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Constitutional Law - Notice of Termination of Welfare Benefits Given in English to Recipients Known to Be Literate in Spanish Only Held Constitutionally Valid

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RECENT CASES

CONSTITUTIONAL LAW—NOTICE OF TERMINATION OF WELFARE BENEFITS GIVEN IN ENGLISH TO RECIPIENTS KNOWN TO BE LITERATE IN SPANISH ONLY HELD CONSTITUTIONALLY VALID.

Welfare authorities terminated plaintiffs'[1] AFDC benefits.[2] In response, plaintiffs sought a preliminary injunction to enjoin state and county welfare authorities from taking this action. Plaintiffs alleged that notice[3] given in English to recipients who were known to be literate in Spanish only[4] violated the Fourteenth Amendment's due process and equal protection clauses.[5] The petition was denied by the Superior Court of Los Angeles County and the California Court of Appeal.[6] On review, the Supreme Court of California held that notice in English to Spanish-speaking welfare recipients was constitutionally permissible. *Guerrero v. Carleson*, ——Cal. 3d——, 512 P.2d 833, 109 Cal. Rptr. 201 (1973).

In attempting to define due process, courts have evolved three distinct theories. The absorption theory incorporates into the Fourteenth Amendment all specific guarantees in the Bill of Rights.[7] A

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1. Three individual plaintiffs and a welfare rights organization were joined as plaintiffs in this action. For convenience, plaintiffs hereinafter will refer to the three individual plaintiffs only.

2. Aid to Families with Dependent Children was established by the Social Security Act of 1935, 42 U.S.C. §§ 601 to -10, *as amended* 42 U.S.C. §§ 601 to -10 (1970), *as amended* (Supp. I, 1971). It is a categorical assistance program supported by federal grants-in-aid but administered by the states on a county level according to regulations of the Secretary of Health, Education, Welfare. Categorical assistance, as contrasted with general assistance or programs financed only by state and local governments, gives assistance to particular categories of individuals. There are several assistance programs: (1) Old Age Assistance (OAA), 42 U.S.C. §§ 301 *et seq.* (1970); (2) Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601 *et seq.* (1970), *as amended* (Supp. I, 1971); Aid to the Blind (AB), 42 U.S.C. §§ 1201 *et seq.* (1970); (4) Aid to the Permanently and Totally Disabled (APTD), 42 U.S.C. §§ 1351 *et seq.* (1970); and (5) Old Age, Survivors, and Disability Insurance (OASDI), 42 U.S.C. §§ 401 *et seq.* (1970), *as amended* (Supp. I, 1971).

3. 45 C.F.R. § 205.10 requires timely and adequate notice to the recipient. Timely means notice mailed fifteen days before further action is to be taken. Adequate requires that the written notice include: (1) reasons for the proposed action, (2) right to a conference, (3) right to request a fair hearing, and (4) the fact that if a hearing is requested, assistance will be continued until a final decision is made. 45 C.F.R. § 205.10.

4. California welfare authorities make routine checks to determine if a recipient is literate in a language other than English. If a language barrier of this type is discovered, it is noted on the recipient's file. Guerrero v. Carleson, ——Cal. 3d——, 512 P.2d 833, 834, 109 Cal. Rptr. 201, 202 (1973).

5. This casenote will deal primarily with the due process challenge.

6. Guerrero v. Carleson, 27 Cal. App. 269, 103 Cal. Rptr. 552 (1971).

7. *See* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). *Contra*

second theory, originating in *Griswold v. Connecticut*,[8] suggests that a state cannot violate rights falling within the "penumbras" formed by emanations from specific guarantees of the Bill of Rights.[9] A third theory has interpreted the due process clause to be a guarantee of privileges "implicit in the concept of ordered liberty,"[10] and a prohibition of state actions violating "fundamental fairness."[11] The "fundamental fairness" doctrine balances the importance of the right to the individual against the state interest.[12]

Although debate continues over which theory should be applied to the due process clause,[13] one aspect of due process, notice, has not changed since the landmark case of *Mullane v. Central Hanover Bank & Trust Co.*[14] Here the modern guidelines for adequate notice were established by requiring notice to reasonably convey the necessary information. The exact form it takes must vary with each particular factual circumstance.[15] In other words, the courts must balance the state interest in using a particular type of notice against the individual interests that may be harmed by the use of such notice.

