220 HJ COMPARATIVE NEGLIGENCE (FILE # 2)

reason that this is the only form in which it was available. The sources for other data are set out in the tables, which include some of the data from Table II.

The first impression produced by examination of the tables is that variations in level of liability insurance premiums are accompanied by changes in the cluster of variable factors which might be expected to influence the rates, but no fixed relationship between rates and any one of the factors can be observed. Thus, there is a correlation between higher insurance rates and a higher mileage death rate in only ten of the eighteen comparisons. The correlation between higher insurance rates and the statewide death rate per registered automobile is the same, with an affirmative relation existing in ten of the eighteen comparisons. On the other hand, there is a substantial correlation between the frequency of claims per insured vehicle and the level of rates, there being twelve instances in the eighteen comparisons in which a higher frequency for bodily injury claims is accompanied by higher premium rates, and eleven instances of such correlation with respect to property damage claim frequency. The total pure premium figures, which represent the average amount of losses per insured car, have the highest correlation with insurance premium levels, there being an affirmative relationship in fourteen of the eighteen comparisons. The correlation between per capita income and insurance premiums is weaker, there being an affirmative correlation in only ten of the eighteen comparisons, suggesting the possibility that the higher economic losses in states with high per capita income is partially offset by the improvement in safety conditions which a higher economic level is capable of creating. The same weak correlation exists with respect to the urban-rural population ratio but this is not so puzzling since the rates compared are for the territories "remainder of state," which generally are rural or less developed parts of the state and hence less affected by the overall degree of urbanization.

If a comparison of the rates alone is made, as presented in Table V, it will be noticed that there is an equal division of instances in which the rates applicable in states with one rule exceed the rates applicable in states with another rule. In eight instances the rate of a state with a comparative negligence rule is higher than the rate of a neighboring state with a contributory negligence rule and in eight instances the rate of the state with a comparative

TABLE V

PREMIUM RATES IN COMPARATIVE NEGLIGENCE STATES ARE:

State	Higher	Lower	State	Higher	Lower
Arkansas			*Mississippi*		
Louisiana	....	$ 9.70	Alabama	$ 1.70	....
Mississippi	....	.92	Arkansas	.92	....
Missouri	....	19.72	Louisiana	....	$8.78
Oklahoma	....	.58	Tennessee	....	.79
Tennessee	....	1.71			
			Wisconsin		
Georgia			Illinois	6.18	....
Alabama	....	.30	Iowa	12.25	....
Florida	$ 4.37	....	Michigan	3.38	....
North Carolina	6.50	....	Minnesota	3.56	....
South Carolina	2.40	....			
Tennessee	....	2.79	AVERAGE DIFFERENCE (Eliminating Arkansas-Mississippi Comparison)	5.04	5.55

negligence rule is lower.[70] The average amount of the excess in those comparisons in which the rates for comparative negligence states exceed the average rate for contributory negligence states is $5.04, which is 13.3 percent of the average rate for those twelve states with contributory negligence rules in the group compared. The average amount of the difference in those comparisons in which the rates for comparative negligence states are lower is $5.55, which is 14.6 percent of the average rate in the states with contributory negligence rules.[71] It should also be noted that four of the comparisons in which rates in comparative negligence states are higher involve Wisconsin, and that four of the comparisons in which rates of comparative negligence states are lower involve Arkansas.

This near equality of comparison of rates gives a superficial basis for a conclusion that comparative negligence has had no effect upon the insurance premium rates. However, this absolute equality of comparison in a field so small may be attributed to chance, such as peculiar and particular conditions prevailing in either Wisconsin or Arkansas, and therefore has little statistical significance. It may be noted, however, by reference to Tables IV-A,B,C, and D, that in every case in which the comparative negligence state had a higher premium rate than its neighbors, it also had a higher rate of deaths per registered vehicle, or a higher

70 The number of possible comparisons of states on this basis is smaller than was possible for other statistical measures, because Arkansas and Mississippi, which both have comparative negligence rules, have common borders, but cannot be so compared.

71 This average difference has been distorted by the great difference between the rate applicable in Arkansas and the rate applicable in Missouri.

accident rate.[72] And, two of the comparisons in which the comparative negligence state rates are substantially lower involve comparisons of Arkansas with its wealthier and more highly urbanized neighbors, Missouri and Louisiana. The other instance in which the comparative negligence state rate is substantially lower involves a comparison of Mississippi with the wealthier and more highly urbanized state of Louisiana.

The result of this rather tedious analysis of rates and other statistics is that nothing conclusive appears. While there is no preponderance of higher rates in states with comparative negligence rates, the field is not large enough to permit a statement that there is no effect. But if there is any effect, it certainly is not strong enough to be noted in the sixteen comparisons made.

The Arkansas Experience

As mentioned above, Arkansas adopted the principle of comparative negligence in June 1955. In 1957 the formulation of the principle was changed from the "pure" comparative negligence standard of 1955 to the more limited form in which recovery is allowed only where plaintiff's negligence is less than that of the defendant. Despite this change, the state has, for more than four years, been governed by a standard allowing recovery by one whose negligence was a contributing cause of his injuries. Accordingly, it furnishes working laboratory experiment on the effect of comparative negligence upon liability insurance premiums. If comparative negligence does produce increased premium rates for liability insurance one would expect the rate of increase of rates in Arkansas to be greater than that which has occurred in neighboring states.

Some obstacles exist to the making of such a comparison. Changes in insurance rates become effective in different states with varying frequencies and upon different dates. For example, the most recent of four increases in Class I-A rates for Arkansas since February 1955 became effective on December 10, 1958, whereas the most recent increase in the comparable rates in Oklahoma since November 1955 became effective in October 1957. Moreover, since the initial level of the rates differed in the two states, a dollar and cents increase comparison would be misleading

[72] Thus supporting the proposition that comparative negligence causes carelessness and increases accidents — and at the same time furnishing an example of how statistical support may be found for almost any preconceived notion.

as to the rate of increase. An adjustment may be made, however, for both these factors by converting the increase between the 1955 rate and the present rate into a percentage increase for the period, and then reducing that increase to a monthly rate of increase which is subject to comparison.

Another difficulty is caused by the number of rate territories and territorial groupings in the various states. Because each state has several territories, there are different and varying monthly rates of increase within each state. Moreover, during the four-year period territorial groupings have been broken up, and in 1959 several rate structures existed in some states for an area formerly covered by one rate structure. To some extent it appears that these new territorial groupings have been established for areas in which the greatest change in loss experience has occurred and that the highest monthly rate of change is associated with these new territories. Accordingly, care must be taken to avoid distortion from these figures.

Use of percentage increases by territorial groupings may be misleading as to the extent to which rates have increased in the state as a whole. For example, two states may each have four territorial groupings. In State *A*, the percentage increases in the four territories may have been 10%, 15%, 15%, and 20%, respectively. In State *B*, the rates of increase during the same period might have been 20%, 5%, 10%, and 10%, respectively. One who took an unweighted average of the percentage increases would conclude that there had been a greater increase in State *A* than in State *B*. However, if half of the insured vehicles in each state are located in the first territorial grouping and only one tenth of the insured vehicles are located in the fourth grouping, the increase has been greater in State *B* than in State *A*. In the absence of some statistical adjustment or weighting of averages (and there is none in the computations which follow) this possibility of inaccuracy inheres in the analysis.

The system used by the National Bureau of Casualty Underwriters divides Arkansas into four territories and three territorial groupings. Territory one consists of all Pulaski County, in which the city of Little Rock is located. Territory two covers the Fort Smith area on the border of Arkansas and Oklahoma. Territory three consists of all of certain northeastern counties bordering on Tennessee and hence close to Memphis. Territory four is the remainder of state territory. For purposes of rate structure at the

TABLE V:

AVERAGE MONTHLY PERCENTAGE INCREASE IN CLASS 1-A COMBINED BODILY INJURY AND PROPERTY DAMAGE PREMIUM RATES IN ARKANSAS AND SURROUNDING STATES, 1955-1959

Territories

State	1	2	3	4	5	6	7	8
Arkansas	.8260%	1.9782%	.8260%	....	....	....	....	.....
Missouri	1.5227	1.4318	.0000	1.2272%	1.5909%	1.5909%	2.3409%	2.38[illegible]%
Oklahoma	1.5652	.9565	1.3913	1.3913	1.3913	1.7826	....	.....
Louisiana	.3939	1.6363	—.0909	.2727	.7878	1.3030	.2142	2.5000
Mississippi	1.0540	.1351	.7027	1.3513	.7027	....	....	.....
Tennessee	.5744	.1489	.4255	.1063	.4468	.8723	.4468	.....

present time, the bureau groups territory three and territory four together. The states of Louisiana, Mississippi, Missouri, Oklahoma, and Tennessee, which surround Arkansas, now have thirty-four different territorial groupings.

A tabulation of the monthly percentage increases in the Class I-A liability insurance rates set by the bureau for each of these territorial groupings is presented in Table VI. The same data are recast in graphic form for visual presentation in Table VII. The unweighted average of the monthly percentage increase for all of the 37 territorial groupings is 1.03 percent[73] whereas the monthly percentage increase in two of the Arkansas territorial groupings was .83 percent and for the other, the Fort Smith territory, the monthly percentage increase was 1.98 percent. The median of the monthly percentage increases, which is less affected by the extremely high percentage increases applicable to certain new territorial groupings,[74] is .96 percent.

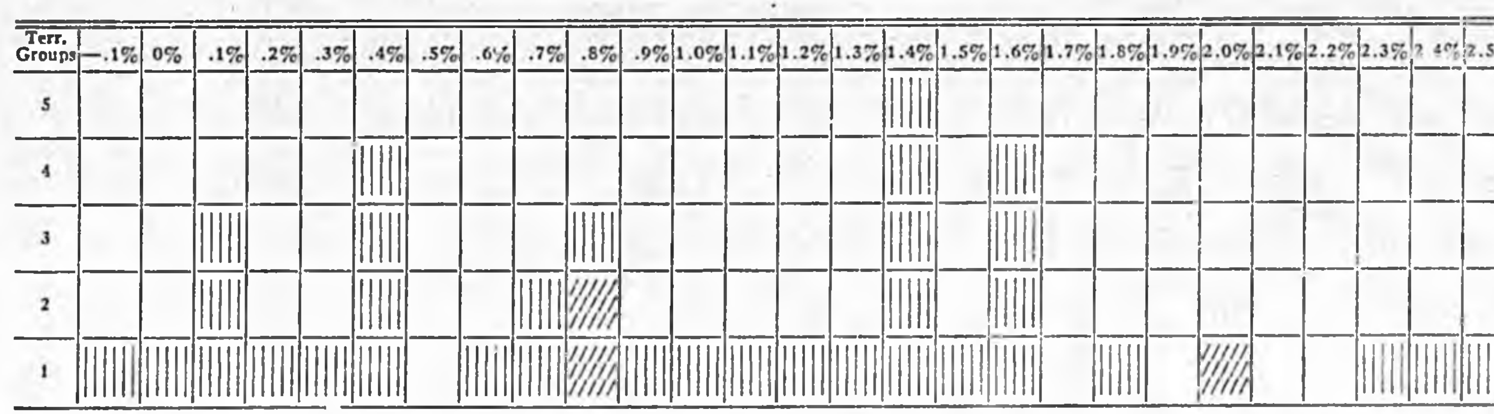
Certainly in these statistics there rests no proof that comparative negligence results in higher liability insurance premium rates. Two of the territorial groupings, which cover most of the states and most of the insured vehicles in Arkansas, have a rate of increase below both the average and the median of the rate of increase which occurred in the other territorial groupings. One, the Fort Smith territory, located on the Oklahoma boundary, is very substantially above both the average and the median. For present purposes this is illuminating, since the residents of Fort Smith probably do a substantial amount of driving in Oklahoma and accordingly have accidents where the contributory negli-

73 If the percentage increases in the seven territorial groupings in Texas are utilized in making the comparisons the unweighted average monthly percentage increase becomes instead .91%.

74 If the percentage increases in the seven territorial groupings in Texas are utilized in making the comparisons the median increase drops to .79%.

TABLE VII

AVERAGE MONTHLY INCREASE IN CLASS 1-A COMBINED BODILY INJURY AND PROPERTY DAMAGE PREMIUM RATES FOR ARKANSAS AND SURROUNDING STATES DURING 1955-1959



Note. Average monthly increases for Arkansas territorial groupings are indicated by diagonal lines.

gence rule still prevails. Presence of this bar to recovery, which would be recognized in Arkansas under the usual rule applicable to such a conflict of laws situation,[75] would be expected to mitigate the increases in rates attributable to the change in Arkansas law if the legal effect given contributory negligence is a significant factor in this respect. Instead, the substantial increase in the Fort Smith rates appears to be caused by setting the dollar amount of those rates on a par with the other territorial groupings.

Of course, these statistics do not prove that comparative negligence does not affect the level of liability insurance premium rates.[76] Without enactment of the comparative negligence statutes Arkansas might have had a lower rate of increase, comparable, for example, with that of Tennessee. However, it is possible to say once again that if comparative negligence does affect insurance rates, its effect is not great enough to be observable in the complex of forces acting on the rate level. It is not, for example, anywhere near as strong as whatever peculiar local developments led to very high increase rates in new territorial groupings in Louisiana and Missouri.

Geographical Distribution of Rate Territories

Under the usual conflicts rule the law of the place of the tort determines the applicability of the defense of contributory negligence.[77] According to available statistics nonresident drivers are involved in a substantial number of accidents.[78] If the presence

75 Powell Bros. Truck Lines v. Barnett, 194 Ark. 769, 109 S.W. (2d) 673 (1937); Missouri P. R. Co. v. Miller, 184 Ark. 61, 41 S.W. (2d) 971 (1931); St. Louis-S.F. R. Co. v. Rogers, 172 Ark. 508, 290 S.W. 74 (1927); St. Louis, I.M. and S. R. Co. v. McNamare, 91 Ark. 515, 122 S.W. 102 (1909); LEFLAR, CONFLICT OF LAWS 222 (1959).

76 Cf. Professor Rosenberg's findings that the Arkansas statute did alter the value of personal injury claims for the purposes of settlement, and increased the proportion of verdicts won by plaintiffs, though it did not increase the size of verdicts. Rosenberg, "Comparative Negligence in Arkansas: A 'Before and After' Survey," 13 ARK. L. REV. 89 at 103-105 (1959).

77 CONFLICT OF LAWS RESTATEMENT §385 (1934). The usual conflict rule is applied in *Arkansas,* cases cited note 75 supra. *Georgia,* Craven v. Brighton Mills, 87 Ga. App. 126, 73 S.E. (2d) 248 (1952), and *Mississippi,* Tri-State Transit Co. v. Mondy, 194 Miss. 714, 12 S. (2d) 920 (1943); and apparently would be applied in *Wisconsin.* See Haumschild v. Continental Cas. Co., 7 Wis. (2d) 130, 95 N.W. (2d) 814 (1959). But cf. Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939) (overruled on another issue in Haumschild v. Continental Cas. Co., supra).

78 During 1956, 16% of all fatal accidents and 9% of all accidents involved drivers who were not residents of the state in which the accident occurred. During the same year, 35% of all fatal accidents and 27% of all accidents involved drivers residing more than 25 miles from the place of the accident. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS—1957, 53.

or absence of a complete defense in contributory negligence is a substantial factor in producing higher liability insurance rates one would hypothesize that residents living near the borders of states with comparative negligence rules would have a loss experience different from those living in the center of the state. Thus, drivers in states with comparative negligence who live near the borders of those states would have lower rates than otherwise comparable drivers in the center of those states. Likewise, drivers in neighboring states with contributory negligence rules who live near the border of a state with comparative negligence would have higher rates than otherwise comparable drivers living at a distance from that border.

The rate data of the National Bureau of Casualty Underwriters unfortunately does not make it possible to make a general test of this hypothesis. There is no general delineation of rate territorial boundaries in either category of states which indicates concern on the part of insurance actuaries for the probability of travel in neighboring states. Of course, this indicates more than lack of actuarial concern with comparative negligence; it indicates lack of concern with all difference in rules of law and, indeed, a lack of concern for a state-by-state consideration of the many other variables affecting insurance rates. It is also a reminder that the actuarial process by which rates are established is not so precise and delicate as to reflect separately the influences of the many factors thought to affect rate structures. Indeed, the insurance principle, requiring a sharing of generalized risks, precludes an overly refined system which would subject small groups or individuals to paying the costs of their particular experience.

There do exist, however, a few instances in which territorial boundaries have been drawn so as to make it possible to test this hypothesis. As previously mentioned, the Fort Smith territory in Arkansas is located on the border of Oklahoma. The bureau's class I-A liability rates for that territory were raised in 1956 to the same level as those for all other territories in Arkansas. Thus, proximity to Oklahoma and resultant driving under its laws have not been reflected in reduced rates for this border city.

Certain cities in Georgia, with comparable populations[70] each of which constitutes a separate territory for the purposes of ac-

[70] In 1950 the population of the cities was as follows: Augusta — 71,508; Columbus — 79,611; Macon — 70,252. THE WORLD ALMANAC 1958, 273.

cumulation of loss experience, provide another opportunity for a test. Augusta, Georgia is located on the border of South Carolina. Columbus, Georgia is located on the border of Alabama. Macon, Georgia is located in the middle of the state. Contrary to the hypothesis all three cities have the same bureau class I-A liability rates. In neighboring Alabama, the bureau has established the same rate for Montgomery, located in the center of the state, as that applicable to somewhat larger Mobile, which is approximately 20 miles from the Mississippi border. Six counties in a territory of South Carolina are located on the border of Georgia. yet they have the same rates as the remainder of the state. One bureau territory in Mississippi consists of a long narrow string of counties running the length of the Mississippi River, and hence a territorial grouping on the boundary with Arkansas and Louisiana. It has the same rate structure as another territory which covers most of the state.

In northern Wisconsin, LaCrosse, located on the border of Minnesota, is classified with and has the same rates as the more centrally located cities of Fond Du Lac, Green Bay, Madison, Oshkosh and Sheboygan. Beloit, located on the Illinois border, is classified with the more centrally located cities of Appleton, Chippewa Falls, Eau Claire, Waukesha, and Wausau. On the other hand, the northern counties of Wisconsin which border on the Upper Peninsula of Michigan have the lowest Class I-A rates in the state, suggesting that here the contributory negligence rule of Michigan has had an effect. This conclusion is dispelled when one notes that the counties of the Upper Peninsula of Michigan bordering on Wisconsin also have the lowest rates in Michigan, suggesting that level of the rates in comparison with the other portions of both states is caused more by similar economic, climatic, and social conditions than by differences in the treatment accorded contributory negligence. However, some factor dependent upon state boundaries, whether it is the regulation of the insurance industry, the Wisconsin joinder rule[80] or some

80 The Wisconsin courts will not permit direct action against an insurance company on a policy with a "no action" clause (i.e., no action may be maintained against the insurance company until liability of the insured has been established by judgment) valid in the state in which it was issued. Ritterbusch v. Sexmith, 256 Wis. 507, 41 N.W. (2d) 611 (1950). See MacDonald, "Direct Action Against Liability Insurance Companies," 1957 WIS. L. REV. 612 at 616-617. Accordingly, even in an action brought in Wisconsin the insurer of a Michigan resident could not be joined as a party defendant if the policy contained such a clause, which is apparently valid in Michigan, but subject to waiver. Cf. Kipkey v. Casualty Assn. of America, 255 Mich. 408, 238 N.W. 239 (1931); Barney v. Preferred Automobile Ins. Exchange, 240 Mich. 199, 215 N.W. 372 (1927). On the other

other legal factor is apparent in the difference between the $27 rate charged for the basic Class I-A coverage in the Michigan counties and the $40 rate charged in neighboring Wisconsin counties.

Once again analysis of the data does not permit an affirmative statement that comparative negligence does or does not affect liability insurance rate levels. This indefiniteness of the data might be due to the fact that the proportion of accidents involving nonresident drivers, though ranging from 9 to 16 percent on a statewide basis and undoubtedly higher near state boundaries,[81] is not sufficient to make the effect of comparative negligence apparent in loss experience. The general lack of concern of the actuaries for proximity to state borders is consistent with this conclusion. However, while the possibility remains of an undetected effect of comparative negligence on the level of rates, this analysis of geographical distribution of territories indicates that its possible force is not sufficient to be observable.

Miscellaneous Indicators

Another indication of lack of concern on the part of insurance actuaries for the differences between comparative negligence and contributory negligence rules may be found in the practice used to determine the premium rate charged for coverage in excess of the basic limits of $5,000 per person and $10,000 per accident for bodily injury coverage and $5,000 for property damage. It is sometimes argued that comparative negligence would encourage the filing of nuisance claims and would result in award of reduced damages to plaintiffs totally at fault out of sympathy for their handicapped condition.[82] Accordingly, one would expect the losses within the basic limits to be higher in states with comparative negligence rules than it is in states following the rule that contributory negligence is a complete bar to re-

hand, it is clear that the insurance company could not be sued in a direct action in Michigan, Lieberthal v. Glens Falls Indemnity Company, 316 Mich. 37, 24 N.W. (2d) 547 (1946). Accordingly, the difference in the results due to the rules relating to joinder might be apparent in the rates, despite a substantial amount of travel across the border by residents of both states.

[81] Note 78 supra.

[82] E.g., Benson, "Comparative Negligence — Boon or Bane," 26 INS. COUNSEL J. 204 at 207 (1956); Gilmore, "Comparative Negligence from a Viewpoint of Casualty Insurance," 10 ARK. L. REV. 82 at 83 (1955); Lipscomb, "Comparative Negligence," 1951 INS. L.J. 667; Powell, "Contributory Negligence: A Necessary Check on the American Jury," 43 A.B.A.J. 1005 at 1007 (1957).

covery. Since the increase in premiums for extended coverage is computed as a percentage of the basic $5,000/$10,000 coverage policy, one would expect different percentage factors to be used in states with comparative negligence rules. However, the same factors are used for all states to determine the premiums for increased limits, with the exception of Louisiana and Oklahoma where somewhat higher factors are applicable.[83]

Another indication that comparative negligence has not affected the proportionate distribution of small and large claims may be found in the statistics of average claim costs presented in Tables II and III, where no marked correlation between comparative negligence and ranking in size of average claim appears. On the other hand, reference to Table IV-A, B, C, and D will disclose that in only five comparisons between comparative negligence states and contributory negligence states did a higher proportion of the residents of states with contributory negligence rules carry insurance with higher coverage limits than the residents of comparative negligence states. Or to put in the other way, in eleven comparisons, a higher proportion of residents in comparative negligence states carried insurance with higher coverage limits than did residents in neighboring states with contributory negligence. From this one might conclude that the residents of comparative negligence states have been made more protection minded, but their concern does not appear to be with the smaller claims which comparative negligence is said to promote.

