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largely designed to serve as aids in ascertaining the testator's probable intent have no controlling force.³⁰

In each case the court should construe each will to effectuate the *probable* intention of the testator in light of all surrounding facts and circumstances, irrespective of rules of construction.

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STATE'S POWER TO REQUIRE AN INDIVIDUAL TO PROTECT HIMSELF

The police power,¹ inherent in the sovereignty of each state,² enables the legislature to act for the protection of the public health, safety, morals and general welfare.³ It is the police power, therefore, which allows the legislature to regulate reasonably the operation of motor vehicles upon the public highways.⁴ Pursuant to this general authority, thirty-five states⁵ have recently enacted statutes requiring

³⁰*Fidelity Union Trust Co. v. Robert*, 36 N.J. 561, 178 A.2d 185, 189 (1962).

¹R. ROETTINGER, *THE SUPREME COURT AND STATE POLICE POWER* 10 (1957) indicates that "police power" was coined by Chief Justice Marshall in *Brown v. Maryland*, 25 U.S. 419 (1827). A classic definition of the phrase was written by Chief Justice Shaw in *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851):

The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

²*James v. Duckworth*, 170 F. Supp. 342 (E.D. Va. 1959); T. COOLEY, *CONSTITUTIONAL LAW* 289 (4th ed. 1931).

³*Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁴*Haswell v. Powell*, 38 Ill. 2d 161, 230 N.E.2d 178 (1967), *appeal dismissed*, 390 U.S. 712 (1968). The operation of a motor vehicle upon the public highways has been variously termed a right, *Adams v. City of Pocatello*, 91 Idaho 99, 416 P.2d 46 (1966); a liberty, *Wall v. King*, 206 F.2d 878 (1st Cir. 1953); and a privilege, *Watson v. Division of Motor Vehicles*, 212 Cal. 279, 298 P. 481 (1931); *State v. Holt*, — Iowa —, 156 N.W.2d 884 (1968); *Walton v. City of Roanoke*, 204 Va. 678, 133 S.E.2d 315 (1963). See Reich, *The New Property*, 73 YALE L.J. 733 (1964) and Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) for a discussion of the validity of restrictions attached to the exercise of privilege.

⁵ALA. CODE tit. 36, § 138 (Supp. 1967); ARIZ. REV. STAT. ANN. § 28-964 (Supp. May, 1968); ARK. STAT. ANN. § 75-1703 (Supp. 1967); CONN. GEN. STAT. ANN. § 14-289e (Supp. 1968); FLA. STAT. ANN. § 317.981(1)(b) (Supp. 1968); GA. CODE ANN. § 68-1673 (1967); HAWAII REV. LAWS (1967 Session Laws, Act 214-96); IDAHO CODE ANN. § 49-761(a) (1967); ILL. ANN. STAT. ch. 95-1/2, § 189(c) (Smith-Hurd

motorcycle operators and passengers to wear crash helmets in order to protect motorcyclists from flying objects and to minimize potential injuries from an accident. The question has arisen in connection with these statutes whether legislation aimed at compelling the individual to protect himself from his own careless or potentially dangerous acts exceeds the scope of the state's police power and abridges the individual's liberty under the fourteenth amendment.

The controversy over this question is illustrated by two recent intermediate state court cases, *American Motorcycle Association v. Davids*⁶ from Michigan and *People v. Carmichael*⁷ from New York. In considering similar statutes⁸ which require the wearing of crash helmets, both courts assumed that the legislation was intended to minimize motorcyclists' personal injuries.