Procedural due process necessarily restricts the state from depriving individuals of benefits the state has previously provided them. However, the recipient of such benefits must first establish a constitutionally protected interest in those benefits before he can enjoy such protections.

In *Goldberg v. Kelly*[16] the United States Supreme Court required

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Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frankfurther, *Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

8. Griswold v. Connecticut, 381 U.S. 479 (1965). *See generally* the *Symposium on the Griswold Case*, 64 MICH. L. REV. 197 (1965).

9. *Id.* at 484.

10. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

11. Betts v. Brady, 316 U.S. 455, 462 (1952). *See* Roe v. Wade, 410 U.S. 113 (1973) (Stewart, J., concurring); Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring). *See generally* Kamisar, *Betts v. Brady Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962). For a discussion about whether Gideon v. Wainwright, 372 U.S. 335 (1963) overruled Betts v. Brady see Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

12. It has been suggested a similar analysis be applied to equal protection problems, most particularly in the area of wealth classifications. *See* Michealman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

13. In addition to the three above noted theories, the court has developed a hybrid test. The test of selective incorporation confines the fundamental fairness doctrine to the Bill of Rights. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963). Note the "Death Penalty Case," Furman v. Georgia, 408 U.S. 238 (1972). There were nine separate opinions. Though focusing on the "cruel and unusual punishments" provision of the Eighth Amendment, it does reveal the more general problem of giving continuity to the vagueness of the Due Process Clause.

14. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

15. *Accord*, Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969). While discussing procedures of welfare termination, the *Goldberg* court stated: "[T]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." 397 U.S. at 268-69.

16. Goldberg v. Kelly, 397 U.S. 254 (1970).

New York to give fair hearings to welfare recipients prior to termination or reduction of welfare benefits. Cases following *Goldberg* have stated that any analysis of cases involving a deprivation of government benefits is a two-fold process.[17] First, the court must determine whether a particular private interest is a "property interest" within the meaning of the due process clause.[18] This means that government benefits deemed not to be property interests, as such, may be terminated without affording typical due process protections.[19] Decisions in this area are often controlled by the "right-privilege distinction" which holds that governmental benefits are privileges in which the recipient has no right and thus no constitutionally protected interest.[20] The Supreme Court in *Goldberg* removed any such distinction concerning procedural due process matters involving the termination of welfare benefits.[21] *Goldberg*, as interpreted in *Richardson v. Belcher*,[22] held:

> [T]hat as a matter of procedural due process, the interest of a welfare recipient in the continued payment of benefits is sufficiently fundamental to prohibit the termination of those benefits without a prior evidentiary hearing.[23]

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17. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Bell v. Burson, 402 U.S. 535 (1971); Richardson v. Perales, 402 U.S. 389 (1971).

18. *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (re-employment of college professor absent tenure program not a "right"); Morriseey v. Brewer, 408 U.S. 471 (1972) (a parolee's protected conditional liberty"); Perry v. Sandermann, 408 U.S. 593 (1972) (re-employment of college professor where a de facto tenure program existed protected); Richardson v. Perales, 402 U.S. 389 (1971) (*formal* administrative proceeding in denying Social Security benefits not required; this case was distinguished from *Goldberg* in the termination of benefits involved an issue of credibility which an *informal* hearing could cure).

19. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1960) (an alien did not have an accrued right to Social Security benefits); Boggacki v. Board of Supervisors, 5 Cal. 3d 3771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971) (a county building inspector for seven years had no constitutionally protected right to maintain employment).

20. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271-79 (Black, J., dissenting) (1970); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

21. Goldberg v. Kelley, 397 U.S. 254, 262 n.8 (1970). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

22. Richardson v. Belcher, 404 U.S. 78 (1971).

23. *Id.* at 81. The court refused to extend *Goldberg* "to impose constitutional limitations on the power of Congress to make substantive changes in the law of entitlements to public benefits." *Id.* at 81. However, the limits of *Goldberg* appear to be in dispute. First, comparing Dandridge v. Williams, 397 U.S. 471 (1970) with Carleson v. Remillard, 406 U.S. 598 (1972); Richardson v. Belcher, 404 U.S. 78 (1971), it appears that the distinction between welfare benefits not being a fundamental right and the right to procedural due process in termination of those benefits is critical. Secondly, in Dandridge v. Williams, 397 U.S. 471, 522-23 & nn. 17, 18 (1970) (Marshall, J., dissenting). Justice Marshall, commenting on Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (importance of AFDE benefits); Kirk v. Board of Regents, 273 Cal. App. 430, 78 Cal. Rptr. 260 (1969), *appeal dismissed*, 396 U.S. 554 (1970) (upholding a one-year residency requirement for tuition-free graduate education in a state university) (equal protection); Shapiro v. Thompson, 394 U.S. 618 (1969) (the very means of subsistence—food and shelter) (equal protection); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (the devasting impact of wage garnishment) stated:

> These cases . . . suggest that whether or not there is a constitutional "right" to subsistence . . . will receive closer constitutional scrutiny, under both the *Due Process* and *Equal Protection* clauses, than will deprivations of less essential forms of governmental entitlements (emphasis added).

However, in Fuentes v. Shevin, 407 U.S. 67, 88-90 (1972), the court held procedural

Once a constitutionally protected interest has been established, the court must exercise a *Goldberg* type balancing to determine what procedures are required to protect that interest.[24] Recent elaborations on *Goldberg* have balanced: (1) the importance of the interest endangered, and (2) the appropriateness of the requested procedure, against (3) the state interest in maintaining the status quo.[25]

The importance of our social welfare system is evident in the fact that for many it provides their only means of survival.[26] Without appropriate procedural safeguards, the recipient has no way of protecting himself from "honest error or irritable misjudgment."[27] Adequate notice is certainly a prerequisite to the defense of any protected right.

Yet, opposing financial interests are almost always present when a state is ordered to offset the impact of poverty.[28] Such orders often impose great financial and administrative burdens on the state.[29] In *Carmona v. Sheffield*,[30] the court recognized that maintaining a multi-linquistic governmental system would be nearly impossible.[31] Not surprisingly, there are several California cases[32] holding that

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due process requirements of *Goldberg* did not arise from the special importance of welfare benefits or other necessities, but rested in principles applicable to deprivations of property generally. Perhaps, the conflict can be explained in that Justice Marshall combined equal protection and due process protections when each involve distinct tests. Equal protection dwells upon classifications among individuals and the state's interest in those classifications, whereas due process balances the importance of the individual right against the state interest involved.

24. Goldberg v. Kelly, 397 U.S. 254 (1970). The test the court stated,

> must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action.

Id. at 263, *quoting* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

25. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Morrissey v. Brewer, 408 U.S. 471 (1972); Perry v. Sindermann, 408 U.S. 593 (1972); Richardson v. Perales, 402 U.S. 389 (1971).

26. There were 1,060,800 recipients of AFDC payments in California in 1971 alone. U.S. Bureau of the Census, Statistical Abstract of the United States: 1972 (93 ed.), Table 488, at 300. It is conceivable a person could depend upon government for his income (42 U.S.C. §§ 601 *et seq.* (1970), *as amended* (Supp. I, 1971)), for his medical care (42 U.S.C. §§ 1381 *et seq.* (1970), *as amended* (Supp. I, 1971)), for his food (7 U.S.C. §§ 2011 *et seq.* (1970), *as amended* (Supp. II, 1972)), and for his housing (*see, e.g.*, 42 U.S.C. §§ 1401 *et seq.* (1970), *as amended* (Supp. I, 1971)).

27. Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

28. State and local expenditures for public assistance programs in the United States in 1971 were over $8.7 billion. U.S. Bureau of the Census, Statistical Abstract of the United States: 1972 (93 ed.), Table 452, at 279.

29. *See* Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151, 161 n.38 (1957). It cost the state of Illinois an additional $250,000 to provide transcripts of trial records to indigents on appeal.

30. Carmona v. Sheffied, 325 F. Supp. 1341 (N.D. Cal. 1971), *aff'd* 475 F.2d 738 (9th Cir. 1973).

31. *Id.* The court held that the costs of a multi-linguistic system were

> so staggering as virtually to constitute its own refutation. . . . [I]t would virtually cause the processes of government to grind to a halt. . . . [T]he Courts and administrative agencies would become all but impossible.

