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Guest Statute Violates Equal Protection

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was, "the legislative history of Title VII is in such a confused state that it is of minimal value in its explication."[79]

In sum, as the dissent suggests, "the Court adjudicates wherein the Congress failed to legislate."[80] Moreover, the court allowed disclosure of congressionally-protected confidential information before any judicial proceeding compelled the production of such evidence.

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Guest Statute Violates Equal Protection

Plaintiff brought suit against the driver of an automobile in which he was riding for damages resulting from injuries received when the host's vehicle crossed the centerline of a highway and collided with an embankment. The plaintiff alleged willful misconduct and negligence and the defendant pleaded the California guest statute[1] as a bar to the negligence count of the action. The trial court granted defendant's motion for summary judgment on the negligence issue. The issue of willful misconduct was tried by a jury, which returned a verdict for the defendant. Plaintiff appealed only from the summary judgment against his cause of action in negligence. *Held, reversed*: The classification of passengers by an automobile guest statute which prohibits recovery for ordinary negligence by non-paying passengers does not bear a substantial and rational relationship to the statute's primary purposes of protecting the hospitality of the host driver and preventing collusive lawsuits, and, thus, the guest statute violates the equal protection guarantees of the Constitution of the State of California[2] and the United States Constitution.[3] *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

I. THE GUEST STATUTE IN PERSPECTIVE

Guest statutes, as well as other types of tort immunities which have either been created by statute or judicial precedent, have been eliminated in many jurisdictions.[4] In California the traditional tort immunity of a property owner as to a trespasser and limited duty as to a licensee has been supplanted by a duty of ordinary care for all people upon his property.[5] Similarly, the parental,[6] charitable,[7] and family[8] immunities have been

79 Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460 (5th Cir. 1970).
80 472 F.2d at 1152.

1 CAL. VEHICLE CODE § 17158 (West 1971).
2 CAL. CONST. art. 1, §§ 11, 21.
3 U.S. CONST. amend. XIV.
4 *See* Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968).
5 Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).
6 *See* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971).
7 *See* Malloy v. Fong, 37 Cal. 2d 356, 232 P.2d 241 (1951).
8 *See* Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

abolished in California because they were over-inclusive and prevented many legitimate suits as well as collusive ones. Although California has been one of the more progressive jurisdictions in removing immunities created by the judiciary or the legislature and has returned for the most part to the common-law standard of care, many other jurisdictions have also taken steps to remove some types of tort immunities.[9]

At common law a guest passenger could recover for an injury caused by the negligence of the driver of a vehicle.[10] No distinction was drawn between paying and non-paying passengers, but twenty-seven states have enacted automobile guest statutes drawing such distinctions in derogation of the common law.[11] While the provisions vary, each requires a lower standard of care to be exercised by the host driver with respect to non-paying passengers.[12]

The California guest statute allows only certain classes of plaintiffs to recover for the ordinary negligence of their driver.[13] The statute does not bar a passenger's action for ordinary negligence of the driver if the passenger has given any compensation for the ride,[14] or if the non-paying passenger can show that the driver was intoxicated.[15] The California statute

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[9] Charitable immunity has been abolished in other jurisdictions as well as California. *See, e.g.*, Ray v. Tucson Medical Center, 72 Ariz. 22, 230 P.2d 220 (1951); Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950); Sheehan v. North Country Community Hosp., 273 N.Y. 163, 7 N.E.2d 28 (1937). Also, parental immunity has been abrogated in several jurisdictions. *See, e.g.*, Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); France v. A.P.A. Transp. Corp., 56 N.J. 500, 267 A.2d 490 (1970).

[10] Perkins v. Galloway, 194 Ala. 265, 69 So. 875 (1915); Callet v. Alioto, 210 Cal. 65, 290 P. 438 (1930); Bauer v. Greiss, 105 Neb. 381, 181 N.W. 156 (1920).

