EQUAL PROTECTION CHALLENGES TO AUTOMOBILE GUEST STATUTES

In the months since the California Supreme Court announced the demise of that state's automobile guest statute in the momentous decision of Brown v. Merlo,1 eight other state courts have had to decide the fate of their respective guest statutes as the result of constitutional challenges based on the equal protection clause of the fourteenth amendment.2 The Nebraska Supreme Court in the recent case of Hale v. Taylor heard equal protection arguments against Nebraska’s guest statute,3 but the court declined to rule on the issue because the constitutional challenge had not been properly raised in the pleadings.4 If the Nebraska Unicameral does not reconsider its guest statute at Section 39-6,191, the Nebraska Supreme Court will most certainly be confronted again with the statute’s constitutionality.

Equal protection challenges arise out of alleged deviations from the mandate of the fourteenth amendment which forbids states from denying “any person . . . the equal protection of the laws.” In order to achieve some legislative purpose, statutes sometimes create different classifications of persons. When these classifications are discriminatory or not reasonably related to

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achieving the statute's purpose, they are susceptible to challenge. This article will examine the status of Nebraska's guest statute in light of recent decisions in other jurisdictions that have considered the merits of an equal protection attack on such legislation. It will discuss the varying classifications attributable to guest statutes and the appropriate equal protection test for these classifications, the commonly recited purposes of the guest statute, and the reasonableness of the relationship between these purposes and the classifications created.

HISTORICAL BACKGROUND

As an aid in understanding automobile guest statutes, one must briefly look to the history of such statutes in the United States.

In the early days of the automobile, as today in those states without a guest statute, the applicable rule of law has been one of a duty of ordinary care owed by a driver to his guest passenger. A guest could recover damages for injuries resulting from his driver's ordinary negligence. Before the enactment of the guest statute in Nebraska, the law was succinctly stated in a 1926 decision as follows:

Defendant, not Jessup, was in control of the car. Jessup had no authority over defendant and no authority to direct the movements of the automobile. Defendant was a private, gratuitous carrier and, as such, owed Jessup the duty to exercise ordinary care in the operation of the automobile, and would be liable in damages if his failure to exercise such care was the proximate cause of injury to his passenger. 6

The first judicial acknowledgement that a driver owed anything less than the duty of ordinary care for the safety of his guest passenger appears in the 1917 Massachusetts decision of Massaletti v. Fitzroy 7 in which the status of an automobile guest was compared to that of a gratuitous bailee. In order to impose liability for a gratuitous undertaking, the court demanded that "a materi-

5. In the absence of a guest statute, the rule in almost all jurisdictions is that the person operating or responsible for the operation of an automobile must use reasonable and ordinary care for the safety of a guest therein, and is liable for injuries proximately caused by negligence in the operation of the vehicle. Roberson v. Roberson, 193 Ark. 669, 101 S.W.2d 961 (1937); Dashiell v. Moore, 177 Md. 657, 11 A.2d 640 (1940); Clinger v. Duncan, 166 Ohio St. 216, 141 N.E.2d 156 (1957). See 60A C.J.S. MOTOR VEHICLES § 399.1 (1969).
7. 228 Mass. 487, 118 N.E. 168 (1917).
ally greater degree” of negligence on the part of the host or driver be established.8

In 1927, Iowa and Connecticut enacted the nation’s first guest statutes.9 Throughout the remainder of that decade and through the 1930’s, approximately half the states enacted comparable statutes.10 During the next three decades, judicial interpretations gave meaning to the language of the guest statutes as automobile usage and lawsuits resulting from a greater number of accidents increased.

The states which had guest statutes applied them to particular factual situations and either narrowed their scope by holding

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8. Id. at 510, 118 N.E. at 177:

... Justice requires that the one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay. There is an inherent difficulty in stating the difference between the measure of duty which is assumed in the two cases. But justice requires that to make out liability in case of a gratuitous undertaking the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. It is a distinction which seventy-five years' practice in this Commonwealth has shown is not too indefinite a one to be drawn by the judge and acted upon by the jury.

Massachusetts never enacted a guest statute because Massaletti accomplished the same result. However, Massaletti v. Fitzroy was overruled in 1971 by the Massachusetts legislature with the passage of MASS. GEN. LAWS ANN. ch. 231, § 85L (Supp. 1974-5) which provided for recovery of damages against the operator of a motor vehicle by a guest upon the proof of ordinary negligence.


The Connecticut guest statute withstood an equal protection challenge in the noted case of Silver v. Silver, 108 Conn. 143 A. 240 (1928) and in 280 U.S. 117 (1929). There the Supreme Court found an additional justification for the passage of the statute—the elimination of much “vexatious litigation” caused by increasing numbers of automobiles on the road which were involved in accidents that resulted in negligence actions against drivers whose passengers were injured. Id. at 123. However, the Connecticut legislature repealed its guest statute in 1937. CONN. GEN. STAT. § 540E (Supp. 1939).

The Iowa automobile guest statute faced an equal protection challenge in Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974), and emerged intact. However, the various concurring and dissenting opinions in the 5-4 decision do not evidence a solid position on its constitutionality.


These statutes, which have been held constitutional, vary considerably in their language from state to state according to the fancy of the legislature or compromises in drawing the particular act. The required form of aggravation is specified as ‘gross negligence,’ ‘intentional,’ ‘willful,’ ‘wanton,’ or ‘reckless’ misconduct, acting ‘in disregard to the safety of others,’ ‘intoxication,’ or some combination of two or more. There is so much individual variation in the statutes, and in their interpretation, that it may safely be said that there are as many different guest laws as there are acts.

