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Automobile Guest Statute; Unconstitutional; Equal Protection; Due Process; Right to Seek Legal Redress; Primes v. Tyler

Margaret Fuller Conrneille

cases in general, the effect could be far-reaching. Although the court did not prescribe the coverage that an insurance company must offer,[59] it did require that the policy which the insurance company later delivered "be reasonably fit for its intended purpose".[60] The written terms must not be unreasonable or unfair, and they must provide the protection that the insured bargained for when he purchased the insurance.[61]

The court insisted upon full disclosure of any limitations on coverage.[62] Disclosure was seen as beneficial in that "technical policy provisions which tend to drain away bargained-for protection"[63] would be eliminated. And if a purchaser deliberately elected limited protection for a lower premium, at least he would be fully aware of what coverage he was receiving.[64]

In a society which has become increasingly complex, we have felt a need for Truth in Lending, Truth in Advertising, and labels that clearly identify the components of our food and clothing. If the *C & J Fertilizer* holding is followed, we will have Truth in Insurance as well.

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TORTS

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Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975)

IN JULY 1975, the Supreme Court of Ohio in the case of *Primes v. Tyler*[1] joined a small but growing number of states[2] which have declared automobile guest statutes[3] unconstitutional. The circumstances of the *Primes* case are similar to those encountered in countless other suits brought by injured

[59] Such a requirement, which would set forth general standards, would be more akin to the warranty of merchantability under UNIFORM COMMERCIAL CODE § 2-314(2)(c).

[60] 227 N.W.2d at 177. Probably the warranty of fitness for particular purpose was selected because the insurance purchaser relies on the agent to provide a policy which corresponds to the needs which the purchaser has communicated. *See* UNIFORM COMMERCIAL CODE § 2-315, Comments 1 & 2.

[61] 227 N.W.2d at 178.

[62] *Id.* at 179.

[63] *Id.*

[64] *Id.*

[1] 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975).

[2] Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 518 P.2d 362 (Kan. 1974); Johnson v. Hassett 217 N.W.2d 771 (N. D. 1974).

[3] Ohio's statute is typical of those of states which have guest statutes. OHIO REV. CODE ANN. § 4515.02 (Page 1973). Guest statutes have frequently been criticized for the harsh conse-

guest passengers since the Ohio guest statute was enacted in 1933.[4] George Primes, III and Donald G. Tyler were members of an informal golf group which shared a car pool arrangement. Tyler, driving for the car pool, was involved in an automobile accident in which Primes, a passenger, was injured. Primes brought suit against Tyler demanding recovery for personal injuries incurred in the accident on the basis of ordinary negligence on the part of Tyler. Since both parties were part of a car pool, Primes asserted that he was a paying passenger and thereby excepted from the guest statute preclusion from maintaining suit on the basis of ordinary negligence. The trial court, nevertheless, determined that Primes was not a paying passenger and directed a verdict for Tyler.

On appeal, the Summit County Court of Appeals[5] agreed that Primes was not a paying passenger, but reversed the trial court decision on the basis that the guest statute was unconstitutional. The court of appeals held that the guest statute violated Primes' right to equal protection as guaranteed by Article I, Section 2 of the Ohio Constitution.[6]

The Supreme Court of Ohio affirmed the court of appeals' decision, holding that the guest statute, by its grant of a "special privilege and immunity to negligent drivers who injure nonpaying passengers",[7] was violative of equal protection guarantees of both the Ohio Constitution and the fourteenth amendment to United States Constitution. The higher court further held that because the guest statute "closes the courts and denies a remedy"[8] to some of the people of Ohio, the statute was also violative of the due process guaran-

quences which they produce in denying automobile guests a remedy for negligently inflicted injuries. *See* Comment, *The Constitutionality of the Ohio Guest Statute,* 8 AKRON L. REV. 135 (1974); Comment, *The Ohio Guest Statutes Always Unpopular; Now Unconstitutional?* 1 OHIO NORTH L. REV. 357 (1974); Comment, *The Ohio Guest Statute,* 22 OHIO ST. L. REV. 629 (1961); Comment, *Treadmill of Confusion—Ohio Guest Statute,* 8 W. RES. L. REV. 170 (1957). *But cf.* Comment, *Rationality of Guest Statute Classifications Questioned,* 53 NEB. L. REV. 267 (1974). The great number of exceptions which courts have carved into the rule has made recovery seem almost fortuitous. *See* Burrow v. Porterfield, 171 Ohio St. 28, 168 N.E.2d 137 (1960) (guest's knowledge which was imparted to host constituted payment for ride); Economou v. Anderson, 4 Ohio App. 2d 1, 211 N.E.2d 82 (1965) (plaintiff injured while entering car, not considered guest); Lewis v. Woodland, 101 Ohio App. 442, 140 N.E.2d 322 (1955) (plaintiff injured inside vehicle when vehicle not moving, not considered a guest).

