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The Constitutionality of the Ohio Guest Statute

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There is one impact of talent, genius, and excellence uniformly manifested in whatever fields they occur: they make fine fire furnishing creative insights for others working in the same areas.[1]

THIS IS THE MANNER in which one writer described the court opinion written by Mr. Justice Tobriner in *Brown v. Merlo*,[2] the California Supreme Court decision which declared the California automobile guest statute unconstitutional. In *Brown* an automobile guest, alleging both willful misconduct and negligence, brought an action against his host driver for injuries received in an automobile accident which occurred on a California highway. The trial court granted the defendant's motion for summary judgment holding that the state automobile guest statute barred recovery since the plaintiff failed to prove that the accident was caused by the driver's willful misconduct or intoxication.[3] The plaintiff-guest appealed from the summary judgment, contending that the statute conflicted with the equal protection clauses of both the state[4] and federal[5] constitutions. The California Supreme Court agreed with the plaintiff, asserting that the classifications set forth in the statute "do not bear a substantial and rational relation to the statute's purposes of protecting the hospitality of the host-driver and of preventing collusive lawsuits."[6]

Since *Brown*, four other state courts have declared their state's

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1 The Association of Trial Lawyers of America, NEWSLETTER, Vol. 17, No. 2 at 52 (1974).

2 8 Cal. App. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 399 (1973) [hereinafter cited as *Brown*].

3 This was the standard of proof established by the California Automobile Guest Statute, CAL. VEH. CODE § 17158 (West 1971):

> No persons 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 that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

4 CAL. CONST. art. 1 §§ 11, 21.

5 U.S. CONST. amend. XIV.

6 Brown v. Merlo, 8 Cal. App. 3d at 882, 506 P.2d at 231, 106 Cal. Rptr. at 407 (1973).

automobile guest statute unconstitutional.[7] Each of these courts based their decision primarily upon the rationales set forth in *Brown*.[8] The Ohio automobile guest statute[9] is quite similar to the now unconstitutional California, Kansas and North Dakota statutes. The following discussion will examine the proffered justifications of the Ohio statute in light of the constitutional arguments that have been raised in these recent decisions.

THE HISTORY OF AUTOMOBILE GUEST STATUTES

Before delving into an analysis of the Ohio guest statute,[10] it becomes necessary to first discuss the historical development of guest statutes generally. According to common law principles, the owner of an automobile owes a guest the duty to use ordinary care in the operation of his automobile.[11]

The typical automobile guest statute, however, relieves the owner or operator of an automobile from liability for injury to non-paying passengers unless caused by some form of aggravated misconduct.[12] Connecticut enacted the first such statute in 1927 and two years later in *Silver v. Silver*,[13] its constitutionality was upheld by the United States Supreme Court.[14] Since the decision in *Silver*, guest statutes not wholly denying a guest the right of action have been held constitutional.[15] Today,

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[7] Henry v. Bauder, 518 P.2d 362 (Kan. 1974); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Clements v. Greenwood, Case No. 73-C-342 (Indiana Clark Cir. Ct. 1974); Putney v. Piper, Case No. 2798 (Dist. Ct. Iowa 1973). For a review of these court opinions, *see* The Association of Trial Lawyers of America, NEWSLETTER, Vol. 17, No. 2 at 52 and 91 (1974).

[8] *E.g.* in Henry V. Bauder, 518 P.2d 362, 366 (Kan. 1974), the court specifically stated: "We are impressed with the sound rationale of the opinion of *Brown*. The result reached . . . is reasonable and in accordance with our concept of equal justice under the law."

[9] OHIO REVISED CODE ANN. §4515.02 (Page 1953) reads:

> The owner, operator or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, resulting from the operation of said motor vehicle, while such guest is being transported without payment therefor in or upon said motor vehicle, unless such injuries or death are caused by the willful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle.

See note 3 *supra*.

[10] Whenever the author makes reference to guest statutes, he is referring to automobile guest statutes.

[11] Alexander v. Carey, 98 F. Supp. 1013 (D. Alaska 1951); Spivey v. Newman, 232 N.C. 281, 59 S.E.2d 844 (1950); Dickerson v. Connecticut Co., 98 Conn. 87, 118 A. 518 (1922); 2 HARPER AND JAMES, THE LAW OF TORTS § 16.15 at 950 (1956); White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326, 329 (1934).