Davids, a declaratory judgment proceeding as to the constitutionality of the helmet statute, held the statute to be an unconstitutional exercise of the police power. The statute was attacked as violating not only the due process and reserved powers clauses of the Michigan

Supp. 1967); IND. ANN. STAT. § 47-2246(a) (Supp. 1968); KAN. STAT. ANN. § 8-574(b) (Supp. 1967); KY. REV. STAT. ANN. § 189.285 (Supp. 1968); LA. REV. STAT. ANN. § 32:190 (West's Legislative Service 1968); ME. REV. STAT. ANN. tit. 29, § 1373 (Supp. 1968); MD. ANN. CODE art. 66-7/2, § 195(g) (Supp. 1968); MASS. ANN. LAWS ch. 90, § 7 (Supp. 1967); MICH. PUB. ACTS (1966), No. 207 [repealed by MICH. STAT. ANN. § 9.2358(d) (1968)]; MINN. STAT. ANN. § 169.974(4) (Supp. 1967); MO. ANN. STAT. § 302.020.3 (Supp. 1968); N.H. REV. STAT. ANN. § 263:29-b (Supp. 1967); N.J. STAT. ANN. § 39:3-76.7 (Supp. 1968); N.M. STAT. ANN. § 64-18-55.1 (Supp. 1967) (requiring minors under eighteen and their passengers to wear helmets); N.Y. VEH. & TRAF. LAW § 381(6) (McKinney Supp. 1968); N.C. GEN. STAT. § 20-140.2 (Supp. 1967); OKLA. STAT. ANN. tit. 47, § 40-105.G (Supp. 1968); ORE. REV. STAT. § 483-443 (1967); PA. STAT. tit. 75 § 625.1 (1968 Session Laws, Act. 162); R.I. GEN. LAWS ANN. §§ 31-10.1-4, 1-6 (Supp. 1966); S.C. CODE ANN. § 46-631 (Supp. 1967); S.D. CODE (1967 Session Laws, ch. 215); TENN. CODE ANN. § 59-934 (Repl. Vol. 1968); TEX. REV. CIV. STAT. art. 6701 c-332 (Supp. 1968); VT. STAT. ANN. tit. 23, § 1256 (Supp. 1968); WASH. REV. CODE § 46.37-530(3) (Supp. 1967); WIS. STAT. ANN. § 347-485.1(a) (Supp. 1968). The use of crash helmets has been endorsed by federal authority. U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL HIGHWAY ADMINISTRATION, NATIONAL HIGHWAY SAFETY BUREAU, HIGHWAY SAFETY PROGRAM STANDARDS 6 (1968).

⁶158 N.W.2d 72 (Mich. Ct. App. 1968).

⁷56 Misc. 2d 388, 288 N.Y.S.2d 931 (Genesee County Ct. 1968), *rev'g*, 53 Misc. ed 584, 279 N.Y.S.2d 272 (Ct. Spec. Sess. 1967).

⁸"A person operating or riding on a motorcycle or motor driven cycle shall wear a crash helmet approved by the department of state police . . ." MICH. PUB. ACTS (1966), no. 207.

"It shall be unlawful, . . . for any person to operate or ride upon a motorcycle unless he wears a protective helmet of a type approved by the commissioner. Such a helmet must be equipped with either a neck or chin strap and be reflectorized on both sides thereof." N.Y. VEH. & TRAF. LAW § 381(6) (McKinney Supp. 1968).

Constitution⁹ but also the due process, equal protection and right of privacy provisions of the United States Constitution. The court held the statute unconstitutional without stating upon which of these grounds it was proceeding. Instead, the court cited two maxims as controlling: (1) "[T]he individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself"¹⁰ and (2) "*Sic utere tuo ut alienum non laedas.*" (So use your own that you do not harm that of another.)"¹¹ In light of these maxims the court held that protection of the individual from himself did not bear a substantial relation to the public health or welfare. Therefore, the statute was unconstitutional. The court rejected the argument that the state has an interest in the viability of its citizens, saying that such logic could lead to unlimited paternalism. It stated further that if the legislative power to regulate the use of the highways was broad enough to allow the crash helmet legislation, then it could also justify legislation requiring automobile drivers to wear helmets or to buckle their seat belts. The traditional argument under the scope of the police power, that the injured motorcyclist might become a public charge and that the unprotected motorcyclist might become a menace to others (for example, by being struck by a flying object and losing control of his motorcycle), were rejected as too remote and as not being the real purpose of the legislation.

