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The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges

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COMMENTS

The Constitutionality of Automobile Guest Statutes: A Roadmap to the Recent Equal Protection Challenges

INTRODUCTION AND OVERVIEW

During the 12-year period from 1927 to 1939, 27 states[1] enacted legislation denying automobile guests a right of action for personal injuries caused by the ordinary negligence of their host-drivers.[2] These statutes,

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[1]Since 1939 no state has enacted a guest statute, but guest statutes have been repealed in Connecticut, Vermont, Florida, Virginia, and Washington; declared unconstitutional in California, North Dakota, Kansas, and Idaho; and declared unconstitutional but later amended in Oregon and Delaware. ALA. CODE tit. 36, § 95 (1959); ARK. STAT. ANN. § 75-913 (1947); CAL. VEHICLE CODE § 17158 (West 1971) (declared unconstitutional 1973); COLO. REV. STAT. ANN. § 13-9-1 (1963); ch. 308, §§ 1-2, [1927] Conn. Acts 4404 (repealed 1937); DEL. CODE ANN. tit. 21, § 6101 (1953) (ch. 270, §§ 1-2, [1929] 36 Del. Laws 795) (declared unconstitutional 1932), (amended by ch. 26, §§ 1-2, [1933] 38 Del. Laws 159); ch. 18033, §§ 1-2, [1937] Fla. Laws 671 (codified FLA. STAT. ANN. § 320.59 (1968)) (repealed 1972); IDAHO CODE ANN. §§ 49-1401 to -02 (1967) (ch. 135, §§ 1-2, [1931] Idaho Laws 232) (declared unconstitutional 1974); ILL. ANN. STAT. ch. 95 ½, § 10-201 (Supp. 1973) (§ 42-1, [1935] Ill. Laws 1221); IND. STAT. ANN. § 9-3-3-1 (1973); IOWA CODE ANN. § 321.494 (Supp. 1972); KAN. STAT. ANN. § 8-122b (1964) (declared unconstitutional 1974); MICH. STAT. ANN. § 9.2101 (1968); MONT. REV. CODES ANN. §§ 32-1113 to -1116 (1947); NEB. REV. STAT. § 39-740 (1968); NEV. REV. STAT. §41.180 (1971); N.M. STAT. ANN. §§ 64-24-1 to -2 (1972); N.D. CENT. CODE §§ 39-15-01 to -03 (1972) (declared unconstitutional 1974); OHIO REV. CODE ANN. § 4515.02; ORE. REV. STAT. § 30.115 (1971) (ch. 342, § 1, [1927] Ore. Laws 448) (declared unconstitutional 1928), (amended by ch. 401, §§ 1-2, [1929] Ore. Laws 550); S.C. CODE ANN. § 46-801 (1962); S.D. COMPILED LAWS ANN. § 32-34-1 (1969); TEX. REV. CIV. STAT. art. 6701b (1969), *as amended* ch. 28, § 3, [1973] TEX. LAWS 42; UTAH CODE ANN. § 41-9-1 (1970); VT. STAT. ANN. tit. 23, § 1491 (1967) (repealed 1970); VA. CODE ANN. § 8-646.1 (Cum. Supp. 1974); WASH. REV. CODE § 46.08.080 (1970) (repealed 1974); WYO. STAT. ANN. § 31-233 (1967). The Colorado guest statute was repealed on April 9, 1975, by House Bill 1137. GENERAL ASSEMBLY BILL BOOK FOR THE STATE OF COLORADO, 50th Assembly, 1st Sess., No. 1137.

It should be noted that the recent amendments to the Virginia guest statute have effectively repealed the prior statute by imposing a standard of ordinary care upon all owners and drivers of automobiles. Because of Virginia's common law background which imposed a duty of only slight care, *see* note 21 *infra*, it was necessary that the legislature amend rather than simply repeal the guest statute. Likewise, the Illinois guest statute has been amended to include only those who illegally solicit rides, ILL. ANN. STAT. ch. 95 ½, § 10-201, (Supp. 1973), and the Texas guest statute has been amended to include only those persons "related within the second degree of consanguinity or affinity to the owner or operator," ch. 28, § 3, [1973] Tex. Laws 42.

In addition, Massachusetts and Wisconsin have overruled judicially-created doctrines similar to the guest statutes, although a judge-made rule persists in Georgia. Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917), *overruled by statute,* MASS. ANN. LAWS ch. 231, § 85L (Supp. 1972); O'Shea v. Lavoy, 175 Wis. 456, 185 N.W. 525 (1921), *overruled in* McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Epps v. Parrish, 26 Ga. App. 399, 106 S.E. 297 (1921).

[2]For example, California's automobile guest statute states:

> No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes

commonly referred to as "guest statutes," were generally sustained by the courts against a variety of constitutional attacks[3] until 1973, when the California Supreme Court in *Brown v. Merlo*[4] struck down California's guest statute as a denial of the equal protection of the laws.[5] Since *Merlo,* nine additional state supreme courts have considered similar equal protection challenges to guest statutes with mixed results.[6]

In each of these 10 recent decisions, plaintiff, or a member of his immediate family,[7] sustained serious physical injuries while traveling upon a public highway as a guest[8] in defendant's automobile.[9] Plaintiff's injuries were either stipulated or adjudged not to have been caused by the gross negligence or other aggravated misconduct of defendant, and plaintiff's alternative claims based on the ordinary negligence of the defendant were squarely met by the defensive bar of the automobile guest statute. Plaintiff's counter-assertions that the guest statute denied automobile

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that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

CAL. VEHICLE CODE § 17158 (West 1971).

[3]Cases cited note 33 *infra.*

[4]8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[5]*Id.* at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407.

[6]Guest statutes were recently held unconstitutional in Kansas (Henry v. Bauder, 213 Kan. 751, 518 P.2d 362 (1974)), North Dakota (Johnson v. Hassett, 217 N.W. 2d 771 (N.D. 1974)), and Idaho (Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974)).

Similar statutes were upheld in Texas (Tisko v. Harrison, 500 S.W. 2d 565 (Tex. Civ. App. 1973)), Utah (Cannon v. Oviatt, 520 P.2d 883 (Utah), *cert. denied,* 95 S. Ct. 24 (1974)), Iowa (Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974)), Oregon (Duerst v. Limbocker, 525 P.2d 99 (Ore. 1974)), Delaware (Justice v. Gatchell, 325 A.2d 97 (Del. 1974)), and Colorado (Richardson v. Hansen, 527 P.2d 536 (Colo. 1974)).

Similar challenges have also been considered at the trial level in several other jurisdictions (*e.g.,* Clements v. Greenwood, Case No. 73-C-342 (Indiana Clark Cir. Ct. 1974) (invalidating the Indiana guest statute)), and an appeal on this issue is presently pending before the Ohio Supreme Court (Berisford v. Sells, Case No. 74-307, filed April 4, 1974, to be heard with Primes v. Tyler, Case No. 75-61, filed January 20, 1975).

[7]In *Tisko, Keasling,* and *Justice* the injuries were sustained by a minor child of the plaintiff, while in *Richardson* the plaintiff was a minor child suing for the wrongful death of his mother; 502 S.W.2d at 566; 217 N.W.2d at 688; 325 A.2d at 98; 527 P.2d at 536.

[8]Although plaintiffs in *Johnson* had contributed $5 for gas during a 300-mile trip, the trial court ruled that they were nonetheless "guests" within the meaning of the North Dakota statute. This issue was not reached on appeal. 217 N.W.2d at 772.

The "guest" issue was also raised in *Justice.* Since the injured person was a 6-year-old child, plaintiffs contended that she could not "knowingly" have consented to ride with her defendant-grandmother, and hence could not have been a guest within the meaning of the statute. This issue was not decided on appeal since it was determined that the child was riding with the express consent of her mother. Plaintiffs also contended that the benefit conferred on the defendant-grandmother by reason of the companionship of the child during the ride was sufficient "compensation" to take the case out of the guest statute — a contention dismissed by the court without comment. 325 A.2d at 103-04.

For a more complete discussion of judicial interpretations of the compensation requirement in determining one's status as a guest see note 105 *infra.*

[9]With the exception of *Keasling,* the defendant in each of these cases was the operator of the vehicle in question at the time of the accident. In *Keasling,* defendant's son was the operator of the automobile at the time of the accident. 217 N.W.2d at 689.

guests the equal protection of the laws were rejected by all but two of the trial courts by granting defendant's motion for summary judgment.[10] Thus, the single issue before each of the state supreme courts was the constitutionality of the automobile guest statute under both federal and state equal protection guarantees.[11]

This comment suggests that the divergent holdings of these recent guest statute decisions can be reconciled on the basis of the differing equal protection tests applied by the courts. After a brief review of the history of the guest statutes and the early challenges to their validity, four approaches taken by state supreme courts to avoid the precedent of constitutionality established by the Supreme Court in the 1929 case of *Silver v. Silver*[12] are considered. The last of these four approaches suggests that the courts which recently invalidated a guest statute did so on the basis of a newer and substantially stricter equal protection test than that applied in *Silver*.

The body of the comment discusses the parameters of this "newer" equal protection test and its application to guest statutes. This newer test is compared with two popular models for explaining similar developments in the equal protection test currently being applied by the Supreme Court. Finally, the comment suggests an approach which would enable courts to review equal protection challenges to the guest statutes on their merits while avoiding many of the criticisms leveled against the recent decisions.