[12] *E.g.*, ALA. CODE tit. 36, § 95 (1940) (willful or wanton misconduct); IDAHO CODE ANN. § 49-1401 (1963) (intentional, intoxication, gross negligence); WASH. REV. CODE § 46-08.080 (1937) (intentional accident, gross negligence, intoxication).

[13] 280 U.S. 117 (1929) [hereinafter cited as *Silver*].

[14] Connecticut was also the first state to repeal its guest statute, ten years after it was passed: CONN. GEN. STAT. § 1628 (repealed 1937).

[15] *See, e.g.*, Westover v. Schaffer, 205 Kan. 62, 468 P.2d 251 (1970); Naudzius v.

24 states have statutes limiting the liability of the owner or operator of a motor vehicle to a guest.[16] Two states, Massachusetts[17] and Georgia,[18] have imposed similar restrictions by judicial decision; while 24 states have no automobile guest statute and still adhere to the common law rule requiring that a host exercise reasonable care for the safety of his guests.

Guest statutes were adopted ostensibly as a device to protect the "good samaritan" host driver and to insulate insurance carriers from the burdens of collusive suits.[19] A few writers assert that the series of automobile guest legislation passed in the late 1920's and 1930's was a legislative response to the public's outcry over a series of publicized cases in which hitchhikers sought exorbitant damages from their host drivers.[20] Professor Prosser, however, finds little support for this theory noting that he has had extreme difficulty locating any such decisions.[21] The more credible reason for the passage of these statutes appears to be that they were passed as a result of extensive lobbying by liability insurance companies.[22] The insurance industry strongly contended that guest statutes enabled them to offer coverage at a lower premium rate, thereby increasing the accessibility of liability insurance.[23] Several critics of this contention argue that there is little, if any, correlation between insurance rates and the presence or absence of guest statutes.[24] In spite of this underlying

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Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Corish, *The Automobile Guest*, 14 Bos. U.L. REV. 728 (1934); Hodges, *The Automobile Guest Statutes*, 12 TEX. L. REV. 303 (1934); Weber, *Guest Statutes*, 11 U. CIN. L. REV. 24 (1937).

16 For the most recent, complete listing (excepting California, Kansas, and North Dakota), *see* Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884, 899-901 (1968).

17 Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917) (The court applied the analogy of the liability for a gratuitous bailment and said, "The measure of liability of one who undertakes to carry gratis is the same as that of one who undertakes to keep gratis").

18 Caskey v. Underwood, 89 Ga. App. 418, 79 S.E.2d 558 (1953); Hennon v. Hardin, 78 Ga. App. 81, 50 S.E.2d 236 (1948); Epps v. Parrish, 26 Ga. App. 379, 106 S.E. 297 (1921).

19 PROSSER, THE LAW OF TORTS 187 (4th ed. 1971) [hereinafter cited as PROSSER]; Furman, *The Future of the Automobile Guest Statute*, 45 TEMP. L.Q. 432-433 (1972); Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287-288 (1958) [hereinafter cited as *Tipton*].

20 *E.g.*, Tipton, *supra* note 19 at 288.

21 PROSSER, *supra* note 19 at 187 n.8.

22 One author curtly charged that guest statutes are "the most vicious pieces of legislation an active insurance lobby was able to foist on an unsuspecting public." Gibson, *Guest Statute Discrimination*, 6 ALBERTA L. REV. 211, 218 (1968). *See generally*, PROSSER, *supra* note 19 at 187; Furman, *supra* note 19 at 432; Tipton, *supra* note 19 at 288.

23 *Id.*

24 *See* James, *Accident Liability Reconsidered: The Impact of Liability*, 57 YALE L.J. 549 (1948); Weinstein, *Should We Kill the Guest Passenger Act*, U. DET. L. REV. 185 (1965); White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326 (1934).

controversy, the courts have almost universally justified the denial of recovery to the guest for injury occasioned by the ordinary negligence of his host driver on the theories of protection of the host driver's hospitality and the fear of collusive suits between the driver and the passenger.[25]

As alluded to earlier, the constitutionality of guest statutes was established early in their history by the United States Supreme Court when the Connecticut statute was challenged on the grounds of equal protection.[26] Mr. Justice Stone, speaking for the Court, took notice of the increasing frequency of litigation in which passengers transported gratuitously in automobiles sought recovery of large sums from their driver-hosts for injuries alleged to have been due to negligent operation.[27] In addressing the argument of plaintiff that permitting paying passengers to recover while denying the right to non-paying passengers amounts to an arbitrary distinction, the Court responded:

> Granted that the liability to be imposed upon those who operate any kind of vehicle for the benefit of a mere guest or licensee is an appropriate subject of legislative restriction, *there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the legislature must be held rigidly to the choice of regulating all or none.*[28]

Another case frequently cited as upholding the constitutionality of automobile guest statutes is *Naudzius v. Lahr.*[29] In that case, the plaintiff contended that the Michigan legislature, by abolishing the "right of action for ordinary negligence," deprived the plaintiff-guest of his right of property without due process of law.[30] The plaintiff further argued that the act established "unreasonable, arbitrary, and unlawful classes of persons" by distinguishing between guests in motor cars and guests in other vehicles, and between gratuitous and paying passengers in the same situation.[31] Notwithstanding these arguments, the Michigan court upheld the statute on the basis of its underlying purpose: to prevent collusion between the host and guest against an insurance company, and to prevent

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[25] *E.g.*, Shea v. Olson, 189 Wash. 143, 155, 53 P.2d 615, 620 (1936):

> It has been asserted that collusion frequently takes place between the host and the guest to establish a case of gross negligence against the host, in order to fasten liability upon a company by whom the host is insured, that because of a friendly regard for the guest, and knowing that he himself will not have to pay the bill anyway, the host is willing to admit, and often testify to, a state of facts other than it actually is and thus deprive the insurance company of the benefit of a good defense.

[26] Silver v. Silver, 280 U.S. 117 (1929).

[27] *Id.* at 122-23.

[28] *Id.* at 123 (emphasis added).

[29] 253 Mich. 216, 234 N.W. 581 (1931) [hereinafter cited as *Naudzius*].

[30] *Id.* at 221, 234 N.W. at 583.

[31] *Id.* at 222, 234 N.W. 583.

recovery by an ungrateful guest.[32] The *Naudzius* court approved these purposes, finding that such classifications had their basis in reason.[33]

THE OHIO GUEST STATUTE

In *Smith v. Williams*,[34] the constitutionality of the Ohio guest statute was examined for the first time. The action was one for damages for the wrongful death of plaintiff's decedent who was fatally injured while riding as a guest in defendant's automobile. The petition alleged that the wanton misconduct of the defendant caused the fatal injury to the decedent, a non-paying passenger. The trial judge gave the following charge to the jury: "If you find that the driver of said automobile at the time and place in question . . . was not guilty of any wanton misconduct . . . then you must find for the defendant."[35] On appeal, plaintiff contended that the charge was erroneous as the Ohio guest statute was unconstitutional. In upholding the lower court decision, the Court of Appeals of Scioto County asserted that the statute was not repugnant to either article 1, section 19(a) of the Ohio Constitution or the fourteenth amendment to the United States Constitution.[36]

The Ohio General Assembly enacted this state's guest statute in 1933.[37] Like guest statutes in general, the Ohio provision was enacted to carry out a policy of "social equity" against gratuitous guests bringing personal injury actions against "good samaritan motorists."[38] Consistently, another underlying purpose of the Ohio Guest Statute was to prevent the possibility of fraud and collusion between social friends and family members to recover from the driver's insurance company.[39]

In construing the meaning of the Ohio statute, the courts have held that willful misconduct, a finding of which precludes the protection of the statute, implies an intention or purpose to do wrong, an intentional deviation from a clear duty or from a definite rule of conduct, and not a mere error of judgment.[40] "Wanton misconduct," a finding of which again

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[32] *Id.* at 224, 234 N.W. at 584.

[33] The court analogized the discriminatory treatment to similar distinctions in other areas such as between the bailee and the bailor, the common carrier and the ordinary driver, and the innkeeper and the social host. 253 Mich. at 226-27, 234 N.W. at 584 (1931).

[34] 51 Ohio App. 464, 1 N.E.2d 643 (1935) [hereinafter cited as *Smith*].

[35] *Id.* at 465, 1 N.E.2d at 644.

[36] *Id.* at 467-68, 1 N.E.2d at 645. *See also* Rector v. Hyer, 35 Ohio L. Abs. 451, 41 N.E.2d 886 (1941).