Id. at 186-87.
that statutes in derogation of the common law must be strictly construed, or expanded their scope by looking to the legislative intent and evaluating the facts to determine if they constituted the evil that the statute was intended to affect. The Nebraska Supreme Court adopted the latter philosophy. In the authoritative guest statute case of Van Auker v. Steckley's Hybrid Seed Corn Co., which discusses the predecessor of Section 39-6,191, the court stated:

In construing a statute, it is the duty of this court to discover, if possible, the legislative intent from the language of the act and give effect thereto.\textsuperscript{11}

There has not been a guest statute enacted in any state since 1939. In fact, the concept of a guest statute remains so unpopular that some states which do not have a guest statute refuse to recognize the guest statutes of other states, reasoning that they are against public policy.\textsuperscript{12} In recent years, an increasing number of guest statutes have come under the scrutiny of legislatures, courts, and law review writers,\textsuperscript{13} in growing dissatisfaction with an outdated concept.\textsuperscript{14}

CLASSIFICATIONS CREATED

The recent judicial assaults upon guest statutes have challenged their constitutionality on an equal protection basis. It is essential, therefore, to examine the classifications that such legis-

\textsuperscript{11} 143 Neb. 24, 27, 8 N.W.2d 451, 453 (1943).
\textsuperscript{12} The Rhode Island court in Labree v. Major, ___ R.I. ___, 306 A.2d 808 (1973), declined to enforce the judicially created guest statute of Massachusetts because the court disapproved of that doctrine as a matter of public policy.

The following cases have refused to enforce guest statutes of other states: Kapp v. Rechtzigel, 273 Minn. 441, 141 N.W.2d 526 (1966); Mellk v. Sarahson, 49 N.J. 226, 229 A.2d 625 (1967); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 204 N.Y.S.2d 743 (1963); Wilcox v. Wilcox, 26 Wisc. 617, 133 N.W.2d 408 (1965).
\textsuperscript{13} Recent articles include 59 CORNELL L. REV. 659 (1974); 53 NEB. L. REV. 267 (1974); 1 OHIO NORTHERN L. REV. 357 (1974).
lation creates before ascertaining if such classifications discriminate sufficiently to be violative of the fourteenth amendment. Brown v. Merlo, recognized three levels of classification: (1) the distinction between automobile “guests” and “paying” automobile passengers; (2) the distinction between automobile guests and other social guests and recipients of generosity; and (3) the distinction between subclasses of automobile guests created by statute and judicial interpretation.\textsuperscript{15}

Only one case challenging a guest statute on the basis of the fourteenth amendment’s equal protection clause has ever been decided by the United States Supreme Court. Silver v. Silver\textsuperscript{16} has been cited numerous times to uphold the constitutionality of guest statutes since it was decided in 1929. The classification questioned in that case was one “between gratuitous passengers in automobiles and those in other classes of vehicles.”\textsuperscript{17} The court held that such a classification was a rational exercise of a state’s power, in that “the use of the automobile as an instrument of transportation is peculiarly the subject of [state] regulation.”\textsuperscript{18} Upon this basis the Court declared that the discriminatory classification of automobile passengers was a permissible exercise of Connecticut’s police power.\textsuperscript{19}

In recent attacks on guest statutes, courts which have upheld the constitutionality of their statutes have cited Silver as controlling authority.\textsuperscript{20} Those courts which have held their statutes to be unconstitutional have not found Silver controlling because it was decided on the basis of the single classification of automobile “guests” as opposed to other social guests.\textsuperscript{21} Since Silver failed to address the distinction between automobile “guests” and “pay-

\begin{itemize}
\item 15. 8 Cal. 3d at 864, 506 P.2d at 217, 106 Cal. Rptr. at 393.
\item 16. 280 U.S. 117 (1929) affirming 108 Conn. 371, 143 A. 240 (1928).
\item 17. Id. at 123.
\item 18. Id. at 122.
\item 19. Id. at 123-24. Connecticut revoked its guest statute in 1937. See note 9 supra.
\end{itemize}
ing” passengers or the subclasses of “guests” created by guest statutes, the California court analyzed the Supreme Court’s holding carefully and stated that the forty-year-old decision was inadequate to justify the tri-level classification scheme recognized in Brown v. Merlo.22

Not all courts, however, have recognized all three distinctions, and in fact, many decisions perceive only one distinction and decide the equal protection issue on that one basis. A court’s willingness to ascertain and consider all possible classifications often bears directly on whether the court will declare a statute to be constitutional.

AUTOMOBILE “GUEST” v. “PAYING PASSENGER”

This type of classification is apparent from a cursory reading of any guest statute. The Nebraska statute draws the distinction by defining a guest as “a person who accepts a ride in any motor vehicle without giving compensation therefor . . . .”23 Presumably, then, one who gives compensation for a ride is not a guest, but a “paying” automobile passenger.24 This distinction, however, is subject to judicial interpretation, and in Nebraska such interpretation has led to a further distinction between “guests” and “paying” passengers on the basis of who receives the benefit of the ride. If the ride is solely for the benefit of the passenger, then it appears that he would be considered a guest.