I. Historical Background

A. Common Law Precedents

In the early years of this century, a rapidly increasing number of lawsuits involved claims brought by injured automobile guests against their host-drivers. To determine the nature and extent of the host's liability in these cases, lawyers and judges analogized to theories of liability adopted

[10]In *Thompson*, plaintiff's counter-assertions were accepted by the trial court. This accounts for the somewhat different procedural posture in *Thompson*, as the defendant on appeal was the district court judge Hagan, who, under a writ of mandamus from the Idaho Supreme Court, had been ordered to show cause why defendant's motion for summary judgment based on the Idaho guest statute should not be granted. 523 P.2d at 1366. *See also* Johnson, 217 N.W.2d at 772.

[11]*Tisko* also considered the issue of whether the Texas guest statute barred a claim brought by a parent in his own behalf for medical expenses incurred in treating injuries sustained by his minor child. The court concluded that since the guest statute barred recovery directly by the child, no legal wrong had been sustained by the child and hence no derivative cause of action lay in the parents. 500 S.W.2d at 567.

In *Henry*, plaintiff raised the additional claim that the Kansas guest statute denied her "a remedy by due course of law" as guaranteed by section 18 of the Bill of Rights of the Kansas Constitution. On the basis of earlier decisions resolving this issue in favor of the constitutionality of the guest statute, the court refused to reconsider the issue. 518 P.2d at 364. *See also* note 33 *infra*.

[12]108 Conn. 371, 143 A. 240, *aff'd* 280 U.S. 117 (1929).

in cases involving (1) passengers in horse-drawn vehicles,[13] (2) gratuitous bailment of chattels,[14] (3) invitees, licensees, and trespassers on the property of another,[15] and (4) the breach of a fiduciary relationship.[16] What-

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[13]In *Liggo v. Newbold*, 23 L.J. Exch. N.S. 108 (1854), plaintiff was injured when a wheel on defendant's cart came off. The court held that the fact that plaintiff had only paid for the carriage of her goods and not for the carriage of herself was immaterial; "the defendant being equally bound to take her carefully. No doubt, a person who undertakes to provide for the conveyance of another is responsible, although he does so gratuitously." *Id.* at 110.

Analogizing the situation of a gratuitous passenger in a motor vehicle to that of a gratuitous passenger in a horse-drawn cart, the Alabama Supreme Court in *Perkins v. Galloway*, 194 Ala. 265, 69 So. 875 (1915), relied heavily on the *Liggo* rationale in imposing a standard of "reasonable care" on automobile hosts:

> The express or implied duty of the car owner and driver to the occupant of the car is to exercise reasonable care in its operation not to unreasonably expose to danger and injury the occupant by increasing the hazard of that method of travel. He must exercise the care and diligence which a man of reasonable prudence, engaged in like business, would exercise for his own protection and the protection of his family and property — a care which must be reasonably commensurate with the nature and hazards attending this particular mode of travel.

Id. at 272, 69 So. at 877.

[14]By 1869, the English Privy Council had extended the analogy of gratuitous bailment of chattels to include gratuitous carriage of passengers, holding in both cases that the gratuitous bailee was liable only for acts of "gross negligence." Moffat v. Bateman, L.R.3P.C. 115, 16 Eng. Rep. R. 765 (1869); Gammon, *The Automobile Guest*, 17 TENN. L. REV. 452 (1942). *See also* West v. Poor, 196 Mass. 183, 81 N.E. 960 (1907) (an American decision holding the driver of a cart to the standard of care imposed on a licensor or gratuitous bailee).

For a more complete discussion of the "gratuitous bailments" analogy see note 21 and accompanying text *infra*.

[15]The Wisconsin Supreme Court analogized the situation of the automobile guest to that of the social guest on real property. Holding that both types of guests were to be considered "licensees," the court imposed a standard of slight care on the host in the active operation of the car, but went on to state that as to the condition of the car, the host had a duty to warn the guest only of known hidden dangers or defects, the licensee having assumed the risk of latent defects upon accepting the invitation to enter the car. O'Shea v. Lavoy, 175 Wis. 456, 185 N.W. 525 (1921), *overruled in* McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962) (holding the automobile host to a standard of ordinary care).

> The application of the licensee on personal property analogy has led to decisions in several states holding that while the driver is under a duty to exercise reasonable care for the protection of the guest in his active operation of the car, and is required to disclose to him any defects in the vehicle of which he has knowledge, he is not required to inspect the automobile to make sure that it is safe, and is not liable for the defects of which he does not know.

W. PROSSER, LAW OF TORTS, § 60 at 383 (4th ed. 1971) [hereinafter cited as PROSSER].

For a more complete discussion of the social guest analogy see notes 73-77 and accompanying text *infra*.

[16]The Michigan Supreme Court compared the duty imposed upon the host to that of a fiduciary entrusted with the property of another:

> It has been our boast that when one entrusts another with life or property relying upon a relationship of trust and confidence, rather than the weapons and guarantees of the business world, a performance of duty the most exacting will be demanded, a conformity not with the arm's length standard of the market but rather with the infinitely nicer standards of the hearth and the heart.

Stevens v. Stevens, 355 Mich. 363, 370, 94 N.W.2d 858, 862 (1958).

ever the analogy applied,[17] by 1926 the established rule in the majority of American jurisdictions was that the private owner or operator[18] of a motor vehicle owed his passengers a duty of reasonable care in the operation of his vehicle.[19]

A small minority of jurisdictions, however, followed the Massachusetts case of *Massaletti v. Fitzroy*,[20] and adopted a rule varying the duty owed by a driver to his passengers on the basis of whether they had compensated him for their carriage. This rule, stemming from the English common law concerning gratuitous bailments of chattels, continued to protect paying passengers from the ordinary negligence of the owner or driver of the vehicle, but allowed nonpaying passengers recovery only for injuries caused by the gross negligence or other aggravated misconduct of their hosts.[21]

B. The Rise of the Guest Statutes

In 1927, Connecticut[22] and Iowa[23] became the first states to adopt the *Massaletti* rule in statutory form.[24] By 1939, 25 additional states had en-

[17]Variations on the analogies discussed in notes 13-16 *supra* may also be found. For example, New Jersey formerly held the host to a duty of ordinary care toward an invited guest, while exacting a standard of slight care toward the self-invited guest. Lutvin v. Dopkus, 108 A. 862 (N.J. 1920), *overruled,* Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961) (adopting a standard of ordinary care toward both types of automobile guests). Comment, *Judicial Nullification of Guest Statutes,* 41 S. CALIF. L. REV. 884 n.2 (1968). Pennsylvania, in a variation of the bailment of personal property analogy, requires that the host "must exercise great care when the trip is for his sole benefit; must exercise only slight care when it is for the sole benefit of the guest; and must exercise ordinary care when it is for the mutual benefit of both parties." Comment, *Duty of Driver to Guest,* 18 CALIF. L. REV. 186 & n.8 (1929), *citing* Cody v. Venzie, 263 Pa. 541, 107 A. 383 (1919).

[18]It has long been recognized in all American jurisdictions that the commercial carrier owes a higher duty of care, often characterized as "utmost care," to his passengers, gratuitous or paying. PROSSER § 34.

[19]*E.g.,* 2 F. HARPER & F. JAMES, LAW OF TORTS § 16.15, at 950 & n.3 (1956) [hereinafter cited as HARPER & JAMES]; Annot., 20 A.L.R. 1014 (1926).

[20]228 Mass. 487, 118 N.E. 168 (1917), *overruled by statute,* MASS. ANN. LAWS ch. 231, § 85L (Supp. 1972).

[21]The *Massaletti* rule was subsequently adopted by the courts of Georgia (Epps v. Parish, 26 Ga. App. 407, 106 S.E. 297 (1921)), Virginia (Boggs v. Plyborn, 157 Va. 30, 160 S.E. 77 (1931), *replaced by statute,* VA. CODE ANN. § 8-646.1 (1957)), and Washington (Saxe v. Terry, 140 Wash. 503, 250 P. 28 (1926), *replaced by statute,* WASH. REV. CODE ANN. § 46.08.080 (1970), *repealed* Senate Bill 2046 (1974 WASH. LEGIS. SERV., ch. 3)).

The majority of American jurisdictions, however, rejected this rule on grounds that the bailment was of persons and not of chattels, and that society has a much higher interest in protecting life than property. *E.g.,* Munson v. Rupker, 96 Ind. App. 15, 30, 148 N.E. 169, 174 (1925):

> [I]t will not do to say that the operator of an automobile owes no more duty to a person riding with him as a guest at sufferance, or as a self-invited guest, than a gratuitous bailee owes to a block of wood.

[22]Public Acts 1927, ch. 328, § 1 (repealed 1937).

[23]IOWA CODE ANN. § 321.494 (Supp. 1972).

[24]One author has suggested that a forerunner of the guest statutes was contained in a sec-

acted similar statutes denying automobile guests a right of action for injuries resulting from the ordinary negligence of their hosts.[25] The legislative purposes prompting the enactment of these statutes were never clearly expressed either in the statutes themselves or in their legislative histories. By hindsight, the statutes apparently slowed the rising tide of litigation flowing from automobile accidents and averted serious financial loss from a number of uninsured drivers during a generally depressed economic era. Whatever purposes prompted these enactments, the fact that no state has adopted a guest statute since 1939 indicates that they were the product of a unique era in American history.[26]

C. Early Constitutional Challenges

The constitutionality of a guest statute was first challenged in the 1929 Connecticut case of *Silver v. Silver.*[27] In *Silver,* the plaintiff sought recovery for injuries sustained in an automobile accident caused by the ordinary negligence of her husband and asserted that the Connecticut guest statute denied her the equal protection of the laws by arbitrarily withdrawing from automobile guests the right to sue for negligently inflicted injuries — a right enjoyed by guests in all other forms of transportation. The Supreme Court of Errors of Connecticut, however, granted a "wide range of discretion" to the power of the legislature to regulate motor vehicle traffic upon the public highways, and held that the guest statute did not violate plaintiff's fourteenth amendment rights.[28] The United States Supreme Court affirmed.[29] Asserting that the statute was designed "to attain a permissible legislative object," viz., the elimination of "vexatious litigation" arising out of automobile accidents, and that it could not be said a priori that no grounds existed for

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tion of the 1911 general automobile act of Alabama which imputed the negligence of the host driver to his guest, thus barring the guest's recovery under the doctrine of contributory negligence. This provision was subsequently declared unconstitutional as a denial of the equal protection of the laws. Georgetta, *The Major Issues in a Guest Case,* 1954 INS. L.J. 583.