CONCLUSION

Certainly this analysis of insurance data and other statistical information has produced no definite or precise measure of the effect of comparative negligence on automobile liability insurance. The effect of some factors, such as safety conditions or the death rate and the urban-rural population ratio can be detected. Generally speaking, however, it must be said that no effect from comparative negligence appears in the data. Teachers of tort law who each year must instruct their first-year classes on the effect of contributory negligence upon recoveries—and their classes consist of college-educated students who certainly possess a sophistication much above that of the general public—may find nothing surprising in the indications that comparative negligence has no effect upon the claims consciousness of the general

83 Letter from the National Bureau of Casualty Underwriters, November 5, 1958.

public. A total lack of effect would be consistent with the view that despite the legal bar of contributory negligence, comparative negligence is in fact practiced in all states, by insurance adjusters,[84] defense and plaintiffs' attorneys, juries,[85] and even judges.[86] If this is true, one would expect no effect on the general level of rates. Instead, in only a limited number of cases, in which juries literally applied the contributory negligence bar or dealt freely with one totally at fault in producing his injuries, would a different result occur with a different rule of law. The choice then between the two rules would not be one involving a question of

84 One manual for casualty insurance adjusters contains the following advice:

"Since our first and most important defense is that of contributory negligence, I think that this is the proper time to warn the new claims man that although he must know the law as related to his work, he must be just as careful to avoid giving it too much weight when it comes to settling claims. Take the law seriously, but don't become wedded to it. As the new man gains in experience, he will learn much to his chagrin that some juries do not give proper consideration to theoretically valid defenses.

". . . Theoretically, the percentage of negligence with which the plaintiff can be charged is immaterial in defeating his right of action, in cases where this defense is proper. In other words, according to the law, even if his own contributory negligence was only 10 per cent of all the negligence in the accident, this would be sufficient to bar his recovery. In practice, however, the theory is rarely applied so stringently." MAGARICK, SUCCESSFUL HANDLING OF CASUALTY CLAIMS 17-18 (1955). See also id. at 271-272; GORTON, AUTOMOBILE CLAIM PRACTICE 92, 145 (1940). But cf. id. at 158-159.

85 Benson, "Comparative Negligence — Boon or Bane," 26 INS. COUNSEL J. 204 at 205, 211 (1956); Bress, "Comparative Negligence: Let Us Hearken to the Call of Progress," 43 A.B.A.J. 127 at 128 (1957); Harkavey, "Comparative Negligence — The Reflections of a Skeptic," 43 A.B.A.J. 1115 at 1116-1117 (1957); Powell, "Contributory Negligence, A Necessary Check on the American Jury," 43 A.B.A.J. 1005 at 1006 (1957); Tooze, "Contributary vs. Comparative Negligence — A Judge Expresses His Views," 12 NACCA L.J. 211 at 212 (1953); ULMAN, A JUDGE TAKES THE STAND 31-32 (1936).

86 For an example of judicial approval, or at least condonation, of compromise verdicts limiting the damages awarded a plaintiff whose contributory negligence was believed by the jury to be a cause of his injuries, even though the legal rule would require a complete bar, see Karcesky v. Laria, 382 Pa. 227 at 234, 114 A. (2d) 150 (1955). The court there said, "The doctrine of comparative negligence, or degrees of negligence, is not recognized by the Courts of Pennsylvania, but as a practical matter they are frequently taken into consideration by a jury. The net result, as every trial judge knows, is that in a large majority of negligence cases where the evidence of negligence is not clear, or where the question of contributory negligence is not free from doubt, the jury brings in a compromise verdict.

". . . In the instant case twelve reasonable men could have serious doubt as to whether Laria was negligent; and if Laria was negligent, whether the accident was caused by his negligence or by the contributory negligence of the plaintiffs or partly by the negligence of each of them. Under such circumstances, a jury usually does what this jury did, namely render a compromise verdict which is much smaller in amount than they would have awarded (a) if defendant's negligence was clear, and (b) if they were convinced that plaintiffs were free from contributory negligence.

"Where the evidence of negligence or contributory negligence, or both is conflicting or not free from doubt, a trial judge has the power to uphold the time-honored right of a jury to render a compromise verdict, and to sustain a verdict which is substantial — a capricious verdict or one against the weight of the evidence or against the law, can and should always be corrected by the Court."

substantially higher insurance rates for everyone, but a question of the justness of results in a limited number of cases.

It is possible that comparative negligence has an effect upon insurance rates, but that that effect cannot be detected with the data on hand and the techniques used. Even if this is true, however, some measure of its force has been obtained. Adoption of a comparative negligence rule, as shown by the Arkansas experience, would not have a catastrophic result upon the insurance rate structure of any state. Indeed, it would not have as much effect as rapid growth of population, increased urbanization, or change to a traffic program with the effective safety record of a neighboring state. Its effect, if any, would probably go undetected in the rates and statistics of the insurance industry.

WASHINGTON LAW REVIEW

Volume 46, Number 2, 1971

NEGLIGENCE AND LIABILITY WITHOUT FAULT IN TORT LAW

Cornelius J. Peck*

It is frequently assumed that with a few exceptions the principles of negligence comprise the field of tort law, and that fault is the most common basis for determining liability for harmful conduct. The space devoted in most law school torts casebooks suggests to students and future lawyers that negligence is the dominant principle of tort law.[1] The emphasis given the subject by teachers, stimulated by the intellectual challenges of defining proximate cause or establishing standards of care, further impresses the importance of negligence principles upon each class of law students. Moreover, most of the tort cases litigated are in fact decided pursuant to principles of negligence, largely because of the litigation-spawning capacity of automobile accidents.[2] Though these are changing times, the concept persists that what now exists has always been. However, a survey of tort law produces a somewhat different view, and discloses a surprising number of instances in which liability is imposed without fault.

The conclusion reached by most scholars is that until the 19th century a person whose actions caused harm to another was in most situations held responsible for that harm simply because he had acted.

* Professor of Law, University of Washington; B.S., Harvard, 1944; Certificate, Harvard Business School, 1945; LL.B., 1949. This article first appeared in U.S. Dept. Transp., The Origin and Development of The Negligence Action—Automobile Insurance and Compensation Study (1970), and is reprinted in substantially the same form.

1. Prosser devotes in excess of 500 of 1150 pages in his casebook to negligence concepts, W. Prosser & Y. Smith, Cases and Materials on Torts (4th ed. 1967); W. Seavey, P. Keeton & R. Keeton, Cases on Torts (2d ed. 1964) devotes about 450 of its 1043 pages to negligence principles; and C. Gregory & H. Kalven, Cases and Materials on Torts (1959) likewise gave about 450 of 1299 pages to negligence concepts.

2. 2 F. Harper & F. James, The Law of Torts § 11.3, Supplement to Volume 2, Comments to 11.3 n.1, to 11.3 n.8 (1956); O'Connell, *Taming The Automobile*, 58 Nw. L. Rev. 299, at 303-04 (1963).

Holdsworth tells us that this was the case both with respect to early Anglo-Saxon law[3] and the Mediaeval Common Law.[4] Wigmore earlier summarized the primitive German doctrine that "The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer . . . ."[5] This absolute responsibility, without regard to blame, persisted until the early 1500's, when the primitive notion was abandoned in favor of permitting a defendant to exempt himself from liability by showing that he was without blame even though he had acted voluntarily.[6] Street agreed that for several hundred years the conception of negligence was unknown to the law of trespass; a defendant was liable if it was shown that damage had been done by the direct or immediate application of force, without regard to whether or not he was negligent.[7] Justice Holmes was persuaded that policy and consistency required rejection of the rule of strict liability, but recognized that the theory enjoyed the support of some lawyers of his time, and that the common law probably followed such a rule during what he called a period of dry precedent.[8] Scholars today agree that a rule of strict liability prevailed at the early stages of development of the common law, usually rendering an actor liable if he in fact caused injury to another.[9]

Escape from the rule of strict liability evolved and developed slowly, in typical common law fashion. There are a number of detailed accounts of this development.[10] Prominent among the early decisions is *The Case of Thorns*,[11] in which an action for trespass to real property was brought against a defendant who had cut a hedge of thorns, some of which fell upon plaintiff's land. While holding for the plaintiff, one of

3. 2 W. Holdsworth, A History of English Law 51 (3d ed. 1923).
4. 3 *id.* at 375-82.
5. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 317 (1894).
6. Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441, at 442-44 (1894).
7. T. Street, Foundations of Legal Liability 74-78 (1906).
8. O. Holmes, The Common Law 89 (1881).
9. 2 F. Harper & F. James, The Law of Torts § 12.2 (1956); W. Prosser, The Law of Torts 144 (3d ed. 1964); J. Fleming, The Law of Torts 107, 290 (3d ed. 1965).
10. Winfield, *The Myth of Absolute Liability*, 42 Law Q. Rev. 37 (1926); Winfield, *The History of Negligence in the Law of Torts*, 42 Law Q. Rev. 184 (1926); Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441 (1894); O. Holmes, The Common Law 85-88 (1881).
11. 1466 Y.B. 6 Ed. 4, f.7a pl. 18.

the judges noted that the defendant had failed to allege that he could not have acted in any other way, or that he had done all in his power to keep the thorns from falling on plaintiff's land. This observation suggests that establishing such facts might have constituted a valid defense. One hundred and fifty years later a similar suggestion was made in a case holding liable a soldier whose gun accidentally discharged and injured the plaintiff.[12] But the examples given—"as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt"—indicate that liability would have been imposed upon an actor guilty of much less than what is today required to establish negligence.

And so things continued until the 19th century, with liability in trespass being imposed upon actors who had caused harm in a series of cases suggesting that inevitability of the accident and lack of any fault upon the part of the defendant would have constituted justification and a defense against liability.[13] Finally, three American courts, relying in large part upon dicta from earlier cases, announced the proposition that liability could not be imposed unless the actor were guilty of some fault or neglect.[14] Of the three, the decision of the Supreme Court of Massachusetts in *Brown v. Kendall*[15] became the most famous, and is now considered the leading case establishing the necessity of proving negligence in order to impose liability for accidental injury. Perhaps the decision has gained that position because of the esteem enjoyed by its author, Chief Justice Lemuel Shaw; more likely, its prominence derives from the fact that it clearly imposed the burden of proving negligence upon the plaintiff rather than leaving the absence of negligence something to be proved by the defendant, as the other two decisions suggested.[16] Several years later, in England, comprehensive

12. Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616).
13. See the cases set out in the Appendix to Wigmore, *Responsibility for Tortious Acts: Its History—III*, 7 Harv. L. Rev. 441, at 456-63 (1894). *See also*, O. Holmes, The Common Law 85-88 (1881).
14. Vincent v. Stinehour, 7 Vt. 62 (1835); Harvey v. Dunlop, 39 N.Y.C.L.R. 193 (1843); Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).
15. 60 Mass. (6 Cush.) 292 (1850).
16. In Vincent v. Stinehour, 7 Vt. 62, 65-66 (1835) the court said: "To prevent any

reviews of precedent led to a clear statement that, where an act causing harm is neither intentional nor negligent, there will be no recovery, even though trespass would have been the right form of action if one had been maintainable.[17] But even as late as 1959 an English trial court was called upon to determine that a complaint did not state a cause of action where it alleged an injury caused by the defendant without specifying that the harm was either intentionally or negligently inflicted.[18]

As early as the 14th century, however, liability for causing harm could be established in an action of trespass on the case by showing that the conduct of the defendant was negligent. This action was devised in order to provide a remedy for harm caused by misfeasance in the performance of an obligation which had been undertaken.[19] In time, trespass on the case came to lie for the doing of any unlawful act, provided the damage sustained was "consequential" rather than "immediate."[20] At that time it was fatal error to proceed by case if the harm had been immediately caused by the defendant;[21] however, shortly before the American courts developed the modern negligence principle, an English court decided that a plaintiff might make negligence the ground of an action on the case even where the injury had been "immediately" caused by a negligent act.[22] In effect, one could waive the trespass and sue for negligence. The effect of the mid-19th century American decisions was to merge the substantive law of trespass and case, and to impose upon plaintiffs who relied upon trespass

abuse of this protection [against liability for harm involuntarily occasioned], a person is accounted negligent or careless, and blame is imputed to him, if he does not use an extraordinary degree of circumspection and prudence, greater than is commonly practiced, and if he might have prevented the accident." In Harvey v. Dunlop, 39 N.Y.C.L.R. 193, 195 (1843), the plaintiff had argued that the onus lay on the defendant to show that the injury had not been done wrongfully or carelessly. The highest New York court agreed, but concluded that the jury might have reached such a determination on the evidence.

17. Holmes v. Mather, [1875] L.R. 10 Ex. 261; Stanley v. Powell, [1891] 1 Q.B. 86.

18. Fowler v. Lanning, [1959] 1 All. E.R. 290 (Q.B.). Probably plaintiff's counsel was attempting to put on the defense the burden of showing freedom from fault.

19. 3 W. Holdsworth, A History of English Law 429-34 (3d ed. 1923).

20. Blackstone, J., in Scott v. Shepherd, 1773. 3 Wils. 403, 95 Eng. Reprint 1124; 1 J. Chitty, Pleadings 148 (16 Am. Ed. 1883).

21. Day v. Elwards, 5 T.R. 648, 101 Eng. Rep. 361 (K.B. 1794).

22. Williams v. Holland, 131 Eng. Rep. 848 (C.P. 1833).

theory the same burden which they formerly would have had to carry in an action on the case.[23]

Why the change took place must, of course, remain a matter of speculation. It has been suggested that Chief Justice Shaw may have been motivated by a desire to make the risk-creating enterprises of a developing industrial economy less vulnerable to liability than they had been under the earlier common law.[24] This suggestion has been countered with the observation that *Brown v. Kendall*, which Shaw used as the vehicle for changing the law, involved not industry but instead the actions of private persons engaged in separating two fighting dogs.[25] It seems unlikely that Chief Justice Shaw shrewdly selected the case in order to disguise the ends to be served by changing the law; but it seems equally unlikely that he could have written the decision without considering what the contemporary conditions of society suggested as appropriate standards for allocating responsibility for unintentionally caused harms.

Indeed, the common law trespass rule was probably well suited to the conditions which prevailed during its evolution. Most energy sources at that time were either human or familiar domestic animals; the implements used in labor and recreation were relatively uncomplicated devices operating on elementary mechanical principles. One who directly or immediately harmed another by his active conduct probably had departed from community standards of behavior much in the same way that one who is negligent today departs from the standard of the reasonably prudent man. Proof of "immediate" causation was then a satisfactory standard for allocating responsibility for harm. It did not have a disruptive effect upon society, and did not deter or misdirect otherwise desirable economic activity.

The development of industry and transportation using steam and other sources of power, and the development of new products and devices, changed the situation. One need only read a description of the operation of steam locomotives prior to adoption of the air brake to

23. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359, 366 (1951).
24. *Id.* at 368.
25. Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade In A Tory Vein*, 50 Cornell L.Q. 191, 205 (1965).

realize what costs might have been imposed upon railroads if liability for harm were to be determined by the common law trespass rule:[26]

> Down to the year 1868 the brake system remained very much as it was in 1830 when railways were first adapted to commercial operation. Even though detailed improvements covering structural items had been incorporated, the essential principles were the same. Those in charge of the locomotive had no direct control over the brake manipulation of the vehicles comprising the train. Communications between engineman on the locomotive who senses the danger and the brakeman in the cars who drew up the cables was effected by whistle signals in case of sudden emergency. The first action was to signal danger and to this signal the train crew was instructed to respond with celerity. Each operation required time and every second of time represented many feet of space.

Moreover, about the only safety measures which the railroads could use at crossings were warning signals by whistle and bell.[27] As one commentator colorfully put it some time ago:[28]

> Early railway trains, in particular, were notable neither for speed nor safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law.

Predictably, the reaction of the law was not strict condemnation of this activity which offered escape from the slow, uncomfortable and jolting transport by stage over mud-filled roads,[29] and which promised development of the nation's rich resources deposited over thousands of miles of virgin territory. The negligence standard provided a legal environment in which rail transportation could grow and prosper. It aided other branches of industry and commerce as well.

The judicial response to the question of the liability of one who causes harm by handling a new and relatively unknown material suggests a similar adaptation of law. *The Nitroglycerine Case* involved an explosion which occurred soon after "a gentlemen by the name of Noble" [sic] suggested that nitroglycerine might be used for blasting

26. SILCOX, SAFETY IN EARLY AMERICAN RAILWAY OPERATIONS: 1853-1871 (1936), quoted in Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 at 161 (1946) [hereinafter cited Malone].
27. *Id.*
28. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184, 195 (1926).
29. *See* Malone, *supra* note 26, at 153-54.

purposes.[30] Employees of the defendant express company had undertaken with hammer and chisel to open a case, from which some unidentified "sweet oil" was leaking. The explosion which followed did severe damage to the building in which the express office was located. The defendants were not held liable for the harm done, even though it resulted "immediately" from the actions of the employees. Chief Justice Shaw's opinion in *Brown v. Kendall* provided the basis for holding that the directness or remoteness of the consequences of the defendants' act related only to the proper form of action, and not to the basis of liability. Negligence was the standard by which liability was to be determined. Coupled with the then prevailing notion that a manufacturer was not liable absent privity of contract,[31] the decision significantly aided preparation of the legal environment for an economy which would be producing and using new and unfamiliar products whose composition or principles of operation were not generally known.

The restructuring of the legal environment for the industrial age was not accomplished solely through reformulation of the rule concerning liability for trespass. As Professor Malone has effectively demonstrated,[32] the concept of contributory negligence as a bar to recovery rose to prominence in response to the need for a legal system compatible with the demands of a growing industrial economy. The unimpressive opinions in *Butterfield v. Forrestor*,[33] uniformly recognized as the fountainhead of contributory negligence theory, could hardly have prompted such widespread proliferation of the doctrine had it not been the case that some additional bar to recovery was considered necessary and appropriate to the times. The entire population stood to benefit from the workings of an industrial economy, and society could not afford to burden itself with compensating those individuals who were so unfortunate as to be injured accidentally by an instrument of progress.[34]

Thus it appears that a significant change in tort law was made by abandonment of the strict liability rule of common law trespass, and substitution of the principles of negligence law in cases involving un-

30. 82 U.S. (15 Wall.) 524, 529 (1872).
31. Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).
32. Malone, *supra* note 26.
33. 11 East 59, 103 Eng. Rep. 926 (K.B. 1809).
34. *See* L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE 33-34 (1958).

intended consequences. That this change took place within the last one hundred and fifty years is in itself evidence that strict liability is not a principle alien to Anglo-American tort law. Perhaps even more persuasive evidence is the fact that strict liability is applied as the principle for determining responsibility for much harmful conduct within the area of tort law. Strong eddies and cross-currents developed in response to the changes in liability for unintended consequences, and, to extend the metaphor, it seems possible that the tide has begun to turn.

An example of strict liability derived from the early common law, but still of vitality, is the rule imposing liability upon one who intentionally enters onto land in the possession of another, even though under a reasonable mistake.[35] Of course, a distinction exists between consequences which are intended, though brought about by mistake, and consequences which are unintended. But the significant point is that liability may be imposed for trespass even though a reasonable man might have made the same mistake. Moreover, the liability of a trespasser extends to all harm which he in fact causes to the land, the possessor, or members of the possessor's household, without regard to whether the trespasser acted in a way which was intentionally wrongful, reckless, or negligent.[36] Perhaps the preservation of this rule of strict liability can be attributed to our unexamined retention of the early common law zeal for protecting interests in land; or perhaps no social purpose equivalent to that of freeing industry from judicial restraints has been advanced on behalf of trespassers to real property. The consequence is, at any rate, that one may be held liable for harm caused without fault other than entry based upon a reasonable mistake.[37]

35. 1 RESTATEMENT (SECOND) OF TORTS § 164 (1965); J. FLEMING, THE LAW OF TORTS 77-80 (3d ed. 1965); 1 F. HARPER & F. JAMES, THE LAW OF TORTS 12-13 (1956); W. PROSSER, THE LAW OF TORTS 74 (3d ed. 1964).

36. 1 RESTATEMENT (SECOND) OF TORTS § 162 (1965); J. FLEMING, THE LAW OF TORTS 38 (3d ed. 1965); 1 F. HARPER & F. JAMES, THE LAW OF TORTS 29 (1956); W. PROSSER, THE LAW OF TORTS 67 (3d ed. 1964).

37. Illustration 2 to § 162 of 1 RESTATEMENT (SECOND) OF TORTS is as follows:

2. A is driving his car along the highway in a neighborhood with which he is unfamiliar. He asks B to direct him to a certain town. B tells him that he can take a short cut through a private road over which the public is not accustomed to travel, which B asserts to be upon his own land but which, in fact, is on the land of C. While driving carefully along the road, A runs over D, C's three-year-old child, who suddenly dashes out from the bushes which border the road. A is

Strict liability is still imp
necessary lateral or subjac
another thereby causing sub
the land and for any dam
thereon.[38] In fact, Tentative
Torts Second recently propo
of land by imposing strict lia
sons otherwise privileged to
or other substances from ur
by the subsidence of land w
the weight of buildings upo
gence,[40] but the total pictur
vators to strict liability. Aga
be an unexamined retention
interests in land, but the r
unintended consequences cau
the actor.

The early common law a
done by trespassing animal
avoided by surrender of the
personal to the possessor of
a rule of strict liability comp
applicability of this strict l
States was a matter of some
nation, but today, even in ju
jected, it has since found lo
fencing statutes.[42] Once aga
seems to have turned upon h
needs of the community, rath
as to whether the possessor
fault.

subject to liability to D and to C
38. 4 RESTATEMENT OF TORTS §§
OF TORTS § 1.27 (1956).
39. RESTATEMENT (SECOND) OF T
40. 4 RESTATEMENT OF TORTS §§
41. O. HOLMES, THE COMMON
Tortious Acts: Its History, 7 HARV.
42. *See* 1 F. HARPER & F. JAMES,

Strict liability is still imposed upon one who removes the naturally necessary lateral or subjacent support of land in the possession of another thereby causing subsidence of the land, both for damages to the land and for any damage to buildings or artificial conditions thereon.[38] In fact, Tentative Draft Number 15 of the *Restatement of Torts Second* recently proposed to increase this protection for support of land by imposing strict liability for subsidence of land caused by persons otherwise privileged to withdraw subterranean water, oil, minerals, or other substances from under the land.[39] Liability for harm caused by the subsidence of land which would not have taken place but for the weight of buildings upon it is determined by principles of negligence,[40] but the total picture is one of broad exposure of land excavators to strict liability. Again, the reason for the strict liability may be an unexamined retention of the common law's zealous protection of interests in land, but the result is that one may be held liable for unintended consequences caused without fault other than that of being the actor.

The early common law also recognized a strict liability for harm done by trespassing animals, although liability apparently could be avoided by surrender of the animals.[41] In time, this liability became personal to the possessor of the animals, and thus became more nearly a rule of strict liability comparable to those discussed previously. The applicability of this strict liability rule to conditions in the United States was a matter of some doubt during the formative stages of this nation, but today, even in jurisdictions in which it was judicially rejected, it has since found legislative acceptance in various forms of fencing statutes.[42] Once again, the appropriateness of strict liability seems to have turned upon how well the particular rule has suited the needs of the community, rather than upon any philosophical conclusion as to whether the possessor of an animal, for example, was guilty of fault.

subject to liability t[illegible] and to C.

38. 4 RESTATEMENT [illegible] TORTS §§ 817, 820 (1939); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.27 (195[illegible]

39. RESTATEMENT ([illegible]OND) OF TORTS §§ 818 (Tent. Draft No. 15, 1969).

40. 4 RESTATEMENT OF TORTS §§ 819, 821 (1939).