[11] When a statute is in derogation of common law it has generally been held that its provisions must be strictly construed. *See, e.g.*, Weber v. Pinyan, 9 Cal. 2d 226, 70 P.2d 183 (1937); Clinger v. Duncan, 166 Ohio St. 216, 2 Ohio Op. 2d 31, 141 N.E.2d 156 (1957).

[12] *See* Comment, *supra* note 4, at 898-901.

[13] CAL. VEHICLE CODE § 17158 (West 1971):

> No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person has any right of action for the 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 plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver.

[14] *See, e.g.*, Whitechat v. Guyette, 19 Cal. 2d 428, 122 P.2d 47 (1942), where the passenger promised some future monetary compensation for the ride he was entitled to recover. In Boykin v. Boykin, 260 Cal. App. 2d 768, 67 Cal. Rptr. 520 (1968), the court held that sharing of expenses for a trip which is primarily social in nature is not compensation paid by the passenger to the driver. However, if the driver's motivating influence for providing the transportation was monetary payment, sharing of expenses will be considered compensation within the meaning of the statute. *See, e.g.*, Thompson v. Lacy, 42 Cal. 2d 443, 267 P.2d 1 (1954). *See also* Comment, *supra* note 4, at 890.

[15] In De Armond v. Turner, 141 Cal. App. 2d 574, 297 P.2d 57 (1956), the court defined an intoxicated driver as one who is so affected as to hamper his ability to operate a car as would an ordinarily prudent man in full possession of his faculties, under similar circumstances. Generally, the injured passenger will not be barred from recovery for the ordinary negligence of an intoxicated driver, merely because he was drinking himself. However, in Reposa v. Pearce, 11 Cal. App. 2d 517, 54 P.2d 475 (1936), the guest was not allowed to recover where he knowingly and intentionally

also allows recovery by a non-paying passenger if "willful misconduct" by the driver proximately caused the passenger's injury.[16]

II. THE GUEST STATUTE AND THE EQUAL PROTECTION CHALLENGE

Guest statutes have been held constitutional by ten states where they do not wholly deny an automobile guest an action against the host for injuries received as a result of his negligence.[17] In five states guest statutes have been upheld against the assertion that they unconstitutionally violate the guest's right to equal protection of the law.[18] During recent years courts have allowed the state legislatures a wide range of discretion in enacting guest statutes as well as other types of social and economic legislation. There has been a presumption that these statutes do not violate equal protection guarantees unless the categorization of individuals affected by the statute is clearly arbitrary.[19]

Traditional Equal Protection Analysis. Although the United States Supreme Court has applied a strict standard of review to statutes which rely upon suspect classifications or which affect fundamental interests,[20] it has been inclined to apply a much more flexible equal protection standard to social and economic legislation. The test which has been applied by the Court with respect to this type of legislation was well stated by Chief Justice Warren in *McGowan v. Maryland*: "A statutory discrimination will not

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took part in the drinking which led to the driver's intoxicated condition and the resulting accident.

[16] Williams v. Carr, 68 Cal. 2d 579, 440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968). The court stated that "willful misconduct implies the intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result . . . ." *See also* Gonzales v. Los Banos Mining Co., 58 Cal. 2d 916, 918, 376 P.2d 833, 834, 26 Cal. Rptr. 769, 770 (1962), where the court said the test was "intentional wrongful conduct, done either with knowledge that serious injury to the guest will probably result or with a wanton and reckless disregard of the possible results."

[17] *See* Silver v. Silver, 280 U.S. 117 (1929) (upheld the Connecticut guest statute); Roberson v. Roberson, 101 S.W.2d 961 (Ark. 1937); Forsman v. Colton, 133 Cal. App. 97, 28 P.2d 429 (1933); Gallegher v. Davis, 183 A. 620 (Del. 1936); Naudzius v. Lahr, 253 Mich. 216, 234 N.W. 581 (1931); Rogers v. Brown, 129 Neb. 9, 260 N.W. 794 (1935); Smith v. Williams, 51 Ohio App. 464, 1 N.E.2d 643 (1935); Perozzi v. Ganiere, 149 Ore. 330, 40 P.2d 1009 (1935); Elkins v. Foster, 101 S.W.2d 294 (Tex. Civ. App.—Amarillo 1936), *error dismissed*; Shea v. Olson, 185 Wash. 143, 53 P.2d 615, *aff'd on rehearing*, 186 Wash. 700, 59 P.2d 1183 (1936).