[37] OHIO REV. CODE ANN. § 4515.02 (Page 1953) (formerly § 6309-6 GEN. CODE). *See* note 9 *supra.*

[38] Miller v. Fairley, 141 Ohio St. 327, 48 N.E. 217 (1943). *See* text accompanying notes 19-25 *supra.*

[39] Thomas v. Herron, 20 Ohio St. 2d 62, 67, 253 N.E.2d 772, 775 (1969); Kitchens v. Duffield, 149 Ohio St. 500, 503, 79 N.E.2d 906, 908 (1949).

[40] Bailey v. Brown, 34 Ohio St. 2d 62, 295 N.E.2d 672 (1973); Schultz v. Fible, 71 Ohio App. 353, 48 N.E.2d 899 (1943); Cousins v. Booksbaum, 51 Ohio App. 150, 200 N.E. 133 (1935).

would preclude operation of the statute, has been construed as such conduct that manifests a "disposition to perversity"[41] and from the surrounding circumstances and existing conditions, it must be shown that the party was aware that his conduct would in all probability result in injury.[42] A "guest," within the meaning of the statute, is one who is invited either directly or by implication to enjoy the hospitality of the driver, and who takes a ride either for his own pleasure or business, without making any return to or conferring any benefit upon the driver.[43]

From the plain meaning of the statute, it appears clear that in order for a passenger to recover for injuries, it must be shown either that the person being transported is a "guest" and his injuries resulted from the willful or wanton misconduct of his host motorist, or that the plaintiff is a "passenger for payment"[44] who seeks to recover for the host motorist's negligence.[45] Notwithstanding this apparently unambiguous language, the guest statute has not been applied in a consistent manner, and the Ohio courts have been erratic and arbitrary in delineating the situations where the statute does and does not apply. For example, in *Angel v. Constable,*[46] a passenger who was being transported home for

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[41] Jenkins v. Sharp, 140 Ohio St. 80, 83, 42 N.E.2d 755, 756 (1943): "Such a disposition of mental state is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of the danger, with indifference to consequences and absence of all care." *See generally* Akers v. Stirn, 136 Ohio St. 245, 25 N.E.2d 286 (1940); Morrow v. Hume, Admx., 131 Ohio St. 319, 3 N.E.2d 39 (1936); Universal Concrete Pipe Company v. Bassett, 130 Ohio St. 567, 200 N.E. 843 (1936)); Kennard v. Palmer, 39 Ohio L. Abs. 429, 53 N.E.2d 652 (Ct. App. 1943), *rev'd on other grounds,* 143 Ohio St. 1, 53 N.E.2d 908 (1944).

[42] *See* Sullivan v. Bruce, 250 F.2d 453 (6th Cir. 1957); Vecchio v. Vecchio, 131 Ohio St. 59, 1 N.E.2d (1936); Reserve Trucking Company v. Fairchild, 128 Ohio St. 519, 191 N.E. 745 (1934); Haacke v. Lease, 35 Ohio L. Abs. 381, 41 N.E.2d 590 (Ct. App. 1941).

[43] Peleps v. Oliver, 165 Ohio St. 493, 137 N.E.2d 676 (1956); Dorn v. North Olmsted, 133 Ohio St. 375, 14 N.E.2d 11 (1938); Bailey v. Neale, 63 Ohio App. 62, 25 N.E.2d 310 (1939); Beer v. Beer, 52 Ohio App. 276, 3 N.E.2d 702 (1935); Ackerman v. Steiner, 44 Ohio L. Abs. 600, 59 N.E.2d 950 (Ct. App. 1944).

[44] In Duncan v. Hutchison, 139 Ohio St. 185, 39 N.E.2d 140 (1942), the Ohio Supreme Court attempted to prescribe certain tests to determine when one is actually a "passenger for payment" and thus takes himself out of the operation of a statute:

1) when the automobile host has a financial or business interest in the time or service of the occupant, and the purpose of the transportation is to take the occupant to or from his place of employment;
2) when the occupant is making the trip to assist the automobile host in arriving at the latter's destination or to perform some service for the latter's benefit;
3) when a substantial or tangible benefit is conferred upon the automobile host;
4) when the automobile host and occupant embark upon a joint adventure or enterprise in which both are equally interested, and payment is the motivating influence in providing for the transportation;
5) when the person is an involuntary occupant of the automobile.

[45] *See,* Burrow v. Porterfield, 171 Ohio St. 28, 168 N.E.2d 137 (1967); OHIO REV. CODE ANN. § 4515.02 (Page 1953).