41. O. HOLMES, THE COMMON LAW 1520-23 (1881). Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 325 *et seq.* (1894).

42. *See* 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 14.9 (1956).

There are other rules derived from early common law precedents which also may appropriately be considered rules of strict liability within the body of tort law. For example, a bona fide purchaser of stolen property is strictly liable to the true owner for its value, regardless of the care and prudence he may have exercised in ascertaining the title of the vendor.[43] This liability is imposed without regard for the relative fault of the owner in exposing the goods to the possibility of conversion.[44] Another rule of law holds a bailee liable for misdelivery of property, regardless of his good faith or his freedom from negligence.[45] Moreover, in order to avoid an otherwise insurmountable obstacle to recovery, the usual rule is that a bailor may establish a prima facie case simply by proving that he delivered the property, and that the bailee either failed to return it, or returned it in damaged condition.[46] The same reasoning underlay the common law rule, now embodied in the Interstate Commerce Act, making a carrier liable for damage to goods transported unless it can show that the damage was caused solely by an act of God, the public enemy, the shipper himself, a public authority, or by the inherent nature of the goods.[47] The consequence is that a carrier may be held liable even though it was guilty of no negligence. Except where modified by statute, a similar strict liability has been imposed upon hotels and innkeepers for the loss or destruction of the goods of guests.[48] It might be objected that these are rules of property law rather than tort law; but such an argument smacks too much of the fine analysis formerly applied in determining the correct form of action for obtaining redress for harmful conduct.

If instead one may avoid that perspective of the law, it seems quite certain that the strict liability effect of the *respondeat superior* doctrine is one of the most important principles of liability for tortious conduct. Early commentators described it as such,[49] and the fact that the doctrine

43. R. Brown, The Law of Personal Property 231 (2d ed. 1955) [hereinafter cited as Brown]; *See* Uniform Commercial Code § 2-403.
44. Brown, *supra* note 43, at 241-42. Restatement (Second) of Torts § 234 (1965).
45. Brown, *supra* note 43, at 351; 1 F. Harper & F. James, The Law of Torts 156 (1956); W. Prosser, The Law of Torts 88 (3d ed. 1964).
46. Brown, *supra* note 43, at 359-75; Restatement (*Second*) of Torts § 328A, comment *b* (1965).
47. Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134 (1964).
48. Brown, *supra* note 43, at 481-87. Innkeepers are afforded a greater opportunity than carriers to escape liability by showing freedom from negligence.
49. Wigmore, *Responsibility for Tortious Acts: Its History—II*, 7 Harv. L. Rev. 383 (1894); 1 W. Blackstone, Commentaries 429-32 (17th ed. 1830).

seems to fit more neatly into the law of agency is no reason for de-emphasizing its operative effects in the law of torts. The liability of an employer for the tortious conduct of his employee is a strict liability imposed without regard to the fault of the employer. It makes no difference how careful the employer is in recruiting his workers, how carefully he trains them, or how carefully he supervises their activities. If an employee commits a tort in the course of his employment, his employer is liable.

Another rule of liability without fault which is frequently considered an element of agency law, but which is also clearly a principle for determining liability for tortious conduct, is that imposing liability for harm done by carefully selected independent contractors performing non-delegable duties.[50] This liability is not simply a development of the strict liability imposed for engaging in abnormally hazardous activities, for it extends to activities which are not so classified.[51] Other principles of vicarious liability, such as the family car doctrine,[52] may likewise be considered to permit the imposition of liability for tortious conduct without proof of fault. While it is true that in many of these situations, someone has been at fault in bringing about the harm suffered, for present purposes the significant point is that liability may be imposed on one who was without fault.

The employment relationship offers other illustrations of liability without fault. For example, the obligation imposed in admiralty upon an employer of seamen, to furnish maintenance and cure for seamen who fall sick or are injured in the service of the vessel, is a strict liability imposed without regard to the fault of the employer.[53] Far from meeting disapproval in modern times, this principle has been codified by the Jones Act,[54] which broadens the rights of seamen. Moreover, the enactment of workmen's compensation acts throughout the United States reflects the conclusion that imposition of strict liabil-

50. *See* RESTATEMENT (SECOND) OF TORTS §§ 416-27B (1965).
51. *See* RESTATEMENT (SECOND) OF TORTS § 417 (1965) (Work done in a public place) § 418 (Maintenance of Public Highways) §§ 419, 421 (Repairs which a lessor is under a duty to his lessee to make) § 422 (Work on buildings and other structures on land) § 425 (Repair of a chattel supplied or land held open to the public as a place of business).
52. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 1419-24 (1956).
53. *See* Calmar Steamship Corp. v. Taylor, 303 U.S. 525 (1938); The Osceola, 189 U.S. 158 (1903).
54. 46 U.S.C. 688 (1964).

ity upon employers is an appropriate way to deal with industrial accidents.[55]

Defamation is, of course, an intentional tort insofar as it requires an intention to publish the defamatory statement, but it is often illustrative of liability without fault. Except for constitutionally protected statements concerning public officials, public figures, and matters of public interest,[56] liability may be imposed because a statement, innocent on its face, was rendered defamatory by facts not known to the defendant nor discoverable by him in the exercise of reasonable care.[57] Liability may likewise be imposed even though the defendant did not intend to defame the plaintiff, and had no reason to know that his statement would be defamatory.[58] In short, one who publishes a defamatory statement will be held liable to one injured without regard to whether the publication could be said to be the product of fault.

An innocent misrepresentation made by a party to a business transaction may also give rise to liability irrespective of the good faith or reasonable belief of the defendant.[59] Prosser lists eighteen jurisdictions which have adopted this rule of strict liability, and suggests that in other jurisdictions such a rule is in fact applied, although disguised in the more traditional language of fraud through the use of presumptions or fictions concerning the defendant's state of mind.[60] The rule may also have been made effective with respect to the sale of securities by Section 17(a) of the Securities Act of 1933, and Rule 10b-5 of the

55. 2 F. HARPER & F. JAMES, THE LAW OF TORTS 730-33 (1956); W. PROSSER, THE LAW OF TORTS 554-58 (3d ed. 1964).

56. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Time, Inc. v. Hill, 385 U.S. 374 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

57. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 5.5 (1956); W. PROSSER, THE LAW OF TORTS 791-92 (3d ed. 1964). A leading example is a Scottish case, Morrison v. Ritchie & Co., 39 Scot. L.R. 432 (1902), in which the defendant published as a routine social item a false report that plaintiff had become the mother of twins. Plaintiff had been married only a few weeks, but this was unknown to defendant. Defendant was held liable. Care or the lack of it went only to affect damages.

58. F. HARPER & F. JAMES, *supra* note 57, at § 5.7 (1956); W. PROSSER, THE LAW OF TORTS 791 (3d ed. 1964). A leading example is the case of Jones v. E. Hulton & Co., [1909] 2 K.B. 444, *aff'd* [1910] A.C. 20, in which defendant published what it intended to be a fictitious account of immoral behavior of one Artemus Jones on the beach at Dieppe. A real Artemus Jones was held entitled to recover despite defendant's lack of intent to defame any living person.

59. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 7.7 (1956).

60. W. PROSSER, THE LAW OF TORTS 724-29 (3d ed. 1964).

Securities Exchange Commission's Regulations pursuant to the Securities Act of 1934.[61]

One of the more spectacular changes in tort law in recent years has been the adoption of a rule imposing strict liability upon sellers of defective products for the harm caused by the defect. Soon after the leading decision of the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors*,[62] this rule of strict liability was adopted in many other jurisdictions.[63] So swift was this change to the rule of strict liability that the reporter and council for the *Restatement (Second) of Torts* urged abandonment of a section approved in 1962 limiting such strict liability to products designed for intimate bodily use, and adoption of a broader version applicable to all products so that the *Restatement (Second) of Torts* would not be out of date when published.[64] The broader version later obtained the approval of the Institute, and now appears as Section 402A of the *Restatement (Second) of Torts*. This strict liability has been further extended to defects in housing produced by a mass developer of housing,[65] to the lessor of a rental truck,[66] and to the manufacturer of a demonstrator model for injuries received before purchase.[67] This general and rapid acceptance of strict liability reflects a judicial consensus that the rule is more appropriate to the present day economy than was the old rule, which imposed a burden upon the injured party to prove negligence on the part of the manufacturer or seller of the product.

There remains to be noted the strict liability imposed upon those who engage in extra-hazardous or abnormally dangerous activities. This is probably the type of strict liability which most readily comes to mind when the subject of strict liability is mentioned, perhaps be-

61. *See* Meisenholder, *Scienter and Reliance as Elements in Buyer's Suit Against Seller Under Rule 10b-5*, 4 Corp. Prac. Comm. 27 (1963).
62. 32 N.J. 358, 161 A.2d 69 (1960).
63. *E.g.*, Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 377 P.2d 897 (1962); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81 (1963); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967); Ulmer v. Ford Motor Co., 75 Wn. 2d 522, 452 P.2d 729 (1969). *See* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966).
64. Restatement (Second) of Torts § 402A (Tent. Draft No. 10, 1964).
65. Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965).
66. Cintrone v. Hertz Truck Leasing and Rental Service, 45 N.J. 434, 212 A.2d 769 (1965).
67. Delaney v. Towmotor Corp., 339 F.2d 4 (2d Cir., 1964).

cause several generations of lawyers have now been exposed to torts courses in which this type of liability was discussed as a contrast to basic negligence principles. Traditional discussion of the subject begins with analysis of the decision in *Rylands v. Fletcher*,[68] even though the opinions in that case reveal that the judges had no intention of changing the law or providing remedies beyond those which had existed for centuries under English law. In any event, the principle of liability without fault applied in that case had a ready adaptability to cases involving harm caused by the powerful devices and products of an industrial age. Although a number of courts have avoided specific application of *Rylands v. Fletcher* to problems of this sort, in fact a principle of strict liability for extra-hazardous activities has become accepted doctrine in American law.[69] The original *Restatement of Torts* incorporated the principle of strict liability for what were called "ultrahazardous activities."[70] With a change of terminology to "abnormally dangerous activities"[71] and recognition that the liability should attach even though the activity might be perfectly safe if the utmost care were used,[72] this principle will be carried into the *Restatement (Second) of Torts*, where it will be extended even further to cover harm caused to property or persons on the ground by the ascent, descent or flight of any aircraft.[73]

In a number of respects, even liability imposed on a negligence basis is in fact a liability without fault. The standard of the reasonably prudent man is an objective standard which ignores many considerations which would be involved in determining whether there was moral or ethical fault on the part of the actor.[74] Deviations from that standard are made at the peril of the actor, as are the deviations from community standards which take place when one engages in abnormally dangerous activities. Certainly there is no moral fault on the part of a man who for more than 30 years has driven carefully and without accident, but

68. 3 Hurl. & C (Ex. 1865); [1866] L.R. 1 Ex. 265; [1868] L.R. 3 H.L. 330.
69. 2 F. Harper & F. James, The Law of Torts § 14.4 (1956); W. Prosser, The Law of Torts 523-32 (3d ed. 1964).
70. 3 Restatement of Torts §§ 519-24 (1938).
71. Restatement (Second) of Torts § 519 (Tent. Draft No. 10, 1964).
72. *Id.* at § 520.
73. *Compare* Restatement (Second) of Torts § 520A (Tent. Draft No. 12, 1966) *with* § 520A (Tent. Draft No. 11, 1965) and § 520A (Tent. Draft No. 10, 1964).
74. *See* Seavey, *Negligence, Subjective or Objective*, 41 Harv. L. Rev. 1 (1927).

who, distracted by concern for the health of his hospitalized wife, drives through a stop sign and collides with a person who had the right of way. Yet such a man would be deemed negligent because, considering only certain aspects of his conduct, he created unusual and unreasonable risks. Even insane persons are liable for negligently inflicted harm and their conduct is judged by the standard of the reasonably prudent man, although it is beyond their power to meet that standard.[75]

At times, allocation of the burden of proof in negligence cases may also impose liability upon one whose fault has not in fact been established. Thus the established principle that an unexcused violation of a criminal statute constitutes negligence per se places the burden of establishing excuse or justification on the defendant, with liability following if such is not established.[76] Even when the violation of the statute can never be excused—as with the Federal Safety Appliance Act,[77] for example—liability may be imposed although a total evaluation of the cirucumstances would lead to the conclusion that there was no fault. In some jurisdictions, the effect of *res ipsa loquitur* is to create a presumption of negligence which stands unless rebutted,[78] and hence supports liability where in fact there was no fault. Where the more usual version of the doctrine is followed, and *res ipsa loquitur* simply creates a permissible inference of negligence,[79] there is still the possibility that a jury will draw that inference where in fact there was no negligence.

CONCLUSION

This review of the field of tort law indicates that if regard is given to the various types of problems encountered, rather than the number of cases pending on court dockets, strict liability is applied more often than negligence as the principle which determines liability. It is neither a mere vestige of primitive law, as indicated by its recent judicial

75. RESTATEMENT (SECOND) OF TORTS § 283B (1965).
76. F. HARPER & F. JAMES, THE LAW OF TORTS § 17.6, at 1010-11 (1956); W. PROSSER, THE LAW OF TORTS § 35, at p. 202 (3d ed. 1964).
77. O'Donnell v. Elgin J. & E.R.R., 338 U.S. 384 (1949), *rehearing denied* 338 U.S. 945 (1950).
78. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 19.11 (1956); W. PROSSER, THE LAW OF TORTS, 232-39 (3d ed. 1964).
79. *See* authorities in note 78, *supra.*

and legislative applications, nor a new and untried development. It is a principle with adaptability to serve the needs of society in a variety of situations. Apparently no set formula can be derived as to when strict liability constitutes the appropriate principle of liability, but some observations may be made about certain common features of the situations in which strict liability is applied.

One of these common features is that the person harmed would encounter a difficult problem of proof if some other standard of liability were applied. For example, the disasters caused by those who engage in abnormally dangerous or extra-hazardous activities frequently destroy all evidence of what in fact occurred, other than that the activity was being carried on. Certainly this is true with explosions of dynamite, large quantities of gasoline, or other explosives. It frequently is the case with falling aircraft. Tracing the course followed by gases or other poisons used by exterminators may be difficult if not impossible. The explosion of an atomic reactor may leave little evidence of the circumstances which caused it. Moreover, application of such a standard of liability to activities which are not matters of common experience[80] is well-adapted to a jury's limited ability to judge whether proper precautions were observed with such activities.

Problems of proof which might otherwise have been faced by shippers, bailors, or guests at hotels and inns certainly played a significant role in shaping the strict liabilities of carriers, bailees, and innkeepers. Problems of proof in suits against manufacturers for harm done by defective products became more severe as the composition and design of products and the techniques of manufacture became less and less matters of common experience; this was certainly a factor bringing about adoption of a strict liability standard.[81] Superior knowledge and difficulties of proof are frequently mentioned as justifications for application of the *res ipsa loquitur* doctrine.

Another common feature of situations in which strict liability is imposed is that the conduct giving rise to liability is not one which it would be socially desirable to prohibit or enjoin, so that the giving of a remedy to a plaintiff threatened with harm must be delayed until

80. *See* Restatement of Torts § 520 (1939).
81. *See e.g.*, Traynor, J., concurring in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944).

harm has actually occurred. T
dangerous activities, the keep
lateral or subjacent support fo
views which may be defamator

Another very important com
a compensatory function in
through the use of insurance
sponsible person. Certainly th
respondeat superior principle,
vicarious liabilities. It is also tr
liability of one engaging in ab
generally true of common carrie
or guests), as well as those who
remove lateral or subjacent supp
liability in these situations is us
activities on to those who enjoy

A number of the situations in w
a type of conduct which can b
ensure that application of a stri
miscarriages of justice in a subs
parent with respect to those who e
ities, manufacturers, persons who
the keepers of domestic animals,
fide purchasers of stolen property,
and persons violating statutes.

If the activity involved is one
precision, that definition may serv
costs of the activity may be allo
cision. Precise definition of an acc
actuarial techniques for accumula
the activity appropriate for service

Of course, not all activities to whi
apply are now governed by a rule
Automobile accident claims settlem
ample of an area to which the pr
applied with benefit, but in which n

The problems of proof involved

harm has actually occurred. This is certainly the case with abnormally dangerous activities, the keeping of domestic animals, the removal of lateral or subjacent support for land, the publication of statements or views which may be defamatory, and the flight of aircraft over land.

Another very important common feature is that strict liability serves a compensatory function in situations where the defendant is, or through the use of insurance may become, the financially more responsible person. Certainly this underlies the strict liability of the *respondeat superior* principle, the family car doctrine, and other vicarious liabilities. It is also true of a manufacturer's liability and the liability of one engaging in abnormally dangerous activities, and is generally true of common carriers and innkeepers (rather than shippers or guests), as well as those who engage in excavating activities which remove lateral or subjacent support. The consequence of imposing such liability in these situations is usually to pass the cost of the beneficial activities on to those who enjoy its benefits.

A number of the situations in which strict liability is imposed involve a type of conduct which can be defined with sufficient precision to ensure that application of a strict liability principle will not produce miscarriages of justice in a substantial number of cases. This is apparent with respect to those who engage in abnormally dangerous activities, manufacturers, persons who remove lateral or subjacent support, the keepers of domestic animals, shippers, bailees, innkeepers, bona fide purchasers of stolen property, publishers of defamatory statements, and persons violating statutes.

If the activity involved is one which can be defined with sufficient precision, that definition may serve as an accounting unit to which the costs of the activity may be allocated with some certainty and precision. Precise definition of an accounting unit makes it possible to use actuarial techniques for accumulating loss experience, thus rendering the activity appropriate for service by insurance institutions.

Of course, not all activities to which these general observations might apply are now governed by a rule imposing strict liability for harm. Automobile accident claims settlement and litigation is a prime example of an area to which the principle of strict liability might be applied with benefit, but in which negligence standards still prevail.

The problems of proof involved in automobile accident litigation under a negligence standard are so great that it is only blind optimism in a large number of cases to hope that what in fact occurred will become known. Modern highway traffic situations may attach critical significance to such factors as lines and markers painted on a road surface, relative positions of rapidly moving vehicles, presence and color of steady or flashing lights, and very short time intervals. On-the-scene observations are ordinarily made by untrained persons, who were not prepared for the event which transpired. The event may have been so shocking that it had effects upon both their psyche and memory. Moreover, the determination is not based upon what these untrained persons in fact observed, but instead turns upon what they remember of what they observed perhaps two or three years earlier. Even these memories do not control the final judicial decision, because that depends upon what jurors can remember perhaps two or three days after having heard the poorly remembered and conflicting accounts of witnesses, who may have been neither articulate nor precise in their use of language. As with a number of other situations in which strict liability provides an appropriate rule, one may be able to say confidently only that the parties were engaged in a particular activity—*i.e.*, the use of motor vehicles.

Given the values of our society, high speed traffic is a necessity of the day. It cannot be prohibited, and those threatened by it must await harmful injury before seeking a remedy. The owner of an automobile has by its acquisition demonstrated a financial capacity making it possible for him at least to purchase insurance to absorb any loss caused by its operation. So much of our affluence is devoted to automobiles, there is little doubt that, taken as a whole, the activity can afford to bear all the costs of harm which are factually connected with it. If insurance is made compulsory its cost becomes a cost of transportation, and thus is passed on to those who benefit from the use of automobile transportation. The activity involved—the use of motor vehicles—is one which can be defined with sufficient precision to ensure that strict liability will not be imposed unjustly in any significant number of cases. Finally, it is an activity for which there is a wealth of statistical data, making it possible to use the actuarial techniques which facilitate the use of insurance.

It should be no surprise, then, that in recent years a number of proposals have been made to deal with the problem of distributing

the costs of automobile accid
This is not the proper occasi
plans, or to determine whether
strict liability without regard
dent insurance. But it may b
the foreseeable future, some
out fault will substantially r
in automobile accident claim
occurs, the principles of negli
tion they now occupy in tort
accidents.

82. R. KEETON & J. O'CONNELL, B
L. GREEN, TRAFFIC VICTIMS: TORT LA
Financial Impact of Automobile Acci
ZWEIG, FULL AID INSURANCE FOR TH
these and other proposals, see R. Ke
contrary view, see W. BLUM & H. K
LAW SUBJECT (1965), first published i

the costs of automobile accidents upon some basis other than fault.[82] This is not the proper occasion to review or evaluate these various plans, or to determine whether the optimal scheme would be to impose strict liability without regard to fault or to utilize some type of accident insurance. But it may be said with a certain confidence that, in the foreseeable future, some principle or principles of liability without fault will substantially replace the principles of negligence law in automobile accident claims settlement and litigation. When this occurs, the principles of negligence will have lost the dominant position they now occupy in tort law due to the frequency of automobile accidents.

82. R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim (1965); L. Green, Traffic Victims: Tort Law and Insurance (1958); Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. Pa. L. Rev. 913 (1962); A. Ehrenzweig, Full Aid Insurance for the Traffic Victim (1954). For a description of these and other proposals, see R. Keeton and J. O'Connell, *supra*, at 124-219. For a contrary view, see W. Blum & H. Kalven, Public Law Perspectives on a Private Law Subject (1965), first published in 31 U. Chi. L. Rev. 641 (1964).

UCLA Law Review
Vol 21, No. 6
August, 1974

JUDICIAL ACTIVISM IN TORT REFORM: THE GUEST STATUTE EXEMPLAR AND A PROPOSAL FOR COMPARATIVE NEGLIGENCE

Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.[1]

I. Introduction

The California Supreme Court in its comprehensive efforts to reform tort law has fulfilled Justice Traynor's challenge: tort law has been shaped and reshaped by the hammer blows of an activist court. The result is a system of law guided by the modern policy goal of increasing the incidence of compensation for accidental injury by placing tort liability on the party who is best able to spread the risk of loss.

Though judicial activism is generally regarded by traditional legal process scholars as undesirable, in tort law, it appears to be an appropriate fulfillment of the historical function of the common law—to meld the precedents of the past to the needs and concerns of the present. The California Supreme Court has most forcefully demonstrated the strength of its resolve to reform tort law and its willingness to employ activist judicial standards to accomplish the reform in the case of *Brown v. Merlo*[2] which found the California automobile guest statute[3] to be unconstitutional. *Brown* illustrates the vitality of the court's resolve to reform and gives evidence of the overriding importance of judicial policy goals in tort law. Given the magnitude of the resolve so strongly shown in *Brown*, this Comment proposes that the California Supreme Court pursue its course one further step by implementing comparative negligence.

One of the primary obstacles to a judicial implementation of

---

1 Justice Roger Traynor, *Law and Social Change in a Democratic Society*, U. Ill. L.F. 230, 232 (1956).

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

3 The basic premise of a guest statute is that the driver of a vehicle owes no duty of ordinary care to one who rides with him gratuitously. 2 F. Harper & F. James, The Law of Torts § 16.15, at 950-51 n.4 (1956); *Id.* at 48-49 (Supp. 1968). W. Prosser, Handbook of The Law of Torts § 60, at 382-85 (4th ed. 1971).

comparative negligence has been the doctrine of judicial restraint which would severely restrict the judicial law-making capacity. *Brown* manifests a high level of judicial activism. Judicial implementation of comparative negligence would not reach even this level in that it involves modification of a common law formulation.