[25]*See* note 1 *supra.* Presently, guest statutes are in effect in only 18 states. *Id.*

[26]PROSSER § 34; Note, *The Present Status of Automobile Guest Statutes,* 59 CORNELL L. REV. 659, 665 & n.38 (1974); Tipton, *Florida's Automobile Guest Statute,* 11 U. FLA. L. REV. 287, 288 (1958) [hereinafter cited as Tipton]; HARPER & JAMES § 16.15; Comment, *Duty of Driver to Guest,* 18 CALIF. L. REV. 184, 191 (1929).

It has also been suggested that the statutes were enacted partly as a reaction to widespread stories about lawsuits brought by hitchhikers against a generous host. These stories are discounted by a number of authors including Dean Prosser. PROSSER § 34 at 187 n.8:

> In legislative hearings there is frequent mention of the hitchhiker, who gets little sympathy. The writer once found a hitchhiker case, but has mislaid it. He has been unable to find another.

See also Tipton, at 287.

[27]108 Conn. 371, 143 A. 240, *aff'd* 280 U.S. 117 (1929).

[28]*Id.* at 376-78. For a more complete discussion of the equal protection test applied in *Silver* see notes 49-54 and accompanying text *infra.*

[29]280 U.S. 117 (1929).

the distinctions drawn by the Connecticut legislature, the Supreme Court refused to inquire into the "wisdom" behind the statute's enactment.[30] Even though the disabilities imposed by the statute did not extend to guests in other forms of transportation, the Court held that there was "no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied."[31]

Guest statutes have been subjected to judicial review many times since 1929. Until the 1973 decision of the California Supreme Court in *Brown v. Merlo*,[32] however, state and federal courts confronted with an equal protection challenge to a guest statute considered themselves bound by the *Silver* decision, and no guest statute had been struck down as a denial of equal protection under either the federal or the various state constitutions.[33] In fact, six of the nine decisions since *Merlo* have followed the result if not the exact reasoning of *Silver*.[34] Therefore, a starting point for analysis of these recent decisions is a determination of the manner in which *Silver* was distinguished by *Merlo* and its progeny.

II. Recent Equal Protection Challenges

A. Silver Distinguished

The four recent decisions invalidating a guest statute on equal protection grounds, *Merlo*, *Johnson v. Hassett*,[35] *Henry v. Bauder*,[36] and

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[30]*Id.* at 123.

[31]*Id.*

[32]8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[33]Although guest statutes were generally upheld on equal protection grounds, they were also challenged on a variety of alternative constitutional theories, including: denial of due process (*see, e.g.*, Delaney v. Badame, 49 Ill. 2d 168, 274 N.E.2d 353 (1971); Westover v. Schaffer, 205 Kan. 62, 468 P.2d 251 (1970); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931)), denial of a remedy at law for injuries received (*see, e.g.*, Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932); Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935); Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935)), denial of the right to trial by jury (*see, e.g.*, Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936)), infringing vested rights (*see, e.g.*, Forsman v. Colton, 136 Cal. App. 97, 28 P.2d 429 (1933); Hazzard v. Alexander, 36 Del. 212, 173 A. 517 (1934); Cusick v. Feldpausch, 259 Mich. 349, 243 N.W. 226 (1932)), granting special privileges and immunities (*see, e.g.*, Delaney v. Badame, 49 Ill. 2d 168, 274 N.E.2d 353 (1971); Vogts v. Guerrette, 142 Colo. 527, 351 P.2d 851 (1960); Shea v. Olsen, 185 Wash. 143, 53 P.2d 615 (1936)), insufficiency of title (*see, e.g.*, Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Shea v. Olsen, 185 Wash. 143, 53 P.2d 615 (1936)), and limiting recoverable damages (Smith v. Williams, 51 Ohio App. 464, 1 N.E.2d 643 (1935)).

The general rule emerging from these decisions apparently was that "[w]here these statutes do not wholly deny a gratuitous guest a right of action against the owner or operator of an automobile they are generally held constitutional." Annot., 111 A.L.R. 1011 (1937). For examples of cases invalidating statutes purporting to absolve the owner or operator of all liability to his guests see Coleman v. Rhodes, 35 Del. 120, 159 A. 649 (1932); Stewart v. Houk, 127 Ore. 589, 271 P. 998 (1928).

[34]Cases cited note 6 *supra*.

[35]217 N.W. 2d 771 (N.D. 1974).

[36]213 Kan. 751, 518 P.2d 362 (1974).

Thompson v. Hagan,[37] suggest four reasons, singly or in combination, for declining to follow the precedent of *Silver*. *First, the application of a stricter state equal protection test.* In *Johnson,* the North Dakota Supreme Court avoided the holding of *Silver* by ruling only on the constitutionality of the North Dakota guest statute under the state constitution.[38] The *Johnson* court noted that the holding in *Silver* was limited to the constitutionality of the Connecticut guest statute under the equal protection clause of the fourteenth amendment to the federal constitution; and that in reviewing challenges based on the equal protection guarantees of the North Dakota constitution, the court had traditionally applied a more stringent test than that used by the United States Supreme Court in *Silver*.[39] The California Supreme Court also asserted that it was applying a stricter state test in *Merlo*[40] but, unlike *Johnson,* held the California guest statute violative of both state *and* federal constitutional guarantees.[41] *Henry* and *Thompson* adopted both the analysis and the holding of *Merlo* without discussing the effect of *Silver* on the federal equal protection issue.[42]

Second, a narrow reading of Silver. By reading *Silver* as limited to a

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[37]96 Idaho 19, 523 P.2d 1365 (1974).

[38]217 N.W.2d at 780. Sections 11, 13, and 20 of the North Dakota Constitution provide:

> All laws of a general nature shall have a uniform operation.

N.D. CONST. § 11.

> . . . No person shall be . . . deprived of life, liberty or property without due process of law.

N.D. CONST. § 13.

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

N.D. CONST. § 20.

[39]The *Johnson* court stated that its equal protection test required "a close correspondence between statutory classification and legislative goals," and noted that:

> The Federal courts examine State statutes only to determine if they comply with the United States constitutional mandates. . . . In addition, Federal courts should, and usually do, defer to State courts as to interpretation of their own statutes. No one should be surprised if a statute passes the one set of standards and not the other.

217 N.W.2d at 774-76.

[40]The *Merlo* court noted:

> Although by straining our imagination we could possibly derive a theoretically "conceivable," but totally unrealistic, state purpose that might support this classification scheme, we do not believe our constitutional adjudicatory function should be governed by such a highly fictional approach to statutory purpose. We recognize that in past years several Federal equal protection cases have embraced such an excessively artificial analysis in applying the traditional "rational basis" test . . . [but] we believe that it would be inappropriate to rely on a totally unrealistic "conceivable" purpose to sustain the present statute *in the face of our state constitutional guarantees.*

8 Cal. 3d at 865 & n.7, 506 P.2d at 219 & n.7, 106 Cal. Rptr. at 395 & n.7 (emphasis added).

[41]*Id.* at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407.

[42]518 P.2d at 366; 523 P.2d at 1370.

consideration of the distinctions drawn between automobile guests and guests in other forms of transportation, the courts in *Merlo* and *Johnson* felt free to consider plaintiffs' additional challenges to the distinctions drawn by the guest statutes between automobile guests and all other social guests or recipients of hospitality, between paying and nonpaying automobile passengers, and among various subclasses of automobile guests.[43]

Third, a discussion of changing circumstances. Noting that "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts no longer exist,"[44] *Merlo,* and the three decisions adopting its rationale, discussed several changes in the "legal and factual" setting of the guest statutes since the *Silver* decision was handed down in 1929. First, citing the almost universal existence of liability insurance, the courts reasoned that automobile hosts no longer needed statutory protection from the risk of financial loss in lawsuits instituted by their guests.[45] Second, recent judicial changes in several common law tort doctrines have rendered the statutory disabilities imposed on automobile guests the exception rather than the rule in negligence law.[46] Finally, *Johnson* and the special concurrence in *Thompson* suggested that the enactment of a comparative negligence statute was "essentially incompatible" with retention of a guest statute, and that the guest statute must therefore have been "implicitly repealed" by the legislature.[47]

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[43]8 Cal. 3d at 863-64 & n.4, 506 P.2d at 217 & n.4, 106 Cal. Rptr. at 393 & n.4; 217 N.W.2d at 773.

[44]Merlo, 8 Cal. 3d at 868-69, 506 P.2d at 222, 106 Cal. Rptr. at 398, *citing* Milnot Co. v. Richardson, 350 F. Supp. 221, 224 (S.D. Ill. 1972).

[45]*See* note 89 *infra.* Hereinafter, the term "the courts" will be used in the text and footnotes as a generic term to refer to one or more of the four state supreme courts recently invalidating a guest statute.

