

12-15-1984

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### Recommended Citation

Emery J. Mishky *The Liability of Providers of Alcohol: Dram Shop Acts?*, 12 Pepp. L. Rev. 1 (1985)

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# The Liability of Providers of Alcohol: Dram Shop Acts?

*The use of alcohol in a mechanized society produces potentially devastating results. Yet the area of civil liability for providers of alcohol remains inconsistent and unresponsive to the needs of victims of alcohol-related accidents. This comment seeks to identify the policies surrounding liability of providers of alcohol as well as to propose a suggested "dram shop" act which will further these goals.*

## I. INTRODUCTION

With the advance of technology, alcohol-related legislation and case law have taken on increasing significance.<sup>1</sup> In today's mobile society, over ninety-five million people drive automobiles and seventy million people consume alcoholic beverages with some frequency.<sup>2</sup> This mixture creates the possibility for devastating injury. Auto accidents in the United States take more than 50,000 lives and produce more than 2,000,000 disabling personal injuries per year.<sup>3</sup> Furthermore, these accidents have an enormous economic cost.<sup>4</sup> Despite these statistics, however, the law relating to

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1. As one court has noted:

When most people walked and few had horses or carriages, or even in the days when the horse and buggy was a customary mode of travel, it may have been that the common law rule of non-liability arising from the sale of liquor to an intoxicated person was satisfactory. But the situation then and the problem in today's society of the imbibor going upon the public highways and operating a machine, that requires quick response of mind and muscle and capable of producing mass death and destruction are vastly different.

Meade v. Freeman, 93 Idaho 398, 409, 462 P.2d 54, 65 (1969) (expressly overruled in *Algria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980)) (Prather, J., concurring specially in result).

2. Cramton, *The Problem of the Drinking Driver*, 54 A.B.A. J. 995 (1968). It has been estimated that at least one out of every ten drivers on Friday and Saturday nights is legally drunk. *Washington Post*, Oct. 17, 1982, at H1, col. c (citing the National Highway Traffic Safety Administration).

3. Cramton, *supra* note 2, at 995.

The statistics are staggering: 26,000 people (at least 8,800 of them teenagers) die at the hands of drunk drivers every year, more than die as a result of handguns every year, more than the population of Gaithersburg, Md. On an average day, 71 Americans are killed and 2,000 persons are injured in alcohol-related accidents, according to the National Highway Traffic Safety Administration. . . .

*Washington Post*, Oct. 17, 1982, at H1, col. c.

4. In 1981, the total economic cost for alcohol-related accidents in New Jersey

the control and distribution of alcohol remains wholly inadequate.

In the area of civil liability for providers of alcoholic beverages, the law is based upon arbitrary distinctions and capricious classifications.<sup>5</sup> The tremendous importance of this area of the law to so many victims of alcohol-related accidents demands close examination, and perhaps change, in a system that should yield the fairest and most equitable results.

This comment will review the various legal systems that deal with the liability of providers of alcoholic beverages. The basic principles within this area of the law will be discussed to provide a foundational structure from which an equitable and fair system may be derived. Finally, these principles will be applied to propose a statutory system intended to accomplish the above-mentioned goals.

## II. THIRD PARTY LIABILITY: THE INABILITY OF THE COURTS

### A. *Traditional Common Law Liability for Providers of Alcoholic Beverages*

Traditionally, society has professed deep concern with the control of alcohol. There are a myriad of statutory provisions controlling its distribution.<sup>6</sup> Virtually any commercial endeavor in which alcohol is involved requires either a license or a permit and virtually every state has an Alcoholic Beverage Control Board or its equivalent which monitors and supervises the disposition of alcoholic beverages. Furthermore, alcohol is subject to specific taxes, which usually are quite heavy.<sup>7</sup> Finally, during the distribution process, before the final sale to a consumer, there are a variety of regulations concerning the time, place and manner in which alcohol may be dispensed.<sup>8</sup> However, post-sale problems seem to be

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alone was \$1,594,497,898. This figure includes economic cost arising from deaths, personal injuries and property damages. See *Kelly v. Gwinnell*, 96 N.J. 538, 545 n.3, 476 A.2d 1219, 1222 n.3 (1984). These figures would appear to be consistent with nationwide statistics on this subject. See *id.* and authorities cited therein.

5. See *infra* notes 15, 17, 103-21 and accompanying text.

6. See, e.g., CAL. BUS. & PROF. CODE §§ 23000-25762 (West 1968 & Supp. 1984) (Alcoholic Beverages); ILL. REV. STAT. ch. 43 (Smith-Hurd 1944 & Supp. 1984) (Liquor Control Act); MICH. COMP. LAWS ch. 436 (West 1978 & Supp. 1984) (Liquor); N.Y. ALCO. BEV. CONT. LAW §§ 60-99-d (McKinney 1970 & Supp. 1983).

7. See, e.g., N.Y. TAX LAW §§ 420-45 (McKinney 1975 & Supp. 1983) (statutes concerning taxes on alcoholic beverages). For an example of specific rates of tax, see *id.* at § 424.

8. See generally CAL. BUS. & PROF. CODE §§ 23000-25762 (West 1968 & Supp. 1984) (Alcoholic Beverages); MICH. COMP. LAWS ANN. §§ 435.19-C, 436.46 (Liquor) (West 1978 & Supp. 1984-85); N.Y. ALCO. BEV. CONT. LAW § 1-155 (McKinney 1970 & Supp. 1983-84); S.D. CODIFIED LAWS ANN. §§ 35-2-1-35-4-93 (1977 & Supp. 1983) (Alcoholic Beverages).

left in the neglected disarray of a legal ashheap.<sup>9</sup> As a result, the law in the area of post-sale damages and injuries has become a confusing patchwork consisting of a variety of different legislative enactments as well as differing distortions and exceptions under the common law.<sup>10</sup>

The traditional common law has done little to alleviate post-sale problems pertaining to the provision of alcohol.<sup>11</sup> Courts have woven a unique web of legal principles dealing with actions by plaintiffs injured or damaged by intoxicated persons against defendants who had provided the means of intoxication. Although tavern keepers are charged with a duty to control order within their premises and ensure the safety of their patrons,<sup>12</sup> courts have traditionally drawn the line at this, imposing no further duties. Despite basic tort principles pertaining to the actions of third parties,<sup>13</sup> courts have chosen not to adhere to these principles.<sup>14</sup> Although legislation characteristically stops upon the sale of alcoholic beverages to the consumer, tort law, unhampered, may have been able to handle the post-sale problems. However, the courts have destroyed the capacity of tort law to eq-

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9. See *infra* notes 174-83 and accompanying text.

10. *Id.*

11. In an attempt to head off confusion that may arise from the terminology used, the following explanations are offered. Throughout this article:

a. *The traditional common law rule* is the name given to the early common law developed by the courts which held that, as a matter of law, the person who consumes alcohol is the proximate cause of the inebriation, and the act of selling alcohol is too remote to be proximate;

b. *The modern common law rule* is the name given to the law developed by the courts that uses negligence standards in the review of cases without the direct imposition of the traditional common law rule (the modern common law rule has different variations depending on factors such as whether the courts rely on the violation of statute to impute liability);

c. *Common law negligence* is the area of law that this comment is concerned with, so the unembellished use of the term *common law principles* refers to the principles that are relevant to this article, namely common law negligence;

d. *Pure (standard, general) common law negligence* is an attempt to put a label on the generic elemental negligence cause of action (i.e., the concepts of duty and a breach of duty);

12. Farrell, *Liability of Tavern Owners Under the New York State Dram Shop Act*, 30 ALB. L. REV. 271, 272 (1966) (tavern keepers owe a high standard of care towards patrons within their establishment).

13. See RESTATEMENT (SECOND) OF TORTS § 449 (1965). "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." *Id.*

14. See *infra* notes 18-46 and accompanying text.

uitably adjudicate lawsuits concerning the providers of alcoholic beverages by creating arbitrary exceptions resulting in defendant immunities.<sup>15</sup>

The traditional common law rule developed by the courts is that, as a matter of law, the person who consumes alcohol is the proximate cause of the inebriation and the act of selling alcohol is too remote.<sup>16</sup> Thus, any injury or damage that is caused by an inebriated person is the sole responsibility of that person, and in *no circumstance* may the provider of the alcohol become culpable. Such an absolute precept runs contrary to the principles of tort law.<sup>17</sup>

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15. For examples of non-liability rules imposed by courts, see, *e.g.*, Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945) (overruled in *Ontiveros v. Borak*, 36 Ariz. 500, 667 P.2d 200 (Ariz. 1983); see *infra* note 41); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 28 S.E.2d 329 (1943); Stringer v. Calmes, 167 Kan. 278, 205 P.2d 921 (1949); Waller's Adm'r v. Collinsworth, 144 Ky. 3, 137 S.W. 766 (1911); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966) (overruled in *Pence v. Ketchum*, 326 So. 2d 831, 838 (La. 1976)); State *ex rel.* Joyce v. Hatfield, 197 Md. 249, 78 A.2d 754 (1951); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966) (overruled in *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982); see *infra* note 42).

16. See, *e.g.*, Cole v. Rush, 45 Cal. 2d 345, 356, 289 P.2d 450, 457 (1955) (overruled in *Vesely v. Sager*, 5 Cal. 3d 153, 286 P.2d 151, 95 Cal. Rptr. 623 (1971)) ("as to a competent person it is the voluntary consumption not the sale or gift, of intoxicating liquor which is the proximate cause of injury from its use"); Cruse v. Aden, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889) (sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication). Cf. Keenan, *Liquor Law Liability in California*, 14 SANTA CLARA LAW. 46, 48 (1973) (an injured person could only recover from the consumer, if the buyer were the plaintiff, the vendor had the defense of contributory negligence).