Brown v. Merlo is an important exemplar of appropriate judicial activism in tort law and warrants careful analysis. The California guest statute denied recovery for unaggravated driver negligence to any person injured who "as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride."[4] The plaintiff in *Brown* challenged the statute as a denial of equal protection because a "paying" passenger would have been entitled to recover on the negligence issue alone.[5] The court agreed. In a thorough and carefully structured opinion written by Justice Tobriner, the court found the guest statute violative of the equal protection guarantees of the California Constitution[6] and the Fourteenth Amendment of the United States Constitution.

Several aspects of the decision illustrate the activist stance taken in *Brown*. First, the court applied a somewhat redefined standard of equal protection—a standard requiring a "realistic," rather than merely a "legitimate," state purpose which is *substantially*, rather than merely rationally, supported by the classifica-

---

[4] The California guest statute was passed in 1929. Ch. 787, § 141.75, [1929] Cal. Stats. 1580, reenacted, ch. 3, § 17158, [1959] Cal. Stats. 1655. The aggravated negligence portions of the statute provided there would be no recovery "unless the plaintiff . . . establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver." *Id.*

[5] In October 1967, the plaintiff, Brown, was a passenger in Merlo's jeep in Butte County. Unexpectedly the jeep left the road, crossing the center divider and crashing into an embankment. Brown, seriously injured in the mishap, attempted to recover damages from Merlo charging both simple negligence and willful misconduct. The plaintiff did not attempt to exempt himself from the provisions of the guest statute, though as the *Brown* court noted, it was a usual practice for a guest plaintiff to claim he or she was within one of the statutory exceptions. The jury heard the willful misconduct issue and decided in favor of the defendant; plaintiff did not appeal on that cause of action. The case came to the Supreme Court on an appeal from a summary judgment for the defendant on the negligence issue.

For critical and sometimes amusing histories of the applications of the California guest statute, see Lascher, *Hard Laws Make Bad Cases—Lots of Them (The California Guest Statute)*, 9 SANTA CLARA LAW. 1 (1968); Comment, *Judicial Nullification of Guest Statutes*, 41 S. CAL. L. REV. 884 (1968).

[6] The equal protection guarantees of the California Constitution appear in Article 1, sections 11 & 21: "All laws of a general nature shall have a uniform operation"; and "[no] citizen, or class of citizens [shall] be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

tion system set up by the legislature.[7] In contrast to its approach in earlier equal protection cases,[8] the court in *Brown* refused to attribute to the legislature a "theoretically 'conceivable,' but totally unrealistic, state purpose that might support this classification scheme . . . ."[9] Thus the California Supreme Court, perhaps following the lead of the United States Supreme Court in recent equal protection cases,[10] adopted a more activist equal protection standard of review than had been traditionally followed in cases not involving suspect categories of classification or deprivations of fundamental interests.[11]

Second, the court in Brown overtly measured the rationality of both the purpose of the statute and the effectiveness of its classification system against *common law* judgments made by the court in recent tort cases. In *Brown*, common law standards of rationality were made determinative of constitutional rationality; the guest statute fell because it was directed toward a purpose and utilized a classification scheme considered and rejected by the courts in analogous cases.[12] Thus, the court made

---

[7] 8 Cal. 3d at 865 & n.7, 506 P.2d at 219 & n.7, 106 Cal. Rptr. at 395 & n.7.

[8] In previous equal protection cases the California Supreme Court has closely adhered to the "dual level test" in reviewing legislative classifications. Justice Sullivan utilized the two level analysis in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) and *In re* Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970). *See also* Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969). In economic areas the court has exercised restraint, "investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear *some rational relationship to a conceivable legitimate state purpose*." Westbrook v. Mihaly, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970) (emphasis added).

Earlier cases using traditional equal protection review emphasized the wide discretion given the legislature in making classifications. *See, e.g.*, Subsequent Injuries Fund v. Industrial Accident Comm'n, 48 Cal. 2d 365, 310 P.2d 7 (1957); Sacramento Municipal Util. Dist. v. Pacific Gas & Elec. Co., 20 Cal. 2d 684, 693, 128 P.2d 529, 535 (1942). These cases were quoted approvingly in Board of Admin. v. Ames, 215 Cal. App. 2d 215, 29 Cal. Rptr. 917 (1st Dist. 1963), where a more beneficial retirement plan for legislators and judges was sustained against an equal protection attack.

For recent changes in equal protection standards compare Justice Sullivan's opinions in Serrano v. Priest, *supra* and In re Antazo, *supra* with Swoap v. Superior Ct. of Sacramento County, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973).

[9] 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

[10] *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther] and cases cited therein.

[11] *See generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969) [hereinafter cited as *Developments*]. For recent developments see Gunther, *supra* note 10; Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter cited as Tribe].

[12] *See* notes 63-96 & accompanying text *infra*.

a two-step attack upon the statute. First, in requiring a "substantial relationship in fact,"[13] the court opened to judicial review the legislative judgment underlying the guest-passenger classification; second, the court measured the rationality of the legislative judgment by its own judgments in analogous common law tort cases. Applying this standard of review, the court concluded there was no rational relationship under the traditional equal protection test, and therefore the guest statute was unconstitutional.

The court in *Brown* thus appears to have undertaken a sweeping redefinition of equal protection doctrine and appears to have countenanced anathema—the superiority of judicial policy judgments over those of the legislature. However, it is further apparent that those characteristics of the decision are misleading. *Brown* is *not* good constitutional law; it is, however, sound tort policy. Indeed the case is best understood as an instance of judicial activism in the service of the substantive reform of tort law.

This Comment will delineate the level of judicial activism in *Brown* through careful analysis of the court's use of equal protection. It will then explain that the activism is both well-tempered and especially appropriate as a means of reform of tort law. Finally it will discuss how the judicial implementation of comparative negligence would further the principles of tort reform implicit in *Brown* and would require even less activism than the court manifested in *Brown*.

II. Equal Protection

A. *Equal Protection Standards*

To appreciate fully the activism implicit in the equal protection analysis in *Brown v. Merlo*, it is useful to review the standards ordinarily employed in equal protection cases.[14] In general, the demand for equal protection has always been assumed to accommodate the need of a state to classify its citizens for various legitimate legislative and administrative purposes. It is difficult to conceive of legislation which is functional and which does not in some way classify persons differently. Thus, equal protection

---

[13] This term is taken from Comment, *Fundamental Personal Rights: Another Approach to Equal Protection*, 40 U. CHI. L. REV. 807, 817 (1973) [hereinafter cited as *Fundamental Personal Rights*], although it has been used in some lower court opinions as well. *See, e.g.*, Boraas v Village of Belle Terre, 476 F.2d 806, 814 (2d Cir. 1973), *rev'd*, 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974); Aguayo v. Richardson, 473 F.2d 1090, 1109 (2d Cir. 1973).

[14] *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); *Developments*, *supra* note 11.

traditionally has been said to demand only that a classification system encompass "all [and only those] persons who are similarly situated with respect to the [legitimate] purpose of the law."[15] Justice Tobriner stated in *Brown v. Merlo*: "The primary concern of the 'equal protection' guarantee of our state and federal Constitutions, however, is that 'persons similarly situated with respect to the legimitate purpose of the law receive like treatment' . . . ."[16] However, this apparently simple formula requires complex judgments about the legislature's purposes, the legitimacy of those purposes, and the required degree of relevance between the classification and the purposes, since virtually no classification could meet perfectly the general test of "all and only those."[17] With respect to the relationship between the challenged classification and the (assumed) legislative purpose, the classification system at a minimum must "be reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[18]

Two completely disparate standards of review for equal protection challenges have been delineated, one of general application and the other of special application to cases involving suspect classifications or touching fundamental interests.[19] In general, the standards differ in both the degree of relevance required between the challenged classification and the statutory purpose and the substantiality of the interest allegedly furthered by the classification.[20]

1. Rational Relationship Test[21]

This test has been described as "restrained review"[22] and as involving "minimal judicial scrutiny."[23] Equal protection re-

---

[15] Tussman & tenBroek, *supra* note 14, at 346.

[16] 8 Cal. 3d at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403, *citing* Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969); Reed v. Reed, 404 U.S. 71, 75-76 (1971).

[17] *Developments*, *supra* note 11, at 1076-77.

[18] F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[19] The two level structure, particularly as it emerged in the Warren Court, is thoroughly delineated in *Developments*, *supra* note 11.

[20] Although Justice Harlan, dissenting in Katzenbach v. Morgan, 384 U.S. 641, 660-61 (1966), denied the existence of a dual level test for equal protection, most equal protection scholars are in agreement that such a standard exists. *See, e.g.*, Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966); Gunther, *supra* note 10, at 8-9; *Developments*, *supra* note 11, at 1120-23.

[21] The textual description of the "rational relationship" test is the traditional version, pre-1969 or so.

[22] *Developments*, *supra* note 11, at 1077.

[23] *Fundamental Personal Rights*, *supra* note 13, at 808.

view under this test has been in reality no review at all, as an almost irrebuttable presumption of constitutionality foils those challenges to legislative classifications.[24] This presumption of constitutionality has led many courts to defer to the legislature by hypothesizing some conceivable permissible legislative purpose which is supported by the challenged classification.[25] The effective level of judicial scrutiny under the traditional rational relationship test is so minimal and extends so much deference to the legislature that, as one commentator concluded, "[it] has therefore almost always resulted in a finding of constitutionality."[26]

2. Strict Scrutiny

This most demanding equal protection standard of review has been applied to two types of classifications—those based on

---

[24] The case of *McGowan v. Maryland*, 366 U.S. 420 (1961), provides illustration. *McGowan* sustained a Sunday closing law, banning the sale of all goods, but excepting "tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases, drugs and medicines, and newspapers and periodicals" against an equal protection attack. *Id.* at 422-23. The Court extended great leeway to the legislature: "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 425-26. In *McGowan* the Court was willing to "strain" to find a reasonable rationale, concluding the legislature might reasonably have determined that the exemption was conducive to the safety and well-being of the populace. *Id.* at 426.

Simliar latitude has been extended to legislatures making very subtle distinctions in classifications. In Railway Express Agency v. New York, 336 U.S. 106 (1949), a law which prohibited all commercial advertisements on trucks except those by the owners of the trucks themselves was justified on safety grounds: "The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use." *Id.* at 110.

[25] Several commentators have observed that the selection of a purpose as the support for a challenged classification is often a mere tautology since the purpose is inferred from the classification itself: that is, the purpose is suggested by the plain terms of the statute. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). The student commentator in Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972) questioned why a single purpose is necessary rather than an overall legislative purpose of "partial achievement of several sub-purposes." *Id.* at 127.

For illustration of the "conceivable" purposes the Court has relied upon to sustain legislation, see Justice Frankfurter's opinions in Goesaert v. Cleary, 335 U.S. 464 (1948) (statute denying bartending licenses to women unless related to barowner upheld on the conceivable purpose of avoiding social and moral problems involved in having women in bars); Kotch v. Board of River Port Pilots Comm'rs, 330 U.S. 552 (1947) (nepotism statute involving river pilots upheld as conceivably a safety measure).

[26] *Fundamental Personal Rights*, *supra* note 13, at 808. Professor Gunther, considering the years prior to 1970, *e.g.*, found the correlation between the rational relationship test and a finding of constitutionality to be "virtually

suspect classifications[27] and those infringing fundamental interests.[28] This strict scrutiny standard results in a dramatic contraction of the latitude permitted legislatures in classifying their

---

perfect." Gunther, *supra* note 10, at 19. *See also* Tribe, *supra* note 11, at 118 n.9. Recent cases, however, have struck down legislation, purportedly using the traditional rational relationship test. *See* Gunther, *supra* note 10, at 18-20; cases cited notes 13 *supra* & 74 *infra*.

[27] The suspect classification doctrine was originally developed and applied in the area of classifications based on race. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (overturning a state antimiscegenation law); McLaughlin v. Florida, 379 U.S. 184 (1964) (striking down a law against interracial cohabitation). Classifications based on national ancestry (Korematsu v. United States, 323 U.S. 214 (1944)) and alienage (Graham v. Richardson, 403 U.S. 365 (1971)) have also been treated as resting on suspect criteria. But with respect to alienage, Sugarman v. Dougall, 413 U.S. 634 (1973) and *In re* Griffiths, 413 U.S. 717 (1973) (discussed in detail note 44 *infra*) appear to utilize the rational relationship test though referring to alienage as a suspect category. Four members of the majority in Frontiero v. Richardson, 411 U.S. 677 (1973), advocated treating sex as a suspect category. It is deemed to be so under the California Constitution. *See* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971). Illegitimacy has been suggested as a suspect category. *See* Gomez v. Perez, 409 U.S. 535 (1973); Levy v. Louisiana, 391 U.S. 68 (1968). *But see* Labine v. Vincent, 401 U.S. 532 (1971). Perhaps sex and illegitimacy can be classified as "near-suspect" criteria, as suggested in Comment, *A Question of Balance: Statutory Classifications under the Equal Protection Clause*, 26 STAN. L. REV. 155, 158-60 (1973).

[28] Various interests have been designated as fundamental by the United States Supreme Court, the protection of which demands strict equal protection scrutiny comparable to that afforded to constitutionally guaranteed rights. The essential characteristic of fundamentality cannot be stated simply. On the one hand, it has been argued that only constitutionally enumerated rights should be treated as sufficiently fundamental to merit this kind of scrutiny. This is the view of the four justices who joined Justice Powell's plurality in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-36 (1973). *See also* Shapiro v. Thompson, 394 U.S. 618 (1969) (Harlan, J., dissenting); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Harlan, J., dissenting). The right of interstate travel is said to be of constitutional significance. United States v. Guest, 383 U.S. 745 (1966). Legislative classifications impairing its exercise have been subjected to strict scrutiny. Shapiro v. Thompson, 394 U.S. 618 (1969).

Other interests deemed fundamental are said to derive from constitutionally protected rights or are such that their protection is deemed essential to the exercise of explicitly guaranteed rights. Thus the right to vote (in state elections) is fundamental because it is a necessary prerequisite to the continuation of all rights. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). *But see* San Antonio Independent School Dist. v. Rodriguez, *supra* at 30.

Other rights are more personal: the right to procreate which is designated as fundamental in Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942). Justice Marshall advocates a standard which would be protective of "the literally vital interests of a powerless minority" while continuing a policy of deference in "the area of economics and social welfare" in his dissent in Dandridge v. Williams, 397 U.S. 471, 520 (1968).

Recently the Court has rejected a suggestion that housing is a fundamental interest. Lindsey v. Normet, 405 U.S. 56 (1972). The *Rodriguez* majority similarly rejected such a designation for education. The California Supreme Court apparently disagrees. *See* Brown v. Merlo, 8 Cal. 3d 855, 863 n.2, 506 P.2d 212, 216 n.2, 106 Cal. Rptr. 388, 392 n.2 (1973); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

citizens. The presumption of constitutionality is reversed when the challenged classification utilizes a suspect criterion[29] or when it impairs interests deemed to be fundamental.[30] Strict scrutiny requires more than a simple rational connection to a legislative purpose; the classification must be "necessary to a compelling governmental interest"[31] and a less onerous alternative must not be possible.[32] Similarly, greater exactitude in the drawing of classifications, as well as a real rather than a hypothetical legislative purpose, is required when scrutiny is strict. Thus the converse effect of the traditional rational relationship test results from the application of the strict scrutiny test—that is, legislation so reviewed consistently has been found to be violative of equal protection.[33]

In this two tier system, the critical juncture in a decision is the determination of which test to apply: the traditional deferential test or the strict scrutiny test. If a court finds that a fundamental interest is involved or that the classification is based upon suspect criteria, the court will require strict scrutiny. The foreseeable result in such a case is that the challenged legislative classification will be held to be a denial of equal protection either on the ground that the classification is not "necessary" to achieve the legislative purpose[34] or that the legislative purpose, supported by the classification, is not sufficiently "compelling."[35] On the other hand, if neither a fundamental interest nor a suspect criterion is involved, the test is the traditional one of a ra-

---

29 *See, e.g.*, Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952): "[T]he presumption of validity is greatly narrowed in scope, if not entirely dispelled, whenever it is shown . . . that legislation actually discriminates against certain persons because of their race or nationality." *Id.* at 730, 242 P.2d at 626.

30 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

31 *See* Kramer v. Union School Dist., 395 U.S. 621 (1969). However, in In re *Griffiths*, Justice Powell reviewed the various characterizations of a state's interest sufficient to justify the use of a suspect classification—"overriding," "compelling," "important," "substantial" and "necessary"—and noted the court attributed "no particular significance to these variations in diction." 413 U.S. 717, 722 n.9 (1973).

32 *E.g.*, in McLaughlin v. Florida, 379 U.S. 184 (1964) the Court held that the specific ban on cohabitation by interracial couples could be enforced by "the general, neutral, and existing ban on illicit behavior." *Id.* at 196. Similarly in a fundamental interest case, Carrington v. Rash, 380 U.S. 89 (1965), the Court suggested that Texas' interest in restricting the state franchise to residents could be served by individual assessment of residency rather than by the wholesale disenfranchisement of all servicemen. *Id.* at 96.

33 *See* Gunther, *supra* note 10, at 19; Tribe, *supra* note 11, at 118 n.9. *See also* notes 13 *supra* & 74 *infra*.

34 *See, e.g.*, Kramer v. Union School Dist., 395 U.S. 621 (1969); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

35 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

tional relationship, and the legislation most likely will be sustained.[36] The accuracy of this observation is evidenced by Justice Powell's prodigious efforts in *San Antonio Independent School District v. Rodriguez*[37] to deny that the case involved either a suspect category (wealth)[38] or impaired a fundamental interest (education)[39] in order to sustain the Texas school financing system.

3. Transitional Test: Substantive Reasonableness

Dissatisfaction with the rigidity of the two level approach to equal protection[40] has led to overt attempts to formulate a standard of review which permits an intermediate degree of judicial scrutiny.[41] Professor Gunther saw in these efforts a higher standard of scrutiny in cases not involving suspect categories or touching fundamental interests. He concluded, "The Court is prepared to use the [equal protection] clause as an interventionist tool without resorting to strict scrutiny language . . . ."[42] The emerging standard of equal protection has been called "substantial relationship in fact,"[43] implying that it constitutes a stronger version of the rational relationship test, though no such clear enunciation has come from the Supreme Court. Indeed, there seems to be some struggle over equal protection criteria. In recent suspect classification cases, the standards of strict scrutiny seemed to undergo some dilution in strictness, resulting in a muting of the differences between the levels of the two tier rationale.[44]

36 *But see* cases cited note 13 *supra* & 42, 74 *infra*.

37 411 U.S. 1 (1973).

38 *Id.* at 18-29.

39 *Id.* at 29-39. This was despite the fact that a line of cases beginning with Brown v. Board of Educ., 347 U.S. 483 (1954) have so classified education. See the dissenting opinions filed by Justices Brennan, White, Douglas, and Marshall in *Rodriguez*. 411 U.S. at 63-133.

40 *See, e.g.*, Justice Marshall's dissent in Dandridge v. Williams, 397 U.S. 471, 520-23 (1968).

41 Gunther, *supra* note 10; Comment, *Equal Protection in Transition: An Analysis and a Proposal*, 41 FORD L. REV. 605 (1973); *Fundamental Personal Rights*, *supra* note 13. *See* cases cited in *Brown*, 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

42 Gunther, *supra* note 10, at 12. It should be noted that Professor Gunther further suggests that a weakening of the strictness of the strict scrutiny standard may be a contrapuntal element of the "newer" equal protection as well. Recent cases suggest the accuracy of the second observation, *see, e.g.*, Kahn v. Shevin, 42 U.S.L.W. 4591 (U.S. Apr. 24, 1974) (holding that a statute granting widows, but not widowers, a $500 property tax exemption not violative of equal protection); Village of Belle Terre v. Boraas, 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974) (discussed in notes 52-54 & accompanying text *infra*).

The *Brown* court, however, cited Gunther's "prediction" of a "new bite" for the "traditional 'rational basis' test." 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

43 *See* note 13 *supra*.

44 For example in Sugarman v. Dougall, 413 U.S. 634 (1973), the Court

The "newer" equal protection doctrine may have a much more delimited meaning, however. One of the most salient fea-

---

found a New York state ban on permanent employment by aliens in "competitive job classifications" to be violative of equal protection. The Court acknowledged that classifications based on alienage are "subject to close judicial scrutiny" (*id.* at 642) but then reverted to language more akin to the rational relationship test: "We therefore, look to the substantiality of the State's interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined." *Id.* The tone of the opinion leans away from the "suspect" category as a per se test for constitutionality: "A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining 'political community'." *Id.* at 649. Similarly, *In re* Griffiths, 413 U.S. 717 (1973), a companion case of *Sugarman*, struck down a Connecticut ban on the admission of aliens to the bar because the state failed to demonstrate the rationality of its wholesale ban: "[T]he Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients." *Id.* at 724.

Similarly, several of the cases cited in *Brown* for the new, stronger rational relationship test might have reached the same results through the application of the strict scrutiny standard if they had been decided by an earlier Court. Two of the cases so cited involved classifications which have been suggested as having the essential characteristics of suspect categories, that is, an immutable trait, determined at birth and bearing no relation to an individual's ability to perform or contribute to society. *Developments, supra* note 13, at 1126-27. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) struck down a statutory exclusion of illegitimate dependent children from recovery under the Louisiana workmen's compensation statute. Illegitimacy had been suggested for suspect designation. *See* cases cited note 27 *supra*. The plurality in Frontiero v. Richardson, 411 U.S. 677 (1973) suggested the explanation of Reed v. Reed, 404 U.S. 71 (1971) was that sex was a suspect category justifying departure from the deferential traditional rational relationship in that case. 411 U.S. at 682. *See also* Justice Marshall's dissent in *Rodriguez*, 411 U.S. at 70 (1973).

None of the cases cited by the *Brown* court involved a designated fundamental interest category. However, several of the cases concern interests parallel to earlier cases discussed in the rubric of fundamental interests. James v. Strange, 407 U.S. 128 (1972) struck down a Kansas statute which was designed to recoup legal defense fees. *James* appears to have utilized stricter scrutiny than the traditional rational relationship test it purported to use. Justice Powell in fact acknowledged both the importance of the state's purpose and the rational relevance of the classification to the attainment of the purpose. This is usually sufficient to satisfy the traditional test for constitutionality. Instead Justice Powell appeared to employ the less onerous alternative requirement in striking down the statute. The key to the stricter standard appeared to be the same kind of wealth discrimination recognized in Douglas v. California, 372 U.S. 353 (1963) and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966): not wealth per se, but a classification of wealth affecting some other important individual interest.

Stanley v. Illinois, 405 U.S. 645 (1972) did not use the specific language of fundamentality, but it certainly evoked the essence of the doctrine:

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent *a powerful countervailing interest*, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Id. at 651 (emphasis added).

tures of the new doctrine is that it appears to be applicable to situations where (1) a statutory classification scheme is (at least arguably) supportive of a state goal, (2) the classification is clearly overinclusive in individual cases, and (3) there is no appeal from the presumptive classification. In *Reed v. Reed*[45] the Supreme Court acknowledged the legitimacy of the state purpose in minimizing government expenditure by the elimination of an individual hearing. However, even though the classification scheme arguably supported the state purpose of obtaining the best estate administrators,[46] neither the state goal nor the underlying rationale was sufficiently preeminent to allow a state to make a decision by presumption between equally qualified men and women.[47] The result in *Stanley v. Illinois*[48] was the same. Despite the important interest of the state in the protection of children and the conceivable validity of the assumption underlying the classification that "most unmarried fathers are unsuitable and neglectful parents,"[49] the Court said the denial of a hearing to an individual unmarried father was not reasonable.