In *Carmichael*, a prosecution for failure to wear the required headgear, the defendant argued that the requirement denied him equal protection of the laws, infringed upon his right of privacy and was not a valid exercise of the police power.¹² In justifying the statute, the court noted the argument that the unprotected motorcyclist could become a menace to others. However, the court specifically held that the state has an interest in having "robust, healthy citizens" and, therefore, that a statute forcing an individual to protect himself falls within the scope of the police power. While conceding that this statute, just as any statute, may infringe upon individual rights, the court found that this particular requirement met the reasonableness standard since crash helmets are widely accepted and used safety devices.

It is clear that the conflict between *Dauids* and *Carmichael* turns

⁹MICH. CONST. art. 1, §§ 17, 23.

¹⁰158 N.W.2d at 73, citing J. S. MILL, *On Liberty*, in UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 201 (1950).

¹¹158 N.W.2d at 74. The power of the state to compel its citizens to observe this maxim has been traditionally considered the police power. *E.g.*, *Crowley v. Christensen*, 137 U.S. 86 (1890); *Munn v. Illinois*, 94 U.S. 113 (1876).

¹²Apparently these contentions were Federal Constitutional objections.

on the validity of the maxim that a state cannot force an individual to protect himself. Apparently the first statement of this maxim appeared in 1859 in John Stuart Mill's essay, *On Liberty*.¹³ The framers of the Constitution, however, had the maxim's underlying philosophy in mind when they followed John Locke's implicit assumption that the ideal government is the minimum government,¹⁴ that is, the one which places the fewest restrictions upon the individual.¹⁵

There has been no difficulty in justifying legislative restrictions upon the individual where his unrestricted action creates an obvious public menace. Thus, the state may require individuals to be vaccinated and thereby protect the individual as well as the public at large from the threat of a contagious disease.¹⁶ However, a problem arises when statutes directed toward the individual's conduct do not have such a clear relationship to the public welfare.

The maxim must stand or fall on the validity of its basic assumption that the welfare of the individual can have no significant relation to the public welfare. In *Mugler v. Kansas*¹⁷ the Supreme Court of the United States indirectly passed upon this question when it sustained a statute prohibiting the manufacture and sale of alcoholic beverages. The Court premised its holding on the idea that it is within the scope of the legislature to determine whether even the manufacture of liquor for one's own use may detrimentally affect the public.

The rationale which permits such legislative involvement with the individual's own welfare has been a factor in employment contract cases which have sustained legislation aimed at improving the employees' bargaining position. *Holden v. Hardy*¹⁸ and subsequent cases¹⁹ recognized that "the whole is no greater than the sum of all the

¹³Note 10 *supra*.

¹⁴F. NORTHROP, *THE MEETING OF EAST AND WEST* 107 (1946).

¹⁵"[I]nsomuch that were it made a question, whether no law, as among the savage Americans, or too much law, as among the civilized Europeans, submits man to the greatest evil, one who has seen both conditions of existence would pronounce it to the last: . . ." T. JEFFERSON, *DEMOCRACY* 60 (S. Padover ed. 1939).

¹⁶*Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *cf.*, *Zucht v. King*, 260 U.S. 174 (1922); *Bissell v. Davison*, 65 Conn. 183, 32 A. 348 (1894).

¹⁷123 U.S. 623 (1887). *See also* *Crane v. Campbell*, 245 U.S. 304 (1917) (statute forbidding the possession of liquor); *Austin v. Tennessee*, 179 U.S. 343 (1900) (statute prohibiting the sale of cigarettes).

¹⁸169 U.S. 366 (1898).

¹⁹*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *New York Central R.R. v. White*, 243 U.S. 188 (1917); *Chicago, B. & Q. R.R. v. McGuire*, 219 U.S. 549 (1911).

parts"²⁰ and, therefore, that the individual is an integral part of the entire population. Thus, legislation aimed at protecting the individual from powerful employers or even "from himself"²¹ was found to have a valid relation to the public welfare. The conclusion to this line of reasoning was stated in *People v. Charles Schweinler Press*²² which held: "[T]he state has such an interest in the welfare of its citizens that it may, if necessary, protect them against even their own indifference, error, or recklessness."²³ However, there was an alternative ground for the decision as the statute which was considered regulated the working hours of women and the court noted a special relationship between the health of women and the future health and capacities of their offspring.