17. Negligence involves standards of reasonable care by a person of ordinary prudence under the same or similar circumstances. The action of an ordinary prudent person is dependent upon the circumstances involved. This is a highly determinative and variable factor entangled in any negligence action. To formally adjudge that the providing of a drink can never be a negligent act is contrary to tort theory. In 1949, Justice Dooling, in the California case of *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949), recognized the incompatibility of the traditional common law approach with basic tort theory. In his dissent, Justice Dooling stated:

I frankly admit that the cases from other jurisdictions are all to the effect that in the absence of statute no remedy exists against the dispenser of liquor for injuries resulting to third persons from the acts of intoxicated persons. However, considered as questions of the law of negligence and proximate cause, I cannot bow to the reasoning of those decisions when carried to the full extreme of holding that under no circumstances can one who dispenses liquor to another knowing that he is becoming intoxicated be liable to a third person later injured by the intoxicated person's conduct, and I can see no reason for perpetuating in the law of this state the error of the courts of other jurisdictions.

Negligence is measured by what a person of ordinary prudence would or would not do under the same or similar circumstances and it is thoroughly settled that negligence may be the proximate cause of an injury to another even though the act of a third person intervenes, if a person of ordinary prudence could reasonably anticipate the probability of the third person's intervening conduct.

By adhering to the traditional common law rule, the courts have indirectly limited the duty of care owed by a person through changing the standards of proximate cause. Because a provider of a drink can never be the proximate cause of an injury, he effectively has no duty whatsoever to either the intoxicated person or the public at large.<sup>18</sup> The use of ordinary tort standards for negligence would not provide such a vehicle for absolute immunity to the vendor. The genesis for the shift in position by the courts is difficult to fathom in light of the existence of tort standards which would serve society in this area of the law with the same integrity as other areas of tort law are served.<sup>19</sup> A seller would not be liable in instances in which it would be unreasonable or unfair to hold him liable.<sup>20</sup> The rationale utilized by the courts in adopting the traditional common law rule is based upon two premises.<sup>21</sup> First, once a customer leaves a bartender's establishment, the bartender has no control over the intoxicated person.<sup>22</sup> Second, a person who voluntarily becomes inebriated should bear his own

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*Id.* at 251-52, 210 P.2d at 534. See also Keenan, *supra* note 16, at 48-49 (traditional common law rule was based upon "outmoded reasoning" and was ripe for disapproval by the courts); cf. Farrell, *supra* note 12. For example, are tort theories properly served, when, after a bartender serves an intoxicated minor alcohol and the minor subsequently injures another after losing control of his automobile, the court holds that *as a matter of law* the server of the drink has no legal liability? (this being so despite the fact that the server violated standards of reasonable care). See *infra* notes 51-55 and accompanying text.

18. This stance seems to put the courts in a position contrary to the purposes of the Alcoholic Beverage Control Acts. The purposes of the Acts involved "in the highest degree, the economic, social, and moral well being and safety of the State and all its people." *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 248, 210 P.2d 530, 532 (1949).

19. For a case with a strong fact pattern that begs for the application of usual tort standards, see *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959), and a discussion of this case *supra* notes 51-59 and accompanying text.

20. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 283 (1965).

The words "reasonable man" denote a person exercising those qualities of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interests of others. It enables those who are to determine whether the actor's conduct is such as to subject him to liability for harm caused thereby, to express their judgment in terms of the conduct of a human being. The fact that this judgment is personified in a "man" calls attention to the necessity of taking into account the fallibility of human beings.

*Id.* at Comment b.

21. For a discussion of the basis for the court's adoption of the traditional common law rule, see Dooley & Mosher, *Alcohol and Legal Negligence*, 7 CONTEMP. DRUG PROBS. 145, 158 (1978). See also McClintock, *Common Law Remedy for Negligent Acts of the Drunk*, 5 TULSA L.J. 289 (1968).

22. Dooley & Mosher, *supra* note 21, at 158.

responsibilities.<sup>23</sup> These arguments ignore the fact that, in each case of negligence, these circumstances would be reckoned with. Therefore, the traditional common law rule becomes difficult to defend. Furthermore, the first premise assumes that because the intoxicated person will leave the control of the bartender, this provides sufficient reason to grant a bartender the license to launch an intoxicated person onto the streets, whatever the *foreseeable* consequences may be.

The traditional common law rule's absolute blanket protection of a class of defendants is contrary to the basic theories of tort law.<sup>24</sup> The early courts were erroneously overconfident in their ability to categorize circumstances in which a sale of alcohol would take place.<sup>25</sup> Accepting the idea that, in *all* cases and circumstances, a provider of alcohol was acting prudently does not sustain the rationale for an attack upon the negligence duty analysis with a proximate cause adjustment. If a court believes the basis for the traditional common law rule is sound, then that court can rest confident that future courts would similarly find, case by case, that no duty exists under ordinary tort principles. An identical result would be assured by the pure and natural operation of tort law. The traditional common law rule becomes a capricious act by the courts which serves no purpose, save to provide an arbitrary zone of safety for the fortunate, but undeserving, defendant.

Arizona originally held to the traditional common law rule of liability limitation.<sup>26</sup> In *Collier v. Stamatis*,<sup>27</sup> a fifteen-year-old girl was sold a "tall drink of highly intoxicating liquor."<sup>28</sup> This child drank the liquor and became intoxicated.<sup>29</sup> In an action by the mother against the tavern owner, it was held that the girl was the author of her own injury.<sup>30</sup>

The question considered by the court was whether the child possessed the will, choice or discretion to consume the beverage.

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23. *Id.* See, e.g., *Nolan v. Morelli*, 154 Conn. 432, 443, 226 A.2d 383, 389 (1967) (no liability for injuries at places and in circumstances outside the defendant's knowledge or control).

24. See *supra* note 17.

25. *Id.*

26. See, e.g., *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147 (1940) (overruled in *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 700 (Ariz. 1983)) (traditional common law was adhered to, despite dissent. The dissent felt the issue was beyond the powers of the court and should have been left to the legislature).

27. 63 Ariz. 285, 162 P.2d 125 (1945).

28. *Id.* at 287, 162 P.2d at 126.

29. *Id.*

30. *Id.* at 290, 162 P.2d at 128 (mother of the child brought suit claiming she had been deprived *inter alia* of the services of her child).

age.<sup>31</sup> This was answered in the affirmative, resulting in the claim against the tavern owner being denied.<sup>32</sup> The court implied that the only way the tavern owner could have been liable was if the child was found to have no volitional choice in consuming the alcohol.<sup>33</sup> Thus, the court's intimation is that liability would attach to the bar owner only if the actual action of drinking could be *imputed directly* to him. This result follows regardless of the age of the child involved so long as the child possesses the requisite will, choice or discretion.<sup>34</sup>

An ordinary negligence standard, on the other hand, would consider all the circumstances when deciding whether the tavern keeper violated a duty established under a reasonable person standard. In a later Arizona case,<sup>35</sup> a minor consumed eight to ten beers in the defendant's bar before purchasing hard liquor and additional beer from a co-defendant. He then jumped from a roof at least three stories high into a pool.<sup>36</sup> While an Arizona appellate court stated that there should be some remedy,<sup>37</sup> it nevertheless felt itself bound by the strict traditional common law rule.<sup>38</sup> Issues of fact, such as whether the defendants knew that the plaintiff was both a minor and intoxicated, and whether the defendants were a proximate cause of the injuries never reached the trial court.

Even in the face of the violation of a statute the common law

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31. "It is to be considered whether the child . . . was capable in law of having or giving effect to her own will to consume or to refuse the drink she had caused to be set before her." *Id.* at 290, 162 P.2d at 127.

32. *Id.* at 290, 162 P.2d at 128.

33. For other courts that have grappled with the same issue, see, *e.g.*, *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Hull v. Rund*, 150 Colo. 425, 374 P.2d 351 (1962).

34. This approach was recognized by the Arizona Supreme Court to include any person, notwithstanding the age, who did not have the discretion or will to refuse a drink. *Pratt v. Daly*, 55 Ariz. 535, 104 P.2d 147 (1940) (sale of alcoholic beverages to habitual drunkard).

35. *Valentine v. Azar*, 8 Ariz. App. 247, 445 P.2d 449 (1968) (overruled in *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (Ariz. 1983)).

36. The minor landed in the pool he was aiming for, but still suffered thirty to thirty-two fractures in the bones in his feet. When deposed, he stated that he purchased and consumed the alcohol because "it was camp, so to speak" to drink while a minor. *Valentine*, 8 Ariz. App. at 249, 445 P.2d at 451.

37. *Id.*

38. The court recognized that if the child had no will, choice or discretion, liability may have been imposed. However, the court found that under the facts of the case, with a twenty-year-old college student, such a lack of will was not supported. *Id.* See *supra* notes 31-34 and accompanying text.



has denied liability. In *Hall v. Budagher*,<sup>39</sup> the New Mexico Supreme Court considered an action for wrongful death arising out of an automobile accident. Despite the fact that a customer was under the severe influence of alcohol, the defendant tavern owner continued to serve him liquor. The tavern owner *knew* that the customer had driven to the bar and would later drive home.

At closing, the bar owner evicted the patron from the bar.<sup>40</sup> An action was brought against the tavern keeper by a party who was injured by the intoxicated customer.<sup>41</sup> After reviewing case history from throughout the United States,<sup>42</sup> the Supreme Court of New Mexico decided that despite the fact that a negligent sale may have been involved, or a sale in violation of statute or regulation, sellers were not liable as a matter of law to an injured third person.<sup>43</sup>

In 1977, the New Mexico Supreme Court again denied recovery based upon the strict traditional common law rule.<sup>44</sup> The court, however, recognized the seriousness of alcohol abuse and its consequences, and called for legislative action in the area of third party liability.<sup>45</sup> The court did not change the law, but held that it

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39. 76 N.M. 591, 417 P.2d 71 (1966).

40. The intoxicated person caused an automobile collision with Hall, the defendant, dying as a direct result of the customer's intoxicated condition. *Id.* at 592, 417 P.2d at 72.

41. The action was supported by the claim that the bar owner had violated state liquor regulations.

Regulation No. 31 - Sale to intoxicated person

No dispensary, retailer or club licensee shall sell, serve or deliver alcoholic beverages to any person who is obviously in an intoxicated condition.

Regulation No. 32 - Urging persons to purchase alcoholic beverages and sharing proceeds from drinks served by employees

No dispenser, retailer or club licensee shall urge, entice, or induce any person to purchase alcoholic beverages or shall permit any employee to urge, entice or induce any person to purchase alcoholic beverages, nor shall any dispenser or club licensee pay any employee any share of proceeds from drinks served by said employee.