[46] 40 Ohio L. Abs. 1, 57 N.E.2d 86 (Ct. App. 1943).

dinner so that he might work overtime for the driver-host was considered a "passenger for payment" by the court and thereby not barred from recovery by the guest statute. However, under a similar circumstance, in which a passenger had been asked by the host-driver to ride with him on a trip because the host-driver needed an experienced driver to accompany him, the court held that the passenger was a "guest," and the guest statute was a bar to any recovery for ordinary negligence in operation.[47] These inconsistent results occurred despite the fact that the well-settled rule in Ohio is that where the passenger confers a benefit upon the host-driver, he should be considered a "passenger for payment" thus falling outside the guest statute.[48] While the former court followed the established rule, the latter court apparently ignored it.

Another glaring inconsistency in application has occurred in applying the guest statute to "car pools." In 1958, the Ohio Supreme Court declared that in a "car pool" situation, the plaintiff qualified as a "passenger for payment."[49] Inconsistently, however, in 1967, an Ohio Court of Appeals held that the passenger in the "car pool" situation qualified as a "guest" and fell within the statute.[50] Similarly, Ohio courts have applied questionable "exceptions" to the application of the guest statute. One Ohio court concluded that a passenger who had both feet in a stopped car was outside the operation of the statute;[51] another court held that a passenger who had both feet in a moving car was within the statute;[52] while a third court asserted that a passenger who had one foot in the moving car and one foot out was outside the statute.[53] Undoubtedly, it was this sort of questionable reasoning which led one writer to refer to the Ohio guest statute as a "treadmill to confusion."[54]

ATTACKING THE CONSTITUTIONALITY OF GUEST STATUTES

Since the recent state court decisions which overturned the guest statutes used *Brown* as their primary basis, this author will also use this decision as the focal point for analysis of the Ohio statute.[55] The constitutional attack of automobile guest statutes must begin with an analysis of the fourteenth amendment's guarantee of equal protection and conclude with a critical evaluation of the two announced justifications of guest statutes—protection of hospitality and prevention of fraud and collusion.[56]

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47 Sabo v. Mayn, 103 Ohio App. 113, 144 N.E.2d 248 (1956).

48 See accompanying text and cases cited in notes 43 and 44 *supra.*

49 Lisner v. Faust, 168 Ohio St. 346, 155 N.E.2d 59 (1958).

50 Meier v. Edwards, 11 Ohio App. 2d 224, 229 N.E.2d 758 (1967).

51 Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1957).

52 Kilgore v. U-Drive-It Co., 149 Ohio St. 505, 79 N.E.2d 908 (1948).

53 Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957).

54 Day, *Treadmill to Confusion—Ohio's Guest Statute*, 8 CASE W. RES. L. REV. 170 (1957).

55 *See* note 8 *supra.*

56 *See* accompanying text to notes 19-25 *supra.*

EQUAL PROTECTION

In the past, most state courts which addressed themselves to the question of the equal protection guarantee as it relates to guest statutes have cited *Silver*[57] as a bar to such a suit.[58] However, *Silver* can be distinguished as outmoded in its 40-year-old emphasis upon the uniqueness of automobiles and out of focus in its treatment of the guest statute as merely one of many automobile regulatory devices which had developed during the 1920's.[59] Furthermore, the *Silver* rationale is vulnerable in that the Court confined its decision solely to the categorical distinction between vehicular guests and guests in all other conveyances,[60] thereby ignoring legislatively created discriminations between the various subclasses of vehicular guests, *e.g.*, in a stopped car and in a moving car.

While the fourteenth amendment does not prohibit classifications, it does require that persons similarly situated receive equal treatment.[61] Courts have traditionally applied two standards of equal protection in examining the validity of legislative acts: the "strict scrutiny test" and "the rational relation test." The "strict scrutiny test" was defined in the classic decision by Justice Douglas in *Harper v. Virginia Bd. of Elections*,[62] wherein it was held that where the legislative enactment involved a suspect classification[63] or a fundamental right,[64] any infringement must be carefully scrutinized. As a result, the "strict scrutiny test" is only applied in so-called "suspect classifications" and/or "fundamental rights" cases.[65]

As to the less restrictive "rational relation test" the United States Supreme Court recently held: "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair

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[57] *See* note 15 *supra.*

[58] For additional examples *see* Pringle v. Gibson, 195 A. 695 (Me. 1937); State v. King, 188 A. 775 (Me. 1936); Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935); Sleeper v. Massachusetts Bonding and Insurance Co., 283 Mass. 511, 186 N.E. 778 (1933); Commonwealth v. Reardon, 282 Mass. 345, 185 N.E. 40 (1933).