Various Nebraska cases have attempted to describe this “benefit” measure with varying degrees of precision. Where, for example, even a generalized remuneration passed between a child’s parents and the family the child was staying with for a summer, it was thought to be a sufficient benefit to make the child something more than a guest.25 Or, further, a completely nonpaying and nonpaid passenger whose mere presence was of some positive pub-

22. 8 Cal. 3d at 863, n.4, 506 P.2d at 217-18, n.4, 106 Cal. Rptr. 393 n.4.
24. The Nebraska court has defined “compensation” as that which constitutes or is regarded as an equivalent or recompense; that which makes good the lack or variation of something else; that which compensates for loss or privation; amends; remuneration; recompense. The phrase “without giving compensation therefor” in the statute indicates an intention not to limit compensation to persons specifically paying for transportation in cash or equivalent, or to require that it pass exclusively from the passenger to the driver.
lic-relations value to a commercial concern was held not to be a
guest within the meaning of the statute.  

On the other hand, no substantial benefit was found where a
church pastor, in keeping with his custom, drove some members
of his congregation to a meeting.  Nor, apparently, do soldiers
who travel together on leave (and presumably share the driving
and expenses) confer such a benefit on the particular defendant
driver so as to become something other than guests.

Furthermore, business relationships are occasionally involved
and tend to muddle the analysis. But the Nebraska court has left
it to the jury to decide whether an employee accompanied his em-
ployer on a particular trip for business (benefit) or social (guest)
reasons.

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26. Van Auker v. Steckley's Hybrid Seed Corn Co., 143 Neb. 24, 27,
  8 N.W.2d 451, 453-54 (1943). The "guest test" as enunciated in Van Auker
  states:

  [A] person riding in a motor vehicle is a guest if his carriage con-
  fers only a benefit upon himself and no benefit upon the owner
  or operator except such as is incidental to hospitality, social rela-
  tions, companionship, or the like, as a mere gratuity. However,
  if his carriage contributes such tangible and substantial bene-
  fits as to promote the mutual interests of both the passenger and
  the owner or operator, or is primarily for the attainment of some
  tangible and substantial objective or business purpose of the owner
  or operator, he is not a guest.

  Id. at 27, 8 N.W.2d at 454.


A benefit removing an occupant riding in the motor vehicle of
another from the provisions of the guest statute must be a tangible
and substantial one to the owner and a motivating influence for
his furnishing the transportation. A remote, vague, incidental, or
speculative benefit is not sufficient to have that effect. This is the
basis of the rule that the sharing of the cost of operating the car
or other expenses of the trip, when the acceptance of the occupant
for conveyance is not motivated by or conditioned on such contri-
bution, is incidental, an exchange of social amenities, and does not
transform the occupant into a passenger for compensation.

  Id. at 178, 65 N.W.2d at 599.


The general rule in Nebraska is that if the relationship between the driver
and occupant is found to be an employer-employee relationship, the guest
statute is not applicable. Occasionally, however, persons begin a ride in
the employer-employee roles, but at the conclusion of their business they
divert the trip to a restaurant or other social gathering place. When faced
with similar facts in Svitak, the Nebraska Supreme Court found that the
jury should be instructed to examine the employer's (driver's) purpose in
inviting his employee to accompany him on the trip to determine if it was
more for business or for social reasons. If they found that the initial pur-
pose had been for business reasons, then the plaintiff would be adjudged
a passenger. If, however, the jury found that the owner-employer had
asked the plaintiff to accompany him on the trip because they enjoyed each
other's company and thought that the sales meeting which they attended
would be a socially enjoyable function, then the plaintiff would be ad-
judged a guest. In the latter instance, the plaintiff's presence conferred lit-
Thus, the Nebraska Supreme Court, in distinguishing between an “automobile guest” and a “paying” passenger, interprets the statutory term “a person who accepts a ride in any motor vehicle without giving compensation therefore,” as a person who fails to confer an adequate benefit upon his driver. The court looks not only to the compensation that passes from an occupant to a driver but also to the relationship between the parties and the purpose for the ride to determine if a driver has been adequately compensated for what would otherwise be considered his hospitality.

The Kansas Supreme Court in Henry v. Bauder, struck down its guest statute as unconstitutional after examining past decisions which interpreted the statute, and finding that those decisions had created wide variations as to who was a guest and who was not.

The California Supreme Court in Brown v. Merlo looked to the effects of guest-passenger classification and noted that it deprived an automobile guest of protection against negligent injury, while allowing passengers, pedestrians and guests riding in other cars to recover for their injuries. The Merlo court noted that:

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

... If the defendant in the instant case had injured a pedestrian or a guest riding in another car, rather than...

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30. Id. at 307, 285 N.W. at 607.  
33. Id. at ___, 518 P.2d 368. The Kansas court observed that sometimes payment of money would take the passenger out of the operation of the guest statute and sometimes it [would] not. Even if payment is made, if the trip is for social benefits and pleasure, the guest statute applies and the guest is barred from recovery. A person who pays a driver $2 per week to a fellow employee for transportation from his home to work under a prearranged agreement is not a "guest" and may recover for the ordinary negligence of the driver. Where the purpose of a ride is not purely social, any substantial benefit to the driver is sufficient to take the case out of the operation of the guest statute even if no actual payment in money is made to the driver. From these decisions it is obvious that under different factual situations even paying passengers are afforded different treatment under the law where they sue the driver to recover for personal injuries. (Emphasis added.)  
34. 8 Cal. 3d at 865, 506 P.2d at 20, 106 Cal. Rptr. at 369.
this plaintiff, such person would have been fully protected from defendant's negligence even though he had paid no compensation. Thus the mere fact that a guest has not paid for the ride cannot serve as a rational basis to single him out for discriminatory treatment.\(^3\)

(Emphasis added.)