Regulations of New Mexico Division of Liquor Control, Nos. 31, 32, as cited by the court in *Hall*, 76 N.M. at 593, 417 P.2d at 72-73.

42. 76 N.M. 594-95, 417 P.2d 73-74.

43. This was supported with the argument that it was within the province of the legislature to change the law by enacting a dram shop act. Since there was no such enactment, the legislature was seen to approve the traditional common law. *Id.* at 595, 417 P.2d at 74.

44. *Marchiondo v. Roper*, 90 N.M. 367, 563 P.2d 1160 (1977) (overruled in *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982)); *see supra* note 42).

45. *Marchiondo*, 90 N.M. at 369, 563 P.2d at 1162. *Cf. Lewis v. Wolf*, 122 Ariz. 567, 596 P.2d 705 (Ariz. Ct. App. 1979) (the court calls to higher authority within the court system to change the rule to impose liability). "Liability can and should be imposed . . . . What has been created by the courts can be undone by the courts. Were we the Supreme Court of this state, we would abolish the anachronistic and illogical common law rule and subject the bar owner to liability." *Id.* at 572, 596 P.2d at 710. In *Ontiveros v. Borak*, 136 Ariz. 500, 667 P.2d 200 (Ariz. 1983), the

would not be improper for it to address the issue in the future.<sup>46</sup>

## B. Modern Common Law Liability for Providers of Alcoholic Beverages

### 1. General Move to a Modern Common Law Rule

Modernly, the potential numerosity and severity of actions involving drinking drivers<sup>47</sup> has become too serious to be ignored.<sup>48</sup> The courts are beginning to acknowledge that they can no longer afford to indulge in arbitrary quirks of the law that result in manifestly inadequate awards to victims.<sup>49</sup> As a result, some courts have taken the initiative and begun to change the traditional common law rule of absolute non-liability for tavern keepers.<sup>50</sup> The landmark change in the common law occurred in the New Jersey Supreme Court and concurrently in the Seventh Circuit Court of Appeals.

The New Jersey Supreme Court took the plunge in *Rappaport v. Nichols*<sup>51</sup> in 1959. In *Rappaport*, an intoxicated minor was served liquor in defendant's bar. The plaintiff was injured as a result of an automobile accident involving the intoxicated youth.<sup>52</sup>

The law in New Jersey prohibited the sale of liquor to both minors and intoxicated persons. The court relied upon a standard of foreseeability to create a duty of care under the tort theory of negligence.<sup>53</sup> Specifically, the court held that a tavern operator could foresee the risk of harm resulting from the intoxication of his patron, especially when it was known that the patron would

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Supreme Court of Arizona responded by abolishing the common law doctrine of non-liability, substituting instead the standard of reasonable duty of care.

46. In *Lopez v. Maez*, 98 N.M. 625, 651 P.2d 1269 (1982), the New Mexico Supreme Court took the step and recognized common law liability. This liability was limited, however, to creation of duty by violation of statute or regulation which prohibited the serving of alcoholic beverages to an intoxicated person.

47. "Because automobiles were a relatively new device, the problem of driving while intoxicated was, of course, not the devastating menace it is today." *Ross v. Ross*, 294 Minn. 115, 119, 200 N.W.2d 149, 151 (1972).

48. *See supra* notes 1-4.

49. *Id.* *See also supra* note 45 and accompanying text.

50. *See, e.g., infra* notes 51-68 and accompanying text.

51. 31 N.J. 188, 156 A.2d 1 (1959).

52. *Id.* at 192-93, 156 A.2d at 3.

53. For a discussion of an action that included a claim of gross negligence thereby including an element of reckless and wanton misconduct, see Note, *Dram Shops: Third-Party Recovery for Reckless and Wanton Misconduct*, 3 W. NEW ENG. L. REV. 769 (1981).

be driving intoxicated upon leaving the bar.<sup>54</sup> Further, when this duty was breached, the tavern keeper became liable for damages accruing from the breach. This position was supported by the belief that laws prohibiting sales to minors and/or intoxicated persons were enacted not only to protect the minor and/or intoxicated person, but also the public at large.<sup>55</sup>

Concurrently with *Rappaport*, the Seventh Circuit Court of Appeals decided *Waynick v. Chicago's Last Department Store*.<sup>56</sup> In *Waynick*, a Michigan resident was injured by an Illinois resident who had become intoxicated in an Illinois bar. The injured Michigan resident brought an action against the Illinois tavern. The court noted that although both states had enacted Dram Shop Acts,<sup>57</sup> neither act applied extra-territorially.<sup>58</sup> Therefore, the court turned to the *common law* of Michigan, the state in which the injury occurred.<sup>59</sup>

The court determined that the existence of dram shop acts was irrelevant to the decision anyway, because the *criminal* code section of Illinois was enacted for the protection of "any member of the public who might be injured or damaged as a result of drunkenness to which the particular sale of alcoholic liquor contributes."<sup>60</sup> This was deemed sufficient to *create* the requisite duty necessary for a negligence action.

To complete the creation of a duty, the court reasoned that the statutes that prohibited sales to minors and/or intoxicated persons were intended to protect the general public, of which the

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54. "[T]his is particularly evident in current times when traveling by car to and from the tavern is so commonplace and accidents resulting from drinking are so frequent." 31 N.J. at 202, 156 A.2d at 8.

55. See, e.g., *supra* note 18 and accompanying text; ILL. ANN. STAT. ch. 43, § 94 (Smith-Hurd Supp. 1984-85), which states:

This [Liquor Control] Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.

*Id.*; accord CAL. BUS. & PROF. CODE § 23001 (West 1964 & Supp. 1984).

56. 269 F.2d 322 (7th Cir. 1959).

57. ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1983); MICH. STAT. ANN. § 18993 (Callaghan 1980 & Supp. 1983).

58. 269 F.2d at 324.

59. As the court noted:

[W]here the question relates to the choice between the law of the place where the negligent act or omission took place and the law of the place where the injury or death or both were inflicted, by the almost unanimous consensus of decision the place of the tort, within the contemplation of the rule that the law of the situs of the tort governs the liability and substantive matters, is the place where the injury or death was inflicted and not the place where the negligent act or omission took place.

*Id.* at 325 (quoting 133 A.L.R. 260, 263 (1941)).

60. 269 F.2d at 325.

plaintiff was a member.<sup>61</sup> The court had beaten a path back from the traditional common law rules into the area of general common law principles of negligence.

These early cases establishing the modern common law rule placed heavy reliance upon penal statutes to establish the duty owed by a tavern keeper.<sup>62</sup> However, it was not long before the existence of liability was recognized independent of penal statutes. In *Jardine v. Upper Darby Lodge No. 1973, Inc.*,<sup>63</sup> the Supreme Court of Pennsylvania recognized that where the serving of alcoholic beverages is concerned, there "is a duty which everyone owes to society and to law entirely apart from any statute."<sup>64</sup> The duty recognized was "to stop pouring alcohol" into a person, who "because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others."<sup>65</sup>

This alteration in the law may have been viewed by the courts as a radical departure from existing law. However, upon closer examination, this turnabout in the law was an application of ordinary and familiar negligence principles.<sup>66</sup> This modification in the law did not necessarily and absolutely shift all liability to tavern keepers, nor did it impose a court-legislated dram shop act. Simply, an inexplicable and unsteady foundational aberration in this area of tort law was removed.<sup>67</sup> Thus, the case trilogy of *Rapaport*, *Waynick*, and *Jardine* charted a full move from the artificial traditional common law rule to the self-sufficient common law principles of ordinary negligence actions.<sup>68</sup>

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61. *Id.* at 325-26.

62. *See supra* notes 60-61 and accompanying text. *See also infra* notes 72-74, 85-86 and accompanying text.

63. 413 Pa. 626, 198 A.2d 550 (1964).

64. *Id.* at 631, 198 A.2d at 553.

65. *Id.* This position was also recently followed by the New Jersey Supreme Court. *See Kelly v. Gwinnell*, 96 N.J. at 544-45, 476 A.2d at 1222.

66. *See, e.g.,* Comment, *Dram Shop Liability—A Judicial Response*, 57 CALIF. L. REV. 995, 1007 (1969).

67. For a discussion of a complete integration into the ordinary principles of the tort field, including concepts of contributory negligence, see Binchy, *Tort Negligence—Breach of Statutory Duty—Common Law Duty of Care—Affirmative Duties—Contributory Negligence—Volenti; Volenti Non Fit Injuria—Ex Turpi Causa Non Oritur Action—Drink Now - Sue Later*, 53 CAN. B. REV. 344 (1975). *Cf.* Symmons, *Contributory Negligence Defenses for The Drunken Driver*, 40 MOD. L. REV. 350 (1977).

68. "The treatment of the problem . . . shows that the new common law consists of nothing more revolutionary than a case-by-case application of traditional negligence principles." Comment, *supra* note 66, at 1007.

## 2. Adoption of the Modern Common Law Rule Under a Limited Basis

*Rappaport* and *Waynick* represented early small steps in a new direction to the then-existing law. These cases, though revolutionary in concept, chose to depend upon statutes for the establishment of a duty. *Jardine* represented the last step into independent tort law, in that liability was imposed without the assistance of penal statutes. Not all courts have gone as far as *Jardine*. *Davis v. Shiappacossee*,<sup>69</sup> decided in 1963 by the Supreme Court of Florida, was an action for the wrongful death of a sixteen-year-old boy. The bar involved took orders for alcoholic beverages from patrons who were seated in their cars, and then delivered the ordered beverages to the cars.<sup>70</sup> On one night, three minors, ages sixteen, seventeen, and eighteen years old, were delivered twenty-four cans of beer and a half-pint of whiskey without an inquiry as to their age.<sup>71</sup> The sixteen-year-old was driving. The court discussed the circumstances of the sale in terms of the foreseeability of events. It was noted that "the purchasers were but boys . . . [and they were] seated in a dangerous instrumentality. . . ."<sup>72</sup> However, the court pulled up short and reduced this reasoning to dicta, by holding that the sale of alcoholic beverages to minors in violation of statute constituted negligence per se.<sup>73</sup> The court had thus limited its decision to the creation of a duty arising from the violation of statute.<sup>74</sup>

California took almost a decade to catch up with the move to the modern common law. Until 1971, California strictly adhered to the traditional common law rule that the consumption, rather than the provision, of alcoholic beverages was the proximate cause of intoxication.<sup>75</sup> Thus, actions against providers of alcohol were aborted through dismissal in the pretrial stage.