Id. at 1342.

32. In addition to *Guerrero*: Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (overriding requests for unemployment insurance communications to be in Spanish); Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970) (not requiring ballots to be printed in Spanish).

"the state interest in maintaining a single language system is substantial."[33]

Guerrero v. Carleson,[34] *Carmona v. Sheffield*,[35] and *Castro v. State*[36] approached the balancing problem almost identically. The courts noted that the state had an interest in maintaining a single language system in order to avoid increased administrative burdens and costs involved in a multi-linquistic system.[37] However, such grounds alone are not sufficient to modify due process protection to welfare recipients.[38] For this reason the courts placed great emphasis on the importance the benefits played in the recipient's lives.[39]

Taking into account the importance of these rights, the court raised an assumption in the instant case. Even though the recipients of the notice could not understand what was sent to them, the court assumed that the recipients would intuitively realize that it was important[40] and that they would go out and seek an interpretation.[41] The court's faith in this self-initiated action by the recipient was the crux of its argument in *Guerrero* and an earlier case, *Castro v. State*.[42]

The court's assumption appears to raise several questions. First, placing upon the recipient the burden of discovering what has been sent to him does not seem to be "notice reasonably calculated, under all circumstances, to apprise interest parties of the pendency of the action. . . ."[43] Secondly, two writers, commenting on welfare ter-

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33. *Guerrero* at 203, *quoting* Castro v. State, 2 Cal. 3d 223, 242, 466 P.2d 244, 258, 85 Cal. Rptr. 20, 34 (1970).

34. ——Cal. 3d——, 512 P.2d 833, 109 Cal. Rptr. 201 (1973).

35. 475 F.2d 738 (9th Cir. 1973).

36. 2 Cal. 3d 22, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

37. Early decisions discussed the Americanization of "foreigners" to avert their following foreign leaders in a *coup d' etat* of the American government. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

38. Goldberg v. Kelly, 397 U.S. 254 (1970) required New York to provide pretermination hearings because

> [t]he interest of the eligible recipient in uninterruptive receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

Id. at 266. *See also* Bell v. Burson, 402 U.S. 535, 540-41 (1971); Shapiro v. Thompson, 394 U.S. 618, 627-31 (1969) (equal protection). Furthermore, New York was financially and administratively able to employ both a letter and a personal conference with a caseworker before termination of benefits occurred.

39. Guerrero v. Carleson, ——Cal. 3d——, 512 P.2d 833, 836-37, 109 Cal. Rptr. 201, 204-05 (1973) (welfare benefits); Carmona v. Sheffield, 325 F. Supp. 1341, 1342 (N.D. Cal. 1971), *aff'd* 475 F.2d 738 (9th Cir. 1973) (unemployment insurance); Castro v. State, 2 Cal. 3d 223, 242, 466 P.2d 244, 248, 85 Cal. Rptr. 20, 34 (1970) (the vote).

40. In support of the validity of its assumption the court said:

> [E]ach [notice] is . . . printed on letterhead of the Department of Social Services of Los Angeles County; each is . . . personally addressed to the individual plaintiff, by home address, and case number; each is *obviously* an official communication, with boxes checked and blanks filled in by hand. . . . (emphasis added).

Guerrero at 204.

41. Evidence showed that two of the plaintiffs did in fact seek out and receive adequate interpretations. *Guerrero* at 204 nn.7, 8.

42. Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970).

43. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

mination hearings, contend that "the prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have."[44] Although these remarks refer to the hearing itself, the personality characteristics appear to be equally applicable to initiating the search for an interpretation of a letter of unknown content. Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia has stated: "[To] the welfare recipient whose benefit has been sharply reduced . . . such action often appears as mysterious as it is sudden, as arbitrary as it is disastrous."[45]

Finally, pretermination notices need not be considered formal or official state communications.[46] Pretermination hearings need not be of judicial or quasi-judicial character, but should be formal enough to produce an initial determination of the validity of the welfare department's accusations.[47] If a formal judicial or quasi-judicial hearing need not be held, the notice of the right to request such a hearing should not be considered a formal communication. Since much correspondence between the welfare authorities and the recipients was done in Spanish, pretermination notices in minority languages should not be considered a significant extension of existing practices so as to endanger the state's official language.