[59] The *Silver* court expressly stated: "The use of the automobile as an instrument of transportation is peculiarly the subject of regulation. We cannot assume that there are no evils to be corrected or permissible social objects to be gained by the present statute." 280 U.S. 117, 122 (1929).

[60] Silver v. Silver, 280 U.S. 117, 123 (1929).

[61] Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); U.S. CONST. amend. XIV. *See generally* GUNTHER AND DOWLING, CONSTITUTIONAL LAW 983-1049 (8th ed. 1970).

[62] 383 U.S. 663 (1966).

[63] *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Douglas v. California, 372 U.S. 353 (1963) (wealth); Slaughter-House Cases, 83 U.S. (16 Wall) 36 (1873) (race).

[64] *See, e.g.*, Kramer v. Union School Dist., 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Levy v. Louisiana, 391 U.S. 68 (1968) (rights of illegitimate children); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

[65] *See* notes 62, 63, and 64 *supra. See also*, Tribe, *The Supreme Court, 1972, Term*, 87 HARV. L. REV. 121 (1973).

and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."[66] Under this "rational relation test," the equal protection guarantee is thus violated when a statute places people into different classes on the basis of a criteria which is unrelated to the objective of the statute.[67] In overturning their guest statutes, the supreme courts of California,[68] Kansas,[69] and North Dakota[70] employed the "rational relation test." These three courts applied this test to the two often-quoted objectives of guest statutes: protection of hospitality and the elimination of collusive suits.[71] The courts had to determine whether either objective constituted a rationale basis for the differential treatment resulting from the classification scheme of their guest statutes, such as, "guests" as opposed to "passenger for payment"; "automobile guests" as opposed to "other recipients of generosity"; guests injured while "in the vehicles, during a ride upon a public highway," as opposed to "automobile guests injured in other circumstances."[72]

PROTECTION OF HOSPITALITY

In examining the hospitality objective the North Dakota Supreme Court found no realistic purpose to support the distinction between automobile guests and other recipients of generosity.[73] Similarly, the *Brown* court analogized the precedent set in *Rowland v. Christian,*[74] which held that hosts must exercise reasonable care not to injure a social guest. The court reasoned that since state law requires that hosts generally owe a duty of ordinary care to their guests, the failure of the guest statute to provide a similar duty where automobile guests were concerned created an arbitrary discrimination between classes of guests.[75] The *Brown* court

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66 Reed v. Reed, 404 U.S. 71, 75-76 (1971). For later cases applying this standard, *see* Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972).

67 *Id. See also* Forbush v. Wallace, 405 U.S. 970 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

68 Brown v. Merlo, 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 391 (1973).

69 Henry v. Bauder, 518 P.2d at 365-366 (Kan. 1974) [hereinafter cited as *Henry*].

70 Johnson v. Hassett, 217 N.W.2d at 775-776 (N.D. 1974) [hereinafter cited as *Johnson*].

71 *See, e.g.,* Clarke v. Storchak, 384 Ill. 564, 52 N.E.2d 229 (1944) (hospitality); Bailey v. Resner, 168 Kan. 439, 214 P.2d 323 (1950) (collusion); Hasbrook v. Wingate, 152 Ohio St. 50, 87 N.E.2d 87 (1949) (hospitality); Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969) (collusion). *See also* text accompanying notes 19-25 *supra.*

72 *See, e.g.,* former CAL. VEH. CODE § 17158 (West 1971) as analyzed in this regard in Brown v. Merlo, beginning at 8 Cal. 3d at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393.

73 Johnson v. Hassett, 217 N.W.2d 771, 778 (N.D. 1974) (the notion that it is improper to allow a guest to sue for ordinary negligence is not applied to any other host-guest relationship).