[18] Silver v. Silver, 280 U.S. 117 (1929) (upheld Connecticut guest statute); Miller v. Huzinga, 23 Mich. App. 363, 178 N.W.2d 542 (1970); Romero v. Tilton, 78 N.M. 696, 437 P.2d 157 (1967); Smith v. Williams, 51 Ohio App. 464, 1 N.E.2d 643 (1935); Shea v. Olson, 185 Wash. 143, 53 P.2d 615, *aff'd on rehearing*, 186 Wash. 700, 59 P.2d 1183 (1936).

[19] *See* Gunther, *In Search of Evolving Doctrine on a Changing Court, a Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1971), for a general discussion of the development of the equal protection standards applied to different types of legislation.

[20] During the Warren Court era "new" equal protection standards developed. The Court began to review with strict scrutiny statutes which embodied suspect classifications, such as race and alienage. Also, statutes which infringed upon fundamental interests such as criminal appeals and voting were reviewed with strict scrutiny. The burden under this standard shifts to the state to show a compelling state interest justifying a classification which infringes on one of these protected personal rights. This test is not applicable to a guest statute which only affects the economic interest associated with the right to bring suit for damages. See, for a general discussion, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1067 (1969). *See also* Gunther, *supra* note 19, at 8-10.

be set aside if any state of facts reasonably may be conceived to justify it."[21] There must be a rational relationship between the statutory classification and the purpose of the statute.[22]

Using this same standard, the United States Supreme Court in the earlier case of *Silver v. Silver*[23] held that a statutory classification which distinguished guests in automobiles from those in other vehicles did not infringe upon the plaintiff's right to equal protection of the law. In *Silver* the plaintiff argued that it was inequitable for the legislature to limit the recovery of non-paying passengers in automobiles, while continuing to allow guests in other vehicles to recover for the ordinary negligence of the operator. The Court rejected this argument, stating that "there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied . . . ."[24] The Court reasoned that since the automobile was by far the most frequently used means of transportation, the states could reasonably regulate suits arising out of this mode of transportation without regulating in a like manner all modes of transportation. Accordingly, the Court held that the statute met the equal protection requirement, as it did not arbitrarily limit the recovery of automobile guests and that there was some rational basis for the distinction between automobile guests and guests in other forms of transportation.[25]

In *Patton v. LaBree*[26] a car owner took her car to a dealer to be serviced. While being driven home by an employee of the service center, an accident occurred due to the employee's negligence. The district court entered judgment adverse to the owner and she appealed. In affirming the trial court, the California Supreme Court found that there was a rational relationship between the primary purpose of the statute which was to promote hospitality, and the statutory distinction between non-owner passengers and owner-passengers. The non-owner passengers were allowed to recover for the ordinary negligence of the driver when compensation was given for the ride but owner-passengers could not recover except in the case of willful misconduct or intoxication of the driver.

New Trend in Equal Protection. The United States Supreme Court during the 1972 term appears to have taken a different outlook concerning the standard of review which should be applied to legislative enactments which would have traditionally been scrutinized under the rational basis test.[27] The Court suggests that legislative classifications must bear a substantial

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[21] 366 U.S. 420, 426 (1961). *See also* Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947). For a general discussion, see *Developments in the Law, supra* note 20.

[22] Rinaldi v. Yeager, 384 U.S. 305 (1966).

[23] 280 U.S. 117 (1929).

[24] *Id.* at 123.