In 1971, the Supreme Court of California, in an unanimous deci-

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69. 155 So. 2d 365 (Fla. 1963).

70. *Id.* at 366.

71. *Id.*

72. *Id.* at 367.

73. The facts of the case were determined to be so similar to the previous case of *Tamiami Gun Shop v. Klein*, 109 So. 2d 189 (Fla. Ct. App. 1959), as to require identical rulings. 155 So. 2d at 367-68.

74. See FLA. STAT. ANN. § 562.11 (West Supp. 1984).

To be distinguished is the creation of a duty without the use of the legal theory of violation of statute, but rather the direct operation of the reasonable person standard. See *supra* note 17 for a brief discussion of the scope of this standard.

75. See, e.g., *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955) (liquor seller not liable for injuries caused by an intoxicated patron to himself); *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (liquor seller not liable for injuries caused by an intoxicated patron to third parties) (disapproved in *Vesely v. Sager*, 5 Cal. 3d 153, 167, 486 P.2d 151, 160-61, 95 Cal. Rptr. 623, 632-33 (1971)).

sion penned by Chief Justice White, handed down the landmark case of *Vesely v. Sager*.<sup>76</sup> In this case, the court held that the traditional common law rule of nonliability for the providers of alcohol was "patently unsound."<sup>77</sup>

The plaintiff in the action had suffered personal injuries and property damage as a result of an automobile accident. The defendant owned and operated a tavern located near the top of a mountain. The defendant *knew* the only route patrons of his establishment could take home was a very steep winding and narrow mountain road.<sup>78</sup> Furthermore, he *knew* his patron had become excessively intoxicated as a result of alcoholic beverages he had served.<sup>79</sup>

The court reviewed the *Waynick* and *Rappaport*<sup>80</sup> cases, and chose to join in the abandonment of the rule of nonliability.<sup>81</sup> The law chosen to fill the legal void left by the abandonment of the old analysis arose from the principles established "by cases dealing with matters other than the furnishing of alcoholic beverages."<sup>82</sup> Under these principles "an actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such an act was reasonably foreseeable at the time of his negligent conduct."<sup>83</sup>

The proximate cause distinction, founded solely on the circumstance that the consumption of a beverage is a voluntary act of the intoxicated, was rejected by the court.<sup>84</sup> The court recognized that a sound system of liability could only rest upon concepts of foreseeability that could be applied on a case-by-case basis. Analysis of tavern keepers' liability was correctly returned to the analysis of duty, and away from arbitrary distinctions within proximate cause. However, in congruity with other courts that had moved from the traditional common law, the California court

76. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

77. *Id.* at 157, 486 P.2d at 156, 95 Cal. Rptr. at 627.

78. *Id.* at 158, 486 P.2d at 154, 95 Cal. Rptr. at 626.

79. In fact, the bar owner continued to serve the patron for three hours after the closing of the bar. *Id.*

80. *Id.* at 162-63, 486 P.2d at 157-58, 95 Cal. Rptr. at 629-30.

81. To this end the earlier case of *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955), was overruled, and *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949), was disapproved. See *supra* note 75.

82. 5 Cal. 3d at 163, 486 P.2d at 158, 95 Cal. Rptr. at 630.

83. *Id.*

84. *Id.*

spoke of a pure foreseeability standard, yet pulled up short in its decision by basing its holding on the presumption of negligence from the violation of a statute.<sup>85</sup> The California statute which was relied upon provides that the selling, furnishing or giving of alcoholic beverages to any obviously intoxicated person is a misdemeanor.<sup>86</sup> Further, the plaintiff was deemed to be a member of the class of persons this statute was intended to protect.

The defendant's arguments against the changing of the traditional rule were countered by pointing out that the rule was originally court-created and thus subject to court change.<sup>87</sup> The supreme court also pointed out that "[o]ther common law tort rules which were determined to be lacking in validity have been abrogated . . ."<sup>88</sup>

Five years after the *Vesely* decision, the California Supreme Court was forced to tighten its reasoning in the area of liability of alcohol providers. In *Bernhard v. Harrah's Club*,<sup>89</sup> the defendant owned a gaming establishment in Nevada which served alcohol. The driver of an automobile that collided with the plaintiff was intoxicated at the time of the accident as a result of alcohol provided by the defendant's establishment.<sup>90</sup> The California Supreme Court was forced to move away from statutory crutches and move towards a statute-free tort theory in grappling with the question of which state's law was applicable. A duty based upon the foreseeability of injury or damages as a result of the defendant's actions was utilized.

The supreme court focused on the fact that the defendant *knew and expected* California residents to respond to its advertisements and solicitations.<sup>91</sup> Further, the defendant *knew and expected* California highways to be used in transit to his place of

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85. [P]laintiff is within the class of persons for whose protection section 25602 was enacted and that the injuries he suffered resulted from an occurrence that the statute was designed to prevent. Accordingly, if these two elements are proved at trial, and if it is established that [the defendant] violated section 25602 and that the violation proximately caused plaintiff's injuries, a presumption will arise that defendant was negligent in furnishing alcoholic beverages . . .

*Id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 531-32.

86. CAL. BUS. & PROF. CODE § 25602 (West Supp. 1968).

87. *Vesely*, 5 Cal. 3d at 166, 486 P.2d at 160, 95 Cal. Rptr. at 632. This is antipodean from the point of view of the New Mexico Supreme Court in *Marchiando v. Roper*, 90 N.M. 367, 563 P.2d 1160 (1977). See *supra* notes 44-45 and accompanying text.

88. 5 Cal. 3d at 166, 486 P.2d at 164, 95 Cal. Rptr. at 636.

89. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).

90. The intoxicated driver hit the plaintiff in the plaintiff's lane of travel. *Id.* at 316, 546 P.2d at 720, 128 Cal. Rptr. at 216.

91. *Id.* at 319, 546 P.2d at 725, 128 Cal. Rptr. at 221.

business.<sup>92</sup> It was reasoned that this theory would not be an impairment of Nevada interests because the law would only put liability on those Nevada businesses that "actively solicit California business."<sup>93</sup> Therefore, a duty was imposed only upon those whose actions produced a foreseeable result.

The defendant pointed out that in *Vesely* the court used a state statute to impose civil liability. The California Supreme Court countered by pointing out that, although no statute was applicable to the case at bar, this did not "preclude recovery on the basis of negligence apart from the statute."<sup>94</sup>

Once the Supreme Court of California integrated actions against tavern keepers into the ordinary theories of tort negligence, it did not hesitate to make this integration as complete as possible. In *Coulter v. Superior Court*,<sup>95</sup> the idea that the creation of a duty could be established by a pure foreseeability standard, clear of any artificial barriers based upon defendant's status, was strengthened. In the *Coulter* case, the court held that the status of the provider of alcohol, as either commercial or noncommercial, was irrelevant in and of itself in determining whether there was liability.<sup>96</sup> The court stressed that the actor's conduct in light of his knowledge and foreseeability of a certain result were the determinative factors in the *creation* of a duty.<sup>97</sup>

Absent legislative interference, the California Supreme Court was well on its way to integrating the law of third party liability for the providers of alcoholic beverages into a logical and cohesive niche in tort negligence law. The court not only moved this area of third party liability under general tort law, but also showed that the movement was a complete one, independent of distinctions based on the status of the defendant or the existence of pe-

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92. *Id.*

93. *Id.* at 323, 546 P.2d at 729, 128 Cal. Rptr. at 225.

94. *Id.* at 325, 546 P.2d at 727, 128 Cal. Rptr. at 223.

95. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

96. For an analysis of liability in California based upon whether the defendant is a social host or a commercial vendor, see Comment, *Social Host Liability For Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L.J. 95 (1978); Dooley & Mosher, *Alcohol and Legal Negligence*, 7 CONTEMP. DRUG. PROBS. 145, 165 (1978) (discussion more national in scope).

97. "We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a *reasonably foreseeable* risk of injury to those on the highway." 21 Cal. 3d at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539 (emphasis supplied by the court).



nal statutes.<sup>98</sup>

The modern common law system is available to the state courts absent contrary state legislation.<sup>99</sup> An advantage of the modern system is that it provides a cohesive interface with existing negligence law.

### III. THE LEGISLATIVE RESPONSE IN THE AREA OF PROVIDER'S LIABILITY

#### A. State Legislation

Dram shop acts involve the legislative imposition of *civil* liability on providers of alcoholic beverages.<sup>100</sup> Thus, these acts become part of the scheme of compensation for people who have been injured or damaged by an intoxicated person. Currently, there are nineteen states that have some form of a dram shop act.<sup>101</sup> States that impose liability judicially, based upon the violation of criminal statutes, do not qualify as states with dram shop acts. These states do not have the requisite legislatively imposed civil liability; rather, they have used common law negligence principles to impose civil liability via the violation of a statute.<sup>102</sup>

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98. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

99. See *supra* notes 50-68 and accompanying text. See also *supra* note 46 and accompanying text. *Contra supra* notes 44-45 and accompanying text.

100. "[S]tatutes giving a right of action to persons injured by an intoxicated person, or in consequence of the intoxication of any person, against the person selling or furnishing the liquor which caused the intoxication, commonly known as 'civil damages acts,' or 'dram shop acts.'" 45 AM. JUR. 2d *Intoxicating Liquors* § 553 (1969).