Further evidence of the "whole is no greater than the sum of all the parts" justification for legislative enactments is evident in the numerous cases upholding fluoridation.²⁴ Fluoridation of municipal water supplies contemplates mass-medication for a non-contagious malady, dental caries. The individual is directly benefited by the reduction of these caries. Contentions that fluoridation infringes upon freedom of religion, by introducing foreign substances into the body, and violates a right of individuals to decide how to care for themselves have been uniformly rejected on the ground that the general benefit outweighs any rights of individuals not to have their water treated.²⁵ It is true that the fluoridation cases are distinguishable from the crash helmet cases since the unwilling individual is imposed upon

²⁰169 U.S. at 397; *cf.*, *People v. Havnor*, 149 N.Y. 195, 43 N.E. 541 (1896), *dismissed for want of jurisdiction*, 170 U.S. 408 (1898). It has also been recognized that a detriment to one person will affect others. *Crowley v. Christensen*, 137 U.S. 86 (1890).

²¹169 U.S. at 397.

²²14 N.Y. 395, 108 N.E. 639 (1915), *dismissed for want of jurisdiction*, 242 U.S. 618 (1916).

²³108 N.E. at 642. The state may also prevent conduct which could result in the individual becoming a public charge. *Territory v. Ah. Lim*, 1 Wash. 156, 24 P. 588, 590 (1890). The interest of the state is to have healthy citizens who are capable of self-support and adding to the resources of the country. *People v. Havnor*, 149 N.Y. 195, 203, 43 N.E. 541, 544 (1896), *dismissed for want of jurisdiction*, 170 U.S. 408 (1898). *Contra*, *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a statute prescribing maximum hours for work in bakeries). However, *Lochner* has been noted as having little current value as authority. *Day-Brite Lightning, Inc. v. Missouri*, 342 U.S. 421 (1952).

²⁴*E.g.*, *Schuringa v. City of Chicago*, 30 Ill. 2d 504, 198 N.E.2d 326 (1964), *petition for cert. dismissed*, 379 U.S. 964 (1965); *Rogowski v. City of Detroit*, 374 Mich. 408, 132 N.W.2d 16 (1965); *see Comment, Fluoridation of Public Water Supplies*, 3 HASTINGS L.J. 123 (1951).

²⁵Cases cited note 24 *supra*.

only so that the rest of the population may have the benefits of fewer cavities. But fluoridation cases do evince the broadening of the police power concept from so-use-your-own-that-you-do-not-injure-that-of-another²⁶ to the-welfare-of-the-people-is-the-highest-law.²⁷

In spite of the "whole is no greater than the sum of all the parts" language by the courts indicating that there is a valid interest in the welfare of the individual, legislatures, in enacting seat belt legislation, have refrained from requiring use of the seat belts and have required only their installation.²⁸ Thus, it appears that legislatures have considered that it is a legitimate exercise of the police power to require the manufacturer to install motor vehicle safety devices, but not to require the motorist to *use* them.²⁹ The only instances of legislation requiring the use of seat belts are limited to special categories: California requires driving instructors and their students to use seat belts³⁰ and Rhode Island requires drivers of certain specified public service vehicles to use them.³¹ Legislative restraint in requiring the use of seat belts may lend support to the proposition that the state has no legitimate interest in protecting the individual from himself. Certainly, the Michigan legislature feared that it might lack the power to tell an individual what to do to protect only himself since, before *Dauids* could be appealed, the legislature amended the statute requiring the *wearing* of crash helmets to require only that motorcycles *be equipped* with a number of crash helmets equal to the number of operators and passengers carried during operation.³² As a result the State's appeal in *Dauids* was subsequently denied as moot.

On the other hand, it is well settled that prohibition of the use of such things as narcotics is within the scope of the police power.³³

²⁶Cases cited note 11 *supra*.

²⁷*St. Louis & S.F. Ry. v. Mathews*, 165 U.S. 1, 24 (1897); *Butchers' Union Co. v. Crescent City Co.*, 111 U.S. 746, 752 (1884).

²⁸See Note, *Seat Belt Legislation and Judicial Reaction*, 42 ST. JOHN'S L. REV. 371 (1968).