74 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

75 Brown v. Merlo, 8 Cal. 3d at 865, 506 P.2d at 219, 106 Cal. Rptr. at 395 (1973) (when a landlord undertook any "active operation" he bore a duty to exercise due care towards trespassers, licensees and invitees alike).

concluded that however laudable the motives of a hospitable host or however generous his charity, it is irrational to reward that generosity by subjecting beneficiaries to a greater risk of uncompensated injury than is faced by other individuals.[76] As the Kansas Supreme Court pointed out, today's universal existence of personal liability insurance coverage eliminates the personal nature of a suit for damages and thus removes any inherent ingratitude in suing the host driver.[77] Under the above-mentioned principles, courts are now holding that the guest statute's "hospitality" classification scheme is clearly arbitrary and unreasonable and therefore inconsistent with the dictates of the fourteenth amendment.[78]

COLLUSION

In addressing the second proffered rationale justifying automobile guest statutes, courts have likewise concluded that this classification is unreasonable. While admitting that a small segment of automobile guests might file collusive lawsuits, the *Brown* court asserted that as written, their guest statute presented a classic case of an impermissibly overinclusive classification scheme, *i.e.*, the statute's classification imposed "a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims."[79] As the North Dakota Court reasoned:

> A Guest Statute is no final answer to collusion. It is still possible for the dishonest to fabricate evidence to support the higher degree of fault required by the statute. As one example, it would be simple for a colluding host and guest to assert that payment had been made for the transportation or that the driver was intoxicated. In other cases we rely upon the standard remedy of perjury, the efficacy of cross examination, the availability of pre-trial discovery, and the good sense of juries to detect false testimony if it should occur. *We do not withdraw the remedy from all injured persons in order to avoid a rare recovery based on false testimony.*[80]

The *Brown* Court analogized the situation to that of the California doctrine concerning family immunity. Members of a family are not precluded from bringing suit against each other merely because of the possibility of collusion. Consistently, the court reasoned that "it is unreasonable to eliminate causes of action of an entire class of persons simply because some undefined portion of a designated class may file fraudulent lawsuits."[81] In any event, collusive suits seem more likely

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[76] *Id.* at 871, 506 P.2d at 223, 106 Cal. Rptr. at 399.

[77] Henry v. Bauder, 518 P.2d 362, 369-370 (Kan. 1974).

[78] *Id.* at 371; Johnson v. Hassett, 217 N.W.2d at 779; Brown v. Merlo, 8 Cal. 3d at 867, 506 P.2d at 221, 106 Cal. Rptr. at 397.

[79] Brown v. Merlo, 8 Cal. 3d at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403.

[80] Johnson v. Hassett, 217 N.W.2d 771, 778 (N.D. 1974) (emphasis added).

[81] Brown v. Merlo, 8 Cal. 3d at 875, 506 P.2d at 226, 106 Cal. Rptr. at 402.

with family members as opposed to a host and guest in an automobile. Since members of a family can sue other members of the same family, there is neither a practical nor a compelling reason why a guest should be precluded from recovering from his automobile host driver.

Finally, the *Brown* court analyzed the statutory exceptions in the guest statute and pointed out:

> The numerous statutory exceptions in the guest statute—making a guest's recovery turn on the mobility or immobility of the vehicle, the physical location of the guest in or outside the car or the physical location of the vehicle on the private or public highway—similarly bear "no discernible relationship" to the realities of life.[82]

THE CONSTITUTIONALITY OF THE OHIO STATUTE

To this writer, it is difficult to dispute the fact that the Ohio automobile guest statute appears unconstitutional when analyzed in light of the recent guest statute decisions. Under Ohio statutory authority, "guests or business invitees are owed a duty of reasonable care by the owner or occupier of premises."[83] However, in Ohio, as was the case in California, Kansas, and North Dakota, automobile guests receive different treatment than other social guests. While the legislature may enact laws in derogation of the common law, the legislature is restrained to the extent that it must not act in an arbitrary or unreasonable manner.[84] As the ensuing discussion will demonstrate, under the equal protection "rational relation test," as applied to the proffered objectives of protecting hospitality and preventing fraud and collusion, the Ohio guest statute fails.[85]

Today, nine out of ten licensed drivers in Ohio have liability insurance.[86] The typical guest statute case is that of the driver who offers his friend a ride to work or invites him out to dinner, and negligently drives him into a collision. The driver and his insurance company hide behind the statute and step out of the picture while the guest is left alone to bear the loss. In the words of Professor Prosser: "[i]f this is good social policy, it at least appears under a novel front."[87] And as mentioned earlier, with the advent of almost universal personal liability coverage there is less "ingratitude" in suing the host driver.[88]

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

[83] OHIO REV. CODE ANN. § 4561.15.1 (Page 1953).

[84] *See, e.g.*, Fleischman v. Flowers, 25 Ohio St. 2d 131, 267 N.E.2d 318 (1971); Vest, a minor v. Kramer, 158 Ohio St. 78, 107 N.E.2d 105 (1952); Miller v. Fairley, 141 Ohio St. 327, 48 N.E.2d 217 (1943).