[25] *See also* Romero v. Tilton, 78 N.M. 616, 437 P.2d 157 (1967); Shea v. Olson, 185 Wash. 143, 53 P.2d 615, *aff'd on rehearing*, 186 Wash. 700, 59 P.2d 1183 (1936).

[26] 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963).

[27] *See* James v. Strange, 407 U.S. 128 (1972); Jackson v. Indiana, 406 U.S. 715 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Humphrey v. Cady, 405 U.S. 504 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See also* Gunther, *supra* note 19.

relationship to legislative purposes.[28]

In *Reed v. Reed*,[29] for example, the Court struck down an Idaho statute which established a preference for males when two or more individuals of different sex sought to be appointed the administrator of an estate. The Court conceded that the statute accomplished one statutory purpose, in that it eliminated the necessity for a hearing to weigh the relative qualifications of the applicants. This degree of relationship between statutory classification and statutory purpose would seem to pass the traditional rationality test because the classification was not wholly unrelated to the objective.[30] Nevertheless, the Court refused to allow the statutory classification to stand because although it accomplished some of the statutory purpose, it did so in an arbitrary and unreasonable way.

In *Railway Express Agency v. New York*,[31] an earlier case, the Court followed the traditional rationality test in upholding a traffic ordinance which banned advertising from the sides of motor vehicles except advertisements for the business of the owner of the vehicle. The primary purpose of the statute was to remove distractions to motorists and thereby promote the public safety. It is certainly arguable that the classification in itself is unreasonable because the advertisement of a vehicle owner would no less distract a passing motorist than the advertisement of one who did not own the vehicle. However, the statute was upheld even though it accomplished the statutory objective by a seemingly unreasonable classification.

The Court apparently has required in recent cases that the classification used as a means to accomplish the statutory objectives not only be an expedient method by which to accomplish these objectives, but also that the classification must accomplish the statutory goal in a way that is fair to those affected by the statute.[32] Thus, the new trend in analysis would require that a genuine difference must exist between those affected by the statute and those who are not.[33]

III. BROWN V. MERLO

In holding the guest statute unconstitutional, the court in *Brown v. Merlo* indicated its willingness to follow the lead of the Supreme Court of the United States in applying the new standard of review.[34] The court in *Brown* stated that a statutory classification, "must be reasonable, not arbitrary, and

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[28] Gunther, *supra* note 19, at 21. Professor Gunther has pointed out that this new standard is a more specific formulation of the general principle that legislative means must substantially further legislative ends, and, therefore, refers to the newer approach in his extensive analysis as "means scrutiny."

[29] 404 U.S. 71 (1971).

[30] *Id.* at 76. *See also* McDonald v. Board of Election, 394 U.S. 802 (1969); Railway Express Agency v. New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Barbier v. Connolly, 113 U.S. 27 (1885).

[31] 336 U.S. 106 (1949).

[32] Comment, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 150-51 (1972).

[33] *See* Gunther, *supra* note 19, at 47.

[34] The court in *Brown v. Merlo* cited with approval the seven cases of the 1972 term of the United States Supreme Court which established this substantial relationship test. Brown v. Merlo, 8 Cal. 3d 855, 861, 506 P.2d 212, 216, 106 Cal. Rptr. 388, 392 (1973).

must rest upon some ground of difference having a fair and substantial relation to the objective of the legislation, so that persons similarly circumstanced shall be treated alike."[35] The classification to which the court referred was the distinction made by the statute between paying and non-paying passengers.[36] The court found that the purposes of the statute—prevention of collusive suits[37] and promotion of hospitality[38]—were not substantially accomplished by the classification of the statute.