[4] Law of March 14, 1933, 115 Laws of Ohio 57 (now OHIO REV. CODE ANN. § 4515.02). Legislation to repeal the statute came before the General Assembly in 1949, 1957, 1959, and most recently in 1974, but was never passed.

[5] 43 Ohio App. 2d 163, 335 N.E.2d 373 (1974).

[6] OHIO CONST. art. 1, § 2 reads:

> All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same, whenever they may deem it necsesary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked or repealed by the General Assembly.

[7] 43 Ohio St. 2d at 205, 331 N.E.2d at 729.

[8] *Id.*

tees of Article I, Section 16 of the Ohio Constitution[9] and the fourteenth amendment to the United States Constitution.[10]

Justice William B. Brown, the author of the unanimous opinion, chose to follow neither Ohio precedent[11] nor recent cases from other jurisdictions which have contended with the problem of the constitutionality of guest statutes.[12] Instead, the problem was analyzed in terms of recent United States Supreme Court decisions employing equal protection and due process analyses to strike down a variety of statutory classifications.[13]

The *Primes* court began its analysis with reference to the traditional two-tier test for determining the constitutionality of a statutory classification in light of equal protection guarantees. Where interests defined as "fundamental"[14] or "suspect" classifications[15] are concerned, the United States Supreme Court has held that statutes will be strictly scrutinized to determine if the fundamental interests sacrificed, or the suspect classifications created, can be justified by some "compelling" state interest.[16] If no compelling interest can be found, the statute will be struck down as violative of equal protection. However, where interests are not fundamental, nor classifications suspect, the courts have traditionally deferred to legislative prerogative and upheld statutes under what can be referred to as the minimal scrutiny standard.[17]

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[9] OHIO CONST. art. 1 § 16 reads: "All Courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law, and shall have justice administered without denial or delay."

[10] U.S. CONST. amend. XIV, *provides in part*: "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

[11] Smith v. Williams, 51 Ohio App. 464, 1 N.E.2d 643 (1935) (a court of appeals opinion holding that the statute was not violative of state or federal constitutional guarantees). *See generally* cases cited note 3 *supra* (which assume the constitutionality of the statute and apply it.)

[12] *See* note 64 *infra.*

[13] Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); Johnson v. Robinson, 415 U.S. 361 (1974); Vlandis v. Kline, 412 U.S. 441 (1973); Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[14] Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (equal access to voting); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

[15] *In re* Griffiths, 413 U.S. 717 (1973) (alienage); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (race); Korematsu v. United States, 323 U.S. 214 (1944) (ancestry).

[16] 43 Ohio St. 2d at 198-99, 331 N.E.2d at 726. For an analysis of the traditional two-tier standard of review see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8-10 (1972) [hereinafter cited as Gunther]; Comment, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1087-1131 (1969).

[17] McGowan v. Maryland, 366 U.S. 420, 426 (1961); Lindsey v. Normet, 405 U.S. 56 (1972); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); North

The *Primes* decision to strike the guest statute emerges, not out of this two-tiered approach, but out of a compromise standard evolving from certain recent decisions of the United States Supreme Court.[18] Although the high court has by no means cast aside two-tiered equal protection analysis,[19] a growing dissatisfaction with the rigidity of the old tests can be discerned.[20] The particular United States Supreme Court decisions on which the Ohio Supreme Court has relied in *Primes* are consistently representative of a new middle scrutiny analysis.[21]

In light of the fact that neither fundamental interests nor suspect classifications are involved, the *Primes* court, under traditional analysis, was precluded from strictly scrutinizing the statute. From a classic minimal scrutiny standpoint the court could have concluded that there is a rational relation between the classification and the two recognized objectives of the legislation—the preservation of hospitality and the prevention of fraudulent and collusive suits against insurance companies.[22] The fraud prevention objective could be said to be furthered by excluding the honest claims along with the false.[23] The hospitality promotion object requires a greater amount of imagination on the part of the court to find a rational relation.[24] Nevertheless, it is this very type of extreme deference to any conceivable legislative objective that has characterized the classic minimal scrutiny decisions.[25]

Dakota Bd. of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[18] *See* cases cited note 13 *supra.*

[19] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972); Dandridge v. Williams, 397 U.S. 471 (1972).

