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Constitutional Law--Validity of Safety Helment Requirements

William Alex Tantilinger
West Virginia University College of Law

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At least one state legislature has, however, taken a more liberal view of the rights of students enrolled in state-supported institutions of higher learning. Oregon has declared the University of Oregon to be a state agency thereby subjecting it to the Oregon Procedure Act.²⁵ This Act requires that a proceeding in a state agency include reasonable notice, right to counsel, compulsory process, cross-examination, evidentiary limitations, and written findings.²⁶ As one noted commentator observed, "Nothing is lost by giving the student the chance to confer with a counsellor during the proceedings if he wishes. His confidence is bolstered and the committee might be aided."²⁷ Professor Seavey has observed, "It is shocking that the officials of a state educational institution . . . should not understand the elementary principles of fair play. It is equally shocking to find that a court supports them in denying to a student the protection given to a pickpocket."²⁸

III. CONCLUSION

It appears as though the law requires only the barest semblance of procedural due process in college disciplinary proceedings, even though a student's opportunity to continue his education may be substantially affected. As exemplified in *Dixon*, a student may not be expelled without at least notice and a hearing. Therefore, it appears that whether or not a student will be allowed to utilize counsel in a disciplinary hearing will be determined by the particular practices of the school involved.

Gary Gordon Markham
Larry Andrew Winter

Constitutional Law—Validity of Safety Helmet Requirements

The State of Michigan amended its motor vehicle code to require all persons operating a motorcycle to "wear a crash helmet

²⁵ ORE. REV. STAT. § 352.010 (1965).

²⁶ ORE. REV. STAT. §§ 183.420-470 (1965).

²⁷ Heyman, *Some Thoughts on University Disciplinary Proceedings*, 54 CALIF. L. REV. 73, 79-80 (1966).

²⁸ Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

approved by the department of state police."¹ The American Motorcycle Association requested a declaration of rights as to the constitutionality of the amendment. The Motorcycle Association contended that the statute violated the ninth and fourteenth amendments to the United States Constitution in that it was concerned solely with the safety of the motorcyclist and had no relationship to the safety or the well-being of the public. The circuit court upheld the amendment and the Motorcycle Association appealed to the Court of Appeals of Michigan. *Held*, reversed. The scope of the statute exceeds the limit placed on the police power of state government by the due process clause of the fourteenth amendment. *American Motorcycle Association v. Davids*, 158 N.W.2d 72 (Mich. 1968).

Two of the more difficult problems faced by courts of the United States in interpreting the Constitution involve the broad, rather nebulous terms, "police power"² and "due process of law."³ When these concepts are put forward by opposing parties in support of conflicting policies and the court is faced with balancing the interests

¹ MICH. STATUTES ANN. Ch. 75b, § 9.2358(d) (1966).

² Police power is the term used by courts to refer to the sovereign right of a government to exercise its power for the promotion of order, safety, health, morals, and the general welfare of society. Under our system of government, it denotes those inherent powers which are reserved to the several states. *In re Lindsay*, 12 F. Supp. 625 (N.D. Iowa 1935). It encompasses preventive, punitive, and regulatory measures. *Gitlow v. New York*, 268 U.S. 652 (1925). The very foundation of police power is the control of private interests for the public welfare. The injured person is, in theory, compensated by sharing in the benefit to society. *See, e.g., Weber City Sanitation Comm. v. Craft*, 196 Va. 1140, 87 S.E.2d 153 (1955). Yet, the police power is not without limit. It must be exercised in such a way that the public as a whole will be benefited. A fundamental individual right must yield to police power only when the public welfare will be clearly promoted. *Christian v. LaForge*, 194 Or. 450, 242 P.2d 797 (1952). *See also Essert, What is Meant by the Police Power?*, 12 NEB. B.A. BULL. 208, 217 (1933).