Prevention of Collusion. The court never denied the proposition that some collusive suits are prevented by the statutory classification. Traditionally, courts have not overturned legislative enactments if there was any rational connection between the purposes of the statute and the statutory classification.[39] Since the guest statute considered by the court did prevent some collusive suits, this standard appeared to be met. However, the court demonstrated that, although the classification might accomplish some of the statute's purposes, it did so in an arbitrary and unreasonable way in that it was both over-inclusive and under-inclusive.[40] The statute was over-inclusive because it precluded all suits by non-paying guests, whether collusive or not, and was under-inclusive because a driver and a passenger bent on collusion could avoid the statutory prohibition simply by colluding on the issue of whether compensation was given for the ride.[41] The court seemed to conclude that the detrimental result of the statute in barring many honest claims outweighed any benefit the statute could yield in preventing some collusive suits. This balancing test, which is more akin to the "new equal protection standard" used when the statute infringes upon fundamental interests or includes suspect classifications, has recently been utilized by the Supreme Court of the United States in cases which were scrutinized under the traditional rational basis test.[42]

Promotion of Hospitality. Promotion of hospitality was assailed by the court as being a questionable statutory objective because one should not be required to pay a fee before he is protected from negligent injury by another.[43] The court relied upon the common-law policy of section 1714 of the California Civil Code,[44] enacted in 1872, which provided, in essence, that all persons should be responsible for their negligent acts. In *Rowland v. Christian*[45] the California Supreme Court had relied on the same statute to abolish the limited liability of possessors of land as to trespassers and licensees, and

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[35] *Id.*

[36] CAL. VEHICLE CODE § 17158 (West 1971).

[37] *See, e.g.*, Stephan v. Proctor, 235 Cal. App. 2d 288, 45 Cal. Rptr. 124 (1965).

[38] *See, e.g.*, Martinez v. Southern Pac. Co., 45 Cal. 2d 244, 288 P.2d 868 (1955).

[39] *See* cases cited note 21 *supra.*

[40] *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347-51 (1949).

[41] Brown v. Merlo, 8 Cal. 3d 855, 875-76, 506 P.2d 212, 226-27, 106 Cal. Rptr. 388, 402-03 (1973).

[42] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). *See also* Comment, *supra* note 32, at 150-51.

[43] 8 Cal. 3d 855, 866-67, 506 P.2d 212, 220, 106 Cal. Rptr. 388, 396 (1973).

[44] CAL. CIV. CODE § 1714 (West 1971) provides in part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . . ."

[45] 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

to substitute the basic tort principle of reasonable care for all those who come upon the property of another.[46] However, *Brown* seems easily distinguishable from *Rowland*, for the immunity of a land owner from suits by trespassers or licensees for injuries received arose out of judicial determinations rather than legislative enactments.[47] It would seem much easier for a court simply to overrule judicial precedent rather than override a clear expression of public policy in the form of a statute enacted by the legislature. The court in *Rowland* recognized this distinction by stating: "It is clear that in the absence of statutory provisions declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy."[48] The court in *Brown* ignored this distinction and the basic precept that the legislature may freely change the common law.[49] The court noted that, with the widespread growth of liability insurance, the concern for prevention of ingratitude which once adhered to a guest's suit against his host is substantially reduced.[50] This fact, however, seems hardly a firm basis for judicial decision, especially in light of the general policy that insurance has nothing to do with liability.[51]

Irrational Scheme of Statutory Exceptions. In analyzing the guest statute, the court concluded that the application of three particular clauses led to irrational results. According to the statutory language, the injury must take place during the ride, in any vehicle, and upon the highway. The California Supreme Court has allowed recovery for ordinary negligence when the open door of an automobile struck the passenger while he was getting out after the ride had terminated,[52] but when the passenger was injured after the driver had exited, it has denied recovery upon the basis that the passenger was still accepting the driver's hospitality.[53] It seems inconsistent to deny recovery to one left in a driverless vehicle after the ride had ceased, but to allow recovery to one who is alighting from a vehicle at the end of the journey. It would thus appear that the meaning of "during the ride" turns on the absurd criterion of who steps out of the car first.