[20] *See* Gunther, *supra* note 16; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications,* 62 GEO. L. REV. 1071 (1974); Comment, *Irrebuttable Presumptions As An Alternative To Strict Scrutiny: From Rodriquez to LaFleur,* 62 GEO. L. REV. 1173 (1974).

[21] *See* cases cited note 13, *supra;* Gunther, *supra* note 16 at 17-20 (where both *Weber* and *Mosley* are specifically recognized as representative of this new standard).

[22] Recent decisions upholding guest statutes in other jurisdictions have done so by employing the traditional minimal scrutiny test. Justice v. Gatchell, 325 A.2d 97, 102 (Del. 1974); Keasling v. Thompson, 217 N.W.2d 687, 689-90 (Iowa 1974); Tisko v. Harrison, 500 S.W.2d 565, 573 (Tex. Civ. App. 1973); Cannon v. Oviatt, 520 P.2d 883, 889 (Utah 1974). All have relied on Silver v. Silver, 280 U.S. 117 (1929), which upheld a Connecticut guest statute against allegations of equal protection violations. The *Silver* case held that the legislative classification does not have to be perfect and that it is sufficient if the "statute strikes at the evil where it is felt." *Id.* at 124. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (on which the Utah and Iowa courts also heavily relied).

[23] *See* Justice v. Gatchell, 325 A.2d 97, 103 (Del. 1974); Tisko v. Harrison, 500 S.W.2d 565, 572 (Tex. Civ. App. 1973).

[24] *See* Cannon v. Oviatt, 520 P.2d 883, 888 (Utah 1974). Judicial imagination was exercised in the Utah Supreme Court's decision. The court asserted that the hospitality encouraged by guest statutes decreases the number of vehicles on the highway thereby conserving fuel, saving on highway surfaces, and avoiding traffic congestion.

[25] Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

An alternative to these two extremes can be seen to lie in a scrutiny which is somehow neither strict nor minimal yet justifies judicial intervention. *Weber v. Aetna Casualty & Surety Co.*[26] and *Jiminez v. Weinberger*,[27] two cases upon which the *Primes* court relies heavily, exemplify this middle scrutiny and a temporary abandonment of the two-tier test. Both decisions make reference to a standard which may be applied in all equal protection cases.

In *Weber v. Aetna Casualty & Surety Co.*, a Louisiana Workmen's Compensation statute defined the word "child" in such a manner so as to preclude compensation payments being made to illegitimate children. Underlying the legitimacy requirements was the state's interest in discouraging illicit relationships and facilitating "potentially difficult problems of proof."[28]

The *Weber* court struck down the statute, without defining illegitimacy as a suspect classification, by applying a more rigorous test than that of minimal scrutiny to the statutory objectives. Rather than settling for a mere rational relationship, the court required a "significant relationship"[29] between the legislative objectives and the statutory burdens. After heightening the standard of scrutiny, the court found the statute violative of equal protection guarantees.

The lack of control over a status created at birth was also a factor in *Jiminez*.[30] In *Jiminez*, the United States Supreme Court considered another statutory classification based on illegitimacy. The court invalidated, on equal protection grounds, a provision of the Social Security Act which denied benefits to unacknowledged illegitimate children of disabled wage earners.[31]

The underlying purpose of the statutory scheme was the same in *Jiminez*[32] and *Weber*[33] as in *Primes*—to prevent fraudulent and collusive claims. In *Jiminez*, Chief Justice Burger determined that the potential for spurious claims was the same as to both classes of illegitimates—acknowledged and unacknowledged. He concluded that the "blanket and conclusive exclusion of the one class was not reasonably related to the purpose of the statute",[34]

[26] 406 U.S. 164 (1972).

[27] 417 U.S. 628 (1974).

[28] 406 U.S. at 174.