In *Reed* and *Stanley* the Court was unable to find a sufficient "rational" connection between the purpose of the statute and the differential status established to implement it. The cases strongly demonstrate antipathy to presumptive procedure.

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[50]

Thus the redefined activist equal protection standard of substantive reasonableness seems to demand not only that the relationship between the classification and the purpose be substantial but

---

[45] 404 U.S. 71 (1971). An Idaho probate statute which dictated a preference for a man over an equally qualified woman when appointing an administrator of an estate was struck down as a denial of equal protection.

[46] One rationale offered was that men generally have more business experience than women and thus would probably make better administrators.

[47] The plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973) indicated that the Court's abandonment of the traditional rational basis test in *Reed* actually occurred because they concluded "classifications based upon sex . . . are inherently suspect . . . ." *Id.* at 688.

[48] 405 U.S. 645 (1972). Mr. Stanley's three illegitimate children were taken from him following their mother's death. This occurred under the state system which presumed an unwed father to be unfit to raise his children while all other "parents" (married, unmarried, or adoptive) (*Id.* at 650, *citing* Juvenile Court Act, ch. 37, § 14, [1966] Ill. Laws Reg. Sess. 2585) were afforded the protection of a judicial neglect hearing involving "notice, hearing and proof of such unfitness." *Id.*

[49] *Id.* at 654.

[50] *Id.* at 656-58.

also that the classification be carefully drawn so that overinclusion is avoided.[51]

If the Supreme Court recently has been inclined to blend the two tier test, a few lower courts have been more open in enunciating and applying a "newer" standard of equal protection. In *Boraas v. Village of Belle Terre*,[52] the Second Circuit Court of Appeal found a zoning ordinance unconstitutional which limited occupancy of dwellings to traditional families or to groups no larger than two unrelated persons. In the clearest expression of the new standard, the court formulated and applied what it deemed a "more flexible and equitable approach" to equal protection: "Under this approach the test for application of the Equal Protection Clause is whether the legislative classification is *in fact* substantially related to the object of the statute."[53]

Manifestly, the Supreme Court disagreed, reversing the decision and reiterating the traditional language of "rational relationship" to a permissible local goal.[54] It is not yet clear, however, whether the reversal is a complete rejection of "substantive reasonableness."[55]

B. *Activist Equal Protection in* Brown v. Merlo

In *Brown v. Merlo*, the California Supreme Court appeared to adopt a stance similar to that of the Second Circuit in *Boraas*. The court found automobile guests were not a suspect category "comparable to racial or sexual classifications" and that recovery for injuries negligently inflicted by the host-driver did not constitute a fundamental interest "analogous to voting rights or education." It therefore rejected the plaintiff's contention that the strict scrutiny standard of review should apply.[56] Although in effect adopting a standard stricter than the no-review stance of the traditional rational relationship test, the court's analysis in *Brown* was structured similarly to that in cases applying the traditional standard.

---

[51] *Stanley* implies the interest of the individual father in retaining custody of his children is so "cognizable and substantial" that even a showing that 99 percent of all unwed fathers are unfit would be insufficient to sustain the statute. *Id.* at 652.

[52] 476 F.2d 806 (2d Cir. 1973), *rev'd*, 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974).

[53] *Id.* at 814 (emphasis in original).

[54] 42 U.S.L.W. 4475 (U.S. Apr. 2, 1974).

[55] It is difficult to reconcile the reversal of *Boraas* with United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), where a virtually identical classification denying food stamps to members of unrelated households was found to have no rational relationship to a legitimate legislative purpose. It is probably most accurate to say that the law is uncertain with regard to the applicable standards of equal protection review.

[56] 8 Cal. 3d at 862 n.2, 506 P.2d at 216 n.2, 106 Cal. Rptr. at 392 n.2.

The court first ascribed to the statute two alternative purposes—each of which has been advanced in judicial opinions and commentary.[57] The first purpose was the promotion of hospitality "by insulating generous drivers from lawsuits instituted by ungrateful guests who have benefited from a free ride."[58] According to the court, this rationale contained two separate policy strands: (a) affirmation of the axiom, "you get what you pay for," and (b) legislative condemnation of an instance of inexcusable ingratitude.[59] The second purpose considered was "to eliminate the possibility of collusive lawsuits, in which a host fraudulently confesses negligence so as to permit his guest—presumably a friend or relative—to collect from the host's insurance company."[60] Neither purpose was challenged by the court as being impermissibly discriminatory or beyond the scope of legislative power.

The second step in the court's analysis was the delineation of the classification system set out in the statute. The guest statute at the time of *Brown* read as follows:

> 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 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.[61]

Thus, as pointed out by the court, the statute established a "tripartite" classification system: (1) "paying" automobile guests and "non-paying" automobile guests; (2) automobile guests and social guests; and (3) several subclasses within the statute itself ("in a vehicle," "during a ride," and "upon a public highway").[62] The court then discussed each of the asserted purposes in light of the triple classification system to determine whether the classifications were reasonably relevant to the purposes.

1. The Hospitality Purpose

The court observed that under contemporary California law

---

[57] *See, e.g.*, Stephan v. Proctor, 235 Cal. App. 2d 228, 45 Cal. Rptr. 124 (2d Dist. 1965); 2 HARPER & JAMES, *supra* note 2, § 16.15, at 961 (1956 ed.).

[58] 8 Cal. 3d at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

[59] *Id.* at 866, 506 P.2d at 220, 106 Cal. Rptr. at 396.

[60] *Id.* at 864, 506 P.2d at 218, 106 Cal. Rptr. at 394.

[61] Ch. 3, § 17158, [1959] Cal. Stats. 1655, amended ch. 1600, § 1, [1961] Cal. Stats. 3429 (emphasis added).

[62] 8 Cal. 3d at 863, 506 P.2d at 217, 106 Cal. Rptr. at 393.

"similarly situated individuals," (*i.e.*, other guests and recipients of generosity) are permitted to recover for negligently inflicted injuries.[63] The differential treatment of automobile guests under the statute was thus contrary to the mainstream of California tort law and therefore "an arbitrary and unreasonable classification."[64] This conclusion, while sound in light of developing California tort law, amounts to the substitution of a judicial judgment of reasonableness for the presumption of constitutionality and deference to legislative judgment which underlay the traditional no-review rational relationship test.

The court in *Brown* measured the constitutional requirement of reasonableness in light of the rationales of common law decisions abandoning old limits on the duties of landowners and landoccupiers to those injured on their property and decisions eliminating the immunity from negligence liability enjoyed by charitable institutions. These decisions found the historical rules against recovery for negligence to be irrational in modern society. *Rowland v. Christian*[65] imposed upon landowners and occupiers a single duty of due care to all persons, including those characterized as "social guests" or "invitees."[66] In an earlier case, *Malloy v. Fong*,[67] the court applied the same reasoning to another category of gratuitous relationships, holding that beneficiaries of charitable institutions were entitled to the protections afforded by the requirement of due care.

The decisions in *Rowland* and *Malloy* did not have to find an equal protection violation in order to alter tort law principles since there were no statutes involved. However, in *Brown* the court's prior judgments of the irrationality of the rules limiting recovery in situations analogous to that of the guest statute were transmuted into judicial criteria for determining the *constitutionality* of legislation. This was a departure from traditional equal protection review which had merely demanded a showing of conceivable reasonableness.[68] This departure demonstrates the

---

63 The Court found no rational distinction between automobile (or airplane or motorboat) guests and "all other guests" in relation to an asserted state interest in protecting hospitality. *Id.* at 864 n.5, 506 P.2d at 218-19 n.5, 106 Cal. Rptr. at 394-95 n.5.

64 *Id.* at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6.

65 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

66 The court concluded: "Whatever may have been the historical justifications for the common law distinctions [between social guests and business guests], it is clear that those distinctions are not justified in the light of our modern society . . . ." *Id.* at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

67 37 Cal. 2d 356, 232 P.2d 241 (1951).

68 *See* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); cases cited note 25 *supra*.

The fact that the old rules against recovery persist in the majority of extent of the court's commitment to the reform of tort law. In *Brown*, the court clearly abandoned a posture of complete deference to legislative judgments and relied upon its own stringent evaluation of the rationality of the challenged classification:

> *Rowland, Malloy* and *Silva* teach that "however laudable" the motives of a hospitable host or generous charity, it is irrational to reward that generosity by subjecting beneficiaries to a greater risk of uncompensated injury than is faced by other individuals; under this principle, the guest statute's classification scheme is clearly unreasonable.[69]

The *Brown* court, acknowledging that it could do so, refused to ascribe a theoretically "conceivable" purpose to the classification system differentiating automobile guests.[70] The refusal to do so constitutes a further departure from traditional equal protection review. Justice Rehnquist, dissenting from the decision in *Weber v. Aetna Casualty & Surety Co.*[71] succinctly stated the traditional approach:

> [Equal protection] requires neither that State enactments be 'logical' nor does it require that they be 'just' in the common meaning of those terms. It requires only that there be some conceivable set of facts which may justify the classification involved.[72]

Brown substituted for this permissive test a requirement of rational relationship to an *actual* rather than constructive legislative purpose. Acknowledging that this was in some fashion "new,"[73] the court found precedent for its action in seven recent United States Supreme Court cases which purportedly used the

---

jurisdictions is evidence that the underlying rationale is at least reasonable to the point of being "conceivable" which was sufficient to satisfy the traditional test. To date a declassification of landowner immunities similar to *Rowland* has been adopted only in Hawaii and the District of Columbia. *See* Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972); Pickard v. Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969); Gibo v. Honolulu, 51 Hawaii 299, 459 P.2d 198 (1969) (imposing a duty of reasonable care to all persons reasonably anticipated to be on the premises). There are, however, suggestions that *Rowland* will be followed in the future in Colorado and Missouri. *See* Mile High Fence Co. v. Radovich, 474 P.2d 796 (Colo. Ct. App. 1970), *aff'd*, 489 P.2d 308 (Colo. 1971) and Smith v. Mill Creek Court, Inc., 457 F.2d 589 (10th Cir. 1972) (which stated that *Mile High* "did away with the distinctions." *Id.* at 591); Heald v. Cox, 480 S.W.2d 107 (Mo. Ct. App. 1972) (which termed the distinctions "vestigial remnants of the historical past." *Id.* at 109). Numerous cases in other jurisdictions since *Rowland* have maintained the landowner liability classification system. *See, e.g.*, Lemon v. Busey, 204 Kan. 119, 461 P.2d 145 (1969); Moore v. Denune & Pipic, Inc., 26 Ohio St. 2d 125, 55 Ohio Op. 2d 237, 269 N.E.2d 599 (1971); Annot., 35 A.L.R.3d 230 (1971, Supp. 1973); Annot., 32 A.L.R.3d 496 (1970, Supp. 1973).

69 8 Cal. 3d at 870-71, 506 P.2d at 223, 106 Cal. Rptr. at 399.

70 *Id.* at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

71 406 U.S. 164 (1972).

72 *Id.* at 183 (Rehnquist, J., dissenting).

73 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

traditional ra
strike down
above,[75] man
lier might ha
because they
or infringed p
tion of the ra
tional terms.
its application
to be an expa
tion.

Such an
1935 judicial
derogatorily r
commentators.
pears to be le
kind of unthi
equal protecti
Supreme Cour
a highly fictio
judiciary a m
ented approac

2. The Collu

The seco
better under
rationale of th
stantial risk th
negligence so
ance company
legislature bar

---

74 The cases
v. Indiana, 406 U
164 (1972); Stanl
U.S. 504 (1972);
U.S. 71 (1971).
75 *See* note
76 Reed v. R
77 Eisenstadt
78 *See* Karst
Equal Protection,
cited in note 74
to cases within th
Invidious Discrimi
Due-Process Formi
79 See the di
cases cited note 25
80 8 Cal. 3d

traditional rational relationship standard of equal protection to strike down statutory classification schemes.[74] As pointed out above,[75] many of the cases cited involved situations which earlier might have been decided under the strict scrutiny standard, because they involved, for example, classifications based on sex[76] or infringed privacy interests.[77] Thus the more stringent application of the rational relationship test was justifiable even in traditional terms. The *Brown* court had no similar rationalization for its application of the more activist standard. So *Brown* appeared to be an expansion of the application of "activist" equal protection.

Such an expansion may be criticized as a return to a pre-1935 judicial predilection for substantive review of legislation—derogatorily referred to as "substantive equal protection" by some commentators.[78] However, the court's approach in *Brown* appears to be less of a rampaging "activism" than a retreat from the kind of unthinking deference apparently endemic to traditional equal protection review of legislative schemes.[79] The California Supreme Court simply refused to engage in what it termed "such a highly fictionalized approach."[80] This refusal restores to the judiciary a measure of credibility abdicated under the result-oriented approach of traditional equal protection analysis.

2. The Collusion Prevention Purpose

The second ostensible purpose of the guest statute fared no better under the *Brown* court's reasonableness standard. The rationale of the guest statute was said to be that there was substantial risk that guest and insured driver would falsely swear to negligence so that the guest could recover from the driver's insurance company. In order to avoid such fraudulent actions, the legislature barred non-paying passengers from recovery for sim-

74 The cases cited were: 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).

75 *See* note 44 *supra*.

76 Reed v. Reed, 404 U.S. 71 (1971).

77 Eisenstadt v. Baird, 405 U.S. 438 (1972).

78 *See* Karst & Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 Sup. Ct. Rev. 39. Prior to *Brown* and perhaps the cases cited in note 74 *supra*, "substantive equal protection" appeared to be confined to cases within the suspect category-fundamental interest spectrum. *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law—Due-Process Formula,"* 16 UCLA L. Rev. 716 (1969).

79 See the discussion of *McGowan v. Maryland* in note 24 *supra*. *See also* cases cited note 25 *supra*.

80 8 Cal. 3d at 865 n.7, 506 P.2d at 219 n.7, 106 Cal. Rptr. at 395 n.7.

ple negligence. The court examined this underlying rationale and concluded that the goal of preventing collusive lawsuits and potential fraud upon insurance companies does not "provide a sufficient basis for the statute's wholesale elimination of all automobile guests' causes of action for negligently inflicted injury."[81] The court found irrationality in two aspects of this system: First, the elimination of all suits because of the risk that a few might be collusive and second, the differentiation between vehicle passengers on the basis of whether payment was given did not rationally relate to the problem of collusion.[82]

As it did in considering the hospitality purpose, the court observed that it had previously examined policies which eliminated all lawsuits between whole classes of individuals because of the risk of collusion. A line of cases examining common law interfamilial immunities found the rationale of collusion to be unreasonable in that it amounted to a per se rejection of recovery with no alternative for non-collusive situations.[83] In *Emery v. Emery*[84] the seminal case in the interfamilial immunity line of cases, the court concluded, "the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class."[85]

Applying this reasoning to the classification scheme of the guest statute, the court said that the paying-nonpaying distinction was

> a classic case of an impermissibly overinclusive classification scheme, that is, a scheme in which a statute's classification "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims".[86]

The classification was overinclusive because it eliminated the lawsuits of honest plaintiffs as well as the lawsuits of collusive

---

81 *Id.* at 872-78, 506 P.2d at 224-28, 106 Cal. Rptr. at 400-04.

82 *Id.* at 875, 506 P.2d at 226-27, 106 Cal. Rptr. at 402-03.

83 Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962); Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955).

84 45 Cal. 2d 421, 289 P.2d 218 (1955).

85 *Id.* at 431, 289 P.2d at 225. In *Brown*, the court found the risk of collusion to be smaller in the automobile guest situation than in the family lawsuit, terming the automobile guest status a "far grosser indicant of the likelihood of collusion" since it exempted friends or relatives who give "compensation" and who in the court's opinion "pose as great a risk of collusion as nonpaying guests." In addition, the nonpaying distinction eliminated many persons with no close relationship with the driver and who therefore presented little danger of collusion. 8 Cal. 3d at 875, 506 P.2d at 226, 106 Cal. Rptr. at 402.

86 *Id.* at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403 (utilizing Tussman & tenBroek's standard definition of an overinclusive classification). Tussman & tenBroek, *supra* note 14, at 351.

plaintiffs. Here again a *common law* determination of the reasonableness of a category was used to measure the *constitutionality* of the statute.

It should be recognized that the guest statute provisions represented the judgment of the legislature (albeit thirty years ago and under undoubted political pressure from insurance lobbies[87]) that the danger of collusion in the automobile guest situation is so great as to require elimination of all recoveries except for willful misconduct or intoxication. The provision as to compensation represented a judgment that one who paid should have been able to claim a higher degree of due care from the driver of the automobile than one who did not pay. While operating in the verbal range of the traditional equal protection test, the court was in reality passing judgment upon the soundness of these legislative policy judgments.

The court's approach seemed to be that, even given what is a very legitimate interest of the state (prevention of collusion), any per se exclusion classifications must be precisely tailored to promote that interest in order to meet the demand of equal protection. For example, in *Brown* the court concluded " 'compensation' is not a factor that assures dishonesty in its absence, or that guarantees honesty in its presence . . . ."[88] The court further noted that the statute merely changed the probable basis of collusion from fraudulent representations as to negligence to fraudulent representations as to whether compensation was given.[89] However, the traditional equal protection standard had long been tolerant of such *underinclusiveness* on the rationale that a legislature "is free to remedy parts of a mischief or to recognize degrees of evil and to strike at the harm where it thinks it most acute."[90]

Requiring greater exactitude between the challenged classification and the state interest it allegedly supports accords with the approach of the United States Supreme Court in the cases

---

87 PROSSER, *supra* note 2, § 34, at 187; Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 287-88 (1958); Note, 5 UTAH L. REV. 257, 258 & n.10 (1968).

88 8 Cal. 3d at 878, 506 P.2d at 228, 106 Cal. Rptr. at 404.

89 *Id.* at 875, 506 P.2d at 226-27, 106 Cal. Rptr. at 402-03.

90 *Developments, supra* note 11, at 1084, *citing* Williamson v. Lee Optical, Inc., 348 U S. 483 (1955), where Justice Douglas wrote for the Court:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Id. at 489 (citations omitted). *See also* Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949), *discussed in* note 24 *supra*.

cited in *Brown*.[91] It also reflects the Court's disapproval of classifications which create irrebutable presumptions. For example, in *Vlandis v. Kline*[92] the Court struck down a statute which assumed, allowing no showing to the contrary, that all married applicants to the state universities who have out-of-state mailing addresses are and remain non-residents for as long as they are students in the state. *Vlandis* relied upon due process deficiencies; and perhaps one valid reading of the "newer" equal protection cases is as an amalgam of equal protection and due process requirements.[93] Given a conceivable legislative judgment, for example, that paying passengers are less likely to be collusive, an individual passenger is still entitled to a separate evaluation as to whether or not he or she is in fact colluding. This seems to be in accord with the results in *Reed v. Reed*[94] and *Stanley v. Illinois*[95] where neither plaintiff had recourse to establish their qualifications apart from the presumptions established by the statutory classifications.[96]

The "newer" equal protection may simply be a fusing of procedural due process requirements to legislative classifications which are not precisely tailored in and of themselves. While there may be a "conceivable" relationship between the classification and the legislative purpose, it is not so unequivocally certain as to justify denial of benefits or impose burdens on the basis of such status alone.

3. The Statutory Subclasses

The final equal protection consideration in *Brown* was that the internal subclasses of the guest statute were irrational in light of the purposes of the act (collusion prevention and promotion of hospitality) and rendered the recovery or lack of recovery largely "fortuitous." The statute burdened only a "portion of all injured automobile guests."[97] The court examined the subcategories of section 17158—"during the ride," "in any vehicle," and "upon a highway" and found: (1) They were totally unre-

---

[91] *See* cases cited note 74 *supra*.

[92] 412 U.S. 441 (1973).

[93] It has been suggested that many of the equal protection cases could have been decided on due process grounds. *See* Karst, *supra* note 78; Karst & Horowitz, *supra* note 78; Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

[94] 404 U.S. 71 (1971).

[95] 405 U.S. 645 (1972).

[96] It is true that Stanley might have been able to regain custody of his children through adoption proceedings or as guardian. The Court rejected this solution saying it had not embraced "the general proposition that a wrong may be done if it can be undone." *Id.* at 647.

[97] 8 Cal. 3d at 878-82, 506 P.2d at 228-31, 106 Cal. Rptr. at 404-07.

lated to the collusion prevention purpose of the statute, and (2) they resulted in a pattern of unequal judicial treatment of persons "similarly situated." These statutory subclassifications created a structure of illogical uncertainty which the court found similar to the pattern resulting from statutory and common law exceptions to sovereign immunity prior to *Muskopf v. Corning Hospital District*.[98]

The court specifically denied that any disparity resulting from the application of the subcategories was of judicial origin.[99] The distinctions, it argued, derived from the legislature, not the courts. Furthermore, a narrow statutory construction by the courts was appropriate since the guest statute was an exception to the general rule of recovery for negligently caused injury, and finally, the failure of the legislature to counteract such judicial interpretations indicated its approval.[100] Regardless of whether the restrictive interpretations were legislatively mandated or judicially created, it should be noted that it was the consequent disparity of results for plaintiffs "similarly situated" which constituted the violation of equal protection.

4. Summary of Equal Protection in *Brown*

The equal protection analysis in *Brown* departed in three significant respects from traditional equal protection: (1) in requiring a "real reason" for the statute rather than a hypothetical one, (2) in applying *common law* determinations of reasonableness to determine the rationality of a statutory classification system, and (3) in refusing to tolerate relative inexactness of classification in light of the alleged legislative purpose supported by the classification. But whatever the ultimate delineation of the "newer" equal protection criteria by the California Supreme

---

98 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). In *Muskopf*, the court observed that the government immunity doctrine "has become riddled with exceptions, both legislative . . . and judicial . . . , and the exceptions operate so illogically as to cause serious inequality." *Id.* at 216, 359 P.2d at 460, 11 Cal. Rptr. at 92.

Prior to *Muskopf*, scattered statutory exceptions to sovereign immunity provided at least occasional relief. *See* examples cited note 187 *infra*. Prior to *Brown*, it was the statute which barred recovery while judge-made exceptions allowed recovery for some fortunate automobile guests. But the reform thrust of both *Muskopf* and *Brown* was identical: to increase the opportunity for compensation of those injured.

For a highly satirical summary of the effect of the subcategories on actual recovery see Lascher, *supra* note 5, at 14.

99 8 Cal. 3d at 880 n.20, 506 P.2d at 230 n.20, 106 Cal. Rptr. at 406 n.20.

100 *Id.* However, it may be noted that a court's responsibility to interpret legislation so as to make it constitutional, if possible, is at least matched by the requirement of strict construction of statutes in derogation of the general standard of liability.