Likewise, a passenger who was still in the vehicle after the ride had ceased but had one foot on the ground was allowed to recover for the ordinary negligence of the driver,[54] while a California court of appeals denied re-

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[46] *See* Comment, *Torts—Occupier of Land Held To Owe Duty of Ordinary Care to All Entrants—"Invitee," "Licensee," and "Trespasser" Distinctions Abolished*, 44 N.Y.U.L. REV. 429 (1969).

[47] *See, e.g.*, Gordon v. Roberts, 162 Cal. 506, 123 P. 288 (1912) (judicial establishment of limited liability of possessors of land as to trespassers); Schmidt v. Bauer, 80 Cal. 565, 22 P. 256 (1889) (judicial approval of the limited liability of a possessor of land to a licensee).

[48] 69 Cal. 2d 108, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968).

[49] Fall River Valley Irrigation Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 67, 259 P. 444, 449 (1927). This case was one of the first in California to recognize that the legislature could modify or abrogate completely rules of common law.

[50] 8 Cal. 2d 855, 867, 506 P.2d 212, 221, 106 Cal. Rptr. 388, 397 (1973).

[51] *See, e.g.*, Hewlett v. Schadel, 68 F.2d 502, 507 (4th Cir. 1934).

[52] Boyd v. Cress, 46 Cal. 2d 164, 293 P.2d 37 (1956).

[53] Ponopulos v. Maderis, 47 Cal. 2d 337, 303 P.2d 738 (1956).

[54] Elisalda v. Welch's Sand & Gravel Co., 260 Cal. App. 2d 46, 67 Cal. Rptr. 57 (1968).

covery to a passenger who was injured after the ride had ceased, but had remained completely in the vehicle.[55] The court in *Brown* pointed out the absurdity of distinguishing between a passenger with his foot on the ground and other passengers. The statute has also been construed to prohibit recovery by the guest passenger for ordinary negligence of the driver when he is injured on a public highway, but to allow recovery by a guest passenger for ordinary negligence when he is injured on a private roadway.[56] The court in *Brown* pointed out that none of these three statutory distinctions has even the remotest connection to the purposes of the statute, the promotion of hospitality, and the prevention of collusion.[57]

Although these criticisms of the statutory language seem quite well founded, they were ancillary because the plaintiff had not attacked any of these clauses, but only sought a determination of the constitutionality of the statutory distinction between paying and non-paying passengers.[58] The legislature, rather than the courts, is the governmental entity more properly vested with the power to amend a statute or correct statutory inconsistencies.[59] Judicial nullification eliminated both the desirable and undesirable aspects of the statute. The court was not a forum where all the competing considerations could be advanced, as the legislature would have been; rather only those arguments relevant to the case at bar were considered. Thus, the court had to make its own determination of what might have been the state's purposes in enacting the particular statute.[60]

Which Standard? Although the court seemed to require a more substantial relationship between the statutory classification and statutory objectives than required by the traditional rationality test, the court concluded that the "classifications which the guest statute creates . . . do not bear a substantial and rational relation to the statute's purposes . . . ."[61] Precedent clearly indicates that a rational relationship standard requires merely that there be some relationship between classification and purposes.[62] It is illogical to equate "some relation" with "substantial relation." Each phrase embraces a different standard of review which may lead to a diverse result.[63] However, by penetrating these semantic difficulties it seems that the new approach taken by the court is a renovation of the old rationality test, rather than a completely new standard. The California court seems to have followed the Supreme Court's lead in questioning whether legislative means

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[55] Frankenstein v. House, 41 Cal. App. 2d 813, 107 P.2d 624 (1940).

[56] O'Donnell v. Mullaney, 66 Cal. 2d 994, 429 P.2d 160, 59 Cal. Rptr. 840 (1967); Olsen v. Clifton, 273 Cal. App. 2d 359, 78 Cal. Rptr. 296 (1969).

[57] 8 Cal. 3d 855, 880, 506 P.2d 212, 230, 106 Cal. Rptr. 388, 406 (1973).