Since the New Deal era, a significant segment of the population has become dependent upon social welfare.[48] The poor more than any other group rely upon the government[49] for the basic necessities of life.[50] Since they rely to such a great extent on the government, any adverse governmental action will necessarily have a magnified effect on the poor.[51] When the individual recipient has so much at stake, the extended effort requested from the state seems hardly to tip the judicial scales in favor of the state.

Goldberg held that the opportunity to a fair hearing was fundamental to the welfare recipient who must deal with government and

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44. Wedemeyer & Moore, *The American Welfare System*, 54 CAL. L. REV. 326, 342 (1966). (1966).

45. Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425, 441.

46. When the court refers to maintaining a single language, it must be assumed they are referring to the official language of the state government in its functional communications.

47. *See* Goldberg v. Kelly, 397 U.S. 254 (1970). *Accord*, Sniadach v. Family Finance Corp., 395 U.S 337, 342-44 (1969) (Harlan, J., concurring). *Cf.* Richardson v. Perales, 402 U.S. 389 (1971).

48. There were 1,060,800 recipients of AFDC payments in California in 1971 alone. U.S. Bureau of the Census, Statistical Abstract of the United States: 1972 (93 ed.), Table 488, at 300.

49. Professor Reich in his article *The Property*, 73 YALE L.J. 733 (1964), describes the growth of government benefits and its distribution capabilities as creating a "new property" derived from benefits and rights doled out by government.

50. It is conceivable a person could depend upon government for his income (42 U.S.C. §§ 601 *et seq.* (1970), *as amended* (Supp. I, 1971)), for his medical care (42 U.S.C. §§ 1381 *et seq.* (1970), *as amended* (Supp. I, 1971)), for his food (7 U.S.C. §§ 2011 *et seq.* (1970), *as amended* (Supp. II, 1972)), and for his housing (*see, e.g.*, 42 U.S.C. §§ 1401 *et seq.* (1970), *as amended* ASupp. I, 1971)).

51. *See generally* Dooley & Goldberg, *The Search for Due Process in the Administration of Social Welfare Programs*, 47 N.D. L. REV. 209 (1971).

its vast bureaucracy. To permit notice of such an opportunity to be given in a language not understandable to the recipient makes *Goldberg* a pyrrhic victory for the administration of justice. Such procedures lend support to words of the late Robert F. Kennedy when he said "there is a reason why the 'poor man looks upon the law as an enemy. . . . For him the law is always taking something away'."[52]

JOHN HOLM

CONSTITUTIONAL LAW—GUEST STATUTE VIOLATES EQUAL PROTECTION OF THE LAW

Plaintiff, an automobile guest, brought a negligence action against his host to recover for injuries that he suffered when his host's automobile crossed the center line of a public highway and collided with an embankment on the opposite side of the road. The trial court granted the defendant's motion for summary judgment. Plaintiff appealed asserting that the guest statute[1] was an unconstitutional denial of equal protection of the law. The Supreme Court of California, reversing the lower court's decision, held that the guest statute[2] violated the equal protection guarantees of the California Constitution[3] and the United States Constitution[4] because it created classifications of automobile guests which did not bear a rational relation to the State's proferred justifications of protection of hospitality and elimination of collusive lawsuits. *Brown v. Merlo,* 8 Cal. 3d 855, 506 P.2d 212, 106 Cal Rptr. 388 (1973).

According to common law principles, the owner of an automobile owes a guest the duty to use ordinary care in the operation of an automobile.[5] As hitchhiking became popular during the late 'twenties and 'thirties, however, state legislatures altered this rule by enacting

52. Wright, *Poverty, Minorities, and Respect for Law,* 1970 DUKE L.J. 425, 426, *citing* P. WALD, LAW AND POVERTY: 1965 at 6 n.13 (1965).

1. CAL. VEH. CODE § 17158 (West 1960):

> No person riding in or occuping 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.

2. *Id.*
3. CAL. CONST. art. 1, §§ 11, 21.
4. U.S. CONST. amend. XIV.
5. 2 HARPER & JAMES, *The Law of Torts,* § 16.15, at 950 (1956).