[46]For a discussion of changes in California tort law see Merlo, 8 Cal. 3d at 869-71, 506 P.2d at 222-23, 106 Cal. Rptr. at 398-99. *See also* notes 73-77 and accompanying text *infra.*

[47]217 N.W.2d at 779-80, 523 P.2d at 1371-72. Although the doctrine of implicit repeal is a court-made doctrine unrelated to the general equal protection arguments followed by these courts, it lends additional support to the result reached in these cases and offers an alternative approach for courts wishing to reevaluate the validity of the guest statutes without reaching the constitutional issues. However, as stated by Justice McFadden in his special concurrence in *Thompson:*

> "Repeals by implication are not favored, but if inconsistency is found to exist between the earlier and the later enactments, such that the legislature could not have intended the two statutes to be contemporaneously operative, it will be implied that the legislature intended to repeal the earlier by the later enactment. . . ."
>
> . . . The question . . . is not whether the legislature intended to repeal the guest statute by enactment of the comparative negligence statute, but whether the guest statute and comparative negligence are sufficiently inconsistent that it must be held that the guest statute has been superceded by the enactment of comparative negligence.

523 P.2d at 1371-72 (citations omitted).

In support of their position that the guest statutes had been impliedly repealed by the enactment of comparative negligence laws, the courts referred to two separate areas of incon-

Fourth, the application of a stricter federal equal protection test.[48] The equal protection issue in *Silver* was decided under the traditional "rational relation" test.[49] Under this test, also described as "restrained review," the rationality of a statute is theoretically evaluated by inquiring whether all persons similarly situated with respect to the purposes of the statute are similarly treated.[50] In practice, however, the validity of the statute is presumed, and unless the plaintiff can demonstrate that there is

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sistency in the operation of the statutes. First, by *limiting* an automobile guest's recovery, the guest statutes take a direction opposed to the fundamental philosophy of comparative negligence, i.e., that the right of a plaintiff to recover for negligently inflicted injuries should be *expanded,* and that plaintiff's contributory negligence should not be a complete bar to recovery unless it is shown to be equal to or greater than the negligence of the defendant. Second, as a prerequisite to recovery under the guest statute, a plaintiff must demonstrate that his injuries were occasioned by the gross negligence or other aggravated misconduct of the defendant. Once this determination is made, the jury must then compare the gross negligence of the defendant with the ordinary negligence, if any, of the plaintiff and assign a relative percentage of fault to each. Plaintiff's recovery will then be reduced pro rata on the basis of his percentage of fault. In jurisdictions treating gross negligence and ordinary negligence as completely separate and distinct species of conduct, this process is not unlike comparing apples and oranges. Most jurisdictions confronted with this problem have therefore been forced to the position that gross negligence constitutes an extreme form of negligence, but is of the same species of conduct as ordinary negligence. *E.g.,* Williamson v. McKenna, 223 Ore. 366, 354 P.2d 56 (1960); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W. 2d 105 (1962). Even under this latter approach, however, the challenge to a lay jury of comparing forms of conduct on opposite ends of the negligence spectrum is formidable and the possibilities for confusion are great. In fact, one commentator has noted that in Nebraska, where both statutes are operative, jury verdicts have been reversed on appeal in a surprising number of cases. Gradwohl, *Comparative Negligence of an Automobile Guest — Apportionment of Damages Under the Comparative Negligence Statute,* 33 NEB. L. REV. 54 (1953). For a more recent discussion of comparative negligence, including a partial listing of jurisdictions which have enacted comparative negligence laws, see Bricker, *Comparative Negligence,* in 1 DAMAGES (OREGON STATE BAR CLE) § 15 (1973).

[48]For a comprehensive review of equal protection standards prior to 1964 see *Developments in the Law — Equal Protection,* 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*]; Tussman & TenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949) [hereinafter cited as Tussman & TenBroek].

[49]A classic formulation of the "rational relation" test is found in the words of Chief Justice Warren in McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> Although no precise formula has been developed, the court has held that the fourteenth amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

See also Developments at 1077.

[50]Tussman & TenBroek at 344:

> The essence of [this] doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated [with respect to the purpose of the law] be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

no conceivable legislative purpose, constitutionally permissible, which is rationally related to the statutory classifications, the statute will be upheld. Because "some play must be allowed for the joints of the legislative machine,"[51] courts seldom inquire whether the challenged statutes are impermissibly "underinclusive"[52] or "overbroad."[53] This practice has led at least one commentator to conclude that the degree of judicial scrutiny typically afforded statutes under principles of restrained review is minimal in theory and virtually nonexistent in fact.[54]

Until recently, the only recognized alternative to the "rational relation" test was the standard of "strict judicial scrutiny"[55] reserved for review of statutes affecting "fundamental constitutional rights"[56] or creating "inherently suspect classifications."[57] To meet this standard, the state must demonstrate that the legislation was necessary to further a "compelling state interest,"[58] and that the means selected to achieve this interest were the "least onerous" available.[59] In contrast to the extremely deferential approach of restrained review, courts subjecting a statute to strict judicial scrutiny have shown little tolerance for overbreadth or underinclusiveness in statutory classifications.[60]

Under this "two-tiered" approach to equal protection, the result of a case turns almost entirely on the test chosen.[61] In recent years, growing dissatisfaction with the rigidity of this traditional approach has prompted both courts and commentators to posit models for a more flexible equal protection test.[62] Taking its lead from these recent models, the Califor-

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[51]The classic statement of this concept was made by Mr. Justice Holmes in Missouri, K. & T. Ry. v. May, 194 U.S. 267, 270 (1904):

> Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

[52]A statute is underinclusive when it fails to benefit or burden all who are similarly situated with regard to the statute's purpose. *Developments* at 1084.

[53]A statute is overbroad when it benefits or burdens more persons than those who are similarly situated with regard to the statute's purpose. *Id.*, at 1086.

[54]Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter cited as Gunther].

[55]*Developments* at 1087-1132.

[56]For examples of "fundamental rights" see Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal appeals); Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel). For a recent judicial discussion of "fundamental rights," see Dunn v. Blumstein, 405 U.S. 330, 336-42 (1972).

[57]*See e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

[58]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[59]Dunn v. Blumstein, 405 U.S. 330, 343 (1970).

[60]Gunther at 8.

[61]*Id.*

[62]Recognizing that many issues do not lend themselves to a rigid, two-tiered analysis, at least two Justices have recently sought a new, more flexible approach to equal protection questions.

nia Supreme Court in *Merlo* adopted what can only be described as a hybrid of the two traditional equal protection tests. Rejecting plaintiff's contention that the California guest statute involved fundamental rights and created suspect classifications and should therefore be subject to strict judicial scrutiny,[63] the court also refused to strain its imagination to derive some "theoretically 'conceivable' but totally unrealistic state purpose" which might be furthered by the statutory classifications.[64] Instead, after reciting the traditional rational relation test, the *Merlo* court put fresh emphasis on the requirement that legislative classifications must bear a "fair and substantial" relationship in fact to an "actual" state purpose.[65] Thus, in evaluating the "rationality" of the guest statutes, the court made three types of inquiries: (1) whether the legislative classifications were overbroad or underinclusive; (2) whether the legislative classifications in fact furthered the purported legislative purposes; (3) whether the relative importance of the legislative purposes justified the severity of the disabilities imposed on automobile guests.

The *Johnson* court adopted a similar approach in reviewing the constitutionality of the North Dakota guest statute under the state equal protection guarantees.[66] And while the courts in *Henry* and *Thompson*

In *Dandridge v. Williams,* 397 U.S. 471, 520-21 (1970), Justice Marshall suggested in dissent that a balancing approach be adopted in which the court concentrates "upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the government benefits they do not receive and the asserted state interests in support of the classification." *See also* Chicago Police Dept. v. Mosley, 408 U.S. 92 (1972); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting); and Justice Powell's opinion in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

Academic commentators also profess to see a "newer" equal protection emerging from several recent court decisions. Most notable is the Gunther article, *supra* note 54, where the 15 equal protection decisions of the 1971 term are analyzed. Because seven of the 15 challenges were invalidated without applying "strict scrutiny," Gunther suggests that the Court has put new "bite" into the "traditionally toothless" rational relation test. Gunther develops from his analysis a model for a newer equal protection which he characterizes as "means-focused," i.e., a model under which the court focuses on whether the means *in fact* further the legislative purpose without making any value judgments about the legislative purpose or granting slavish deference to the legislature's wisdom. Since the Gunther article, the Court has not openly adopted the newer equal protection and, in fact, has reversed the one decision where the Gunther means-focused model was explicitly applied by a lower court. Village of Belle Terre v. Boraas, 476 F.2d 806, *rev'd,* 416 U.S. 1 (1974); *see also* Comment, *Newer Equal Protection: The Impact of the Means-Focused Model,* 23 BUFFALO L. REV. 665 (1974). For other scholarly attempts at formulating new equal protection tests see Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral and Permissive Classifications,* 62 GEO. L.J. 1071 (1974); Goodpaster, *The Constitution and Fundamental Rights,* 15 ARIZ. L. REV. 450 (1973); Comment, *A Question of Balance: Statutory Classification Under the Equal Protection Clause,* 26 STAN. L. REV. 155 (1973); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 827 (1973). For a more complete discussion see text accompanying notes 112-15 *infra.*

[63]Merlo, 8 Cal. 3d at 826 n.2, 506 P.2d at 216 n.2, 106 Cal. Rptr. 392 n.2.

[64]*See* note 40 *supra.*

[65]*Id.*

[66]*See* note 39 *supra.*

were not as explicit in defining their standards of review, their analysis indicates that they too adopted the stricter rational relation test applied in *Merlo*.[67] The stricter equal protection standard adopted by these four courts opened guest statutes to active judicial review for the first time and probably more than any other single factor accounts for the differences between the results reached in these cases and the result in *Silver*.