Court, its decision in *Brown v. Merlo* primarily represents a further step in the court's modernization of tort law rather than a precedential change in equal protection doctrine.[101] The equal protection analysis in *Brown* relied heavily upon recent California tort cases. The cases provided in the first instance the evolving common law standard of tort liability toward social guests against which the ossified statutory treatment of the similarly situated automobile guest was measured and found wanting. In the second instance, common law assessments of the reasonableness of a policy which deprived whole classes of plaintiffs of a cause of action for negligence either to promote hospitality or to prevent collusion were utilized to construct a constitutional standard of rationality. The underlying rationale of *Brown* was the same as that of recent decisions reforming California tort law—a judicial policy that people should be compensated for their injuries, at least when there is a financially responsible defendant able to absorb and spread the initial risk of loss.

The real significance of the activist equal protection standard utilized in *Brown* does not lie in constitutional law. Rather it lies in the graphic demonstration of the assiduity with which the California Supreme Court is determined to pursue its goal of reform of tort law. At the same time, *Brown v. Merlo* represents a confluence of tort law and constitutional law—embodying as it does both the increasing antipathy of common law courts to liability rules which automatically exclude whole classes of plaintiffs from recovery for negligently inflicted injuries and the constitutional law standards of equal protection and due process which demand that a plaintiff have some opportunity to overcome statutory or administrative presumptions.

II. Judicial Activism in the Reform of California Tort Law

A. Review of Tort Law Reform in California

Although it utilized a novel approach, *Brown v. Merlo* is only the latest in a distinguished line of cases which have re-

[101] The fact that *Brown* is not a constitutional law precedent is evident in the fact that it has yet to be cited for its equal protection standard. *See, e.g.*, the recent cases of Swoap v. Superior Court, 10 Cal. 3d 490, 516 P.2d 840, 111 Cal. Rptr. 136 (1973); D'Amico v. Board of Medical Exam'rs, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974). Note especially Justice Tobriner's dissent in *Swoap* where he protests against the use of the "minimal rationality" test without referring to *Brown* as precedent for another standard. 10 Cal. 3d 490, 511, 516 P.2d 840, 854, 111 Cal. Rptr. 136, 150 (1973).

An intermediate appellate court has interpreted *Brown* conservatively: "*Brown* demonstrates not all legislative classifications are rationally related to legitimate government purposes, but does not allow the court to substitute its judgment for formed tort law in California. The thrust of tort reform, which commentators are united in characterizing as dramatic,[102] is toward increasing the incidence of recovery for injuries resulting from the inevitable clashes of flesh and machine by eliminating areas of historical immunity and by expanding the scope of liability.[103] A corollary concern has been to increase the incidence of risk-spreading so as to reduce the impact of actual loss on any single individual. Reform has been so thorough-going as to affect the entire structure of the law.[104] Judicially, the past few years represent an almost complete rejection of nineteenth century limitations on recovery. However, reform is doing more than imposing rationality upon "our senseless hodgepodge of precedents."[105] While the orientation of the nineteenth century was to create and delineate immunities and restrict liability to negligence,[106] that of the twentieth century has been to curtail and finally eliminate those immunities and to expand the range of liability beyond negligence by greatly expanding the kinds of harm for which the standard is strict liability.[107]

---

that of the Legislature when a rational relationship can be shown." Hughes v. San Diego, 35 Cal. App. 3d 349, 352, 110 Cal. Rptr. 75·, 756 (4th Dist. 1973).

102 *See, e.g.*, James, *Inroads on Old Tort Concepts*, 14 NACCA L.J. 226 (1954); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254 (1966); Traynor, *Comment on Courts and Lawmaking*, LEGAL INSTITUTIONS TODAY AND TOMORROW, 48, 52 (1959) [hereinafter cited as Traynor].

103 Professor Fleming James found the expansion of tort liability proceeding in two directions: (1) "The negligence principle is being constantly expanded so as to clear out pockets of vestigial immunity;" and (2) "limitations to liability that inhere in the negligence principle are giving way to [strict liability]." James, *supra* note 102, at 226.

104 Evidence of a reorientation toward tort law policy may also be observed in the California Legislature. In recent years it has been seriously considering a no-fault insurance system, the primary motive of which is compensation and loss-spreading. *See* note 123 *infra*. However, as late as 1961 the Legislature's concern was still oriented toward restriction of recovery rather than increasing compensation. In response to Ahlgren v. Ahlgren, 152 Cal. App. 2d 723, 313 P.2d 88 (4th Dist. 1957), which had exempted an owner of a vehicle injured while a passenger in his own car from the provisions of the guest statute, the California Legislature amended the statute to specifically include owners and thereby restrict their recovery. *See* California Vehicle Code section 17158 which reads: "No person riding in or occupying a vehicle owned by him and driven by another person with his permission . . . ." Ch. 1600, § 91, [1961] Cal. Stats. 3429. The *Brown* court did not evaluate the constitutionality of this provision (8 Cal. 3d at 862 n.3, 506 P.2d at 217 n.3, 106 Cal. Rptr. at 393 n.3), though the statute earlier survived an equal protection attack based upon the statutory distinction between the paying-owner-passenger and the paying-nonowner-passenger. Patton v. LaBree, 60 Cal. 2d 606, 387 P.2d 398, 35 Cal. Rptr. 622 (1963). The ban on recovery by owner-passengers is apparently still operative. *See* 1973 amendment to the guest statute which deleted all references to guests other than owners. Ch. 803, § 4, [1973] Cal. Stats. 1611. *See also* Schwalbe v. Jones, 35 Cal. App. 3d 214, 110 Cal. Rptr. 563 (1st Dist. 1973).

105 Traynor, *supra* note 102, at 53.

106 *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973).

107 C. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV.

In California, charitable immunities have yielded to the general principle of liability for negligently caused harm.[108] Interfamilial immunities, which formed another cluster of exceptions to liability for negligence, disappeared one after the other.[109] A hierarchy of landowner immunities from negligence was firmly rejected in *Rowland v. Christian.*[110] Broad governmental immunity under the common law disappeared in *Muskopf v. Corning Hospital District.*[111] Most notably, the California Supreme Court has significantly expanded the basis of tort liability through the development of product liability doctrines.[112]

Two themes of tort law reform are discernable in these cases. The first is a tendency to impose a uniform duty of reasonable care in all circumstances through the systematic elimination of the various *common law* exceptions to negligence liabil-

---

359 (1951); F. James, *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFFALO L. REV. 315 (1959).

[108] Malloy v. Fong, 37 Cal. 2d 356, 231 P.2d 241 (1951); Silva v. Providence Hosp., 14 Cal. 2d 762, 97 P.2d 798 (1939).

[109] In Emery v. Emery, 45 Cal. 2d 421, 289 P.2d 218 (1955), two sisters were permitted to recover from their brother for simple negligence. A pair of cases in 1962, Self v. Self, 58 Cal. 2d 683, 376 P.2d 65, 26 Cal. Rptr. 97 (1962) and Klein v. Klein, 58 Cal. 2d 692, 376 P.2d 70, 26 Cal. Rptr. 102 (1962), abolished interspousal immunities for negligent as well as intentional torts. Finally in Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971), parental immunity for negligence was similarly discarded as a "legal anachronism." *Id.* at 917, 479 P.2d at 650, 92 Cal. Rptr. at 290. In *Gibson* the supreme court was openly concerned with compensation and insurance coverage: "We feel we cannot overlook the widespread prevalence of liability insurance and its practical effect on intrafamily suits . . . it is unrealistic to ignore this factor in making an informed policy decision on whether to abolish parental negligence immunity." *Id.* at 918, 479 P.2d at 653, 92 Cal. Rptr. at 293.

[110] 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

[111] 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961). Immediately following *Muskopf* the legislature conditionally restored the doctrine of governmental immunity for two years but provided for recovery for causes of action occurring during the period unless barred by subsequent legislation. Ch. 1404, § 1 et seq., [1961] Cal. Stats. 3209. The moratorium was followed by a comprehensive governmental tort liability statute and the time lag presumably permitted government units to cover their liability with insurance.

[112] These doctrines have brought to fruit the rationale expressed in Justice Traynor's 1944 concurrence in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944): "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Id.* at 462, 150 P.2d at 441. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (establishing strict liability in tort for manufacturer of defective product); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (extending the rule of *Greenman* to retailers); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969) (extending the principle of strict liability in tort to bystanders injured by defective products). For products liability *see generally* Rintala, *The Supreme Court of California 1968-1969, Foreword: "Status" Concepts in the Law of Torts*, 58 CAL. L. REV. 80 (1970).

ity.[113] The second is a tendency to reject "automatic" exclusions from recovery which are either based upon historical exceptions found to be irrational in modern society or abstract legal concepts such as privity which serve no important policy function. *Brown v. Merlo* falls squarely within these tendencies.[114]

Most recently, the California Supreme Court has moved from reform of common law rules to an increased use of statutes in the service of reform. Thus in *Vesely v. Sager*,[115] the court found the vendor of alcoholic beverages to be civilly liable for injuries to a third person caused by a customer when the customer had been served in violation of law. Such liability had earlier been rejected on proximate cause grounds;[116] courts declared themselves impotent to impose such liability without legislative direction.[117] The *Vesely* court denied the need for legislative action, maintaining it was merely changing a "judicially created rule now inconsistent with prevailing tort law."[118] But the action in *Vesely* did not alter the statute itself, merely its application as a standard for tort liability. Until *Brown*, the cases evidenced a respect for statutory proscriptions against recovery. Indeed, earlier tort reform cases consistently repeated the refrain that the only justification for rules of law out of line with the general standard of liability was legislative policy.[119] *Brown* represents then the point at which the compensatory impulse of modern tort reform could not be contained even by a clear statutory exception.

---

[113] The general standard of liability for negligence is codified in section 1714 of the California Civil Code which reads:

> 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, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

CAL. CIV. CODE § 1714 (West 1971).

[114] The elimination of the guest statute exception means that the duty owed by a driver to a guest passenger is now the same as the duty owed to all others who may be injured as a result of the driver's simple negligence. 8 Cal. 3d at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6. Similarly, *Brown* rejects the "automatic" exclusion of the guest passenger from possible recovery through the tort system by the implicit, irrebuttable assumption of collusion. *Id.* at 877, 506 P.2d at 227-28, 106 Cal. Rptr. at [illegible]3-04.

[115] 5 Cal. 3d 153, 486 P.2d 151, [illegible]5 Cal. Rptr. 623 (1971).

[116] Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1st Dist. 1949); Hitson v. Dwyer, 61 Cal. App. 2d 803, 143 P.2d 952 (3rd Dist. 1943).

[117] Cole v. Rush, 45 Cal.2d 345, 355-56, 289 P.2d 450, 452-53 (1955).

[118] 5 Cal. 3d at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632.

[119] "[I]t is clear that *in the absence of statutory provision* declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no exception should be made unless clearly supported by public policy." Rowland v. Christian, 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100 (1968) (emphasis added).

B. *Appropriateness of Judicial Activism in Tort Law Reform*

Brown is an expansion of judicial activism in tort law from the systematic elimination of common law rules antipathetic to modern tort policies to the elimination of a similarly offensive statutory scheme. This kind of judicial activism should not be confused with the activism attacked by traditional legal process scholars.[120] First, whatever the merit of the anti-activist posture with regard to constitutional adjudication of economic regulatory legislation under the equal protection and due process clauses, it has little relevance to tort law. Second, the anti-activist stance is based upon an unrealistic assessment of the capabilities of the legislature and the realities of the legislative process.

1. Irrelevance of Traditional Anti-Activist Standard to Tort Law Reform

Traditional attacks upon judicial activism, admittedly formulated in the milieu of constitutional law, are overbroad when applied to tort law. Tort law is, and historically has been, an area predominately developed and cultivated by the courts.[121] Statutory intervention has been minimal and largely supplementary. In addition, tort law activism simply does not present the very real dangers of rampant judicial activism dramatically manifested in the substantive due process excesses of the courts in the 1920's and 1930's. Tort law activism can be distinguished from that of the 1930's in at least two ways. First, activist tort law reform has generally been in touch with the present concerns of society and has been appropriately responsive to them. The model of judicial activism implicit in the anti-activist stance is that of a court acting in opposition to the will of a legislature, frustrating its efforts to deal with contemporary problems.[122]

---

120 Some of the more recent critics in this tradition are: A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Hart, *The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Linde, *Judges, Critics and the Realist Tradition*, 82 YALE L.J. 229 (1973).

121 *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973); R. Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463 (1962).

122 The present generation of legal process scholars spent its formative years under the influence of a generation of legal realists who dissected and observed the process of judicial decision making. The "realists" applied the teachings of the behavioral sciences to understand the process of judicial decision making. The conclusions were that judges were not objective and rational, rather their decisions were invidiously influenced by their own intellectual make-up. *See* Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 ILL. L. REV. 96 (1922); Radin, *The Theory of Judicial Decision Making: Or How Judges Think*, 11 A.B.A.J. 357

However, activist tort law reform, like that exemplified in *Brown v. Merlo*, is actually a model of cooperative endeavor with the legislature, in accord with the tendencies and concerns of this time period.[123] It is apparent that cooperation between the courts and the legislature in law reform can take several forms. One possibility, suggested by Professor R. E. Keeton, is that a court and a legislature may act together to achieve a joint policy goal more rapidly than either could do alone. The courts' role in this model is to strike down a statute which no longer reflects contemporary concerns and which, because of the nature of the political process, is unlikely to be legislatively eliminated.[124] *Muskopf v. Corning Hospital*, though striking down precedent rather than statute,[125] exemplifies this kind of cooperation which resolves in a short period of time a particularly difficult legisla-

(1925). These theories were in the ascendancy in the early 1930's. *See* White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972). *See generally* E. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW (1953); Ackerman, *Law and the Modern Mind*, 103 DAEDALEUS 119 (1974).

A second component of the formation of the legal process stance was the traumatic collision between the Presidency and the Supreme Court in the mid-1930's. The generation witnessed the efforts of the Supreme Court conservatives to nullify judicially the New Deal, providing an eminent example of an exclusively American phenomenon. In Sir Wilmot Lewis' statement is the essence: "Legislation in the United States is a digestive process by Congress with frequent regurgitations by the Supreme Court." *Quoted in* A. SCHLESINGER, THE POLITICS OF UPHEAVAL 452 (1966). *See also* Frankfurter & Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 HARV. L. REV. 577 (1938); ALFANGE, THE SUPREME COURT AND THE NATIONAL WILL (1937); JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

123 The California Legislature has been actively considering a program of greatly increased compensation in the form of a no-fault insurance system. *See* Robinson, *No-fault and the State Bar*, 47 CAL. ST. B.J. 286 (1972). Robinson indicated the plan had the support of the Reagan Administration, the State Bar of California, and the Association of Northern and Southern Defense Counsel. In California he noted the support of automobile insurance companies, saying "a large segment in California aggressively favors a modified no-fault plan." *Id.* at 286. During the 1973-74 legislative session, no less than five proposals for no-fault automobile insurance plans were presented in the California State Senate. S.B. 410, S.B. 557, S.B. 10, S.B. 429, S.B. 1273.

Further, the reforming decisions of the California Supreme Court seem to be firmly within the Holmesian tradition of basing the law upon experience rather than logic. O.W. HOLMES, THE COMMON LAW 5 (1881).

124 Keeton, *supra* note 121, at 354. One excellent example of this kind of interaction can be seen in the immediate reaction of the California Legislature to the decision in *Brown v. Merlo*. The Legislature amended the provisions of the automobile, boat, and airplane guest statutes, deleting all references to guests. Another example is seen in the apportionment decision which ordered the reapportionment of the Tennessee legislature in Baker v. Carr, 369 U.S. 186 (1962), based upon the substantial growth and redistribution of the population of Tennessee since 1901 and the recognized inability of its general assembly to undertake such reapportionment. The Court specifically mentioned the failure of all proposals for reapportionment for 60 years.

125 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

tive problem. The result in *Brown* is similarly within this framework of cooperation; it is certainly not directly contrary to the will of the legislature at a time when the legislature is itself preoccupied with perfection of the compensation delivery system for accidental automobile injuries.

A second point of distinction between judicial activism of the 1930's and tort law activism is their different intellectual origins.[126] Substantive due process activism was based largely upon an abstract "natural law-natural right" intellectual framework which purported to set forth absolute reality to which present reality must be made to conform.[127] Tort law activism has been notably loath to rely upon abstractions. Rather tort law reform is modern, practical and policy-oriented. Cases like *Brown* are firmly grounded in practical assessments of the most rational means to implement the policies of tort law—to compensate the victims of accidents and to spread the risks of loss as broadly as possible. Change in tort law has resulted directly from changed circumstances, such as the increased incidence and availability of liability insurance.

There may be some argument that judicial activism in the reform of common law tort precedents is less offensive and more appropriate than reform of statutes using activist constitutional law principles. However, statutes certainly can be as irrational, arbitrary, and outdated as common law precedents. To deny totally to the judiciary the competency to utilize its constitutional powers of judicial review to strike down obsolete and now unjustifiable statutes, solely because enacted by some legislature at another time, from another frame of reference, and in pursuit of a different policy goal, is to give statute law a superior status completely out of touch with the realities of the legislative process.

2. Unreality of the Legislative Model of Traditional Anti-Activism

Opponents of judicial activism in general insist that the legislature is the only appropriate governmental body to undertake law reform and policy formulation.[128] This argument exaggerates the practical ability of a legislature to meet all the needs of a

---

[126] The author is indebted to Professor E. Ursin of the UCLA School of Law for this analysis.

[127] *See* Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269 (1938). The clearest judicial reflection of this natural law rationale is seen in Lochner v. New York, 198 U.S. 45 (1905).

[128] *See, e.g.*, the discussion in H.M. HART & A.M. SACKS, THE LEGAL PROCESS 386-407 (tent. ed. 1958) of the case of Norway Plains Co. v. Boston & Maine R.R., 1 Gray 263 (Mass. 1854); in general as to legislatures *see, id.* at 714-48.

pluralistic and increasingly complex industrial society. That legislatures themselves are cognizant of the limits of their ability to legislate fully is demonstrated by the massive delegations of legislative power to executive and quasi-legislative agencies which have been characteristic of the period since 1933. The reform of specific rules of tort law is precisely the kind of action which legislatures do not ordinarily undertake.[129]

The anti-activist stance neglects the essentially political nature of legislative activity. A legislature is subjected to competing interests and acts in response to them.[130] A legislature is not a body of philosophers selecting the best, most just policies for the public welfare. In view of the staggering magnitude of problems of society, it is unrealistic to expect, much less demand, that a legislature take action to alter the somewhat technical rules of liability for negligence. There is no articulate pressure group to push for such change. The class of injured plaintiffs is not constant, organized, and articulate, as it would have to be if it is to be fully effective in the political process. Not all the important concerns of a growing, pluralistic society are—nor can they ever be—fully represented in the legislature. Given the complexities of modern life, it is foolish to place the entire burden of lawmaking as well as law-unmaking upon the legislature. Therefore, in practical terms, courts are perhaps the only unit of government in which certain kinds of reform are possible. The California Supreme Court by its judgment in *Brown* indicates that it is in a better position than the legislature to see the need for technical changes in tort law. Certainly in the last twenty years the court has written a startling number of innovative decisions on separate issues of tort law.[131] The record indicates that far from being in a disadvantaged position vis-à-vis the legislature in collecting data and considering factors necessary to draft changes, the courts are actually in a better position than the legislature to know what the problem areas are and which are the most practical tools to implement change. The California Supreme Court is the only body in the state sufficiently involved with the problems, aware of the trends and needs of tort law, and independent of political pressures to undertake this kind of reform.

---

[129] A legislature is more likely to respond to the pressure of great dissatisfaction with the system of accident compensation by sweeping changes in the law, such as imposing a no-fault insurance system, than to repeal the automobile guest statute. Absent pressure from a vocal interest group, a legislature is hampered by a kind of political nearsightedness which tends to obscure all but most looming problems.

[130] *See* A.F. Bentley, The Process of Government (1956); S. Chase, Democracy under Pressure (1945); B. Gross, The Legislative Struggle (1960). *See also* Schattschneider, *Pressure Groups versus Political Parties*, Annals, Sept. 1948, at 17.

[131] *See* notes 109-112 & accompanying text *supra*.

Thus while *Brown* ignores traditional doctrines of judicial restraint, it is entirely in accord with a more realistic model of legislative realities.

III. A Proposal for California Supreme Court Implementation of Comparative Negligence

Brown v. Merlo stands firmly within the movement to reform California tort law. The next step in this reform is, in a sense, easier than the last. *Brown*, invalidating a statute, required a somewhat daring application of equal protection criteria; the judicial implementation of comparative negligence involves only a judicial reevaluation of common law tort precedent,[132] a task the court has grown comfortable with in recent years.

Contributory negligence, unlike the guest statute, does not operate as a per se exclusion from all opportunity to recover for negligently inflicted injuries, since a plaintiff is allowed to prove that he or she was not contributorily negligent; it does, however, operate as a per se exclusion once it is proved. As such, it remains the feature of modern California tort law most inconsistent with the underlying thrust of tort reform. As the various restraints upon liability and compensation are eliminated, contributory negligence stands out in dramatic contrast to the emerging consistent goal of the recovery system to promote compensation rather than provide wholesale exclusions therefrom.[133] A standard of comparative negligence is more in keeping with the general liability principle of tort law and consistent with the trend of

---

[132] At first glance it appears that California contributory negligence is statutory since section 1714 of the Civil Code codifies the common law rule of contributory negligence:

> 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, *except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.*

CAL. CIV. CODE § 1714 (West 1973) (emphasis added).
However, there is nothing in the codification langauge itself which requires that contributory negligence act as a complete bar to recovery. Indeed such an interpretation is implicitly inconsistent with the languange. The phrase, "except so far as," implies, "but not more than." In other words, a doctrine of comparative negligence is well within a permissible statutory interpretation of section 1714. Such an interpretation would understand the "except so far as" phrase to diminish the primary negligence responsibility, but only to the degree that another has contributed to his own injury.

Further evidence that section 1714 does not impose contributory negligence by statute is evident in the fact that courts were able to completely disregard contributory negligence in the formulation of products liability doctrines.

[133] *See* discussion in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Annot., 32 A.L.R.3d 463, 487-88 (1970).

reducing per se recovery-exclusions. Numerous commentators have set forth the objections to contributory negligence on both theoretical and practical grounds and the superiority of comparative negligence.[134] The defenders of contributory negligence, or more precisely the opponents of comparative negligence, have not been silent either.[135] Therefore, this Comment need not examine the pros and cons of comparative versus contributory negligence. It will instead: (1) attempt to delineate the extent to which the contributory negligence doctrine violates the principle of modern tort law reform and the way in which comparative negligence would partially remedy the evil; (2) examine the arguments against judicial implementation of the change;[136] and (3) indicate to what extent the California Supreme Court in *Brown v. Merlo* has already overcome such objections.

A. Inability of Contributory Negligence to Serve the Goals of Modern Tort Law

The major shortcoming of the doctrine of contributory negligence from the point of view of the modern rationale of tort law reform is that it places the entire burden of loss on one party. Chief Justice Traynor points to the automobile accident situation, in particular, as one in drastic need of loss-spreading:

> On the highways alone injury and slaughter are not occasional events, but the order of the day, and sooner or later there is bound to be more rational distribution of their costs than is now possible under the law of negligence. It is ironic that in the field of automobile accidents, where the need for

---

[134] HARPER & JAMES, *supra* note 2, §§ 22.1-.3, at 1193-1209, § 22.11, at 1236-41; Mole & Wilson, *A Study of Comparative Negligence* (pts. 1-2), 17 CORNELL L.Q. 333, 604 (1932); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959); Turk, *Comparative Negligence on the March* (pts. 1-2), 28 CHI.-KENT L. REV. 189, 304 (1950).