101. ALA. CODE § 6-5-71 (Supp. 1983); ALASKA STAT. § 04.21.020 (Supp. 1983); CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); GA. CODE § 3-3-23 (Supp. 1984); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984-85); IOWA CODE ANN. § 123.92 (West Supp. 1984-85); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); MICH. STAT. ANN. § 18.993 (Callaghan Supp. 1983); MINN. STAT. ANN. § 340.95 (West Supp. 1983); N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 1978 & Supp. 1983); N.C. GEN. STAT. § 18B-121 (1983); N.D. CENT. CODE § 5-01-06 (Supp. 1983); OHIO REV. CODE ANN. § 4399.01 (Page 1982); R.I. GEN. LAWS § 3-11-1 (1956); UTAH CODE ANN. § 32-11-1 (Supp. 1983); VT. STAT. ANN. tit. 7, § 501 (1972); WYO. STAT. § 12-5-502 (1977).

102. This type of imposition of liability can be seen in the application of the modern common law rule. See *supra* notes 47-99 and accompanying text. Massachusetts has passed a neutral act that neither imposes criminal sanctions nor civil liability: "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to a person who is known to be a drunkard, to an intoxicated person, or to a person who is known to have been intoxicated within the six months last preceding." MASS. GEN. LAWS ANN. ch. 138, § 69 (West 1974). The courts of Massachusetts have used this statute to impose civil liability. *Cimino v. Milfords*, 385 Mass. 323, 431 N.E.2d 920 (1982). The Oregon legislature, on the other hand, has implicitly accepted the judicially created system of liability by limiting liability in certain cases. See OR. REV. STAT. §§ 30.950, 30.955, 30.906 (1980) (liability of third parties only if person served was visibly intoxicated or for injuries caused by minors; no liability unless a reasonable person would have requested identification or suspected that such identification had been altered).

Dram shop acts have taken many different forms. Typically, some sort of strict liability is imposed on providers of alcoholic beverages. For the most part, these acts do little in providing for a cohesive system in which persons injured or damaged by intoxicated persons are compensated. While dram shop acts represent a step toward making providers of alcoholic beverages liable in actions by victims of inebriated persons, the limitations in these statutes lower their status to that of a second-best solution to the traditional common law rule of nonliability.<sup>103</sup>

The most common type of statute usually provides for an action by any person<sup>104</sup> who is injured in person, property, or means of support.<sup>105</sup> States differ in the type of transfer of alcohol that is required for the imposition of liability (for example, whether there needs to be a sale or whether a gift is sufficient to impute liability).<sup>106</sup> This issue becomes especially important when liability is being imposed upon the social host. There is a split among dram shop acts on the question of whether the provision of alcoholic beverages must be in violation of the law.<sup>107</sup> Most statutes require that the liquor provided actually cause the intoxication of

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103. The criticisms that apply to the traditional common law still apply to dram shop acts. Dram shop acts do not represent a pure common law system. Therefore, the solution that numerous courts have requested, a pure common law system, is not provided for. *See, e.g., supra* note 17, *see also supra* notes 61-67 and accompanying text.

104. *Contra* GA. CODE § 51-1-18 (1968) (where only the father may bring an action, and in the case of his death, the mother, if and only if a minor was served alcohol without permission from the parents).

105. *Contra* R.I. GEN. LAWS § 3-11-2 (1956) (a provider of alcohol may only be liable to a husband, wife, parent, child, guardian or employer, and only if that person gave notice in writing not to provide intoxicating beverages to the person causing the injuries); WYO. STAT. § 12-5-502 (1977) (a parent or guardian must give notice that his/her ward is under 19, or a spouse or guardian must give notice that the person who should provide support is not doing so by reason of habitual drunkenness. The provider of alcohol then becomes liable only to the person giving notice).

106. Connecticut limits liability to those who *sell* liquor. CONN. GEN. STAT. ANN. § 30-102 (West 1975). *Cf.* ALASKA STAT. § 04.21.020 (1975) (liability is limited for practical purposes to sellers, because of the limitation of actions to authorized licensed providers of alcoholic beverages, which are usually in the business of selling alcoholic beverages). N.C. GEN. STAT. § 18B-121 (1983) (liability limited to permittees or the local Alcohol Beverage Control Board). Minnesota has also limited its liability provisions to exclude social hosts. *Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982).

107. Of the states with dram shop acts, the minority do not require a sale in violation of law. *See, e.g.,* COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984-85); WYO. STAT. § 12-5-502 (1977).

the person causing the injury, while others allow for actions where the provision of alcohol merely contributes to the overall intoxication.<sup>108</sup>

Besides differences in the basic cause of action provided for by dram shop acts, there are differences in the limitations on the liability of providers of alcohol. Some states furnish limitations on the amount that may be recovered in an action.<sup>109</sup> This may be determined by the amount of a bond that must be filed as a condition of doing business.<sup>110</sup> Liability may further be limited to cases in which specific persons have been served, usually minors or habitual drunkards.<sup>111</sup> It may even be a necessary condition to recovery that written notification be given to the provider of alcohol stating that a particular individual should not be served alcohol.<sup>112</sup>

In some instances the dram shop acts can be quite broad.<sup>113</sup> Some acts specifically allow for exemplary damages.<sup>114</sup> A dram shop act may also provide liability for the owner, lessee or tenant, of the premises on which the alcoholic beverages were furnished.<sup>115</sup> This inclusion usually requires some form of knowl-

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108. A minority of states impose liability for those who merely contributed to the intoxication of the drinker. *See, e.g.*, ALA. CODE. § 6-5-71 (1975); CONN. GEN. STAT. ANN. § 30-102 (West 1975); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1983); MINN. STAT. ANN. § 340.95 (West Supp. 1983); N.D. CENT. CODE § 5-01-06 (Supp. 1983); UTAH CODE ANN. § 32-11-1 (Supp. 1983).

109. CONN. GEN. STAT. ANN. § 30-102 (West 1975) (after stating that a "seller shall pay *just* damages to the person injured," the legislature limits the recovery to twenty thousand dollars per person, and an aggregate of fifty thousand dollars per seller) (emphasis added); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984) (fifteen thousand dollar limit on injuries to the person or property of any person and a twenty thousand dollar limit for loss of support resulting from death or injury of any person); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1984-85) (the surety that provides the bond, which is a necessary condition of doing business in the sale of alcoholic beverages, is not liable past the amount of the bond, although the licensee may be so liable); N.C. GEN. STAT. § 18B-123 (1983) (five hundred thousand dollar limitation per occurrence with proportional abatement for multiple claims arising from a single occurrence).

110. *See, e.g.*, MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1984-85).

111. *See, e.g.*, ALASKA STAT. § 04.21.020 (Supp. 1983) (minor or a drunken person); COLO. REV. STAT. § 13-21-103 (1973) (habitual drunkard); N.C. GEN. STAT. § 18B-121 (1983) (minor); WYO. STAT. § 12-5-502 (1977) (minor or habitual drunkard who has neglected support duties).

112. *See, e.g.*, COLO. REV. STAT. § 13-21-103 (1973) (notice by court, parent, guardian, spouse or employer); OHIO REV. CODE ANN. § 4399.01 (Page 1982) (notice by order of department of liquor control); WYO. STAT. § 12-5-502 (1977) (notice by court, parent, guardian, spouse or dependent).

113. By "broad" it is meant that there are specific inclusions that may not be available without express inclusion.

114. *See, e.g.*, ALA. CODE § 6-5-71 (1975); ME. REV. STAT. ANN. tit. 17, § 2002 (1983); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978 & Supp. 1983); WYO. STAT. § 12-5-502 (1977).

115. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 2002 (1983); VT. STAT. ANN. tit. 7, § 501

edge by the owner, lessee or tenant of the actions occurring on his premises.<sup>116</sup> Finally, dram shop acts may provide for joint liability.<sup>117</sup> As a rule, a provider of alcohol, if found to be liable, is liable for the total amount of damages. There are no provisions that look to the determination of comparative fault between the intoxicated person and the provider of alcohol.<sup>118</sup>

Dram shop acts become imperfect allocators of liability. On the one side, they impose arbitrary limitations on recovery, such as to the amount that can be recovered and from whom it may be recovered.<sup>119</sup> On the other side there are arbitrarily overbroad provisions that impute liability on an all-or-nothing basis which are wholly inconsistent with the concepts of fault.<sup>120</sup> Dram shop acts thus alleviate inequities caused by the traditional common law only to the extent that they at least conceptually impose *some* liability where previously there was none.<sup>121</sup>

### *B. The Reaction to State Legislation*

Both legislatures and courts have reacted to the passage of

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(1972). North Carolina expressly includes the local Alcohol Beverage Control Board as a potential defendant. *See* N.C. GEN. STAT. § 18B-121 (1983).

116. *Id.*

117. The question as to which parties may be jointly liable varies among the states that contain such a provision. ALA. CODE § 6-5-71 (1975) ("joint or separate action against the person intoxicated or the person who furnished the liquor"); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1984) (person with knowledge of alcoholic sale who owns, rents, leases, or permits the use of the building for such use and the provider are jointly liable); ME. REV. STAT. ANN. tit. 17, § 2002 (1983) (joint liability against provider and owner, lessee or person renting or leasing the premises who had knowledge of illegal sale of alcohol); MICH. COMP. LAWS ANN. § 436.22(5) (West Supp. 1984-85) (surety who issued bond may be jointly liable but only to the extent of the bond involved); OHIO REV. CODE ANN. § 4399.01 (Page 1982) (joint and severable liability for all contributors to intoxication of the individual involved); R.I. GEN. LAWS § 3-11-1 (1956) (provider and intoxicant jointly liable); VT. STAT. ANN. tit. 7, § 501 (1972) (joint liability for provider, intoxicant and owner of building).

118. Even courts have tended not to apply doctrines that distribute liability or provide negligence defenses in the absence of statutory provisions. *See, e.g.,* Zucker v. Vogt, 329 F.2d 426 (2d Cir. 1964) (contributory negligence defense held inapplicable because the gravamen of a Dram Shop Action is violation of statute rather than negligence); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972) (citing Zucker); *but see* N.C. GEN. STAT. § 18B-124 (1983) (joint and several liability for negligent driver of a vehicle and furnisher of alcohol with a right to contribution).

119. *See supra* notes 109-17 and accompanying text.

120. *See supra* note 113-17 and accompanying text.

121. *See supra* note 103 and accompanying text.

dram shop acts. The manner of such response has varied according to the powers of the body making the response.