³ Attempts to give "due process of law" an inclusive definition have usually resulted in the use of words as vague as "due process" itself. Originally, the phrase applied only to procedural questions. When used in that manner, it has been referred to in many ways. *See Owens v. Battenfield*, 33 F.2d 753 (8th Cir. 1929), *cert. denied*, 280 U.S. 605 (1929) (the general rules of society); *Galvan v. Press*, 347 U.S. 522 (1954) (fair play); *Goddard v. Frazier*, 156 F.2d 938 (10th Cir. 1946), *cert. denied*, 329 U.S. 765 (1946) (fundamental fairness); *Wolf v. Colorado*, 338 U.S. 25 (1949) (rights which are basic to our free society). When applied to substantive rights, due process is perhaps primarily a guarantee that government may not deprive an individual of life, liberty, or property by an act that has no reasonable relation to any proper governmental function. As set out in the fourteenth amendment, it provides a guarantee by the federal government that no state shall infringe on the fundamental rights which belong to every citizen. *See U.S. v. Cruickshank*, 92 U.S. 542 (1875). *Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); *Carpenter, Substantive Due Process at Issue: A Resume*, 5 U.C.L.A. L. REV. 47, 50 (1958).

of the opposing sides, the difficulty is often great and the applicable law often confusing. The *American Motorcycle* case involves a conflict between a fundamental individual right protected by "substantive due process" and the "police power" of the state of Michigan. The question presented is whether a legislative enactment which takes away the individual's freedom to ride his motorcycle without wearing a state-approved helmet violates the requirements of due process of law.

Basically, there is such a violation if it does not lie within the police power of the state to infringe upon such freedom. Such infringement does not lie within the police power of the state if it is not reasonably designed to protect the health, safety, morals, or general welfare of the public.

The individual right in question is nowhere definitively set forth in the Constitution. Rather it might be characterized as that "natural" right, which every man possesses—that "the individual is not accountable to society for his actions, insofar as these concern the interests of no person but himself."⁴ Mr. Justice Brandeis described this principle in his dissenting opinion in *Olmstead v. United States*⁵ as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." Apparently, the scope of the protection afforded the citizen by the due process clause extends to such "natural" rights.⁶

Similarly, there is little doubt that legislation of the type in question in the instant case involves rational social policy. There are ample statistics which show that as the number of motorcycles in use across the nation increases, the number which are involved in accidents increases.⁷ The number of severe head injuries which result from these accidents, many because of failure by cyclists to use protective devices, is of concern to all.⁸ This is surely the ra-

⁴ J. S. MILL, *UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT* (1950 ed.). That this right exists even though not enumerated in the Constitution is evident from the "grant of power" theory of our system of government. It is preserved by the ninth amendment to the Constitution.

⁵ 277 U.S. 438, 478 (1928) (dissenting opinion). The right to be let alone has also been held to be guaranteed by the ninth amendment. See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁶ *United States v. Bailes*, 120 F. Supp. 614, 627 (S.D.W. Va. 1954); *Ekern v. McGovern*, 154 Wis. 157, 240, 142 N.W. 595, 619 (1913).

⁷ The accident rate for motorcycles far exceeds that for automobiles. *American Motorcycle Association v. Davids*, 158 N.W.2d 72, 75 n.9 (Mich. 1968).

⁸ See *People v. Carmichael*, 288 N.Y.S.2d 931, 935 (Genesee County Ct. 1968).

tionale for those decisions in other jurisdictions which have upheld similar legislation when it came under constitutional attack.⁹

Yet these courts have been forced to employ rather strained reasoning to support their decisions. To show that police power had been properly invoked in these circumstances, it was argued that "flying stones . . . from the wheels of moving vehicles"¹⁰ might hit the cyclist in the head causing him to lose control and injure others on the highway. Another court¹¹ warned of the danger of hard-shelled beetles or bees causing the cyclist to lose control. The Supreme Court of Rhode Island mentioned that "fallen objects such as . . . tree branches"¹² might cause a cyclist to lose control. However, as is cogently pointed out by the court in the *American Motorcycle* case, if the legislative purpose was really to deflect flying objects, rather than to reduce head injuries, this objective would more reasonably be reached by requiring the manufacturer to install a windshield on all motorcycles.¹³