[135] Benson, *Comparative Negligence—Boon or Bane*, 23 INS. COUNSEL J. 204 (1956); Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005 (1957).

[136] Arguments both for and against judicial implementation of comparative negligence have been made largely in the context of the *Maki v. Frelk* episode. In response to a suggestion by the Illinois Supreme Court that perhaps it was time that the rule of contributory negligence be reconsidered the appellate court overruled the contributory negligence ban and instituted comparative negligence. Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (2d Dist. 1967). The decision was overturned upon appeal to the Supreme Court of Illinois. 40 Ill. 2d 193, 239 N.E.2d 445 (1968). For extensive commentary on this case, see *Comments on* Maki v. Frelk*—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 889 (1968) (containing articles by F. James, H. Kalven, R. Keeton, R. Leflar, W. Malone, and J. Wade) [hereinafter cited as *Comments on* Maki v. Frelk].

> compensating victims regardless of fault is most urgent, we continue to let fault determine whether or not there shall be compensation.[137]

It should be noted that where insurance is common, an increase in compensation is also an increase in loss-spreading to the entire class of automobile insurance buyers. Broadening liability increases the likelihood of people buying insurance in Traynor's view,[138] and thus spreads the losses of apparently inevitable accident casualties. In *Brown*, as in other tort reform cases, the court emphasized insurance as a factor in its decision.[139]

In theory, contributory negligence bars individuals from recovering their losses if they were in any slight degree responsible for the injury-causing event. The harsh non-compensatory aspect of the rule is mitigated by certain exceptions,[140] although the exceptions do not function to spread the losses since only one party pays the whole cost in any event.[141] Moreover, as with the earlier exceptions to governmental immunity, landowner immunity, and driver immunity (to guests), a pattern of illogical and somewhat fortuitous recovery is spawned by the exceptions to the contributory negligence ban and with the uncertainty of its application by juries. The resulting unevenness is exacerbated by

---

137 Traynor, *The Ways and Means of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 375-76 (1965).

138 *See* Traynor's concurrence in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944); Traynor, *supra* note 102, at 52.

139 *Brown* cites the present general availability of liability insurance (in contrast to its unavailability when the guest statute was enacted) as one factor contributing to the *present* irrationality of the statute. 8 Cal. 3d at 863-64 n.4, 868 n.9, 506 P.2d at 217-18 n.4, 221 n.9, 106 Cal. Rptr. at 393-4 n.4, 397 n.9.

140 The recognized exceptions to the contributory negligence ban are: (1) the doctrine of last clear chance; (2) the willful, wanton exception; and (3) the violation of certain kinds of statutes designed to protect a given class of plaintiffs. *See generally* PROSSER, *supra* note 2, § 66, at 427-33 (last clear chance), § 34, at 184-86 (willful wanton exception), § 68, at 453-54 (violation of statute). An interesting account of the history of the doctrine of contributory negligence and the exceptions it generated is contained in L. FRIEDMAN, A HISTORY OF AMERICAN LAW 409-27 (1973).

141 There is widely accepted doubt that contributory negligence acts as a complete bar as a practical matter. Professor Keeton contends that juries tend to reach compromise verdicts where there is persuasive evidence of contributory negligence—thus there exists an ad hoc comparative system. Keeton contends that "Hardly anyone doubts the prevalence of this doctrinally unlegitimated practice of jurors today." R. KEETON, *supra* note 121, at 503. Lawyers and judges believe it to be true. *See, e.g.*, Haeg v. Sprague, Warner & Co., 202 Minn. 425, 430, 281 N.W. 261, 264 (1938); J. ULMAN, A JUDGE TAKES THE STAND 30-34 (1933); POWELL, *supra* note 135. Professor Weinstein's analysis of voluminous empirical studies appears to substantiate these impressions. *See* Weinstein, *Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power*, 14 VAND. L. REV. 831 (1961). Professor Keeton is severely critical of the practice; he described it as "unpoliced, irregular, and unreasonably discriminatory." *Comments on* Maki v. Frelk, *supra* note 136, at 906, 918 (Comment by R. Keeton).

casuistic distinctions made by courts encouraging compensation through mitigation of the absolute ban of contributory negligence. One example of this kind of distinction is the differential standards of proof required to show primary negligence and contributory negligence.[142] Contributory negligence is increasingly difficult to prove; in *Beard v. Atchison, Topeka, & Santa Fe Railway*,[143] for example, the court sustained a finding of no contributory negligence where a fourteen year old boy lost his leg while trying to jump on a moving train.[144]

In contrast to the rule of contributory negligence, it is clear that a rule of comparative negligence would be more in accord with current policy goals. Comparative negligence permits the plaintiff and defendant to spread the cost of the accident between them and by insurance to all drivers.[145] The incidence of

---

[142] James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 VA. L. REV. 218 (1961); 57 AM. JUR. 2d *Negligence* §§ 426-55 (1971).

[143] 4 Cal. App. 3d 129, 84 Cal. Rptr. 449 (2d Dist. 1970)

[144] The California Legislature responded to this decision with a statute, Civil Code section 1714.7, which denied recovery to a person injured while getting on or off a moving locomotive or railroad car, except where aggravated negligence is involved. CAL. CIV. CODE § 1714.7 (West 1973).

[145] It is interesting to note that the California Legislature has already instituted a primitive form of loss spreading where two or more joint tortfeasors share responsibility for an accident. Section 875 of the California Code of Civil Procedure provides for a right of contribution among joint tortfeasors when a judgment is rendered against them, and one has paid more than his pro rata share. CAL. CIV. PRO. CODE § 875 (West Supp. 1974). Section 876 provides that the share be divided equally among the tortfeasors. *Id.* Thus while the division of loss is not based upon a comparative negligence standard, at least the loss is spread among those at fault. In terms of compensation and loss spreading even this is preferable to the complete ban of contributory negligence which bars any division of loss between the "joint tortfeasors," plaintiff and defendant.

Such an equal division may turn out in certain cases to be even more grossly unfair than contributory negligence is to the plaintiff (in theory). In New York, the court of appeals was recently induced to abolish equal contribution between joint tortfeasors and to substitute a rule of pure comparative contribution determined upon the degree of fault of each defendant. In Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the court was confronted with grossly disparate negligence (active v. passive) and a very large judgment. The decision may have indicated a judicial adoption of comparative negligence in that state: "The fairer rule, we believe, is to distribute the loss in proportion to the allocable concurring fault." *Id.* at 294, 282 N.E.2d at 292, 331 N.Y.S. at 386. There is apparently some confusion in New York about whether *Dole* did adopt comparative negligence. *See* Dixon v. Knickerbocker Driverself, Inc., 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (Albany City Ct. 1973); Sorrentino v. United States, 344 F. Supp. 1308 (E.D. N.Y. 1972), indicating that the rule is unsettled.

With regard to the interrelationship between contribution and comparative negligence *see* Loui v. Oakley, 50 Hawaii 260, 438 P.2d 393 (1968). There the Hawaiian Supreme Court discussed the desirability of comparative negligence in the contribution situation and suggested: "It may be time to reconsider the applicability of the doctrine of contributory negligence, a judge-made rule, in light of the mores of the day. Perhaps it should be judicially replaced by a comparative negligence standard . . . ." *Id.* at 265 n.5, 438 P.2d at 397 n.5. Apcompensation is increased to the extent that previously uncompensated plaintiffs, guilty of contributory negligence, are no longer denied any recovery.

The major disagreement, however, is not over *whether* comparative negligence is superior to contributory negligence in terms of policy goals. It is rather a question of *how* comparative negligence should be instituted. Professor R. E. Keeton describes the issue:

> [T]he question whether a court should change the outmoded contributory negligence rule or instead wait for the legislature of its state to act—is actively disputed. There is little doubt that ten years ago a majority of judges and perhaps academic commentators as well would have answered that this is a task for legislatures. A significant change has occurred in these ten years . . . . It is becoming an accepted principle that courts should take a more active role in reforming outmoded tort law than they had done before this past decade. Although no judicial opinions previous to those filed in *Maki v. Frelk* had brought this new spirit to bear upon the contributory negligence rule, this seems a very appropriate area for law reform by judicial decision.[146]

The major rationale for judicial implementation seems to be a kind of possessory doctrine.[147] The Illinois Appellate Court in *Maki v. Frelk* reasoned: "The doctrine of contributory negligence was created by the Courts, not by the legislature. If we have created it, and if it does not meet the needs of present day life, then we are duty bound to abolish it."[148] Prior to *Maki*, no court had acted to implement fully comparative negligence.[149]

B. *Objections to Judicial Replacement of Contributory Negligence*

There is certainly no agreement that it is indeed the province of the courts to modify their own doctrine. In general, three principle objections are raised to judicial implementation of comparative negligence.

One was cited by the Illinois Supreme Court in overturning *Maki*: "[S]uch a far-reaching change, if desirable, should be

---

parently the Hawaiian Legislature acted first to introduce comparative negligence. *See* HAWAII REV. STAT. § 663-3 (Supp. 1973). An excellent discussion of the relationship between comparative negligence and contribution is in Annot., 32 A.L.R.3d 463 (1970).

146 *Comments on* Maki v. Frelk, *supra* note 136, at 906, 914-15 (Comment by R. Keeton).

147 *See generally* Annot., 32 A.L.R.3d 463, § 9 (1970).

148 85 Ill. App. 2d at 452, 229 N.E.2d at 291.

149 Florida recently adopted comparative negligence judicially. *See* Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). New York may have done so in *Dole v. Dow Chemical Co.*, discussed in note 145 *supra*.

made by the legislature rather than by the court."[150] The underlying idea is bifurcated; it is argued that in a democracy a legislature, responsible directly to the electorate, is the only proper forum for such a decision[151] and that a legislature is in a superior position to accumulate the necessary data to construct a complex policy. The effect of judicial nullification of contributory negligence is merely to create a void; bringing in comparative negligence to fill the void would require detailed policy decisions more characteristic of the legislative process than the judicial process. A court, it is argued, is ill-equipped to legislate.[152]

A second objection is that such a change is a gross violation of the principle of stare decisis. The supreme court in *Maki* made the point that "[w]hen a rule of law has once been settled, contravening no statute or constitutional principle, such rule ought to be followed unless it can be shown that serious detriment is thereby likely to arise prejudicial to public interests."[153] The court continued: "Rules long recognized as the law should not be departed from merely because the court is of the opinion that it might decide otherwise were the question a new one."[154]

A third objection is raised by Professor Kalven.

> There is also the fact that the difficulties and weaknesses of the common law rule as to contributory negligence had been fully disclosed and argued out for generations. There was no technological or sociological change that made the doctrine now look different than it had in prior years . . . . In brief, nothing was producing any new insight about the rule nor was there any new reason for changing it that had not been fully evident to all those courts which for all those years had refused to make the change.[155]

The foregoing represent the principle objections to a judicial implementation of comparative negligence. The purpose below is to indicate more fully the scope of these objections and to demonstrate that the California Supreme Court has answered many of these arguments itself in prior decisions, particularly in *Brown*.

The California court sees its role as updating tort law in accord with present conditions—something it is uniquely qualified to do since rules of tort law are constantly before the court. *Brown* illustrates the court's commitment to this modernizing

---

150 40 Ill. 2d at 196, 239 N.E.2d at 447.

151 *See* H. M. HART & A. M. SACKS, THE LEGAL PROCESS 1413-16 (tent. ed. 1958).

152 *See generally*, *id.* at 1425-30; Annot., 32 A.L.R.3d 463, § 10 (1970).

153 40 Ill. 2d at 196, 239 N.E.2d at 447.

154 *Id.* at 196-97, 239 N.E.2d at 447.

155 *Comments on* Maki v. Frelk, *supra* note 136, at 897, 898-99 (Comment by Kalven).

role; there the court insisted that the constitutionality of the guest statute's classification system "be evaluated in light of *contemporary* treatment accorded similarly situated individuals,"[156] even though it acknowledged that when the statute was enacted it was consistent with prevailing policies of tort liability[157] (and thus probably did not create a classification grossly violative of equal protection).

1. Comparative Negligence can be Implemented only by the Legislature

It seems probable that one aspect of the hesitation of courts to implement comparative negligence stems from the fact that no court, until recently, had ever done so successfully.[158] The abortive attempt in *Maki*, coupled with a good deal of verbal hand-wringing upon that occasion by the traditional legal process scholars,[159] reinforced the reluctance to act. However, the Florida Supreme Court in *Hoffman v. Jones*[160] instituted pure comparative negligence[161] in order to "join what seems to be a trend toward almost universal adoption of comparative negligence."[162] The *Hoffman* court emphasized the judicial origin of the rule of contributory negligence and indicated the judiciary

---

156 *Id.* (emphasis added).

157 8 Cal. 3d at 865 n.6, 506 P.2d at 219 n.6, 106 Cal. Rptr. at 395 n.6.

158 *See* recent cases cited note 145 *supra*. Georgia has a modified form of comparative negligence which came about through broad judicial interpretation of a statute on its face applicable to negligence suits against railroads, a feat Dean Prosser termed a "rather remarkable tour de force of construction . . . ." PROSSER, *supra* note 2, § 67, at 436. *See* Goodrich, *Origin of the Georgia Rule of Comparative Negligence and Apportionment of Damages*, 1940 GA. BAR. A.J. 174; Wynne v. Southern Bell Tel. & Tel. Co., 159 Ga. 623, 126 S.E. 388 (1925); Moore v. Sears, Roebuck & Co., 48 Ga. App. 185, 172 S.E. 680 (1934). The Georgia adoption was unique and does not offer precedent to other states without similar statutes.

The California Supreme Court is apparently now considering whether to adopt comparative negligence in the case of Nga Li v. Yellow Cab Co., (L.A. 2 Civ. 41888) which the court accepted for hearing after the Court of Appeal affirmed a verdict for defendant. Accepted for hearing March 18, 1974 (112 Cal. Rptr. No. 5, at I). An opinion is expected early in the fall.

159 *See, e.g.*, *Comments on* Maki v. Frelk, *supra* note 136, at 897 & 918 (Comments by Kalven & Leflar).

160 280 So. 2d 431 (Fla. 1973).

161 Under a pure comparative negligence system a plaintiff's recovery is reduced by the degree of his negligence. Thus if the plaintiff is found to be 20 percent negligent, he will receive 80 percent of his damages. A plaintiff may recover in a pure system even if he is *more* negligent than the defendant. The court in *Hoffman* stated the policy: "The liability of the defendant . . . should not depend upon what damages he *suffered*, but upon what damages he *caused*." 280 So. 2d at 439. Modified comparative negligence diminishes the plaintiff's recovery in the same way, except that a plaintiff may only recover where he is *less* negligent than the defendant.

162 280 So. 2d at 438.

enjoys "broad discretion" to change the common law so as to take "into account the changes in our social and economic customs and present day conceptions of right and justice."[103] Comparative negligence was held to be superior to contributory negligence both in its correlation with contemporary assessments of fairness,[104] and as a more equitable means of "determining liability and a more socially desirable method of loss distribution."[105] Indeed, the superiority of comparative negligence was held to be so overwhelming that the court indicated it "would be shirking [its] duty if [it] did not adopt the better doctrine."[106]

The *Hoffman* court acted in the finest tradition of the common law. Recognizing the need for a response to the "pressing social problems" of automobile accidents, the opinion evidenced a spirit of cooperation with the legislature in responding to the problem:

> Our society must be concerned with accident prevention and compensation of victims of accidents. The Legislature of Florida has made great progress in legislation geared for accident prevention. The prevention of accidents, of course, is much more satisfying than the compensation of victims, but we must recognize the problem of determining a method of securing just and adequate compensation of accident victims who have a good cause of action.[107]

Judicial implementation of comparative negligence would not be irrevocable. Once a decision is made the legislature may step in to make policy adjustments or even completely reinstate contributory negligence. Professor R. E. Keeton maintains that one of the main functions of the overruling judicial decision may be to overcome "legislative inertia, a potent force that otherwise would have delayed or defeated attempts at reform."[108] He further sees in such an interchange (an overruling decision followed by legislative modification) the possibility that "decisional and statutory creativity" will serve "in combination to bring about reform that neither alone would have been likely to achieve."[109]

Some commentators purport to find significance in the fact that few legislatures have acted to implement comparative negli-

---

[103] *Id.* at 435.
[104] *Id.* at 437.
[105] *Id.*
[106] *Id.* at 438.
[107] *Id.* at 436. The court indicated Florida had just missed adopting comparative negligence judicially in 1943 by the veto of the Governor: "One man thus prevented this State from now operating under a much more equitable system of recovery for negligent personal injuries and property damage." *Id.* at 438.
[108] Keeton, *supra* note 121, at 475.
[109] *Id.*

gence—despite the existence of models of comparative negligence in the United States for nearly seventy years.[170] This failure only reflects the political nature of the legislative process and the relatively unpolitical nature of the contributory-comparative controversy.[171] It says little about the merits of, or degree of support for, comparative negligence in judicial and scholarly circles; nor does it indicate the extent to which comparative negligence accords with common expectations of justice. In *Brown* the supreme court demonstrated its unwillingness to defer to the legislature's judgment in passing a law; why then should it defer to the legislature in not changing a law?

A more serious argument against judicial implementation results from the effect of a judicial repudiation of contributory negligence. If contributory negligence is eliminated, something must replace it. Earlier judicial changes in tort law for the most part involved a simple change from negative to affirmative. In the case of government immunity, for example, "no, you cannot recover for negligence" simply became "yes, you can recover." As Robert Leflar noted, "The change in the law was complete within itself."[172] In contrast, judicial promulgation of comparative negligence, he argues, would be "baldly incomplete."[173] Leflar sets out eleven complex policy decisions necessary to create a full comparative negligence system.[174] His conclusion is that "a

---

[170] A comprehensive workmen's compensation plan based upon comparative negligence was instituted by the Federal Employer's Liability Act in 1908. 45 U.S.C. § 53 (1964).

[171] Comparative negligence legislation perhaps may be described by Professor Leach's phrase, "politically sexless legislation." Leach, *Perpetuities: The Nutshell Revisited*, 78 Harv. L. Rev. 973, 989 (1965).

[172] *Comments on* Maki v. Frelk, *supra* note 136, at 921, 929 (Comment by Leflar).

[173] *Id.* at 920.

[174] Leflar's policy decisions are:

(1) Should injured persons recover only in cases in which their negligence is less than that of the other party . . . or in every case in which the negligences can be apportioned. . . .

(2) Should the comparison of negligences be in terms of percentages . . . or in terms of "slight" and "gross" . . . .

(3) If the comparison is to be in terms of percentages, should they be percentages of causal responsibility for the injury, or percentages of fault (relative badness)?

(4) If both parties be injured, should each be allowed to recover from the other, with a setoff? Or, recognizing that recoveries really are from insurance companies, should each injured party be entitled to his full comparative recovery from the other's insurer, without setoff, on the theory that a liability policy covers actual liabilities regardless of separable rights in others?

(5) What about the multi-defendant case . . . . May the plaintiff recover from any, all, or which of the others?

(6) If comparative negligence . . . is established, do not logic and equal fairness require that a rule of contribution between joint tortfeasors be established at the same time. . . .

(7) If comparative negligence is put into effect, should the last clear

comprehensive statute is [needed], with sections and subsections carefully worked out in advance by a legislative drafting committee aided by an advisory commission."[175] The argument centers around the relative incapacity of courts to create complex rules tantamount to legislation. A court, it is argued, cannot investigate, assemble data, and sift varying policy alternatives—all of which is necessary in order to "legislate." The minute precision of *Roe v. Wade*[176] a year ago, setting out a complex structure for al[illegible] [illegible]aws, demonstrates the contrary. The Court in *Roe* was able to formulate standards matched to contemporary medical realities; such an exemplar of judicial law making diminishes the force of the argument of incapacity.

Specifically, with respect to the implementation of comparative negligence, there is no necessity that all the policy decisions listed by Leflar be decided at once. Indeed, it should be noted that typical comparative negligence statutes fail to answer more than four or five of the "relevant questions."[177] Usually the remaining decisions are made by judicial interpretations or by subsequent legislation. The *Hoffman* court, for example, designated the adoption of pure comparative negligence,[178] indicated the degree to which the application of the new rule would be retroactive,[179] and authorized trial courts to impose special verdict procedures.[180] The court declined to answer other issues, de-

---

chance doctrine . . . be abandoned. . . .
(8) Should the rule . . . allowing full recovery for wilful and wanton misconduct despite the injured person's contributory negligence be retained. . . .
(9) What about assumption of the risk? Should that defense be regarded as something completely embodied in contributory negligence? . . .
(10) Should special verdicts or answers to interrogatories be required to set out the total value of injury suffered and the specific percentages of negligence charged to each party, so that a court can doublecheck the jury's damage calculations. . . .
(11) If the state has a host-guest statute, does the comparative negligence system supersede it.

Id. at 920-21 (footnotes omitted).

175 *Id.* at 921.

176 410 U.S. 113 (1973).

177 The Wisconsin comparative negligence statute reads:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

WIS. STAT. § 331.045 (1958). *See also* the statutes collected in GREGORY & KALVEN, CASES AND MATERIALS ON TORTS 250-54 (2d ed. 1969).

178 280 So. 2d at 438.

179 *Id.* at 440.

180 *Id.* at 439. The form of the authorization was as a suggestion: "[T]he trial court is authorized to require special verdicts to be returned by the jury and to enter such judgment or judgments as may truly reflect the intent of the jury as

scribing them as "unripe."[181]

In short, there is no reason a common law, case-by-case structure cannot accomplish the desired completeness. Certainly one relevant question, the choice between pure and modified comparative negligence, must be answered at the outset. But whatever the judicial decision (especially if made as a prospective ruling), the legislature will be able to act to recapture the policy-making initiative by choosing its own alternative. In some jurisdictions, legislatures have reacted in just this way after a judicial abrogation of governmental immunity.[182]

The California Supreme Court has shown itself eminently able to deal with complex problems in tort law and has consistently maintained that courts are able to make subtle and necessary determinations, so that the wholesale elimination of complicated questions from judicial contemplation is unnecessary. Particularly in the line of cases eroding and finally ending interfamilial immunities, the court insisted that the judiciary is able to deal with the risks of collusion and yet avoid a complete ban on the cause of action.[183] Similarly the *Brown* court, quoting *Emery*, conceded:

> The courts may and should take cognizance of fraud and collusion when found to exist in a particular case. However, the fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. Courts must depend upon the efficacy of the judicial processes to ferret out the meritorious from the fraudulent in particular cases.[184]

The *Hoffman* court expressed its confidence in the ability of trial courts to deal with any problems raised by comparative negli-

---

expressed in any verdict or verdicts which may be returned." *Id.* at 440. In general the approach of the *Hoffman* court was to grant the trial court judges "broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion." *Id.* at 440.

181 *Id.* at 439.