The court's influence over dram shop acts has come within the purview of its task of interpreting statutory language.<sup>122</sup> A point upon which courts place particular importance is the question of which parties may be litigants in an action under a dram shop act. The distinction most frequently employed is one between social hosts<sup>123</sup> and commercial sellers,<sup>124</sup> with most courts trying to limit dram shop liability to commercial sellers.<sup>125</sup> As a holdover from traditional common law, courts usually do not include the intoxicated person as a party who may bring a cause of action against a provider of alcohol.<sup>126</sup> This appears to have become an absolute rule in some jurisdictions.<sup>127</sup> Another area in which the courts differ in their interpretations of dram shop acts is on the issue of the patron's contributory negligence.<sup>128</sup> A particularly vulnerable area of court interpretation is causation, with attack coming from

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122. Some courts have gone to the extreme and skirted the whole issue of dram shop acts. *See, e.g.,* Tadey v. Estate of Doe, No. 1: W73G, 1118 L Illinois Circuit Court (Will County) 12th Circuit (1973) (the plaintiff received a verdict for ninety thousand dollars which is more than the thirty-five thousand dollar ceiling on recoveries under the Illinois dram shop act. A recovery independent of the dram shop act, however, removed the possibility of a no-fault recovery as provided for by the dram shop act. The case was settled after the verdict by the trial court and was not appealed).

123. Throughout this paper, a *social host* encompasses persons who provide alcohol either gratuitously in a social gathering, or persons who are not engaged in the business of providing alcohol, and thus do not need to procure a license from an alcohol control board.

124. A *commercial seller* includes those persons who engage in the business of providing alcohol, and thus are required to obtain a license from an alcohol control board. Commercial sellers and social hosts are mutually exclusive groups, i.e., while an act of a party might transfer his status at any time from one group to another, the party cannot be both at once.

125. *See, e.g.,* LeGault v. Klebba, 7 Mich. App. 640, 152 N.W.2d 712 (1967) ("it is not the law that private individuals are liable for the actions of their social guests who over-indulge in the liquid hospitality provided at private homes or parties." 7 Mich. App. at 643, 152 N.W.2d at 713). *Contra* Ross v. Ross, 294 Minn. 115, 200 N.W.2d 149 (1972); Williams v. Klemesrud, 197 N.W.2d 614 (Iowa 1972) (the Iowa dram shop act has been reenacted as IOWA CODE ANN. § 123.92 (West Supp. 1984-85)). *See generally* Case Comment, *Civil Damages Act—Preemption of Social Hosts' Common Law Liability: Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982), 5 HAMLINE L. REV. 489 (1982).

126. *See, e.g.,* Campbell v. Village of Silver Bay, 315 F.2d 568 (8th Cir. 1963) (applying the law of Minnesota); Noonan v. Galick, 19 Conn. Supp. 308, 112 A.2d 892 (1955); Lee v. Peerless Ins. Co., 248 La. 982, 183 So. 2d 328 (1966) (expressly overruled in Pence v. Ketchum, 326 So. 2d 831, 838 (La. 1976)).

127. *See generally* Campbell v. Village of Silver Bay, 315 F.2d 568 (8th Cir. 1963) (wife could not recover loss of support from vendor where intoxicated husband injured himself).

128. *See, e.g.,* Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. J. 561, 585-86 (1980).

both the case-by-case interpretation of facts, and from the analytical interpretation of causation theory.

Legislative reactions to dram shop acts have ranged from minor amendments to the repeal of whole statutes.<sup>129</sup> The California experience is unique in that the state has had extensive legislative and judicial activity in the area of dram shop acts.<sup>130</sup> This interchange of activity is thus illustrative of the reactions of different bodies of the government. Therefore, a discussion of California's background in this area is fruitful.

Originally, California adhered to the traditional common law rule of nonliability for the provider of alcohol.<sup>131</sup> In the early 1970's a string of cases was decided by the California Supreme Court which changed California's posture to that of a modern common law state, where liability was dependent upon ordinary negligence concepts of fault.<sup>132</sup>

In 1978, the California legislature took action in this area by passing an anti-dram shop act.<sup>133</sup> The legislature removed providers of alcohol from the class of persons who may have been liable to a person injured by an intoxicated person.<sup>134</sup> In this promulgation, the key cases of the California Supreme Court that developed the modern common law were specifically cited, and the

129. States that have recently repealed their dram shop acts are Oklahoma, Washington and Wisconsin.

130. See *supra* notes 75-98 and accompanying text.

131. See *supra* note 75 and accompanying text.

132. See *supra* notes 76-98 and accompanying text.

133. This was codified in CAL. BUS. & PROF. CODE § 25602(b),(c) (West Supp. 1984), which provides:

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153), *Bernhard v. Harrah's Club* (16 Cal. 3d 313) and *Coulter v. Superior Court* (— Cal. 3d —) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

134. *Id.* Previous to amendment, the statute merely stated: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25602 (West 1964) (retained as section (a) of current section 25602).

holdings declared to be abrogated.<sup>135</sup> The traditional common law doctrine, which stated that, as a matter of law, the consumption of alcoholic beverages is the proximate cause of injuries inflicted by one who is intoxicated, was legislatively imposed.

In addition, the legislature delineated a set of circumstances and provided that when such circumstances arose, a provider of alcohol would be liable to a person who suffered injury.<sup>136</sup> The court's response was manifested in the case of *Cory v. Shierloh*.<sup>137</sup> The constitutionality of the statute was upheld,<sup>138</sup> and California thus returned to the traditional common law system, with a slight aberration for the inclusion of liability for those providing alcohol to obviously intoxicated minors.

Legislative response to the dram shop acts has ranged from tinkering with the specifics of an act to outright repeal.<sup>139</sup> If there is an act in force, the changing of provisions is significant only to the people who have been specifically affected. As far as the practical reality is concerned, these statutory changes only shift arbitrary distinctions in a system that has already classified persons and circumstances.<sup>140</sup> Fault in any circumstance takes a back seat to the determination of whether a situation fits into a particular state's dram shop act scheme. Thus, the most legally significant legislative act is the repeal or enactment of a dram shop act. A repeal usually has the effect of reinstating either a traditional or modern common law scheme, whereas the enactment of a dram shop act imposes an arbitrary classification system that provides windfalls to persons fortunate enough not to fall into legislated classifications yet who may have been at *fault*.<sup>141</sup>

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135. See *supra* note 133.

136. This was codified in CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1984), which provides as follows:

Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

For a critique of the impact of this statutory provision, see Slomanson, *Emergence of the "Tender Years" Doctrine: Too Young to Drink, But Capable of Escaping the Civil Consequences?*, 5 PEPPERDINE L. REV. 1 (1977) (article preceded enactment of CAL. BUS. & PROF. CODE § 25602.1).

137. 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

138. See, e.g., California Supreme Court Survey, *The Constitutionality of Civil Nonliability of Vendors and Social Hosts Serving Alcohol to Intoxicated Persons: Cory v. Shierloh*, 9 PEPPERDINE L. REV. 680, 784 (1982).

139. See *supra* notes 129-36 and accompanying text.

140. See *supra* notes 100-21 and accompanying text.

141. See *supra* note 17.

Courts' responses to dram shop acts have been mixed.<sup>142</sup> Once a dram shop act is in force, a court's role is reduced to that of an interpreter. Hence, the responsibility for change falls on the legislature to take the steps in restructuring this area of the law.<sup>143</sup>

#### IV. SOCIAL GOALS AND POLICIES

Before an intelligent decision can be made in this area of law, certain precepts must be established. First, the problem must be identified. Second, the goals to be achieved must be decided upon. Finally, the method to solve the problem must be chosen.

The act pertinent to this discussion is the provision of alcohol to a person who subsequently injures another due to an intoxicated condition. Although society may morally dislike the intoxication of its members, it is the injury resulting from such intoxication that must be the focus of society's concern.<sup>144</sup> All other considerations, though they may be important, are secondary to the injury caused.<sup>145</sup> The problem thus becomes whether society can alleviate injury caused by an intoxicant.

The two stages surrounding an injury that are of analytical interest are before an injury, and after an injury. During these times, society has different controls over an individual. If society

142. See *supra* notes 122-28 and accompanying text.

143. In states where there is no dram shop legislation, it is within the court's power to change the law. The legislatures of these states, however, still have the power to legislate. It logically follows that in these states either branch of government may take steps to change the law to a cohesive system that conforms to standards of fault and compensating fairness.

144. This is supported by court-enunciated reasons for enacting a dram shop act. Courts have found that a reason for passing dram shop acts is that public policy mandates the control of liquor in order to protect the health, safety, and welfare of the public. See, e.g., *Lichter v. Scher*, 11 Ill. App. 2d 441, 138 N.E.2d 66 (1956); *Federated Mut. Implement & Hardware Ins. Co. v. Dunkelberger*, 172 N.W. 2d 137 (Iowa 1969) (overruled to the extent that the court refused to recognize a common law cause of action, *Lewis v. State*, 256 N.W.2d 181 (Iowa 1977)); *Putney v. Gibson*, 94 Mich. App. 466, 289 N.W.2d 837 (1979). "The liquor laws . . . are plainly designed to protect the welfare, health, peace, temperance, and *safety* of all the citizens by providing for the strict regulation and control of the manufacture, sale, and distribution of alcoholic beverages." *Lewis v. Wolf*, 122 Ariz. 567, 570, 596 P.2d 705, 708 (Ariz. Ct. App. 1979) (quoting *Mendelsohn v. Superior Ct.*, 76 Ariz. 163, 169, 261 P.2d 983, 988 (1953)) (emphasis added by *Lewis* court).

145. This, however, may be *contra* depending on the social values of a state. Kansas, a state without a dram shop act, has nevertheless passed an act imposing civil liability on wholesalers and distributors for violating rules governing the *geographical scheme* of sales within the state. KAN. STAT. ANN. § 41-701 (1981) (in addition to fines, if a violator is found to be attempting to control prices *treble damages plus attorney's fees* may be recovered).



is to attempt to alleviate injury, then its goal before an injury takes place would be that of *deterrence*.<sup>146</sup> There is no method that exists to undo an act, so the sole consideration after injury becomes only to alleviate the injury through compensation. Thus, society's goals are *deterrence* before injury and *compensation* afterwards.