B. Application of a "Newer" Intermediate Equal Protection Standard

As discussed in the preceding section, the equal protection test applied in *Merlo, Johnson, Henry,* and *Thompson* focused on the fairness and substantiality of the relationship between the guest statutes' classification scheme and the legislative purposes.

The courts noted that guest statutes discriminated against automobile guests in at least three ways. First, the statutes withdrew from automobile guests the right to recover for negligent injuries generally enjoyed by other classes of social guests and recipients of hospitality.[68] Second, the statutes denied automobile guests the protection from negligently inflicted injuries afforded paying automobile passengers.[69] Third, even within the class of automobile guests, only those guests injured "during a ride" "in a vehicle" "upon a public highway" were denied recovery for negligent injury.[70]

In the absence of a clear legislative expression of the purposes for these classifications,[71] the courts considered two justifications for the guest statutes advanced in judicial precedent and academic commentaries: the promotion of hospitality "by insulating generous drivers from lawsuits instituted by ungrateful guests who have benefitted from a free ride"; and the elimination of "the possibility of collusive lawsuits, in which a host fraudulently confesses negligence so as to permit his guest . . . to collect from the host's insurance company."[72]

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[67]Henry, 518 P.2d at 366. Although *Thompson* claimed to be applying "restrained review," the Idaho court explicitly adopted the analysis in *Merlo*. 523 P.2d at 1367, 1370.

[68]*See* notes 73-77 and accompanying text *infra*.

[69]*See* notes 79-96 and accompanying text *infra*.

[70]*See* notes 105-11 and accompanying text *infra*.

[71]*See* note 26 *supra*. One author has suggested that in the absence of such expressions it is always possible to define the legislative purpose "in such a way that the statutory classification is rationally related to it," viz., by defining the purpose as being either to benefit or burden the class created by "the plain terms of the statute." Note, *Legislative Purpose, Rationality, and Equal Protection,* 82 YALE L.J. 123, 128 (1972).

[72]Merlo, 8 Cal. 3d at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394. Several other justifications have been advanced in support of the guest statutes, none of which received extensive consideration in the recent decisions. For example, it has been suggested that the statutes were designed: (1) to prevent vexatious litigation arising out of automobile accidents, Silver v. Silver, 280 U.S. 117, 123 (1929); Note, *The Present Status of Automobile Guest Statutes,* 59 CORNELL L. REV. 659, 671 & n.85; (2) to bring the protections afforded automobile guests into parity with those afforded other social guests, Thompson, 523 P.2d at 1369; and (3) to place

1. *Rejection of the "hospitality" rationale.* At the time the guest statutes were enacted, they resembled several common law negligence doctrines which denied recovery to other classes of negligently injured guests.[73] However, as the result of recent judicial decisions abolishing the doctrines of charitable[74] and governmental[75] immunity, and eliminating the status-oriented distinctions surrounding the duty owed to invitees, licensees, and trespassers on real property,[76] automobile guests are presently the only recipients of hospitality denied a right of action for negligent injuries.[77] In light of these changed circumstances, the courts concluded that with respect to the purpose of promoting hospitality, the guest statutes' distinctions between automobile guests and other recip-

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the risk of financial loss upon the injured guest rather than upon the host or the motoring public, Keasling, 217 N.W.2d at 693 (special concurrence).

[73]*See, e.g.,* Merlo, 8 Cal. 3d at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6.

[74]*See, e.g.,* Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939); Bell v. Presbytery of Boise, 91 Idaho 374, 421 P.2d 745 (1966); Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Rickbeil v. Grafton Deaconess Hosp., 74 N.D. 525, 23 N.W.2d 247 (1946).

"Prior to 1942, only two or three States had rejected charitable immunity outright, but by 1971, 31 States had done so." Johnson, 217 N.W.2d at 779 (citing PROSSER § 133).

[75]*See, e.g.,* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). Other cases abolishing the doctrine of governmental immunity include: Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964); Dunwiddie v. Rock County, 28 Wis. 2d 568, 137 N.W.2d 388 (1965). *See generally* Comment, *Judicial Abrogation of Governmental and Sovereign Immunity: A National Trend with a Pennsylvania Perspective,* 78 DICK. L. REV. 365 (1973); Note, *Torts — Governmental Immunity in West Virginia — Long Live the King?,* 76 W. VA. L. REV. 191 (1972).

[76]*See, e.g.,* Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Other cases eliminating the various entrant classifications include: Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972), *cert. denied,* 412 U.S. 939 (1973); Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Wood v. Camp, 284 So. 2d 691 (Fla. 1973); Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973). *See generally* Recent Developments, *Torts — Abrogation of Common Law Entrant Classes of Trespasser, Licensee, and Invitee,* 25 VAND. L. REV. 623 (1972); Annot., 35 A.L.R.3d 230 (1971).

Even in those jurisdictions where the invitee/licensee distinctions have been retained, courts have generally imposed a duty on the landowner to exercise ordinary care for the safety of all classes of persons whenever he was engaged in any type of "active operation" on his property — the operation of an automobile representing the paradigm case of this type of active operation. *See, e.g.,* Babcock & Wilcox Co. v. Nolton, 58 Nev. 133, 137, 71 P.2d 1051, 1054 (1937); RESTATEMENT (SECOND) OF TORTS § 341 (1965); PROSSER § 60.

[77]*See, e.g.,* Merlo, 8 Cal. 3d at 865-66, 506 P.2d at 219-20, 106 Cal. Rptr. at 395-96.

Tisko and *Cannon* distinguish *Merlo* on grounds that the general distinctions between invitees and licensees on personal property had been retained in their jurisdictions, and that automobile guests were therefore not the only class of guests or recipients of hospitality denied a right of action for the ordinary negligence of their hosts. 500 S.W.2d at 568-69; 520 P.2d at 886. This argument ignores, however, the "active operation" exception to the general rule of slight care owed the class of licensees. *See* note 76 *supra.* Moreover, as pointed out by the court in *Thompson,* because of the many factual distinctions between an automobile host-guest situation and a land owner-licensee situation, "there is no apparent need for the duties of automobile hosts and landowners to be the same." 523 P.2d at 1369.

ients of hospitality no longer afforded similarly situated persons similar treatment.[78]

With regard to the distinctions drawn by the guest statutes between paying and nonpaying passengers, the courts treated the hospitality rationale as embodying "two distinct strands of reasoning."[79] The first strand asserts that in providing a higher standard of care for paying passengers than for nonpaying ones, the guest statutes merely reflect a purportedly general legal principle that "you get what you pay for."[80] However, at common law all nonpaying passengers had the right to recover for negligently inflicted injuries, and the theory that "you get what you pay for" was reflected only in the duty of "utmost care" exacted from commercial carriers.[81] Moreover, on the strength of either a state statute or a general common law rule holding *all* persons responsible for their acts of ordinary negligence,[82] the courts asserted that "no principle in our legal system dictates that one must pay a fee before he is protected from infliction of negligent injuries"[83] — the precise result dictated by the guest statutes. The courts therefore concluded that although the legislature may properly distinguish between paying and nonpaying passengers, the goal of promoting hospitality did not justify doing so at the expense

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[78]One of the factors distinguishing the equal protection test applied by these four courts from the test applied by the courts recently upholding a guest statute was the requirement that "the present constitutionality of the guest statute's classification scheme must be evaluated in light of the *contemporary* treatment accorded similarly situated individuals." Merlo, 8 Cal. 3d at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6 (emphasis added).

In contrast, the six courts recently upholding a guest statute did so largely on the basis of the precedent of constitutionality established in *Silver*. For example, the *Justice* court stated:

> If the rule of *Silver*, the highest present authority on the subject, is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, we shall await the views of the United States Supreme Court on the subject.

Justice, 325 A.2d at 102.

[79]Merlo, 8 Cal. 3d at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

[80]*Id.* at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

[81]*See* CAL. CIV. CODE § 2100 (West 1954) and note 18 *supra*.

[82]For example, the North Dakota Century Code states:

> Every one is responsible not only for the result of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . .

N.D. CENT. CODE § 9-10-06 (1959).

States which have a similar general negligence statute but no guest statute have refused to enforce a neighboring state's guest statute on public policy grounds. *See* cases cited in Johnson, 217 N.W.2d at 779. *See also* Annot., 95 A.L.R.2d 12 (1964).

In Kansas, where there is no general negligence statute, the court noted in *Henry:*

> Prior to the enactment of the guest statute in Kansas in 1931 it was the rule of this court that the host driver of an automobile should not expose his guest passenger to risk of harm by act or omission which violates the common standard of conduct, the conduct of a reasonable man. . . . This is the [common law] rule generally followed throughout the United States.

518 P.2d at 366.

[83]Merlo, 8 Cal. 3d at 867, 506 P.2d at 220, 106 Cal. Rptr. at 396.

of abolishing the automobile guest's traditional protections from negligent injury.[84]

The second strand of the hospitality rationale is based on the so-called "good Samaritan" argument,[85] i.e., that a suit brought against a host by a guest who has paid nothing for his transportation represents "an inexcusable instance of ingratitude" and as such ought to be condemned.[86] However, the almost universal existence of liability insurance,[87] prompted in large part by the adoption of state financial responsibility statutes,[88] removes the danger of serious financial loss to the negligent host by spreading the risk of loss over the entire motoring public.[89] Since

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[84]Merlo, 8 Cal. 3d at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396:

> The claimed invidiousness of the guest statute lies not in the fact that it draws some distinction between paying and non-paying passengers, but rather in the fact that it penalizes guests by wholly depriving them of protection against negligent injury.

[85]Keasling, 217 N.W.2d at 702 (dissenting opinion).