Thus, a guest is discriminated against in two ways as a result of the guest-passenger classification. First, a guest is not allowed to recover for his driver's ordinary negligence, while a passenger, who has compensated his driver to the court's satisfaction, is allowed to recover for injuries arising from the same cause of action. In those cases where a guest statute was struck down, the court often rested its decision on the fact that the criteria used to ascertain the status of an occupant of an automobile were arbitrary and discriminated against innocent guests.\(^6\)

Second, a guest is also deprived of his cause of action for an accident over which he had no control—he was not driving the automobile—while other innocent victims of the same accident are permitted to recover damages for ordinary negligence. Had such a guest been a pedestrian, a driver of another car involved in the same accident or a guest in another car, he would have been able to recover damages for his driver's ordinary negligence rather than having to prove some form of aggravated misconduct. If the guest had not been in the automobile—yet was having some personal property transported by the driver—he would have been able to recover the value of any property lost by proving only ordinary negligence.\(^7\)

The inherent statutory classification of an automobile guest exists in all guest statutes and is subject to the approach used by the California court in *Brown v. Merlo* and the subsequent finding of unconstitutionality.

**Automobile Guest v. Other Social Guest**

In recent decisions upholding guest statutes, most of the courts failed to investigate the variations in their past decisions between

35. *Id.*
37. *Henry v. Bauder*, 213 Kan. at __, 518 P.2d at 368 states:

The guest statute by its terms has no application where the driver of an automobile gratuitously transports the personal property of another and the owner of the property is not riding in the vehicle at the time the collision occurs. In that situation there is no person being transported by the owner and the guest statute would not be applicable. The result is that property rights are protected while personal rights are denied protection.
guests and passengers. Instead, they compared automobile guests with other social guests in order to justify the classification created by the guest statute. To the contrary, a basis advanced in the Brown v. Merlo decision in striking down the California guest statute was the fact that California had previously abolished the distinctions of the duty of care owed by a landowner to those who came upon his land.

In 1968 the California court reconsidered the traditional common law tort doctrine that distinguished between the standard of care which a landowner owed to different categories of persons on his property in Rowland v. Christian and declared the entire classification scheme of business invitee—social guest—trespasser to be irrational in today's society. The court stated:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose.

Thus, when confronted five years later with the classifications in its automobile guest statute, the court was aided in declaring the automobile guest versus other social guest distinction to be unjust. The court found that the automobile guest was being discriminated against because he could hold his driver only to a very minimal standard of care, while a social guest upon the land of another was permitted to exact an ordinary standard of care from his host. Thus, automobile guests were being denied equal protection of the laws by the guest statute.

The Court of Civil Appeals of Texas upheld its guest statute in Tisko v. Harrison by comparing the classifications of guests and passengers with those of business invitees, licensees, and social guests on the land of another person. Common law distinctions in the duty which landowners owe to these classes of persons are still recognized in Texas, and the court held that the distinctions recognized in landowner cases justify the distinction in the automobile guest statute.

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39. Id. at 118, 443 P.2d at 568, 70 Cal. Rptr. at 104.
40. 8 Cal. 3d at 569, 506 P.2d at 222, 106 Cal. Rptr. at 397.
42. Id. at 569–70. The Texas court cited the Massachusetts case of Massaletti v. Fitzroy for the common law rule on the duty of care owed by a driver to his automobile guest, instead of acknowledging this case as the first judicial embodiment of the guest statute principle. The Texas court does admit, however, that "most courts that have considered the question in the absence of statute have held that the owner of an automobile owes a guest a duty of ordinary care so far as operation of the vehicle is
The Supreme Court of Utah applied the same approach to the guest statute as did the Texas court. In *Cannon v. Oviatt* it upheld Utah's guest statute and distinguished the legal environment in which California struck down its guest statute from the legal environment in Utah, which would not justify such action. The court stated that "the distinction between a paying passenger and an automobile guest has been retained in the correlative distinction between an invitee and licensee."

Nebraska, like Texas and Utah, still recognizes the distinction between invitees, licensees, and trespassers who enter upon another's land and determines the appropriate duty of care which the landowner has for the safety of these persons based upon their classification. Since an automobile guest is placed in a situation similar to that of a guest upon the land of another, it is arguable that an analogy can be made between the duties owed by automobile hosts and landowners to their respective guests. On the basis of such reasoning, one could conclude that since the Nebraska Supreme Court has held the classification in the landowner cases to be nondiscriminatory, the classification in the guest statute cases would likewise be adjudged nondiscriminatory.

**Subclasses of Automobile Guests**

Depending upon the precise wording of a specific guest statute, any number of subclasses of guests are created. For instance, the California guest statute referred to people "in a vehicle concerned." In approaching the distinction between "guests" and "paying" passengers in this manner, the Texas court failed to consider the criteria used to establish who is a "guest" and who is not, and the inequities which necessarily result when abstract criteria are applied to factual situations.