The task becomes: by what methods can these goals of society be implemented? The goal of deterrence may be achieved by penal statutes<sup>147</sup> imposing punishment<sup>148</sup> severe enough to make most people *choose* not to do an act.<sup>149</sup> The effectiveness of a penal statute in deterring an action is thus dependent upon the severity of the punishment.<sup>150</sup> Imposing civil liability for an act can

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146. "Can there be any doubt that the *purpose* in prohibiting the bar owner from selling liquor to a person who is already intoxicated is to prevent him from becoming even more intoxicated, so that he is not a greater risk when he leaves the bar?" *Lewis*, 122 Ariz. at 571, 596 P.2d at 708 (emphasis added).

147. For an excellent writing on this point, see *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976) (sentencing memorandum). District Judge Frankel discussed, at length, the basis for the penal sanction of imprisonment. This discussion is equally applicable to the sanction of fines.

The court agrees that this defendant should not be sent to prison for "rehabilitation." Apart from the patent inappropriateness of the concept to this individual, this court shares the growing understanding that no one should ever be sent to prison *for rehabilitation*. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. *Imprisonment is punishment*. Facing the simple reality should help us to be civilized. It is less agreeable to confine someone when we deem it to be an affliction rather than a benefaction.

Contrary to [the defendant's] counsel's submissions, however, . . . sentencing considerations demand a prison sentence in this case:

*First*, the aim of *general deterrence* the effort to discourage similar wrongdoing by others through a reminder that the law's warnings are real and that the grim consequence of imprisonment is likely to follow from crimes of deception for gain like those defendant has admitted.

*Id.* at 498-99 (second set of emphasis added). For reactions to the *Bergman* case, see *N.Y. Times*, June 19, 1976, at 46, col. 2; *N.Y. Times*, June 18, 1976, at A22, col. 2.

148. Oftentimes one may wonder if this goal is aspired to. A statute that imposes a minute fine is hard to classify as a punishing statute. Also, if practical considerations make the imposition of a fine almost impossible, the statute has little punitive value. For example, Louisiana imposes a \$10 to \$50 fine on one who serves a beverage to a "habitual drunkard." "However the penalty shall not be incurred unless previous notice is given in person before witnesses, in writing, or through the public prints, by publication every day for fifteen days, that the person to whom the alcoholic beverage is sold or given is an inebriate." LA. REV. STAT. ANN. § 26:683 (West 1975).

149. For a detailed empirical study focusing on the French system, and on the deterrent effects of laws, see Ross, McCleary & Epperlein, *Deterrence of Drinking and Driving in France: An Evaluation of the Law of July 12, 1978*, 16 LAW & SOC'Y REV. 345 (1982). In conclusion it was found that the deterrent effect that was produced was lost once the perceived threat was found to be bogus, since the deterrent was not enforced or applied as advertised.

150. See *generally* *Kelly v. Gwinnell*, 96 N.J. at 557 n.11, 476 A.2d at 1226 n.11 (reviewing the results of strengthened laws and enforcement efforts in New Jersey).

have similar consequences.<sup>151</sup> The knowledge that one will be liable for the damages or injuries one causes should deter<sup>152</sup> an individual from such actions.<sup>153</sup>

The goal of compensation can best be achieved by imposing civil liability on persons who cause an event.<sup>154</sup> In this way, those who compensate an injury are those who were involved in the injury.<sup>155</sup> An equitable apportionment of liability among those who cause injury<sup>156</sup> should be predicated on the concept of fault.<sup>157</sup>

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For an overall view of the problem of deterring the drinking driver, see Ross, *Deterring the Drinking Driver: A Critique of Blennerhassett*, 3 BRIT. J. L. & SOC'Y 255 (1976).

151. Courts have stated that the reason for passing dram shop acts was to provide a deterrent to actions, as a means of providing additional incentive for the suppliers of alcoholic beverages to avoid providing alcohol to the people covered by these statutes. See, e.g., *Wessel v. Carmi Elks Home, Inc.*, 54 Ill. 2d 127, 295 N.E.2d 718 (1973).

The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim . . . there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

PROSSER, THE LAW OF TORTS § 4, at 22 (4th ed. 1971).

152. See *supra* note 150.

153. See *supra* note 151.

154. "[T]he [Civil Damage Act] by the imposition of the sanction of strict liability provides an extremely effective incentive for liquor vendors to do everything in their power to avoid making illegal sales." *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 423, 161 N.W.2d 657, 661 (1968) (the court expressed this deterrence motive while analyzing the strict liability, and contributory aspects of vendor liability).

155. For courts holding that the *primary* objective of dram shop acts is to provide satisfactory compensation to an injured party, see *Federated Mut. Implement and Hardware Ins. Co. v. Dunkelberger*, 172 N.W.2d 137, 140 (Iowa 1969) (overruled to the extent that the court refused to recognize a common law cause of action, *Lewis v. State*, 256 N.W.2d 181, 192 (Iowa 1977)) (the dram shop act was designed to deter, "but above all to provide an avenue of relief to those offended who had no recourse or right of action under the common law"); *Anderson v. Comardo*, 107 Misc. 2d 821, 828, 436 N.Y.S.2d 669, 674 (Sup. Ct. 1981) (the dram shop act may have been motivated by deterrence in part: "one of their primary goals was to assure that persons injured in person or support by the intemperance of others would have an available avenue of recovery for their injuries . . .") (citations omitted).

156. This is contrary to existing dram shop law where certain persons could not be held liable in an action for contribution. See, e.g., *Friend v. Campbell*, 102 Mich. App. 278, 301 N.W.2d 503 (1981) (intoxicated person cannot seek contribution). Compare *Putney v. Gibson*, 94 Mich. App. 466, 289 N.W.2d 837 (1979), *rev'd*, *Putney v. Haskins*, 414 Mich. 181, 324 N.W.2d 729 (1979), with *Herrera v. Voris*, 365 F. Supp. 744 (E.D. Mich. 1973), *aff'd*, 503 F.2d 1023 (6th Cir. 1974), where the first case did not allow the tavern keeper to maintain a right against the intoxicated customer for contribution, while the second case allowed an intoxicated customer to successfully maintain a right of contribution against a tavern keeper.

157. Contribution is an *equitable* doctrine. A common burden of wrongful acts

Payment should be apportioned according to fault.<sup>158</sup> In sum, society can best achieve the goal of deterrence through imposing penal sanctions and civil liability, and its goal of compensation through civil liability.<sup>159</sup>

There are practical realities and other considerations that affect the problem's solution. Relationships between society's members, such as insurers and insureds, can alter incentives and motivations.<sup>160</sup> Also, specific circumstances require specialized methods to equitably dispose of the parties' responsibilities.<sup>161</sup> For this reason, an ideal system would be one that is flexible and capable of providing equitable solutions in specific instances. Our legal system possesses this case-by-case flexibility.<sup>162</sup>

One practical effect on a civil liability system is that imposed by insurance. If a commercial provider of alcohol buys insurance, then the cost of this insurance will be incurred as a business cost. To maintain profits, commercial providers of alcohol will incorporate this business cost into their pricing structure. In effect, the cost of insurance will be borne, not by the true provider of alcohol, but by the buyers of alcohol.<sup>163</sup> This, however, is not a problem when dealing with the compensatory goal of society, because insurance is used to compensate the injured.<sup>164</sup> In the interest of

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implies a common burden of liability. *See, e.g.,* *Hammerschmidt v. Moore*, 274 N.W.2d 79, 83 (Minn. 1978). *See also* *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 161 N.W.2d 657 (1968) ("There appears [to be] no valid reason to permit other vendors, whose illegal sales have combined to cause the loss, to escape liability while casting the burden solely upon one." *Id.* at 423, 161 N.W.2d at 661.).

158. For allocation of damages among providers, *see, e.g.,* *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 161 N.W.2d 657 (1968) (suppliers considered concurrent tortfeasors); *Rubel v. Stockrow*, 72 Misc. 2d 734, 340 N.Y.S.2d 691 (Sup. Ct. 1973) (plaintiff has option of joining provider defendants or maintaining an action against each for the full satisfaction).

159. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer . . . [T]here is of course a strong incentive to prevent the occurrence of harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive . . . .

This idea of prevention shades into that of punishment of the offender for what he has already done. . . .

PROSSER, *supra* note 151 at § 4, 23.

160. *See infra* notes 163-68 and accompanying text.

161. *See infra* notes 169-71 and accompanying text.

162. *See supra* note 126.

163. It has even been argued that public policy demands that the very ability of the supplier to insure against the risk of loss should impose the cost of loss. *Hammerschmidt v. Moore*, 274 N.W.2d 79, 83 (Minn. 1978); *Skaja v. Andrews Hotel Co.*, 281 Minn. 417, 423, 161 N.W.2d 657, 661 (1968).

164. *See supra* note 155. As the New Jersey Supreme Court has noted:

[T]he financial impact of an insurance premium increase on the homeowner or the tenant should be measured against the monumental financial losses suffered by society as a result of drunken driving. By our decision we not only spread some of that loss so that it need not be borne com-

fairness, the source of funds to compensate should not come from one who is a collateral party to the injury. Buyers, however, are the very people who, as a class, potentially are part of the chain of causation of injury.

Another aspect of insurance is that although the goal of compensation is achieved, the power of civil liability to deter is reduced. Civil liability should deter the occurrence of an injury to the extent that persons would look ahead to the prospect of having to pay for their actions, and then refrain from those actions if the cost were too great.<sup>165</sup> In this area of law, the latent cost of potential injuries caused by intoxicated persons would be the deterrent to unleashing overly intoxicated persons upon the world. If insurance is purchased by a provider of alcohol, except for threatened increases in insurance premiums (which can be absorbed by buyers of alcohol through higher prices), the practical deterrent effect of civil liability is largely defeated.