²⁹Whether this situation is the result of legislative uncertainty with regard to constitutional limitations, opposition of plaintiff-minded legislators worried about implications in personal injury actions, personal distaste, fear of voter reaction, and or other considerations is uncertain. Concern about possible effects in personal injury actions is evident in the crash helmet legislation of two states. GA. CODE ANN. § 68-1673 (1967) (failure to wear not evidence of negligence); N.C. GEN. STAT. § 20-140.2 (Supp. 1967) (violation not to be considered either negligence or contributory negligence per se).

³⁰CAL. VEHICLE CODE § 27304 (West Supp. 1968).

³¹R.I. GEN. LAWS ANN. § 31-23-41 (Supp. 1966).

³²MICH. STAT. ANN. § 9.2358(d) (1968 Session Laws, Act 141).

³³See *e.g.*, N.Y. PUB. HEALTH LAWS § 3305 (McKinney 1954); VA. CODE ANN. § 54-488 (Repl. Vol. 1967).

In the labor field some legislatures have seen fit not only to require that employees be furnished with safety devices but also that they use them.³⁴ However, acts more personal in their nature are becoming objects of legislative concern. There are untested statutes requiring water skiers and surfers to wear life belts,³⁵ prohibiting the handling of poisonous snakes so as to endanger anyone's life³⁶ and forbidding the deliberate inhaling of noxious chemical substances.³⁷

Judicial as well as legislative wariness in this area seems to be indicated by the fact that other courts sustaining crash helmet legislation have not, as did *Carmichael*, sustained the legislation on the ground of the interest of the state in the welfare of the individual. Three courts have justified the legislation on the ground that the unprotected motocyclist might be struck by an object, lose control of his machine, and thereby endanger others.³⁸ In addition, two of these courts noted the possibility that the injured motorcyclist may become a public charge,³⁹ while the third said that it is not unreasonable to demand that a motorcyclist protect himself on public property.⁴⁰

The two cases in addition to *Davids* which have declared the helmet laws unconstitutional have agreed that the statute did not benefit the general public. One held that forcing an individual to protect himself deprived him of his fourteenth amendment right of liberty without due process of law⁴¹ while the other based its decision on a right to wear preferred clothing.⁴²

It remains to be seen whether the "whole is no greater than the sum of all the parts" rationale will be employed in other crash helmet

³⁴*E.g.*, N.Y. LABOR LAW § 202 (McKinney 1965) (window cleaners required to wear safety devices); *cf.*, N.Y. LABOR LAW § 350 (McKinney 1965) (certain industrial homework prohibited to protect those who would engage in it).

³⁵N.Y. NAV. LAW § 73(3) (McKinney Supp. 1968).

³⁶VA. CODE ANN. § 18.1-72 (Repl. Vol. 1960).

³⁷VA. CODE ANN. § 18.1-70.1 (Supp. 1968).

³⁸*People v. Newhouse*, 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (Ithaca City Ct. 1968); *People v. Bielmeyer*, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (Buffalo City Ct. 1967); *State v. Lombardi*, — R.I. —, 241 A.2d 625 (1968). Two courts have sustained crash helmet statutes on the ground they were reasonable measures for promotion of safety along the public way. *Commonwealth v. Howie*, — Mass. —, 238 N.E.2d 373 (1968); *People v. Schmidt*, 54 Misc. 2d 702, 283 N.Y.S.2d 290 (Erie County Ct. 1967).

³⁹*People v. Newhouse*, 55 Misc. 2d 1064, 287 N.Y.S.2d 713 (Ithaca City Ct. 1968); *State v. Lombardi*, — R.I. —, 241 A.2d 625 (1968).

⁴⁰*People v. Bielmeyer*, 54 Misc. 2d 466, 282 N.Y.S.2d 797 (Buffalo City Ct. 1967).

⁴¹*Everhardt v. City of New Orleans*, 208 So. 2d 423 (La. Ct. App.), *review ordered* 252 La. 269, 210 So. 2d 508 (1968).

⁴²*People v. Smallwood*, 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (Ct. Spec. Sess. 1967).