[86]Merlo, 8 Cal. 3d at 867, 506 P.2d at 221, 106 Cal. Rptr. at 397.

[87]For example, the *Johnson* court, after referring to the statement in *Merlo* that "85 per cent of all automobiles in California are insured," noted:

> The presence of insurance is even more persuasive in North Dakota, where the figure must be close to 100 per cent, if we include the coverage provided by the North Dakota Unsatisfied Judgment Fund . . . .

217 N.W.2d at 779. *See also* McAdams, *Automobile Guest Statutes — A Constitutional Analysis*, 41 INS. COUN. J. 408, 412 n.43 (1974); PROSSER § 83.

The *Tisko* court, however, noted that whatever its effect on the validity of the hospitality rationale, "[i]f automobile liability insurance is now more nearly universal than it was when *Silver* was decided, the potentiality for collusion between owners and guests is even greater than it was then." 500 S.W.2d at 570.

[88]The financial responsibility statutes were viewed by these courts as embodying a general legislative policy of "provid[ing] compensation for those injured through no fault of their own." Merlo, 8 Cal. 3d at 872 n.13, 506 P.2d at 224 n.13, 106 Cal. Rptr. at 400 n.13 (quoting Interinsurance Exch. v. Ohio Cas. Ins. Co., 58 Cal. 2d 142, 154, 373 P.2d 640, 646, 23 Cal. Rptr. 592, 598 (1962)). "This goal [of compensating the injured] is no less subverted by limiting the class of persons whose injuries are compensable than by limiting the class of drivers who are insured." Atlantic Nat'l Ins. Co. v. Armstrong, 65 Cal. 2d 100, 106, 416 P.2d 801, 805, 52 Cal. Rptr. 569, 573 (1966).

In addition to their state financial responsibility laws, many states are also mandating insurance coverage as part of their "no-fault" statutes. For example, in *Henry*, the court stated:

> The overwhelming majority of the automobile drivers in Kansas today have liability insurance. Furthermore the modern trend is to make mandatory insurance coverage for all owners of motor vehicles. This is one of the basic concepts of no fault legislation which has been enacted or is being considered in practically every state in the nation today.

518 P.2d at 370. For additional discussions of the possible incompatibility of the guest statutes with no-fault legislation see Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 678 n.142, 684-86 (1974); Comment, *The Future of the Automobile Guest Statute*, 45 TEMP. L.Q. 432, 444-47 (1972). *Contra*, Cannon, 520 P.2d at 888, suggesting that no-fault legislation provides a compromise for the harsh effects of the guest statute by allowing automobile guests to recover for negligently inflicted injuries up to a predetermined limit set by the legislature.

[89]*See, e.g.*, Merlo, 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397 (quoting McConville v. State Farm Mut. Ins. Co., 15 Wis. 2d 374, 383, 113 N.W.2d 14, 19 (1962)):

> In few cases will the [elimination of the guest doctrine] shift the burden of loss from the injured guest to the negligent host personally. In the great majority of cases it will shift all or part of the burden of loss from the injured individual to the motoring public.

the loss is no longer borne by the negligent host directly, the only persons currently protected by the guest statutes are liability insurers, and "[i]n plain language there is simply no notion of 'ingratitude' in suing your host's *insurer*."[90] In fact, the host is often as surprised and shocked as his guest to learn that his insurance policy will not cover his guest's injuries.[91]

In contrast, the courts recently sustaining a guest statute argue that the guest statutes may reflect a legislative policy expressly calculated to leave the risk of loss on the injured automobile guest. *See, e.g.,* Keasling, 217 N.W.2d at 694 (special concurrence). The *Duerst* court also noted that in those cases where the host is either uninsured or underinsured, the loss will be borne directly by the host. 525 P.2d at 103. However, in those jurisdictions having either a financial responsibility statute or a no-fault statute, the uninsured motorist is presumably in violation of state law (or has posted adequate proof that he is able to personally bear the loss). *See* note 88 *supra*. Moreover, while as a practical matter the coverage prescribed by the legislature may be inadequate in some cases, this is a policy judgment which has been made by the legislature. It therefore seems anamolous that a court sustaining the guest statute on grounds that it had "no reliable information concerning the extent of the evil which prompted enactment of the statute," or whether the evil originally seen by the legislature still exists, would argue that the limits of insurance coverage prescribed by the legislature are inadequate. *See* Duerst, 525 P.2d at 103.

[90]Merlo, 8 Cal. 3d at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397. In contrast, the *Cannon* court asserted that a repeal of the guest statutes would expose the owner or operator of an automobile to "unlimited liability and staggering insurance rates . . . , creating an economic hardship on the generous host and chilling hospitality." 520 P.2d at 888. While little empirical data is available to either support or refute this contention, the information which is available would suggest that this argument is largely unfounded. For example, one survey comparing insurance rates in guest statute and nonguest statute jurisdictions concluded that in light of such dominating factors as population density, traffic volume, and road conditions, the net effect of the guest statutes on insurance rates is negligible. Tipton at 304-07. The best estimates available from the insurance lobby during the recent legislative debates over repeal of the Colorado guest statute indicated that the increase would be from $1.60 to $3.00 per year. The Denver Post, Mar. 27, 1975, at 19, col. 5. Moreover, the policy of placing the entire financial loss on the guest, and ultimately on his creditors when he is unable to pay, has been criticized as economically unsound. 23 DRAKE L. REV. 216, 217 n.15 (1973).

[91]Keasling, 217 N.W.2d at 703 (dissenting opinion):

> Hosts are usually as surprised and disappointed as their guests when they learn after an accident that the guest's injury caused by the driver's ordinary negligence must go uncompensated despite liability insurance. This discovery is more likely to be disruptive of the spirit of reciprocal hospitality which fostered the guest relationship than the making of a claim.

Likewise, the *Johnson* court asserted:

> The injured persons most frequently deprived of a remedy by the guest law are those the driver is most anxious to protect — his family and his friends.

217 N.W.2d at 777.

In contrast, the *Duerst* court asserted that the guest statute was a legislative attempt to foster hospitality by eliminating the sense of indignation felt by a host sued for his acts of ordinary negligence. In this light the court stated that it was not prepared to say that a host would not feel offended by the mere fact that his guest had instituted suit against him, even though he would suffer no financial loss due to the presence of insurance. 525 P.2d at 102-03.

This argument, however, is countered by the dissent in *Keasling:*

> It is repugnant to our concept of tort law to suggest it is reprehensible ingratitude for an injured person to seek to be made whole by the person whose negligence has caused his loss.

217 N.W.2d at 703. Moreover, the court went on to suggest that "the guest statute accomplishes a peculiar distortion of the message of the parable of the good samaritan" — a parable often cited in support of the hospitality rationale. *Id.*

Continuing their inquiry into whether the paying/nonpaying distinction in fact furthered the cause of hospitality, the courts analogized to other areas of tort law where immunity from suit for ordinary negligence had been abolished, and noted that reasonable people do not ordinarily vary their conduct toward other persons on the basis of such factors as the exchange of payment for their undertakings or the legal status of their guests.[92] Nor do reasonable people consent to being injured through the negligence of their hosts merely by accepting an offer of hospitality.[93] Finally, the guest statutes do not in fact encourage hospitality in the giving or sharing of rides or decrease the number of vehicles on the highways.[94] The courts therefore concluded that the paying/nonpaying distinction bears no relationship to the "realities of life,"[95] and that the legislative purpose of fostering hospitality does not justify the statutes' arbitrary and discriminatory withdrawal from automobile guests of the right to recover for negligently inflicted injuries.[96]

2. *Rejection of the "collusion prevention" rationale.* The basic premise underlying the second justification advanced in support of the guest statutes is that "the driver who gives a free ride to a passenger does so because of a close relationship with his guest; because of the presumed closeness of this relationship, the driver may falsely admit liability so that his guest may collect from the driver's insurance company."[97] In barring

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[92]Merlo, 8 Cal. 3d at 870, 506 P.2d at 222, 106 Cal. Rptr. at 398.

> Just as it is unreasonable to lower the standard of care owed to a visitor on private property because such visitor is "only" a social guest rather than a "paying" invitee, it is unreasonable to single out automobile guests and to expose them to greater dangers from negligence than paying passengers. In automobiles, as on private property, "reasonable people do not ordinarily vary their conduct depending upon such matters."

[93]Merlo, 8 Cal. 3d at 870, 506 P.2d at 221-22, 106 Cal. Rptr. at 397-98, *citing* Rowland v. Christian, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968); Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951); Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939).

[94]*See, e.g.,* Thompson, 523 P.2d at 1368. *Contra,* Cannon, 520 P.2d at 888:

> The guest statute encourages hospitality and directly affects the number of vehicles present on the highways, thus avoiding traffic congestion and wear to the surfaces of the roadway. The guest statute promotes the conservation of petroleum and other natural resources consumed in highway travel.

[95]*See, e.g.,* Merlo, 8 Cal. 3d at 875, 506 P.2d at 226, 126 Cal. Rptr. at 402; Henry, 518 P.2d at 370.

[96]*See, e.g.,* Merlo, 8 Cal. 3d at 872, 506 P.2d at 224, 106 Cal. Rptr. at 400; Henry, 518 P.2d at 370.

[97]Merlo, 8 Cal. 3d at 873, 506 P.2d at 225, 106 Cal. Rptr. at 401.

The *Tisko* court, however, saw the prevention of collusive lawsuits as the sole purpose of the Texas guest statute, and stated:

> It would be difficult, if not impossible, to demonstrate that insured owners and operators are not more likely to collude with gratuitous guests than with paying passengers, or, at least, more inclined to allow their testimony about responsibility for an accident to be colored by sympathy for guests who have accepted their hospitality.