43. ___ Utah ___, 520 P.2d 883.
44. *Id.* at __, 520 P.2d at 886:

*Brown v. Meris* is a logical consequence in that jurisdiction stemming from their prior determination to abandon the traditional tort doctrine that the status of a person determined the duty owed to him. In this jurisdiction the distinction between "invitees" or "business invitees" and "licensees" or "social guests" has been preserved. Thus the classifications of an automobile guest in Section 41-9-1 does not single out this one group for treatment different than that accorded to other guests.

45. *Id.* at __, 520 P.2d at 886.
47. *Cal. Vehicle Code* § 17158 (1971) reads in full:

No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the
"during a ride" "upon a highway." These phrases were strictly construed by the California Supreme Court by applying the doctrine of strict construction to statutes which were in derogation of the common law. In Brown v. Merlo, the court reviewed the inconsistencies that had developed in the application of these statutory limitations and summarized the confusing state of their case law:

In sum, the statute as presently written and applied distinguishes those automobile guests who may recover for negligence from those guests who may not on the basis of (1) whether or not the journey has come to a momentary halt, (2) whether the guest was physically located inside or outside the car and (3) whether the car was on a public highway or on private land.

The Kansas guest statute makes no reference to being "in a vehicle" "during a ride" "upon a highway," but refers instead to a person who is "transported." Nonetheless, the Kansas Supreme Court, in striking down that state's guest statute, admitted that a study of the cases reveals a crazy-quilt pattern of application of the guest act which permits recovery in many factual situations and denies recovery in others. Some of these decisions clearly show the inequities of the statute and the resulting denial of equal justice to persons similarly situated.

The Nebraska guest statute refers to a person "riding in such 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.

48. Id. 49. 8 Cal. 3d at 879-80, 506 P.2d at 229, 106 Cal. Rptr. at 405. 50. KAN. STAT. ANN. § 8-122b (1964).

[N]o person who is transported by the owner or operator of a motor vehicle, as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or damage shall have resulted from the gross and wanton negligence of the operator of such motor vehicle.

51. Henry v. Bauder, 213 Kan. at __, 518 P.2d at 367. In interpreting the language contained in its guest statute, the Kansas court in earlier decisions had defined "motor vehicle" by looking to the definition of the term in the motor vehicle code. KAN. STAT. ANN. § 8-126(a) (1964) stated that a vehicle was "[e]very device in, upon or by which any person or property is or may be transported or drawn upon a public highway." Under this public highway definition, an earlier decision had reasoned that the statute does not include motor vehicles operated on private property. Smith v. Bassett, 159 Kan. 128, 132, 152 P.2d 794, 797 (1944). Likewise, the phrase "during the cause of transportation" was strictly construed to exclude guests before they had actually entered the motor vehicle, Chapman v. Parker, 203 Kan. 440, __, 454 P.2d 506, 510-11 (1969), but did not include guests when they were departing from the motor vehicle after the ride. Marsh v. Hogeboom, 167 Kan. 349, __, 205 P.2d 1190, 1193 (1949).
motor vehicle," but it makes no reference to a highway or a public highway. Nebraska cases do not present the "crazy-quilt pattern of application" found in the Kansas and California cases, since the Nebraska court has conscientiously attempted to give deference to the statute's legislative intent. The recent decision of *Hale v. Taylor*, is explicit in this regard and holds that the statute is concerned with the relationship of the occupant to his driver and not the physical location of the occupant or the vehicle at the time of the accident:

> It seems to us that a proper construction of our statute requires us to hold that even though the guest was not yet physically in the host's motor vehicle, if the acts immediately preceding or occurring at the time of the injury were incidental to the transportation, the guest statute applies and that entering a vehicle in preparation for transportation is incidental to the actual transportation.  

The Nebraska Supreme Court, therefore, unlike the earlier California and Kansas decisions, has attempted in this most recent decision to minimize any subclasses inherent in the wording of its guest statute as well as any subclasses created by judicial interpretation. By emphasizing legislative intent and the relationship between the driver and his occupant, the court has avoided the entanglements faced by other states in determining whether the guest statute is applicable to a specific set of facts.

52. NEB. REV. STAT. § 39-6,191 (Reissue 1974). For text of statute see note 3 supra.  
53. 192 Neb. at 306, 220 N.W.2d at 383. In *Hale* the court was faced with an accident on private property. Although the guest statute is contained in § 39-6,191, "Regulations Governing the Use of Public Roads," the majority opinion cites NEB. REV. STAT. § 49-802(8) (Reissue 1974) to show that "Title heads, chapter heads, section and subsection heads or title, and explanatory notes and cross-references, in the statutes, supplied in compilation, do not constitute any part of the law." Thus, the court rejected the often expressed rationale that the statute only applied to public highways because of its inclusion in a chapter devised for the regulation of public roads. An argument showing that the Nebraska guest statute does, in fact, create the private property-public property distinction can be made by applying the "general definitions" for the rules of the road found in NEB. REV. STAT. § 39-602 (Reissue 1974). It is stated by a law review writer as:

> The guest statute only applies to auto guests who are injured while riding in a "motor vehicle." Section [39-603(54)] defines a motor vehicle as any self-propelled "vehicle." A "vehicle" is defined as every device, in, upon or by which any person or property may be transported upon a "highway," and a "highway" is defined as the width between the boundary limits of every way publicly maintained when any part thereof is open to the public for purposes of vehicular travel.