A proposed bill, similar to the statute in the instant case, is currently being introduced to the 1969 session of the West Virginia legislature.¹⁴ Arguments in support of the constitutionality of such a law need not be limited to those concerning the possibility of injury to the cyclist and others caused by flying objects and falling trees. For example, there seems to be some merit in contending

⁹ *People v. Carmichael*, 288 N.Y.S.2d 931, 935 (Genesee County Ct. 1968); *State v. Lombardi*, 241 A.2d 625, 627 (R.I. 1968); *People v. Schmidt*, 283 N.Y.S.2d 290, 292 (Erie County Ct. 1967); *People v. Bielmeyer*, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).

¹⁰ *People v. Schmidt*, 283 N.Y.S.2d 290, 292 (Erie County Ct. 1967).

¹¹ *People v. Bielmeyer*, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).

¹² *State v. Lombardi*, 241 A.2d 625, 627 (R.I. 1968).

¹³ *American Motorcycle Association v. Davids*, 158 N.W.2d 72, 75 (Mich. 1968).

¹⁴ H.D. 519, 59th Legis., Reg. Sess. (1968) House Bill Number 519 in West Virginia Legislature. The bill would amend article 15, chapter 17-(C) of the Code of West Virginia by adding six new sections, designated sections 44-49. The bill would provide for the use of helmets, goggles, and face shields by motorcyclists and establish requirements for motorcycle equipment. Section 44 is the section pertaining to helmets:

No person shall operate or be a passenger on a motorcycle which is in motion unless he shall be wearing a protective helmet of a type approved by the commissioner of motor vehicles. Such a helmet, which shall be worn on the head of the operator or passenger, must be equipped with either a neck or chin strap which shall be fastened securely while the motorcycle is in motion. The commissioner of motor vehicles is hereby authorized and empowered to adopt and amend regulations covering the types of helmets and the specifications therefor and to establish, maintain and distribute to law enforcement agencies throughout the state a list of approved helmets which meet the specifications determined by the commissioner.

that the great incidence of head injuries caused by motorcycle accidents results in a large number of these victims becoming wards of the state whose support is then borne by the public. Also, the economic interest of motorcyclists as a class surely extends to the cost of insurance, and as the number of cyclists increases,¹⁵ their economic influence on the public increases. It has been said that protection of the safety of the public includes its economic safety.¹⁶ In addition, some courts have relied upon the expanded police power of the states when regulating the use of their highways.¹⁷

Whether this bill, if passed, would be found constitutional in West Virginia is not clear. In close questions of policy such as the one involved in this type of regulation, it might well be argued that courts should yield to the judgment of the legislature. But it should be remembered that one of the foremost proponents of this concept, Mr. Justice Brandeis, also felt that the greatest threats to individual liberty often lay in beneficent legislation.¹⁸

William Alex Tantlinger

Eminent Domain—Is Noise an Element of Damage?

The Dennisons were owners of a home in a remote wooded area in Lake George, New York. The property was entirely secluded, quiet, and peaceful. As a result of highway construction, some of this secluded property was condemned to make way for an interchange. The seclusion and beauty of their property was replaced by the noise, lights, and odors of the traffic on the new highway. In awarding damages for the partial taking, the Court of Claims considered as factors to determine the damage to the remaining property the loss of privacy and seclusion, the loss of view, the traffic noise, lights, and odors. The Appellate Division unanimously affirmed. The state appealed contending it was error

¹⁵ From 1961 to 1965, motorcycle registration increased 285%. *People v. Bielmeyer*, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).

¹⁶ *Zeigler v. People*, 109 Colo. 252, 124 P.2d 593 (1942).

¹⁷ *People v. Bielmeyer*, 282 N.Y.S.2d 797, 800 (Buffalo City Ct. 1967).

¹⁸ *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (dissenting opinion). Justice Brandeis said:

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.