[29] *Id.* at 175.

[30] Jiminez v. Weinberger, 417 U.S. 628, 632 (1974). Lack of control over status is also an influencing factor in Reed v. Reed, 404 U.S. 71 (1971) and Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). Both of these decisions can be regarded as middle scrutiny equal protection decisions.

[31] 417 U.S. at 630.

[32] *Id.* at 636.

[33] 406 U.S. at 174.

[34] 417 U.S. at 636.

thereby making that exclusion a denial of equal protection. Again there was a blurring of the distinction between strict and minimal scrutiny. In both of these decisions, the United States Supreme Court struck down the statutes without going to the extreme of classifying the category of illegitimates as suspect.

Greatly influenced by *Jiminez*,[35] the *Primes* court was equally unconvinced that there was a rational nexus between the blanket exclusion of nonpaying passengers and the prevention of fraudulent claims. The Ohio Supreme Court recognized that rather than preventing fraud, the Ohio guest statute may actually be encouraging the guest to fraudulently state that he had paid for the ride or that the host was guilty of willful and wanton negligence.[36] Admittedly the prevention of fraud or collusion is a valid purpose for legislative classification,[37] and perhaps the statute would have been upheld under minimal scrutiny.[38] But through the application of a more rigorous scrutiny to the factual realities of the situation, the goal of prevention of spurious claims was found not to be *suitably* furthered.

In viewing the second objective, the promotion of hospitality, the *Primes* court determined that the widespread availability of liability insurance undercuts the credibility of the objective. The doctrine of charitable immunity was abrogated in Ohio on the credibility of this same argument.[39] *Primes* found such an approach equally convincing here. In addition to finding that the objective is not suitably furthered, the *Primes* court concluded that the promotion of hospitality of host automobile drivers or rather its correlative, the prevention of ingratitude of passenger guests, is simply no longer a viable objective in Ohio.[40]

The focus in *Primes* upon the amorphous requirement that the statutory classification "suitably" further the legislative goal is derived from the United States Supreme Court case, *Police Department of Chicago v. Mosely*.[41] Justice Marshall, the author of the court's unanimous opinion in *Mosely*, advocated a singular type of scrutiny to be applied in "all equal protection

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[35] The Ohio court stated that the "concepts of *Jiminez* are transferable to the present matter." 43 Ohio St. 2d at 200, 331 N.E.2d at 727.

[36] 43 Ohio St. 2d at 200, 331 N.E.2d at 727.

[37] Jiminez v. Weinberger, 417 U.S. 628, 632 (1974).

[38] *See* cases cited note 22 *supra*.

[39] Avellone v. St. John's Hospital, 165 Ohio St. 467, 135 N.E.2d 410 (1956).

[40] 43 Ohio St. 2d at 202, 331 N.E.2d at 728.

[41] 408 U.S. 92, 95 (1972). The *Mosley* decision invalidated a Chicago ordinance which prohibited all but peaceful labor picketing within 150 feet of a primary or secondary school building. Although the court recognized that first amendment interests were involved, the decision does not speak in terms of the traditional two-tier standard of review.

cases."[42] He declared that the crucial question was "whether there is an appropriate governmental interest suitably furthered by the differential treatment".[43]

While he alluded to it in *Mosely,* Justice Marshall fully articulates his theory of equal protection called "variable standard of review"[44] or "sliding scale"[45] in his dissenting opinion in *San Antonio Independent School District v. Rodrigues.*[46] There he contends that the "range of choices" which the court is willing to allow the state in "selecting the means by which it will act" and the care with which the court will "scrutinize the effectiveness" of the means "must reflect the constitutional importance of the interest affected and invidiousness of the particular classification".[47] Marshall's contention in *Rodriguez* is that this variable standard of scrutiny, neither strict nor minimal, is in reality the test the court has been applying in cases such as *Weber.*[48] Justice Marshall chastized the court for selecting in private[49] which cases will be subjected to the variable test and which shall be analyzed under the traditional test.

This criticism can be equally applied to *Primes.* The court by no means rejects the traditional dual test,[50] nor does it define how or when this middle scrutiny will be used. The result seems to be that so far as the guest statute is concerned, the justices do not believe that the interests which are promoted justify the burden that is imposed. As the court said, quoting from *Weber,* it is a "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing";[51] the automobile guest is neither responsible for his injury nor guilty of wrongdoing.