[58] 8 Cal. 3d 855, 859, 506 P.2d 212, 215, 106 Cal. Rptr. 388, 391 (1973).

[59] A good example is the legislative revision of the Texas guest statute which narrowed the scope of the statutory prohibition to close relatives only, rather than all non-paying passengers. TEX. REV. CIV. STAT. ANN. art. 6701(b) (Supp. 1973).

[60] *Cf.* Gunther, *supra* note 19, at 48.

[61] 8 Cal. 3d 855, 882, 506 P.2d 212, 231, 106 Cal. Rptr. 388, 407 (1973).

[62] *See, e.g.*, cases cited note 21 *supra.*

[63] *See* cases cited note 27 *supra.* These cases concern statutory classifications which would have probably been upheld under the old rationality standard and concomitant presumption of validity. However, the court struck them down because they did not substantially further legislative ends.

further legislative ends.[64] Additionally, it sought to determine whether the statutory classifications are a fair and just way to accomplish those ends.

IV. CONCLUSION

The court in *Brown v. Merlo* completely struck down the California guest statute, and thus forced the legislature either to enact a more equitable guest statute or settle for the common-law standard allowing recovery by all passengers for injuries resulting from the driver's ordinary negligence. In determining whether to enact a new guest statute, the legislature should recognize that the nature of the relationship between driver and passenger may not be one that lends itself to legislative control. As the court in *Brown* aptly pointed out, the advent of liability insurance has done more to prevent the exploitation of the driver's hospitality than any guest statute could ever have done. Similarly, persons bent upon collusive suits can easily circumvent the prohibition of a guest statute by simply perjuring themselves concerning the issue of compensation. This type of perjury can be prevented by enacting a guest statute which has as a criterion family relationship[65] or some other classification that is inalterable by the testimony of witnesses. However, collusive suits outside this narrowly drawn area of effectiveness would not be prevented. These considerations lead to the conclusion that the judicial system itself is the only effective means of suppressing collusive or fraudulent suits. The demeanor and credibility of the claimant must necessarily be assessed by the court and not the legislature.

Further, the court brought the guest statute into that class of artificial tort immunities which are rapidly being eliminated in all jurisdictions.[66] It seems quite rational to require that the operator of a potentially dangerous instrumentality such as an automobile should be required to exercise reasonable care for the safety of all persons who might be harmed by such activity.

Finally, the California Supreme Court seems to be the first major state tribunal which has followed the lead of the Supreme Court of the United States in applying a more energetic equal protection standard of review to social and economic legislation. The guest statute seemed to fall short

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[64] *See* Gunther, *supra* note 19, at 20.

[65] The recently enacted Texas guest statute, as amended, TEX. REV. CIV. STAT. ANN. art. 6701(b) (Supp. 1973), prohibits recovery for the ordinary negligence of the driver to close family members. Following the reasoning of the California court, it is doubtful that even this narrow statutory prohibition is safe from constitutional attack if the reviewing court required the statutory classification to bear a substantial relation to the purpose of preventing collusive suits, as is indicated in *Brown*. However, the Texas courts seem to have adhered to the traditional rationality test and presumption of validity has inured to legislative enactments. *See, e.g.*, Smith v. Craddick, 471 S.W.2d 375 (Tex. 1971); Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Emmons v. Petry, 498 S.W.2d 38 (Tex. Civ. App.—Beaumont 1973), *error ref. n.r.e.*

[66] In Klein v. Klein, 58 Cal. 2d 692, 695-96, 376 P.2d 70, 73, 26 Cal. Rptr. 102, 105 (1962), the California Supreme Court rejected the possibility of collusion between spouses as a rationale for barring all interspousal negligence actions. Similarly, in Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), the court struck down family immunity upon the same reasoning. In Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), the judicially created immunity of property owners from actions for negligence of trespassers and licensees was eradicated. The court also abolished charitable immunity in Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939).