[85] *See* accompanying text to notes 66-72 *supra.*

[86] U.S. Dept. of Transportation, FEDERAL CASUALTY AND SURETY BULLETIN 3 (1973).

[87] PROSSER, *supra* note 19 at 187.

[88] *See* accompanying text to notes 76 and 77 *supra.*

In *Avellone v. St. John's Hospital*,[89] the Ohio Supreme Court overturned the charitable immunity doctrine, noting that the prevalence of liability insurance helped change this public policy. The Court reasoned:

> The law's emphasis ordinarily is on liability.... The rule of ordinary immunity is out of step with the general trend of legislative and judicial policy in distributing losses incurred by individuals through the operation of an enterprise among all who benefit by it rather than in leaving them wholly to be borne by those who sustain them.[90]

As in *Brown, Henry,* and *Johnson,* one would expect the Ohio Supreme Court to refute the "hospitality" rationale of the guest statute.

In declaring its guest statute unconstitutional the California court had the benefit of having its state courts previously reject the "collusive suit rationale" in overturning its family immunity doctrine.[91] Although Ohio has maintained its family immunity doctrine on the rationale of avoiding collusion between family members,[92] as between driver and guest, such rationale is not persuasive for two reasons. First, there is less of a fiduciary relationship between driver and guest. Second, the host driver and guest passenger need only state that compensation in some form was rendered to circumvent the statute. As an Ohio judge once observed:

> The argument that the difference in Guest Statute liability as between paying and non-paying occupants of motor vehicles is necessary to prevent fraud seems patently to shift the fraudulent potential from bogus liability to pretended payments. Obviously, the latter has the greater susceptibility to mendacious manipulation because it can be contrived with no chance whatever for third party witnesses to be present or objective facts to be adduced, a point reflecting the capricious nature of the distinction.[93]

Apparently then, the assertion of payment by the guest and the driver presents a simple and totally effective method of avoiding the application of the provisions of the guest statute. Further, parties denied recovery by the guest statute would logically only include those whose sense of fair play and honesty would inherently contradict the collusiveness rationale. As pointed out in *Klein:* "It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion."[94]

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89 165 Ohio St. 467, 135 N.E.2d 410 (1956).

90 *Id.* at 476-77, 135 N.E.2d at 416.

91 *See, e.g.,* Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) [hereinafter cited as *Klein*].

92 *See* Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965).

93 Roetzel v. Fortune, Case No. 31211 (Cuyahoga County Ct. App. 1973) (Day, J., dissenting).

94 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962).

Courts in states having no guest statute have refused to apply the guest act of another state.[95] In the words of one state's chief justice:

> Finally, we conclude that our rule is preferable to that of Vermont. The automobile guest statutes were enacted in about half the states, in the 1920's and early 1930's as a result of vigorous pressure by skillful proponents. Legislative persuasion was largely in terms of guest relationships (hitchhikers) and uninsured personal liabilities that are no longer characteristic of our automotive society. . . . The problems of automobile accident laws then were not what they are today. New Hampshire never succumbed to this persuasion. No American state has newly adopted a guest statute for many years. Courts of states which did adopt them are today construing them much more narrowly, evidencing their dissatisfaction with them . . . though still on the books, they contradict the spirit of the times.[96]

In fact, no automobile guest statutes have been enacted since 1939.[97] One must ponder the question of whether such statutes were a product of a particular era, and are no longer needed. As this discussion has hopefully demonstrated, current case law strongly supports the contention that automobile guests statutes are an unconstitutional denial of the equal protection of the laws.

Presently, a case challenging the constitutionality of the Ohio guest statute is docketed before the Ohio Supreme Court.[98] Although the court may well defer to the legislature on this issue, it appears to have enough cogent and convincing rationale at its disposal to put the Ohio Guest Statute to rest in an era which certainly must regard it as an anachronism.

ALEX SHUMATE

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[95] *E.g.*, Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966). For other cases declining to enforce the guest laws of other states, *see* Kopp v. Rechtzegel, 273 Minn. 441, 141 N.W.2d 526 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d (1963); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

[96] Clark v. Clark, 107 N.H. 351, 358, 222 A.2d 205, 210 (1966).

[97] *See* Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884, 889-901 (1968).

[98] *Berisford v. Sells*, Case No. 74-307 (Ohio Supreme Ct., filed April 4, 1974).