In *Primes* the Ohio Supreme Court appears to be influenced by Justice

[42] 408 U.S. at 95.

[43] *Id., see* Gunther, *supra* note 16, at 17 (where Professor Gunther recognized the *Mosley* decision as a basis for new equal protection standard of review).

[44] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Mashall, J., dissenting).

[45] Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

[46] 411 U.S. 1, 70 (1973) (Marshall, J., dissenting).

[47] *Id.* at 125.

[48] *Id.* at 108. Justice Marshall also cites as examples of the trend: Eisenstadt v. Baird, 405 U.S. 438 (1972) (statute that prohibited distribution of contraceptive devices to unmarried persons declared unconstitutional as violative of equal protection); James v. Strange, 407 U.S. 128 (1972) (state statute differentiating between criminal and non-criminal debtors declared unconstitutional as violative of equal protection); Reed v. Reed, 404 U.S. 71 (1971) (state statute giving preference to men over women in assignment of administrator of estate declared unconstitutional as violative of equal protection).

[49] 411 U.S. at 110.

[50] 43 Ohio St. 2d at 198, 331 N.E.2d at 726.

[51] *Id.* at 199, 331 N.E.2d at 726, *quoting* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (The *Primes* court inadvertantly attributed the quote to *Jiminez* when in fact the *Jiminez* decision was quoting *Weber.*)

Marshall's appraisal of this third type of analysis. An individual's right to seek a remedy at law[52] for injuries negligently inflicted by another clearly has "constitutional implications",[53] but has not yet been declared a fundamental right. It does not, therefore, trigger strict scrutiny. However, after examining the state's interests, the Ohio court determined that the statute would be examined under a more rigorous scrutiny than minimal scrutiny. This analysis resulted in its invalidation.

Not satisfied with its equal protection analysis, the court sought to buttress its invalidation of the guest statute by relying on the irrebuttable presumption analysis and findings of *Vlandis v. Kline*.[54] *Vlandis* invalidated a Connecticut statute regulating tuition rates at state universities. If a student was not a state resident at the time of his original application to college, the statute created a conclusive presumption that the student remained an out of state resident. There was no provision for a hearing at a later date to determine the student's true residency status.

Vlandis held that the statute was violative of the due process clause of the fourteenth amendment because it made a presumption about those included within its classificatory scheme which is not "necessarily and universally true in fact".[55] Applying this stringent test, it is not surprising that *Primes* struck down the guest statute. Assuming the accuracy of the stated legislative purposes, the Ohio law also implies an irrebuttable presumption. A nonpaying passenger who sues an auto host for negligent injury is conclusively presumed to be either committing fraud, collusion or destroying the spirit of hospitality in Ohio.

This irrebuttable presumption analysis has re-emerged recently in United States Supreme Court decisions.[56] It has been criticized, however, for the high level of perfection which it requires between the means a statute employs and the ends it seeks.[57] Chief Justice Burger maintains in his *Vlandis* dissent that "literally thousands of state statutes" create classifications which could be struck down under irrebuttable presumption analysis.[58]

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[52] OHIO CONST. art. 1, § 16.

[53] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (Marshall, J., dissenting).

[54] 412 U.S. 441 (1973).

[55] *Id.* at 452.

[56] Turner v. Dept. of Employment Security & Bd. of Review of the Industrial Comm. of Utah, 96 S. Ct. 249 (1975); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); United States Dept. of Agriculture v. Murray, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Bell v. Burson, 402 U.S. 535 (1971).

[57] Comment, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974).

[58] 412 U.S. 441, 462 (Burger, J., dissenting).

The *Primes* case, however, has factors which distinguish it from this criticism. The Ohio Constitution specifically guarantees that "all courts shall be open" and every person shall "have remedy by due course of law" for injuries done to his person.[59] This right of the injured person to his day in court is arguably more basic and deserving of a higher degree of protection than the right, recognized in *Vlandis v. Kline,* not to be prevented from showing one's true state of residence for school tuition purposes. Nevertheless, the irrebuttable presumption approach is still subject to the criticism that the interests of a guest passenger are sufficiently well preserved under the middle scrutiny standard of equal protection analysis.