500 S.W.2d at 569. Conversely, the *Duerst* court stated:

all claims by negligently injured guests, however, the statutes not only eliminate a great number of valid lawsuits by persons sharing close relationships with the driver,[98] they also bar claims brought by relative strangers and hitchhikers posing no significant possibility of collusion. In these respects the statutes are overbroad. At the same time, the statutes are also underinclusive in allowing close friends and relatives who have conferred some marginal benefit on the driver to recover for negligently inflicted injuries, even though the closeness of their relationship would indicate a potential for collusion at least as great as that attributed to nonpaying guests.[99] Moreover, since persons predisposed toward collusion can easily avoid the statutory bar by colluding on the issues of compensation or gross negligence, the imprecision of the legislative classifications is compounded by their practical ineffectiveness.[100] The courts thus concluded that the paying/nonpaying distinction was "even less defensible and less rational" than any of the familial classifications invalidated in recent decisions abolishing various intrafamilial tort immunities.[101]

Noting that "courts must depend upon the efficacy of the judicial process to ferret out the meritorious from the fraudulent in particular

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> Although it may be difficult, if not impossible, to establish that the [guest] statute effectively works to prevent collusive lawsuits, we are of the opinion that the hospitality rationale supports both distinctions drawn by [the Oregon guest statute].

525 P.2d at 102.

One reason for this disparity in approach is suggested by the dissent in *Keasling:*

> The collusion-prevention rationale rests on a premise antithetical to the good samaritan [hospitality] argument. Instead of treating guest claims as reprehensible ingratitude toward the host, it assumes guests and hosts will conspire to defraud the host's liability insurer from a mutual desire to see that the guest is compensated for his injuries. The very fact these imputed legislative goals proceed from opposite premises points up the overinclusiveness of the guest statute classification in relation to either purpose.

217 N.W.2d at 703-04.

[98] *See, e.g.,* Merlo, 8 Cal. 3d at 875, 506 P.2d at 226, 106 Cal. Rptr. at 402; Henry, 518 P.2d at 370.

[99] *See, e.g.,* Merlo, 8 Cal. 3d at 875-78, 506 P.2d at 226-28, 106 Cal. Rptr. at 402-04:

> In short, "compensation" is not a factor that assures dishonesty in its absence, or that guarantees honesty in its presence; in basing its classification scheme on this factor the guest statute fails to accord equal treatment to those who are similarly situated with respect to its goal of the prevention of collusion.

[100] *See, e.g.,* Johnson, 217 N.W.2d at 778; HARPER & JAMES § 16.15 at 961.

[101] Merlo, 8 Cal. 3d at 875, 506 P.2d at 226, 106 Cal. Rptr. at 402, *citing* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (parental immunity); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (interspousal immunity); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955) (intrafamily immunity).

It should also be noted that one of the grounds on which Merlo was distinguished by the courts recently sustaining a guest statute was the retention of the various intrafamily tort immunities in those jurisdictions. *See, e.g.,* Cannon, 520 P.2d at 888.

For a recent discussion of the doctrine of intrafamily tort immunity in the various American jurisdictions see Comment, *Intrafamily Tort Liability — A Situation of Confused Disparity,* 5 CUM. SAM. L. REV. 273 (1974). *See also* PROSSER § 122; Annot., 43 A.L.R.2d 632 (1955) (interspousal tort immunity); 27 U. MIAMI L. REV. 191 (1972) (parental tort immunity).

cases," the courts deemed the standard remedies of perjury, cross-examination, pretrial discovery, and the good sense of juries adequate to detect collusion in guest statute cases without the necessity of a "wholesale" withdrawal of remedies from all injured guests.[102] In addition, the threats of higher insurance rates or the loss of insurance coverage, the possible suspension of driving privileges, and the widespread use of cooperation clauses in insurance contracts are further disincentives against collusion not present in other types of cases.[103] Accordingly, the problem of possible collusion in guest statute cases is better handled as one of burden of proof than one of ability to bring suit.[104]

In summary, the lack of precision in the statutory classifications, the fact that the statutes did not operate as an effective bar to collusive lawsuits, and the experience of the courts with a variety of alternative methods for detecting and discouraging collusive lawsuits led the courts to conclude that the collusion prevention rationale did not justify the guest statutes' dissimilar treatment of similarly situated persons.

3. *The irrationality of the statutory loopholes.* The final group of classifications considered by the courts were those created by several limiting clauses within the guest statutes. The statutes deny recovery only to automobile "guests"[105] injured by the "ordinary negligence"[106] of their hosts while "in a vehicle" "during a ride" "upon a public highway."[107] A brief review of the caselaw interpreting these provisions reveals a "crazy-quilt pattern"[108] of "varying legal results under almost identical factual circumstances."[109] Since the rights of guest might vary

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[102]*See, e.g.,* Thompson, 523 P.2d at 1369; Johnson, 217 N.W. 2d at 778.

[103]*See, e.g.,* Keasling, 217 N.W.2d at 704-05 (dissenting opinion).

[104]Johnson, 217 N.W.2d at 778, *citing* Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968).

[105]In *Henry,* the court described the difficulty of determining when a person is a "guest" within the meaning of these statutes:

> [A]mong the many elements to be considered are the identity and relationship of the parties; the circumstances of the transportation; the nature, type and amount of payment; the benefits or advantages resulting to the respective parties growing out of the transportation; whether the payment, of whatever nature, constituted a tangible benefit to the operator and was the motivating influence for furnishing the transportation; and the nature and purpose of the trip.

518 P.2d at 367. *See also* Kelly, *Compensation and the California Guest Statute; Updating the Tangible Benefit and Motivation Tests,* 22 HAST. L. REV. 1233 (1971); 4 TEX. TECH L. REV. 256 (1972) (nondriving owner as a "guest"); 6 U. RICH. L. REV. 404 (1972) (children of tender years as "guests").

[106]Henry, 518 P.2d at 368. *See generally* 11 ALBERTA L. REV. 165 (1973); Annot., 6 A.L.R.3d 769 (1966).

[107]For a discussion of the difficulties encountered by courts in interpreting these limiting clauses see Henry, 518 P.2d at 367-68. *See also* Annot., 1 A.L.R.3d 1083 (1965) ("during a ride"); Annot., 98 A.L.R.2d 543 (1964) ("in a motor vehicle"); Annot., 64 A.L.R.2d 694 (1959) ("on a public highway").

[108]Henry, 518 P.2d at 366.

[109]Merlo, 8 Cal. 3d at 879, 506 P.2d at 229, 106 Cal. Rptr. at 405.

several times during the course of a single trip as circumstances bring him within or without the scope of the statutes,[110] none of these distinctions bears any rational relationship to the legislative purposes of promoting hospitality and preventing collusive lawsuits, or to the realities of life.[111]

4. *Summary.* The equal protection test applied in *Merlo, Johnson, Henry,* and *Thompson* involved at least three separate levels of judicial inquiry. First, the courts closely examined the precision of the legislative classifications and found the guest statutes to be both overbroad and underinclusive. Second, the courts inquired into whether the statutory classification in fact furthered the legislative purposes of promoting hospitality and preventing collusive lawsuits, and concluded that they did not. Third, the courts concluded that the legislative purposes did not justify the statutes' "wholesale" withdrawal of rights from automobile guests. Included in this discussion was an evaluation of several alternative means for achieving the same legislative ends.

IV. A Comparison of Equal Protection Models

In order to place the equal protection approach adopted by these four state courts in proper perspective, it is necessary to briefly examine two models currently being advanced to explain similar equal protection de-

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[110]The following hypothetical demonstrates how the rights of a guest may vary throughout a trip:

> Husband and Wife enter the family car in the driveway for the purpose of driving to the post office and mailing a birthday card. If Husband backs negligently down the driveway and hits a lamp post before reaching the street, injuring Wife, Wife can recover against Husband. No danger of collusion there and no worry about ingratitude. If, however, he makes it to the street and backs into a car parked at the opposite curb, the guest statute applies and he and his insurance company have to be protected from Wife's ingratitude.
>
> If he successfully negotiates that street, and reaches the post office, where he double parks, with Wife getting out of the car to run across the street and mail the card, he is liable for his ordinary negligence in failing to warn her if he sees that she is running into the stream of traffic, where she is hit by another car. If, however, she makes it back and he pulls out into the stream of traffic, he is not liable for ordinary negligence.
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> Of course, it should be remembered that all of this might be academic if Wife were going along to advise on Christmas shopping or selection of olives, in which case it would possibly be a business trip; but not if the couple were on their way to get married, which is a mere courtesy of the road.

Lascher, *Hard Laws Make Bad Cases — Lots of Them (The California Guest Statute)*, 9 Santa Clara Law 1, 14 (footnotes omitted).

The courts rejected the assertion that this confused state of the law was a result of judicial interpretation. *See, e.g.,* Merlo, 8 Cal. 3d at 880 n.20, 506 P.2d at 230 n.20, 106 Cal. Rptr. at 406 n.20. *Contra,* Comment, *Judicial Nullification of Guest Statutes,* 41 S. Cal. L. Rev. 884 (1968).

[111]In Utah, the guest statute is interpreted broadly and thus many of the difficult questions concerning whether a plaintiff is in a vehicle during a ride upon a public highway are avoided. Cannon, 520 P.2d at 888-89. However, the issues of what constitutes one a "guest" within the meaning of the statute, and what acts constitute "willful misconduct" or "intoxication" on the part of the owner or operator of the vehicle continue to pose interpretational problems in Utah.

velopments in recent United States Supreme Court decisions.[112] One model, posited by Professor Gerald Gunther in his seminal article, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,*[113] suggests a "means-focused" equal protection test which would require that the statutory classification bear a substantial relationship *in fact* to an actual, rather than a merely conjectural, legislative purpose. Under this model, the rationality of a classification is measured by the degree of success with which the statutory means actually further the legislative ends. In contrast to the standard of strict judicial scrutiny, however, this approach does not demand an evaluation of the legislative ends beyond the requirement that they represent an actual and permissible legislative purpose.

