or do one's thing on an expressway. There is no place where any such right to be let alone would be less assertable than on a modern highway with cars whizzing by at sixty or seventy miles an hour. When one ventures onto such a highway, he must be expected and required to conform to public safety regulations and controls, including some that would neither have been necessary nor reasonable in the era of horse-drawn vehicles.[60]

Griswold may be viewed as a resurrection of John Stewart Mill's philosophy that man relinquishes only those rights essential to the common good, and reflects the fact that the court refused to view contraception as a public evil. Though the value of marital privacy was more important than the value of judicial deference to legislative judgment in Griswold, it is submitted that an entirely different hierarchy of values exists with respect to legislation designed to reduce the morbidity and mortality toll on the nation's highways. It is therefore unlikely that mandatory seat belt use legislation would be held unconstitutional as violative on the constitutional right to privacy.

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60 Bisenius v. Karns, 42 Wis. 2d 42, 165 N.W. 2d 377, 384 (1969).