Another major criticism of the irrebuttable presumption analysis is that it has been alleged to represent a return to "substantive due process" reminiscent of the *Lochner* era.[60] The *Vlandis* court's choice of precedent dates primarily from the early twentieth century[61] and lends credibility to this theory. However, a ground of difference can be seen in the fact that *Primes* and *Vlandis* involved judicial interference on behalf of individual interests, whereas the judicial interference justified by substantive due process was used on behalf of business interests.[62] But it is still unclear why the Ohio court resorted to this dangerously flexible irrebuttable presumption analysis.

Since the California Supreme Court decision of *Brown v. Merlo,*[63] several other state courts in addition to Ohio have reviewed the constitutionality of their guest statutes. These courts have, for the most part, analyzed the subject in terms of the California court's constitutional rationale.[64] The

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[59] OHIO CONST. art. 1, § 16.

[60] Vlandis v. Kline, 412 U.S. 441, 468 (Rehnquest, J., dissenting). The decision of Lochner v. New York, 198 U.S. 45 (1905) has become synonomous with an era of judicial intervention during which the due process clause of the fourteenth amendment was used to strike down state regulatory laws thought to constitute an infringement upon the right to freedom of contract. *See* cases cited note 61 *infra.*

[61] *See, e.g.,* Schlesinger v. Wisconsin, 270 U.S. 230 (1925); Hoeper v. Comm'r., 284 U.S. 206 (1931); Heiner v. Donnan, 285 U.S. 312 (1932).

[62] *Id.*

[63] 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

[64] Three courts other than Ohio and California invalidated their guest statutes. *See* cases cited note 2 *supra.* Johnson v. Hassett, 217 N.W.2d 771 (N. D. 1974), explicitly based its decision on specific wording of the North Dakota constitution as well as trends and changes which have occurred in that state since the guest statute was enacted. While acknowledging the existence of a "new intermediate analysis" in the United States Supreme Court's treatment of equal protection cases, the court dismissed, as irrevelant to the situation in North Dakota, national trends as well as the California decision. Henry v. Bauder, 518 P.2d 362 (Kan. 1974), was more in line with a rigorous minimal scrutiny standard. Agreeing with *Merlo,* the court held that the guest statute classification "does not bear a substantial and rational relation to the statute's purposes." Thompson v. Hagan, 96 Idaho 19, 53 P.2d 1365 (1974), also arrived at a middle test, called a "restrained review test" by toning down the strict scrutiny test. Citing Reed v. Reed, 404 U.S. 71 (1971), as an articulation of this third test, the *Thompson* court stated that it failed to find a "fair and substantial relation" between the

Primes court relies on analyses and assumptions similar to those used by the California court;[65] yet, the Ohio court explicitly states that following the California decision would constitute a "constitutional curiosity".[66]

It is true that California's tort law is widely divergent from Ohio's. *Merlo* is the culmination of a progression of cases abrogating the full range of common law intra-familial tort immunities.[67] In addition, California recently chose to abolish the determinative distinctions between invitees, licensees, social guests and trespassers as regards the duty of care owed by the land owner.[68] Ohio, on the other hand, still recognizes all these traditional immunities[69] and distinctions.[70]

However, none of these California decisions were made on constitutional bases, with the exception of *Merlo*. It seems odd, therefore, that the Ohio Supreme Court did not acknowledge the validity of the constitutional arguments in *Merlo*, as did the Summit County Court of Appeals.[71] Several

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guest statute and the legislative objectives. For a discussion of state decisions upholding guest statutes see note 22 *supra*.

[65] As in *Primes*, the *Merlo* court found that neither legislative purpose was rationally furthered by the guest statute. The widespread availability of liability insurance was recognized as a factor in undermining the hospitality promotion objective. 8 Cal. 3d at 860, 506 P.2d at 215, 106 Cal. Rptr. at 391. The California court also concluded that rather than furthering the fraud prevention objective, the guest statute improperly discriminated against guests "on the basis of a factor" which bore no "significant relation to actual collusion." 8 Cal. 3d at 861, 506 P.2d at 215, 106 Cal. Rptr. at 391.

[66] 43 Ohio St. 2d at 204, 331 N.E.2d at 729. The *Primes* court's use of this quote from Justice Harlan's dissent in Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 76 (1968) is something of a constitutional curiosity in itself. The particular statute involved precluded parents of illegitimate children from bringing wrongful death actions against the person responsible for the child's death. The majority held this to be a violation of equal protection. But Justice Harlan strongly defended the Louisiana legislature's right to draw these "highly arbitrary lines." 391 U.S. at 77.