An alternative to the Gunther model is the "sliding scale" or "balancing" approach suggested by Mr. Justice Marshall. This approach views the Supreme Court's recent equal protection decisions as applying a "spectrum of standards" varying the degree of scrutiny to be applied on the basis of the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis on which the particular classification is drawn."[114] Thus, as the interests impinged upon approach the level of fundamental rights and the classifications created approach the status of being inherently suspect, the statute is subjected to increasingly rigorous scrutiny. The "strictness" of the scrutiny would be determined in each case by balancing such factors as the importance of the legislative ends; the overbreadth, underinclusiveness, and practical effectivenes of the means selected to achieve those ends; the availability of other less restrictive means; the importance of the interests impinged upon; and the severity of the legislative intrusion.[115] In contrast to the Gunther model, Marshall's model necessarily entails an evaluation of the legislative ends as well as an examination of the statutory means.

Without attempting to draw any conclusions concerning the validity of either of these models, it must be recognized that the equal protection test applied in the four recent decisions striking down a guest statute resembles more closely the model advanced by Mr. Justice Marshall. The Gunther model was the only one expressly mentioned in these deci-

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[112]It should be noted that the two models subsequently discussed in this comment are not the only models which have been advanced. *See* note 62 *supra.*

[113]Gunther, note 54 *supra.*

[114]San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

Although Mr. Justice Marshall's dissatisfaction with the rigid two-tier equal protection approach was first articulated in *Dandridge v. Williams,* 397 U.S. 471, 519 (1970) (dissenting opinion), his dissent in *Rodriquez, supra,* constitutes the most complete statement to date of his "sliding scale" or "spectrum of standards" model for equal protection review.

[115]*See* Note, *Illegitimacy and Equal Protection,* 49 N.Y.U.L. REV. 497 (1974).

sions,[116] and his means-focused approach accounts for the courts' inquiry into whether the statutory means actually furthered the legislative ends. But these state supreme courts went beyond the Gunther model when they raised the question of whether the purported legislative purposes were sufficiently important to justify the guest statutes' wholesale withdrawal of the protections afforded automobile guests at common law — a question required by the Marshall model.

It should be noted that neither the Gunther nor the Marshall model has been expressly adopted by a majority of the Court.[117] Indeed, each of these models has been subjected to severe criticism by both judges and commentators. Much of this criticism is reflected in the recent guest statute decisions declining to follow the stricter equal protection test applied in *Merlo*. For example, the Gunther model has been attacked on the grounds that it involves the courts in a fact-finding process traditionally, and presumably more appropriately, the function of the legislature. The courts do not have the resources to determine whether the statutory means actually further the legislative ends. Rather, factual inquiries of the scope required by the Gunther model are arguably better handled by the special structure and resources of the legislature.[118] Unquestionably, considerations of this nature lie at the foundation of the extremely deferential approach associated with the traditional rational relation test. However, even under this more traditional approach, it would appear that if a litigant were able to make the necessary factual showing at the trial level and preserve the essential data in the record on appeal, an appellate court would be justified in making the factual determinations required by the Gunther model.[119]

In contrast, the majority of the criticism leveled against the Marshall model has been concerned not with the fact-finding activities of the courts, but rather with their expanded roles as arbiters of public policy. Critics of this model argue that by not only allowing but actually requiring the courts to weigh such factors as the relative importance of the legislative purposes, the value of the rights infringed by the statute, and the severity of the infringement, the Marshall model opens the door to a new era of freewheeling substantive due process based on the subjective values and personal predilections of the judiciary.[120]

A court need not apply either of these models, however, in order to reach the result of *Merlo, Johnson, Henry,* and *Thompson*. If the courts

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[116]Merlo, 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

[117]*See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973).

[118]*See, e.g.,* Justice, 325 A.2d at 101-02; Duerst, 525 P.2d at 103.

[119]*See, e.g.,* Duerst, 525 P.2d at 103; Tisko, 500 S.W.2d at 572.

[120]*See, e.g.,* Keasling, 217 N.W.2d at 690, 692; Tisko, 500 S.W.2d at 572-73; Cannon, 520 P.2d at 886.

were to apply the "original" equal protection test, most current guest statutes would be found unconstitutional.

In the years immediately following the adoption of the fourteenth amendment, judges confronted the task of reconciling the constitutional demand for equality in the application of the laws with the pragmatic realization that legislatures must enact statutes affecting a variety of limited classes of persons in order to carry out their governmental functions.[121] These conflicting demands were reconciled in the original equal protection test:

> The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.[122]

Stated in more familiar terms, the original equal protection test was primarily concerned with the overbreadth and underinclusiveness of the challenged classification. During the last decades of the 19th century, however, the equal protection clause was effectively eviscerated by a series of Supreme Court decisions.[123] As a result, over the next 70 years legislatures were granted an increasingly "wide scope of discretion in enacting laws which affect some groups of citizens differently than others."[124] In fact, some recent decisions have asserted that overbreadth and underinclusiveness are valid equal protection arguments only when the standard of strict judicial scrutiny is to be applied.[125]

In recent years, judicial and academic dissatisfaction with this extreme deference, if not total abdication, to the legislature's judgment has prompted the development of several models for putting new bite into the traditionally toothless standard of minimum scrutiny.[126] In the context of the guest statute decisions, the same result could be achieved by returning to the original equal protection test and limiting the courts' inquiry to the overbreadth and underinclusiveness of the challenged classification. Under this suggested approach, many of the criticisms leveled against more recent models would be avoided as there would be no necessity for inquiring into whether the statutory means in fact furthered the legislative ends, or for balancing competing policies and values in order to determine the appropriate standard of review. Instead, the essential inquiry would be whether persons similarly situated

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[121]Tussman & TenBroek at 343; *Developments* at 1076.

[122]Tussman & TenBroek at 344.

[123]Heath & Milligan Co. v. Worst, 207 U.S. 338 (1907); Plessy v. Ferguson, 163 U.S. 537 (1896); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Tussman & TenBroek at 342.

[124]*See* note 49 *supra*.

[125]*See, e.g.*, Keasling, 217 N.W.2d at 694; Tisko, 500 S.W.2d at 571.

[126]Gunther at 19. *See also* note 62 *supra*.

were similarly treated.[127] Courts applying this original equal protection test would continue to recognize that legislative classifications cannot be drawn with absolute precision and that play must be allowed for the joints of the legislative machine. But more importantly, they would also recognize that at some point slippage in the machinery becomes intolerable and must be corrected if courts are to fulfill their constitutional responsibilities as independent guarantors of the equal protection of the laws.[128]

The difficulty lies in determining when that point has been reached. A suggested guideline might be this: If the party attacking the statutory classifications can demonstrate in a clear and convincing manner that a practical and substantially more precise alternative is available for achieving the espoused legislative ends, the statute cannot be sustained on equal protection grounds. This suggested standard would perpetuate the presumption of constitutionality attached to all regularly enacted legislation, but would recognize that this presumption "is truly rebuttable and not simply a self-fulfilling prophecy."[129]

As demonstrated by *Merlo, Johnson, Henry,* and *Thompson,* the classifications imposed by the guest statutes are inherently overbroad and underinclusive. This imprecision has been compounded by recent legal and social changes expanding the rights of persons generally to sue for negligently inflicted injuries. In addition, these same legal and social reforms have produced several viable alternatives for achieving the purported legislative goals of promoting hospitality and preventing collusive lawsuits. It must therefore be concluded that when measured against the standard of the original equal protection test, most current guest statutes deprive a substantial portion of the population of the equal protection of the laws.

CONCLUSION

Judicial, academic, and public dissatisfaction with the guest statutes

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[127] *See* notes 50 & 124 *supra.*

[128] *See, e.g.,* Thompson, 523 P.2d at 1370:

> Although the equal protection guarantee requires this Court to determine if there is a rational connection between the statute's objectives and the statute's means for achieving the objectives, it is argued that if this Court goes beyond a cursory examination of the statute's objectives it is usurping the legislature's function. In effect, the petitioners argue that if a statute is passed by the legislature, it cannot be a denial of equal protection. . . . The legislature should have wide discretion in the enactment of statutory schemes to promote the general welfare, but *this Court has a duty to protect the people's rights as enumerated in the Idaho and United States Constitutions from legislative encroachment.*

Id. (Emphasis added). *See also* Johnson, 217 N.W.2d at 777.

[129] Keasling, 217 N.W.2d at 700. For a more complete discussion of this presumption see McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1949):

> Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

continues to increase. Yet in light of the over 40-year history of judicial deference to the legislative judgments in this area, it is improbable that a court adhering to the traditional minimum scrutiny standard will invalidate a guest statute, or any other statute, as a denial of the equal protection of the laws. The courts should recognize the futility of continuing to go through the motions of appellate review when the equal protection standard being applied makes affirmance of the legislative classifications a virtually foregone conclusion. Whether under the aegis of one or more of the equal protection models currently being advanced, under the original equal protection test, or under some standard yet to be devised, the courts should reassert their constitutional role as continuing guarantors of the equal protection of the laws in areas other than those subjected to strict judicial scrutiny. Those courts willing to assume this position will find more than ample support in recent legal and social developments to justify subjecting the guest statutes to a realistic and independent reevaluation.