182 Illinois, Molitor v. Kaneland Community Unit. Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960) overruled a precedent recognizing governmental immunity. The legislature passed a series of statutes reinstituting immunity for some institutions and partly restoring the immunities of school districts and nonprofit private schools. ILL. REV. STAT. ch. 122, § 825 (1959). *See* Comment, *Governmental Immunity in Illinois: The Molitor Decision and the Legislative Reaction*, 54 NW. U.L. REV. 588 (1959).

183 *See* the cases abolishing interfamilial immunities discussed in notes 79-80 & 103-06 *supra*. *See also* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968): "[T]he possibility that fraudulent assertions may prompt recovery in isolated cases does not justify a wholesale rejection of the entire class of claims in which that potentiality arises." *Id.* at 735, 441 P.2d at 917, 69 Cal. Rptr. at 77.

184 8 Cal. 3d at 874, 506 P.2d at 225, 106 Cal. Rptr. at 401.

gence.[185] Certainly, the assessment of degrees of fault in a comparative negligence system is within the competency of the trial courts; comparative negligence entails no more complexity for juries than the severability of damages caused by multiple, sequential tortfeasors.

Compared to the state legislature, the California Supreme Court is in the better position to implement comparative negligence.[186] Meeting the problems of tort law on a continuing basis, the court is in a position to continually observe the inequities and hypocrisies of the contributory negligence system and can best appreciate comparative negligence from a policy point of view. Whatever the legislature "should" do, there are serious limits to what it *will* do. In some ways the contributory negligence situation is similar to the chaos of governmental immunity law prior to *Muskopf*.[187] There the legislature was incapable of dealing with the intricacies of the problem, largely because it was unable to perceive the extent of the morass. Legislative efforts to ameliorate the situation (prompted by outside pressure from interested groups)[188] were directed to isolated areas of the problem and only contributed to the overall inequities. Only the court could act to clear the muddle because only the judiciary had a perception of the whole field. Contributory negligence has not generated the same complex of inconsistent applications; nonetheless the legislature is similarly incapacitated. The legislature will not deal with a problem it does not see, and contributory negligence is not highly visible in the political landscape despite the regular introduction of bills to implement comparative negligence. The supreme court has the capacity to act, and the judiciary as a whole is capable of dealing with the complexities raised by comparative negligence. Considering the *realpolitik*, the court should act, if only because the alternative is stagnation.

---

185 280 So. 2d at 439-40.

186 *See* the discussion note 132 *supra*.

187 *See* discussion in Muskopf v. Corning Hospital Dist., 55 Cal. 2d 211, 216-19, 359 P.2d 457, 460-61, 11 Cal. Rptr. 89, 92-93 (1969), of the intricate system of statutory exception to government immunity embracing, *e.g.*, the dangerous or defective condition of public property (CAL. GOV'T CODE § 53051 (West 1964)); damage by mobs or riots (CAL. GOV'T CODE § 50140 (West 1964)); and liability of school districts (CAL. EDUC. CODE § 903 (West 1964)). The piecemeal approach of the legislature to the problems created by government immunity indicated that the full extent of the problem was not manifest, especially since the legislature also had enacted statutes which expressly permitted the state to "sue or be sued." CAL. GOV'T CODE § 641 (West 1964); CAL. HEALTH & SAFETY CODE § 32121 (b) (West 1964).

188 *See* Annot., 60 A.L.R.2d 1198 (1958). For a critical comment on *Muskopf* which clings tenaciously to the argument that the legislature alone can undertake such reform, *see* Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu*, 15 STAN. L. REV. 163 (1963).

2. Violation of stare decisis

Unquestionably contributory negligence has been the rule of law in common law courts for more than 160 years.[189] The argument is that the important functions of stare decisis (continuity, predictability, and reliance) are too important for courts to act impulsively to change such a fundamental rule of law. Chief Justice Traynor's own reservations against judicial implementation of comparative negligence centered upon the reliance of insurance carriers upon contributory negligence.[190]

In the last twenty years the California Supreme Court has often found that the need for flexibility and change in tort law outweighed the recognized values of stability and predictability,

---

189 According to Dean Prosser, although courts almost from the beginning have displayed an uneasy consciousness that something is wrong with the doctrine of contributory negligence, they have been slow to move. *See* PROSSER, *supra* note 3, at 469. The United States Supreme Court expressed its dissatisfaction, calling contributory negligence a "discredited doctrine which automatically destroys all claims of the injured persons who have contributed to their injuries in any degree however slight." Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953).

Judicial dissatisfaction with the doctrine of contributory negligence in California is manifest in one of the last cases to interpret the guest statute prior to *Brown*. Williams v. Carr, 68 Cal. 2d 579, 440 P.2d 505, 68 Cal. Rptr. 305 (1968), in considering whether to apply contributory negligence in the guest statute context, expressed more dissatisfaction with contributory negligence than with the guest statute.

Further evidence of judicial unhappiness with the rule of contributory negligence is demonstrated by the eagerness with which several lower courts in New York have been willing to believe that the ruling in Dole v. Dow Chemical Co., 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972), which instituted comparative contribution between joint tortfeasors, signalled the adoption of a general standard of comparative negligence. *See* Dixon v. Knickerbocker Drivurself, Inc., 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (Albany City Ct. 1973). *See also* Sorrentino v. United States, 344 F. Supp. 1308 (E.D. N.Y. 1972), indicating that the rule in New York is unsettled but concluding in the light of *Dole*: "[A] view of contributory negligence which makes it an absolute bar to a plaintiff's recovery cannot survive." *Id.* at 1310. *But see* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 334 N.Y.S.2d 851, 286 N.E.2d 241 (1972) where the court reiterated that *Dole* applied only to contribution among joint tortfeasors.

The question of whether contributory negligence should be replaced with the principle of comparative negligence which a Florida District Court of Appeal certified to the Florida Supreme Court indicates pressure from the lower courts for change because ordinarily only questions of law which are unsettled are certified to a higher court by a lower court. Certainly the rule with respect to contributory negligence in Florida was settled.

State legislatures are acting with increasing frequency to institute comparative negligence. Since 1969, six additional states have adopted some form of comparative negligence, bringing to 14 the total number of states in which contributory negligence as a complete bar to recovery has been abolished. *See* COMPARATIVE NEGLIGENCE MANUAL § 3 (1973).

190 Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. UNIV. L. REV. 401, 414-15 (1968).

especially when the latter required the repetition of old mistakes. Certainly no more abrupt changes have been undertaken than in the abrogation of government immunity in *Muskopf* or in the sweeping elimination by *Rowland* of century-old distinctions delineating the varying liabilities of landowners. Both cases illustrate the observation of Professor Keeton that outdated doctrines have inbred tendencies to generate causistic distinctions which, coupled with a lack of candidness of courts in setting out their reasoning, may be far more dangerous to a system of law than open change.[101]

Certainly *Brown* and the cases upon which it relies have done more violence to the principle of stare decisis and reliance by insurance carriers than would a substitution of comparative for contributory negligence. Insurance carriers were able to rely on the guest statute to remove the issue of simple negligence from the jury, requiring the plaintiff to prove aggravated negligence or intoxication. Moreover, judges could be expected to intervene frequently to disallow a claim of aggravated negligence as a matter of law. In the case of familial immunities as well there was no question for a possibly sympathetic jury to decide. Insurance carriers have been unable to rely similarly upon contributory negligence as a complete bar. In contrast to earlier times,[102] contributory negligence is no longer a reliable means of securing summary judgment or a directed verdict for the defendant. Contributory negligence which as a matter of law deprives a plaintiff of his cause of action, is largely a thing of the past.[103] In California the generally recognized standard is that contributory negligence is not established as a matter of law unless the *only* reasonable hypothesis is that such negligence exists, or unless reasonable men could have drawn *only* that conclusion.[104] In this modern context, where contributory negligence

---

101 *Comments on* Maki v. Frelk, *supra* note 136, at 914 (Comment by R. Keeton).

102 Professor Malone demonstrates that judges used contributory negligence as a brake upon the looseness of juries in the nineteenth century. *See* Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

103 Professor Keeton emphasized the point: "Many cases are allowed to go to a jury today on evidence that twenty-five years ago would have been held insufficient to warrant reasoned inferences that the defendant was negligent and that the plaintiff was not." Keeton, *supra* note 121, at 503. Apparently the Arizona Constitution *requires* that the issue of contributory negligence be a jury question. Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970). Keeton also observed a trend of "less judicial supervision of verdicts." Keeton, *supra* note 121, at 503.

104 Schmitt v. Henderson, 1 Cal. 3d 460, 462 P.2d 30, 82 Cal. Rptr. 502 (1969); Kuhlmann v. Pascal & Ludwig, 5 Cal. App. 3d 144, 85 Cal. Rptr. 199 (2d Dist. 1970); Markewych v. Altshules, 255 Cal. App. 2d 642, 63 Cal. Rptr. 335 (2d Dist. 1967).

is almost always a jury question, the argument of insurer reliance makes more noise than sense.

Critics of judicial implementation emphasize phrases like "drastic change," but studies of the actual impact of comparative negligence found it to be much less dramatic than either its advocates or critics maintained.[195] Professor Peck, basing his conclusions on an exhaustive analysis of homogeneously matched states with and without comparative negligence, concluded that a shift to comparative negligence would have little, if any effect on liability insurance rates.[196] Professor Rosenberg's study of the effect of introducing comparative negligence in Arkansas found that lawyers evaluated their cases differently and that plaintiffs won a higher percentage of verdicts under the comparative system but that the individual recoveries were not larger.[197]

Thus, it is apparent the argument that stare decisis should bar judicial implementation does not withstand close analysis. Contributory negligence has not been a reliable force in halting recovery, even if such a policy goal could be justified.

3. No New Reasons to Make the Change.

The argument that there are no new developments which make contributory negligence more inadequate today than it has been in the past is a relativistic argument which fails to recognize the cumulative effect of a series of gradual changes. Indeed, the evolution from the nineteenth century of proof of fault to the twentieth century value of injury compensation is truly remarkable. The *Hoffman* court referred to this as a change from favoring industry over the individual to favoring the individual over industry.[198] The development has been gradual although the last twenty years have seen a good deal of acceleration. As the peripheral doctrines of tort law are changed to correspond with the compensatory-loss spreading impulse, other doctrines, once only slightly dissatisfactory, appear more invidious in comparison. *Brown* provides an apt illustration of this phenomenon. One source of the inequity of the guest statute derived from the elimination of barriers to recovery by other categories of guests. Thus the guest statute, once only somewhat unfair and disparate, by 1973 appeared to be grossly inequitable.

---

[195] Gregory, *Loss Distribution by Comparative Negligence*, 21 MINN. L. REV. 1 (1936); Peck, *Comparative Negligence and Automobile Liability Insurance*, 58 MICH. L. REV. 689 (1960); Rosenberg, *supra* note 134.

[196] Peck, *supra* note 195.

[197] Rosenberg, *supra* note 134.

[198] 280 So. 2d at 437, *citing* INSTITUTE OF JUDICIAL ADMINISTRATION, COMPARATIVE NEGLIGENCE 2 (Supp. 1954).

The steady advance of automobile statistics measuring the carnage wrought by the automobile and the steadily advancing cost of accidents eventually generates political forces upon the legislature that demand major change.[199] Political pressures, however, do not cause technical changes in tort law. Rather, such pressures are manifested in statutes imposing strict standards for safety apparatus and serious consideration of alternatives to the entire liability system. By default, if nothing else, reform in tort law is largely the province of the courts. In a spirit of cooperation with the legislature, reflecting the concerns of the era, the courts should continue to alter the substance of negligence law to bring it into the twentieth century.

The California Supreme Court has clearly concluded that overall developments warrant a thoroughgoing reform of tort law. Certainly no abrupt technological or social revolution was responsible for the rapid development of products liability. The dangers of defectively manufactured products are surely not greater today than in a period totally without government regulation and with only minimal protection from mass media disclosures. In fact, except for the vitality concept in prenatal injuries and wrongful death plus perhaps a greater sophistication in the concept of mental suffering,[200] none of the existing changes in tort law rests upon a fundamental change in technology or social values. California has never required such a standard before taking action. Dramatic change, it may be argued, is not even the kind of change to which courts ordinarily react; legislatures react to dramatic change. Courts ultimately react to top-heavy, over-distinguished, out-of-date precedents, with which the field of contributory negligence is certainly littered.

IV. CONCLUSION

The decision in *Brown v. Merlo*, utilizing activist tools of constitutional law in the service of substantive reform of tort law, gives evidence of the strength of the reform impulse in the California Supreme Court. The reforms already completed in the pursuit of greater compensation and loss-spreading suggest the

---

199 A similar political force was generated by the excessively high injury rate among railroad workers at the turn of the century. In 1892, for example, 2,660 employees were killed and 26,140 injured. The first result of pressure was a comprehensive safety statute, the Railway Safety Act of 1893, ch. 196, § 1 *et seq.*, 27 Stat. 531. The eventual result was the workman's compensation system as a complete alternative to the tort law system. *See* G. CAMPBELL, INDUSTRIAL ACCIDENTS AND THEIR COMPENSATION (1911). As to the problem on the railroads, see the discussion in Johnson v. Southern Pac. Co., 196 U.S. 1 (1904).

200 Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

appropriateness of further modification of common law barriers to recovery,[201] the most inequitable of which is the contributory negligence rule. The court should act, therefore, to substitute a rule of comparative negligence more in line with contemporary policy objectives.

DIAN DICKSON OGILVIE

---

201 If the legislature adopts a comprehensive no-fault insurance plan, the need for this action will be diminished. However, if, as seems more likely, the plan is modest (*e.g.*, with a $2,000 threshold) the implementation of comparative negligence will remain desirable as a more symmetrical adjunct to the plan than contributory negligence. In fact the most nearly successful California proposal for a no-fault insurance (the Fenton-Song Motor Vehicle Reparations Act, A.B. 801) also provided for the amendment of section 1714 of the Civil Code to abolish contributory negligence for automobile accidents. The bill would have instituted instead modified comparative negligence. A.B. 801 passed the Assembly June 14, 1973. As of June 5, 1974 the bill remained stuck in the Committee on the Judiciary in the Senate.

UCLA-Alaska Law Review
Vol. 3, No. 1, Fall, 1973

COMPARATIVE NEGLIGENCE: A TIME FOR CHANGE IN ALASKA

INTRODUCTION

At the present time, throughout most of the country[1] and in Alaska,[2] an action for the recovery of damages resulting from an injury to person or property is completely barred if the injured party was in any degree causally negligent. This strict rule of law, known as the doctrine of contributory negligence,[3] is applicable even to situations in which the injured party is only slightly negligent while the party inflicting the injury is seriously at fault.[4] The result is a tort system which places the entire financial burden of an accident upon the less blameworthy of two persons who are both negligent, permitting the more negligent tortfeasor to escape all responsibility and virtually allowing him to profit from his wrong.

General adherence to the principle of contributory negligence is particularly surprising in view of the amount of criticism the doctrine has engendered. For many years, legal scholars have advocated its abrogation.[5] Members of the judiciary, charged with the duty of administering the rule, have likewise expressed serious concern over the inherent inequities embodied in this aspect of

---

1 *See* notes 26-29 & accompanying text *infra*.

2 *See, e.g.*, Roach v. Benson, 503 P.2d 1392 (Alaska 1972). Although the Alaska Supreme Court refused to apply the contributory negligence rule to the facts of the *Roach* case, the decision made no mention of any alternative to this all-or-nothing approach. The rule that a negligent plaintiff must be denied any recovery is the applicable principle in Alaska today.

3 The doctrine of contributory negligence has a common law history dating back to the English case of Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809). In that case the plaintiff was injured when he rode his horse into a pole which the defendent had negligently left protruding across a public highway. The court denied recovery, asserting that "[A] party is not to cast himself upon an obstruction which has been made by fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right." *Id.* at 927.

4 *See, e.g.*, Seaboard Coast Line R.R. v. Owen Steel Co., 348 F. Supp. 1363 (D.C.S.C. 1972); *cf.* Odgen v. State, 395 P.2d 371 (Alaska 1964), in which the plaintiff slipped on a bank of ice which had been allowed to accumulate in front of the main entrance to Fairbanks International Airport. The court found that the plaintiff had failed to exercise reasonable care for his own safety and thus contributory negligence barred his recovery. While the defendent may have been more seriously negligent in permitting the icy condition to exist, the contributory negligence rule allowed the court to ignore this possibility.

5 *See, e.g.*, Bress, *Comparative Negligence: Let us Harken to the Call of Progress*, 43 A.B.A.J. 127 (1957); Ghiardi & Hogan, *Comparative Negligence—The Wisconsin Rule and Procedure*, 18 DEFENSE L.J. 537 (1969); Haugh, *Comparative Negligence: A Reform Long Overdue*, 49 ORE. L. REV. 38 (1969); Heft & Heft, *The Two-Layer Cake: No Fault and Comparative Negligence*, 58 A.B.A.J. 933 (1972); Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135 (1958); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 (1950).

tort law.[6] Since its first application in America in 1824,[7] contributory negligence has been variously depicted in judicial opinions[8] as "unjust and inequitable,"[9] "harsh,"[10] and "highly unrealistic."[11] Nevertheless, despite the intensity of the attack, this common law rule remains a settled principle of law in most jurisdictions.[12]

Efforts to ameliorate the severe impact that contributory negligence has had on our tort system have intensified in recent years. The trend has been to replace the all-or-nothing approach with a more flexible system of "comparative negligence."[13] Nineteen states have recognized this need for change and have adopted comparative negligence rules applicable to all negligence cases.[14] It appears that similar forces are at work in Alaska, but thus far legislative inertia has served to perpetuate one of the most problematic doctrines in the common law.[15] The purpose of this Comment is to compare the

---

[6] *See, e.g.*, Haeg v. Sprague, Warner & Co., 202 Minn. 425, 281 N.W. 261 (1938), in which the court reluctantly denied the injured plaintiff any recovery whatsoever. "No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant . . . ." *Id.* at 427, 281 N.W. at 263.

[7] Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824).

[8] It should be noted that the expressions of judicial dissatisfaction referred to herein are taken from majority opinions. Despite a general recognition that the rule is unfair, the courts apparently feel compelled to follow it. This result is due mainly to the operation of the principle of stare decisis, but it may also stem from an unwillingness to tackle such a complex problem which might more easily be left to the legislature. *See* notes 85-88 & accompanying text *infra*.

[9] Louisville & N.R.R. v. Yniestra, 21 Fla. 700, 737 (1886).

[10] Sun Oil Co. v. Seamon, 349 Mich. 387, 390, 84 N.W.2d 840, 843 (1957).

[11] Frummer v. Hilton Hotels Intl., Inc., 60 Misc. 2d 840, 847, 304 N.Y.S.2d 335, 342 (Sup. Ct. 1969).

[12] Oddly enough, the United States is "virtually the last stronghold of contributory negligence," the doctrine as a complete defense having disappeared from the law in continental Europe, New Zealand, Western Australia, and the Canadian Provinces. There is also evidence of apportionment of damages in China, Japan, Russia, Poland and the Philippines. Even in England, where the rule was born, it has since been rejected by the English Reform Act of 1945. Annot., 32 A.L.R.3d 463, 469 (1970). *See also* Heft & Heft, *Comparative Negligence: Wisconsin's Answer*, 55 A.B.A.J. 127 (1969).

[13] *See* note 36 & accompanying text *infra*.

[14] Ark. Stat. Ann. §§ 27-1730.12 (1962); Colo. Rev. Stat. § 41-2-14 (1971); Ga. Code Ann. §§ 105-603 (1968), 94-703 (1972); Hawaii Rev. Stat. § 663-31 (Supp. 1972); Idaho Code §§ 6-801 to -806 (Supp. 1973); Me. Rev. Stat. Ann. tit. 14, § 156 (Supp. 1972); Mass. Ann. Laws ch. 231, § 85 (Supp. 1972); Minn. Stat. Ann. § 604.01 (Supp. 1973); Miss. Code Ann. § 1454 (1956); Neb. Rev. Stat. § 25-1151 (1964); N.H. Rev. Stat. Ann. ch. 507:7a (Supp. 1972); N.J. Laws ch. 146 (1973); N.D. Century Code ch. 9-10-07 (Supp. 1973); Ore. Rev. Stat. § 18.470 (1971); S.D. Comp. Laws § 20-9-2 (1967); Utah Code Ann. §§ 78-27-37 to -43 (Supp. 1973); Vt. Stat. Ann. tit. 12, § 1036 (1973); Wis. Stat. Ann. § 895.045 (Supp. 1973); Wyo. Stat. § 1-7.2 (Supp. 1973). These statutes apply to all types of negligence cases and must be distinguished from statutes which adopt the comparative negligence doctrine only in limited situations. *See* note 58 & accompanying text *infra*.

[15] The Alaska legislature has had a consistent history of inaction with respect to comparative negligence bills. The first such bill, House Bill 306, was introduced in 1966 but died in committee. In 1969, House Bill 336 received a strong endorsement from the Judiciary Committee. Referring to contributory negligence as a "harsh rule of law," the committee inserted the following report in the legislative journal:

> [A] number of states are moving toward a more reasonable rule which would

opportunity for reform in Alaska with the lawmaking experience of other states and to urge that the anachronistic doctrine of contributory negligence be supplanted by a more equitable system of comparative negligence. Specifically, it shall be proposed that the Alaska Legislature rather than the courts implement the reform.

I. Contributory Negligence—The Problem

A. *Definition and Rationales*

Contributory negligence has been defined by the Alaska Supreme Court as conduct on the part of a plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.[10] At least six rationales may be offered in support of the doctrine: (1) that the rule has a deterrent effect on plaintiff's carelessness; (2) that a negligent plaintiff ought to assume full responsibility for his negligent act; (3) that the plaintiff's fault is an intervening and superseding cause which acts as a fissure between the defendant's negligence and the ensuing injury; (4) that the equitable notion of unclean hands dictates that the courts should not interfere in cases where both parties are at fault; (5) that contributory negligence provides some check on plaintiff-oriented juries; and (6) that whatever injustice may derive from the doctrine, compromise jury verdicts tend to overcome this defect.

The first four arguments are little more than theoretical justifications having no basis in reality. With respect to the deterrence argument, it is unlikely that the behavior of a potential plaintiff in an accident situation is in any way affected by prior or contemporaneous consideration of legal niceties. The second rationale suggests that the plaintiff should be punished for his carelessness by bearing the responsibility for not only his own negligent act, but for that of the defendant as well. This penal basis stems from a 19th

---

> permit recovery by the injured person, but would diminish his recovery in proportion to the degree of negligence attributable to him. This is known as the doctrine of "comparative negligence" and has now been adopted by seven states. The comparative negligence rule, we feel, provides a greater degree of justice than is now afforded by the contributory negligence doctrine.

The bill was amended slightly and managed to pass the House, but thereafter it too died in committee.

Two more bills (Senate Bill 132 and House Bill 176) were introduced in 1971, only to meet a similar fate. Finally, on February 23, 1973, Senator John Rader introduced Senate Bill 166, relating to comparative negligence. It was referred to the Judiciary Committee, but no other action has been taken to date. The bill will be subject to further action in the Second Session of the Eighth Legislature.

[10] Bertram v. Harris, 423 P.2d 909 (Alaska 1967). The court used the definition found in RESTATEMENT (SECOND) OF TORTS § 463 (1965).