[67] Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971) (parent-child tort immunity); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962) (inter-spousal tort immunity); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218, (1955) (intra-familial tort immunity).

[68] Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[69] Ohio still recognizes the traditional immunities from tort liability between husband and wife and parent and child. Thomas v. Herron, 20 Ohio St. 2d 62, 253 N.E.2d 772 (1969) (inter-spousal tort immunity); Teramano v. Teramano, 6 Ohio St. 2d 117, 216 N.E.2d 375 (1966) (parent-child tort immunity); Lyons v. Lyons, 2 Ohio St. 2d 243, 208 N.E.2d 533 (1965) (inter-spousal tort immunity); Leonardi v. Leonardi, 21 Ohio App. 110, 153 N.E. 93 (1925) (inter-spousal tort immunity).

[70] Presley v. Norwood, 36 Ohio St. 2d 29, 303 N.E.2d 81 (1973) (duty of care owed invitee); Scheibel v. Lipton, 156 Ohio St. 308, 102 N.E.2d 453 (1951) (duty of care owed social guest); Cole v. New York Cent. R. Co., 150 Ohio St. 175, 80 N.E.2d 854 (1948) (duty of care owed trespasser); Potts v. David L. Smith Constr. Co., 23 Ohio App. 2d 144, 261 N.E.2d 176 (1970) (duty of care owed invitee); Brown v. Rechel, 108 Ohio App. 347, 161 N.E.2d 638 (1959) (duty of care owed licensee); Stevens v. Ohio Fuel Gas Co., 26 Ohio Ops. 2d 345, 193 N.E.2d 317 (C.P. Pickaway Co. 1960) (duty of care owned trespasser).

[71] 43 Ohio App. 2d at 167-69, 335 N.E.2d at 376-78.

other states which still recognize these common law tort distinctions also followed *Merlo*.[72]

CONCLUSION

The confusion that arises out of the *Primes* case may be due to the same problem that other equal protection decisions seem to have been grappling with, namely, what is to be the test? Under what circumstances does a statutory scheme, because it is less than perfect, become invidiously discriminatory? The attempts to derive a middle scrutiny analysis appear to constitute an effort to add flexibility to the old two-tiered standard. The use of the irrebuttable presumption analysis, however, may unnecessarily cloud the issues. Without advancing any legal analysis, the irrebuttable presumption approach appears to be valuable merely as a tool to allow the court to reach a desired result where strict scrutiny cannot be applied.

MARGARET FULLER CORNEILLE

UNINCORPORATED ASSOCIATIONS

Separate Legal Entity · Suit by Member · Personal Injuries · Liability · Statutory Provision

Tanner v. Loyal Order of Moose, 44 Ohio St. 2d 49, 337 N.E.2d 625 (1975)

GEORGE and Marguerite Tanner, members of the Columbus Lodge No. 11 of the Loyal Order of Moose, an unincorporated association,[1] were attending a dance sponsored by that Lodge when Mrs. Tanner slipped on a recently waxed area of the dance floor[2] and sustained serious injury. The Tanners filed suit against the Lodge in the court of common pleas,[3] alleging that the dance floor had been negligently waxed, making it slippery and thus causing her fall.

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[72] Thompson v. Hagan, 96 Idaho 19, 523 P.2d 1365 (1974); Henry v. Bauder, 518 P.2d 362 (Kan. 1974); Johnson v. Hassett, 217 N.W.2d 771 (N. D. 1974).

[1] An unincorporated association has been defined as an organization composed of individuals united without a charter, pursuing some common enterprise. *See* Local 4076, United Steelworkers v. United Steelworkers AFL-CIO, 327 F. Supp. 1400, 1402-03 (W.D. Pa. 1971).

[2] Depositions of the plaintiffs filed with the trial court indicated that shortly before Mrs. Tanner fell, an officer of the lodge had waxed the floor with a powdered wax which left the floor slippery in spots, including the place where Mrs. Tanner fell.

[3] Tanner v. Columbus Lodge No. 11, Loyal Order of Moose, Docket No. 72 CV-05-1557 (C. P. Franklin County, April 23, 1974).