54. The Nebraska judicial development of the "benefit conferred" test to determine who is a guest presents many of the same inequities imposed
In summary, these three basic classifications—automobile “guest” v. “paying” passenger, automobile guests v. other social guests, and subclasses of automobile guests—must be considered in an equal protection attack on a guest statute. Whether or not a court addresses itself to all three classifications as the California Supreme Court has done will depend upon the interpretation and application of the guest statute in the particular jurisdiction. The distinction between automobile “guests” and paying passengers is the most obvious one from the face of any guest statute, but the other two classifications are recognized to be the result of the statute’s application.

Nebraska’s guest statute and its resulting case law clearly create the classifications of automobile “guests” and “paying passengers,” but the supreme court’s position of giving great deference to the legislative intent when faced with statutory interpretation has minimized the effect of additional classifications inherent in the wording of Nebraska’s guest statute. Nebraska also does not have the same legal environment as that of California regarding the elimination of guest classifications in landowner cases which would facilitate a finding that the automobile guest versus other social guest distinction is unjust and discriminatory. Nonetheless, with the obvious discrimination that results from the automobile guest versus paying passenger classification, the Nebraska guest statute is still subject to an equal protection attack. With these classifications in mind, the investigation into constitutionality of a guest statute turns to the proper equal protection test to be applied.

THE APPROPRIATE EQUAL PROTECTION TEST

The United States Supreme Court has enunciated two approaches to be used in ascertaining whether a particular statute’s classification scheme violates the equal protection guarantee of the fourteenth amendment. If the contested classification involves a fundamental right or a suspect classification, the court applies the “strict scrutiny test” in which a heavy burden is placed upon the state to justify its classification. The traditional equal protection test on the other hand places the burden on the party op-

by subclasses created by courts of other jurisdictions. See text accompanying notes 23-36 supra.  
posing a statute to show that the classification bears no rational relation to the legislative purposes for enacting the statute.57

Courts which have considered the constitutionality of guest statutes agree that the "strict scrutiny" equal protection test is inapplicable because the classifications in question involve neither a fundamental right (such as the right to vote),58 nor a suspect classification (such as race).59 Nonetheless, courts disagree as to the proper statement of the traditional equal protection test. Most courts which have held their guest statutes to be constitutional60 have adhered to the test as set forth in Dandridge v. Williams:

In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." [Citation omitted]. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." [Citation omitted]. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." [Citation omitted].61

On the other hand, most courts which have struck down guest statutes when confronted with an equal protection attack62 have relied upon the traditional test as it is expressed in Reed v. Reed:

The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial re-

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60. Keasling v. Thompson, 217 N.W.2d at 690; Cannon v. Oviatt, ___ Utah at __, 520 P.2d at 889. The Texas court in Tisko did not specifically discuss the applicable equal protection test.
62. Brown v. Merlo, 8 Cal. 3d at 861, 506 P.2d at 216, 106 Cal. Rptr. at 392. Thompson v. Hagan, ___ Ida. at ___, 523 P.2d at 1367; Henry v. Bauder, 213 Kan. at __, 518 P.2d at 365. The North Dakota Supreme Court in Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974), considered the earlier tests developed by that court in interpreting North Dakota's equal protection clause and found that the standards used in interpreting its constitution were similar to those set forth in Reed v. Reed. Id. at 775.
lation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”

Thus, there does not appear to be a single standard for determining whether classifications imposed by guest statutes are violative of the equal protection clause. Both standards express the rule that the classification must be “reasonable,” but they differ in elucidating the criteria for “reasonable.” The Dandridge decision recognizes the practical difficulties inherent in government operations by defining the standard for allowing a statutory discrimination as “any state of facts” that “may be conceived to justify it.” In contrast to this “any conceivable state of facts” concept, the Reed decision requires that the criteria used to establish the classification be related to the objectives of the statute. Attention in Reed is focused on whether the classification aids in achieving the statute’s purpose. If the classification acts as a means to a legitimate statutory end, then the classification is upheld. If, however, the criteria for classification are “wholly unrelated to the objective of that statute,” then the classification is held to be unreasonable.

The choice as to whether Dandridge or Reed standards apply is not clearly mandated by Supreme Court decisions. However, the test selected will predetermine the result the court will reach.

Those courts which have applied the stricter Reed standard in striking down their guest statutes have analyzed the purposes for guest statutes in considering whether the classifications created do, in fact, further those purposes. The most frequently acknowledged justifications for guest statutes must, therefore, be exam-

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63. 404 U.S. 71, 75-6 (1971).
64. Nebraska’s Constitution at Sections 1 and 13 contains language which is applicable to an equal protection discussion. Section 1 enumerates the inherent and inalienable rights for the protection of which governments are instituted: “life, liberty, and the pursuit of happiness.” Of importance to protecting these rights is the assurance that a person will not lose his life or limb or be physically injured in any other way due to the negligence of another. This concept is expanded in Section 13 where there is an additional assurance that the courts will be open to “every person, for any injury done him in his... person” wherein he “shall have a remedy by due course of the law...”. The Nebraska Supreme Court declared in Rogers v. Brown, 129 Neb. 9, 12, 260 N.W.2d 794, 796 (1935), that guests injured as a result of the ordinary negligence of their drivers are not denied this “remedy by due course of law” because the legislature merely changed the degree of proof necessary to a recovery for damages rather than remove a right of recovery.
ined to determine if the resulting classifications are reasonably related to achieving such purposes.

PURPOSES FOR GUEST STATUTES

The two purposes commonly attributed to the enactment of guest statutes are the protection of hospitality and the prevention of collusive lawsuits. These purposes may have been judicially imposed on the statute, in the absence of a stated legislative purpose, to justify its classification scheme. A closer examination of these two purposes is necessary in order to determine a classification's reasonableness.

PROTECTION OF HOSPITALITY

The rationale of this purpose is that a generous "host" who furnishes his "guest" with free transportation should not be liable to his "guest" unless the injuries result from the very highest degree of negligence on the part of the host. Two reasons frequently given to support his position are: (1) one who is a recipient of his host's charity cannot expect to hold his host liable for anything less than gross negligence since the recipient or guest has not paid for the benefit which he receives (the "you get what you pay for" principle); and (2) for such a recipient of a host's charity to sue his host for injuries resulting from ordinary negligence would be the epitome of ingratitude and should be condemned by courts of justice. This justification may have had validity at the time when guest statutes were enacted, but its validity has vanished with the widespread acceptance of automobile liability insurance today.

Automobile liability insurance is so widespread now that when a negligent driver is sued, his insurance company usually represents him at trial. Any judgment that might be rendered against the driver does not come out of his pocket, but rather out of his insurance company's coffer. In fact, there has been legislative effort to make drivers responsible for injuries resulting from their negligence either personally by posting bond or


indirectly through their insurance companies. These recent decisions in which guest statutes have been declared unconstitutional recognize the pervasiveness of automobile liability insurance and declare that automobile hosts no longer need fear financial disaster if they should be sued by a guest for acts of ordinary negligence.

The key to understanding this purpose of protecting hospitality is in defining “hospitality.” Is it that characteristic which a generous host or driver possesses when he kindly offers to take a stranger or a friend with him as he ventures forth on a journey, or is it the remorse and genuine concern felt by a driver, after an accident occurs which is the result of his ordinary negligence and in which his guest is injured, when the driver learns that his liability insurance policy will not cover the cost of his friend’s suffering and medical expenses? The former view is in line with interpreting a guest to be a stranger or hitchhiker, expounded in earlier cases when automobile usage was not as great as it is today, and giving a ride to someone in need was considered to be a virtuous thing to do. Today, however, hitchhiking is discouraged, and many drivers, in light of rapidly rising crime rates, are reluctant to offer rides to strangers or persons about whom they know very little. As a result, most automobile guests are in fact family members, neighbors, good friends, and co-workers of the host. With this class of guests, drivers usually feel guilty when their negligent actions cause harm to others. Most drivers want their guests to receive compensation for their injuries and are chagrined to learn that their guest is exempt from coverage under their

68. See generally 12 COUCH ON INSURANCE § 45.658 et seq. (2d ed. 1964). NEB. REV. STAT. §§ 60-507 and 60-509 (Reissue 1974), provide that after an accident, the license of the driver and the registration of the motor vehicle are suspended, and the driver must post a bond to cover the amount of any judgment against him resulting from the accident. A driver is exempt from these conditions, though, if he has procured liability insurance in the statutorily minimum amounts.

69. The Wisconsin Supreme Court recognized this fact over ten years ago when it discarded its judicially-created guest doctrine in McConville v. State Farm Mutual Auto Ins. Co., 15 Wis. 2d 374, 383, 113 N.W.2d 14, 19 (1962):

[T]he doctrine of limited liability seems to have been developed in sympathy for the host who has extended his hospitality to another. At that time it was evidently considered unfair to impose upon the individual host the burden of the injuries to the gratuitous guest. Liability insurance is widely prevalent today. In few cases will the [elimination of the guest doctrine] shift the burden of loss from the injured guest to the negligent host personally. In the great majority of cases it will shift part or all of the burden of loss from the injured individual to the motoring public. The policy concept that it is unfair to shift the burden from the injured person to his host . . . is no longer applicable.
liability insurance policy. Is this really encouraging good social relations or protecting hospitality?

In recognition of this distinction between hitchhikers and strangers as opposed to relatives and friends, the Illinois legislature recently narrowed the scope of its guest statute so that it pertains solely to those who "solicited such ride." Relatives, friends, and neighbors riding with an automobile host in Illinois may now recover damages for injuries resulting from an accident upon a showing of the host's ordinary negligence.

The Supreme Court of Utah expressed an uncommon protection of the hospitality argument in upholding that state's guest statute in Cannon v. Oviatt. The argument is premised on the expenditure of state funds for the maintenance of state roads. The court's reasoning apparently involved a three step process: first, the guest statute relieved the driver of ordinary negligence to his passengers; second, by freeing him of this liability the driver would be more willing to allow passengers to ride with him; and third, this willingness to take on additional guests would theoretically lessen the number of vehicles on the road with the resulting advantages of less fuel consumption and decreased wear and tear on the highways. What the Utah court ignores is the deterrent effect of a guest statute on guests. A guest statute increases, rather than decreases, automobile traffic and highway use.

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71. ILL. ANN. STAT. ch. 95 1/2, § 10-201 (Smith-Hurd Cum. Supp. 1974) states:

No person riding in or upon a motor vehicle or motorcycle as a guest without payment for such ride and who has solicited such ride in violation of Subsection (a) of Section 11-1006 of this Act [Hitchhiking provision] . . . shall have a cause of action for damages against the driver or operator of such motor vehicle or motorcycle . . . for injury, death or loss, in case of accident, unless such accident has been caused by the willful and wanton misconduct of the driver or operator of such motor vehicle or motorcycle and unless such willful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

Nebraska's statute prohibiting hitchhiking has recently been repealed, L.B. 45, § 135, [1973] Laws of Neb. 64, repealing NEB. REV. STAT. § 39-1379, but this should not be viewed as a bar to narrowing the scope of Nebraska's guest statute to cover those strangers who solicit rides.

72. ___ Utah __, 520 P.2d at 883.

73. Id. at __, 520 P.2d at 88. This argument, however, is also applicable to guests who would be strangers or hitchhikers since it is likely that, had it not been for a host's generosity, the stranger would have been compelled to seek his own separate transportation. Whether the Utah court really intended to foster hitchhiking is questionable.
by encouraging guests to use their own vehicles in order to rely on their own insurance coverage.

The hospitality rationale as a basis of guest statutes is outdated. A reasonable relationship between this purpose of the statute and the discriminatory treatment provided guests is logical only if "guests" were meant to be hitchhikers and strangers. The Nebraska Supreme Court, by defining a "guest" to be one who fails to confer sufficient compensation or benefit upon his driver in payment for the ride, includes close friends and relatives within this definition. Thus, the guest statute not only fails to encourage hospitality among the parties, but may actually inhibit hospitality because of the hard feelings that could emerge between the "host" and "guest" when the "guest" is left to pay his own medical bills for injuries resulting from his host's negligence.

PREVENTION OF COLLUSIVE LAWSUITS

Probably the greatest number of attacks on guest statutes decry the lobbying influence which insurance companies have had on state legislatures. 74 Understandably, insurance companies, at the time when automobile liability insurance was an exception rather than the rule, 75 were fearful that their policy holders would perjure themselves on the negligence issue in order to enable their "guests" to collect damages. This fear was felt to be greater when the guest was a close friend of the driver's. By classifying occupants as "guests" and "paying" passengers, the guest statutes bar close friends, who fail to give adequate compensation for their ride, from any remedy whatsoever for injuries resulting from the driver's ordinary negligence.

Three arguments have been advanced for the unreasonable-ness of classifications in light of the collusion prevention purpose of the guest statute: (1) it is overbroad in that it bars legitimate lawsuits by most injured parties in attempting to prevent a few collusive lawsuits; 76 (2) other legal techniques are available to discover collusion among parties when it exists, such as cross-examination under oath, pre-trial discovery, the good sense of juries, remedies for perjury, and the fact that most insurance poli-

74. Prosser at 187 n.6:
Such [guest] statutes have been the result of persistent and effective lobbying on the part of liability insurance companies.
75. Brown v. Merlo, 8 Cal. 3d at 865 n.9, 506 P.2d at 221 n.9, 106 Cal. Rptr. at 397 n.9.
76. Id. at 874, 506 P.2d at 225-26, 106 Cal. Rptr. at 401-02.
cies provide that the company defend the insured in a lawsuit; and (3) it is unreasonable to assume that a driver and his guest who are so inclined would only be able to collude on the issue of the driver's ordinary negligence. If they were prohibited from colluding on that matter, what prohibits them from colluding on the matters of benefit to the driver or intoxication?

Given modern legal techniques for discovery and the availability of other means to detect collusion among parties to a lawsuit, collusion is hardly an accepted purpose for classifying people as those likely to collude and those unlikely to do so. The California Supreme Court in Brown v. Merlo points out the irrationality of classification for such a purpose:

Thus, not only does the guest statute eliminate the great number of valid lawsuits between relatives and close friends . . . but, in addition, the provision irrationally (1) permits negligence suits by many who have no less reason to collude than those barred from suing, and (2) eliminates causes of action of many individuals as to whom there is no reasonable likelihood of collusion.

CONCLUSION

The recognized purposes for which states enacted automobile guest statutes are obsolete. If they had validity forty years ago, that validity has vanished in the modern age of automobile travel. Almost universal liability insurance for automobile owners and operators, wider use of legal techniques to detect perjury and collusiveness, and the increasing number of automobiles per household have completely changed the complexion of the motoring public. The classifications inherent in guest statutes are unreasonable today. A number of states with guest statutes have recognized these changes in society and have acted in accordance with them by amending or revoking their statutes by legislative action or judicial opinion.

In view of possible future developments such as a continuing energy crisis that would necessitate increased carpooling and

78. 8 Cal. 3d at 877, 506 P.2d at 227, 106 Cal. Rptr. at 403.
79. The Minnesota Supreme Court, in Balts v. Balts, 273 Minn. 419, 430-31, 142 N.W.2d 66, 73 (1966) noted:
   [S]ome states have adopted guest statutes designed in part to prevent collusion, but we find nothing in the authorities to indicate that there is a danger of widespread perjury in jurisdictions such as ours, where passengers, who are usually on friendly terms with their drivers, are permitted to recover for ordinary negligence.
80. 8 Cal. 3d at 874, 506 P.2d at 229, 106 Cal. Rptr. at 402.
growing acceptance of the no-fault automobile insurance concept, Nebraska too would benefit from prompt, decisive action amending or revoking its guest statute. The legislature enacted the statute as part of its obligation to serve the citizens of the state, and the legislature should amend or revoke the statute now that the citizens are not being helped but are in fact being hindered by it in obtaining justice. If, however, the legislature does not act soon to fulfill this responsibility, then the judiciary should do so. The classifications that emerge in the case law are the product of judicial interpretation of legislative intent, and ample evidence is available showing that these classifications are arbitrary and discriminatory and not reasonably related to achieving the purposes of Section 39-6,191.

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