In a world with insurance, a civil liability system cannot cope with the dual goals of the compensation for injury and the deterrence of injury. This forces a search for alternate methods of fulfilling the deterrent effect. Deterrence can also be achieved by the imposition of penal sanctions,<sup>166</sup> with the deterrent effect being directly proportional to the severity of the penalties imposed.<sup>167</sup> Penal sanctions may not be insured against, therefore their deterrent effect remains.<sup>168</sup> Thus, penal sanctions must be implemented to create a legal system that meets both goals.

A consideration affecting the method by which society can attain its goals and alleviate injury caused by an intoxicated person is the role of the provider of alcohol. A provider of alcohol may be a commercial seller or a social host. A commercial seller of alcohol has absolute control over the alcohol that is dispensed. Usually, the persons who are to consume the alcohol are visible to the provider, and sales are small enough to control by the exercise of

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pletely by the victims of this widespread affliction, but, to some extent, reduce the likelihood that the loss will occur in the first place.

Kelly v. Gwinnell, 96 N.J. at 557, 476 A.2d at 1229.

165. See *supra* note 150.

166. See *supra* note 147.

167. See *supra* note 150.

168. The policy of the law is to protect the public from the social consequences of intoxicating liquor, thus a proprietor of a liquor establishment must recognize the risks that flow from his business.

the right of refusal of service.<sup>169</sup> A commercial seller is experienced in selling alcohol, and in dealing with drinking persons. Furthermore, a commercial seller has voluntarily entered the business of making a profit<sup>170</sup> through the provision of alcohol, and thus has a responsibility for the situation he has voluntarily created. On the other hand, while a social host may theoretically have control over the alcohol that is dispensed, in practice this is usually not the case. The refusal to serve drinks takes on different dimensions in the case of a social host provider. A social host does not serve alcohol as frequently as a commercial vendor, and is not as experienced in dealing with drunken people and thus cannot be expected to know when a person has met his or her limit.<sup>171</sup> Furthermore, the potential legal repercussions of throwing even a small party would be an oppressive burden.

An additional difference between commercial and social providers of alcohol is the aspect of insurability. A social host cannot be expected to buy insurance to cover liability for the providing of alcohol. The deterrent effect that civil liability imposes upon the social host is thereby not foiled by the ownership of insurance.<sup>172</sup> Therefore, if penal sanctions are imposed upon a social host, the social host is doubly penalized in relation to the commercial vendor. A commercial vendor really feels only the penal sanctions as a deterrent, while a social host is subject to both the penal sanctions and civil liability as deterrents. Hence, if penal sanctions are used to deter, these sanctions should be limited to commercial vendors.<sup>173</sup> This would provide fairer treatment among the different types of providers of alcohol.

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169. See, e.g., *Connolly v. Nicollet Hotel*, 254 Minn. 373, 95 N.W.2d 657 (1959). But see *Kelly v. Gwinnell*, 96 N.J. at 547-48, 476 A.2d at 1224 (a provider's motive does not change the duty not to create unreasonable foreseeable risks of injury).

170. The very capacity to bear loss, either because of size or the ability to let society absorb the loss, has been a motivating factor in finding ways to hold parties with such capacity liable. This is considered a preferable approach to that of leaving the loss on the shoulders of an individual plaintiff. PROSSER, *supra* note 151, § 4, at 22.

171. By virtue of his position, a commercial vendor is better able to cope with the decision. This is important because knowledge of the plaintiff's intoxicated condition is often required before liability will be imposed. See *supra* notes 110, 111.

172. It should be noted, however, that a social host could arguably be covered against losses through homeowners insurance policies. See *Kelly v. Gwinnell*, 96 N.J. at 549-51, 476 A.2d at 1225.

173. The dependence of the goals of society on the role of the provider of alcohol can be summarized by the table:

	Role	
<u>Goal</u>	<u>Social Host</u>	<u>Commercial Vendor</u>
Deterrence	Civil liability	Penal sanctions
Compensation	Civil liability	Civil liability

In summation, the problem of whether injury by an intoxicated person can be alleviated is capable of solution by pursuing certain goals. These goals are to *deter* actions which would lead to injury, and to *compensate* injury after its occurrence. The methods chosen to achieve these goals, and how those methods are to be applied, are dependent upon practical realities and considerations. The use of insurance and the classification of a provider as either a commercial seller or a social host are factors that justify the use of particular methods. Civil liability is a method that serves the goal of compensation in all situations. However, the impracticality of the social host to insure himself, and the ability of the commercial vendor to do so, creates justification for contrasting treatment. Civil liability is a sufficient deterrent for the social host. Since insurance removes the deterrence value of civil liability for the commercial vendor, penal sanctions are appropriate. However, penal sanctions should be limited to commercial sellers since imposition of these sanctions would impose a double deterrent to the social host.

#### V. A SUGGESTED DRAM SHOP ACT

Since the inception of the automobile, the potential injuries that can be produced by the intoxicated driver cannot be ignored.<sup>174</sup> Providers of alcohol are a powerful ally in the fight against alcohol-related injuries.<sup>175</sup> They can no longer be given a preferential position under the law.<sup>176</sup> Under traditional common law principles and legislated dram shop acts, providers of alcohol have been earmarked for specialized treatment. Dram shop acts are rife with inequities and arbitrary provisions.<sup>177</sup> Social hosts, owners or lessees of buildings, and minors have typically been singled out for specialized treatment in many dram shop acts; they have either been arbitrarily excluded from the responsibili-

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174. See *supra* notes 1-4.

175. See, e.g., Note, *Civil Damages Act—Preemption of Social Hosts' Common Law Liability: Cole v. City of Spring Lake Park*, 314 N.W.2d 836 (Minn. 1982), 5 HAMLINE L. REV. 489, 496 (1982).

176. An intermediate court stated with respect to the traditional common law rule: "This does not mean, however, that we cannot criticize a rule that is patently unsupported by either accepted fundamental legal principles or by logic and is contrary to present tort concepts . . ." *Lewis v. Wolf*, 122 Ariz. 567, 568, 596 P.2d 705, 706 (Ariz. Ct. App. 1979) (overruled in *Ontiveros v. Borak*, 136 Ariz. 500, 508, 667 P.2d 200, 208 (Ariz. 1983)).

177. See *supra* notes 103-21 and accompanying text.

ties of liability, or held subject to liability. Furthermore, if a provider does become liable, the extent of liability is for the the entire injury.<sup>178</sup> Traditional common law and dram shop acts not only lack flexibility,<sup>179</sup> but also fail to provide equitable results in all circumstances due to the categorization of circumstances.<sup>180</sup> A system in which the most contingencies can be adjudged equitably is needed.

Modern common law would theoretically provide the necessary flexibility to deal with all the circumstances in a particular case.<sup>181</sup> It has the capacity to deal with cases equitably, and can impose liability based upon fault.<sup>182</sup> In practice, however, the development of the modern common law has been incomplete.<sup>183</sup> Either arbitrary classifications have been formed, resulting in the absolute denial of a cause of action by an intoxicated person against a provider, or the law has not matured completely into a pure common law system.<sup>184</sup>

Legislative action is needed to alleviate the apparent inconsistencies developing in the common law.<sup>185</sup> Dram shop acts have

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178. *See, e.g.*, *League v. Ehmke*, 120 Iowa 464, 94 N.W. 938 (1903) (defendant contributed to the plaintiff's husband's intoxication and the plaintiff was allowed to recover for injury to her health caused by the husband's threats to her of great bodily injury made in the presence of their children); *Fleming v. Gemein*, 168 Mich. 541, 134 N.W. 969 (1912) (wife was allowed to recover for injuries, incurred in an assault by an intoxicated husband, from a provider of alcohol).

179. [I]t would be well to remember the function of common law judges and the role of the common law. The main characteristic of the common law is its dynamism. It does not remain static. The common law is not a thing of chiseled marble to be left unchanged for centuries. *Lewis v. Wolf*, 122 Ariz. 567, 568, 596 P.2d 705, 706 (Ariz. Ct. App. 1979) (overruled in *Ontiveros v. Borak*, 136 Ariz. 500, 508, 667 P.2d 200, 208 (Ariz. 1983)).

180. "It seems clear that the common law rule is an anachronism, unsuitable to our present society, and that its reasoning is repugnant to modern tort theories." *Id.* at 570, 596 P.2d at 708.

181. Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet changing needs within the doctrine of *stare decisis*, which, if correctly understood, was not static and did not forever prevent the courts from reversing themselves or from applying principles of common law to new situations as the need arose. If this were not so, we must succumb to a rule that a judge should let others "long dead and unaware of the problems of the age in which he lives, do his thinking for him."

*Bielski v. Schulze*, 16 Wis. 2d 1, 11, 114 N.W.2d 105, 110 (1961) (quoting Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949), an article adapted from a lecture given by Mr. Justice Douglas) (footnote omitted).

182. This comes from the ability to judge cases individually on their real merit. Judges and juries can incorporate the concept of the totality of the circumstances in making each particular decision.

183. In the jurisdictions where such law has been adopted, states continue to rely upon the imposition of liability based on statute, *see, e.g., supra* notes 69-74 and accompanying text, or legislative action has arrested the development of the law, *see, e.g., CAL. BUS. & PROF. CODE* § 25602 (West Supp. 1984).

184. *See supra* notes 47-68 and accompanying text.

185. When a dram shop act is in force it would be rendered inoperative if an

only changed the law to the extent that they have *shifted* arbitrary and inequitable provisions within the law.<sup>186</sup> A more flexible system providing equitable solutions under the most circumstances is needed.

The common law concepts must be legislated<sup>187</sup> into the dram shop acts. All persons at fault should be potentially liable for the injuries they have caused. Thus, concepts of contributory negligence would have to be incorporated into the statutes. Furthermore, all providers, regardless of their role as either social host or commercial seller, must be *subject to liability*. This does not make providers of alcohol *necessarily* liable, but makes them amenable to suit.<sup>188</sup> Once a provider becomes such, this does not imply he alone should shoulder the full burden of liability. Concepts of contributory and comparative negligence should apply, along with notions of joint and several liability.<sup>189</sup> Other factors which some

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alternate legal cause of action were allowed to exist contemporaneously. Thus, a dram shop act usually preempts the law in the area of actions against a provider of alcohol. *See, e.g., Snyder v. Davenport*, 323 N.W.2d 225 (Iowa 1982) (dram shop legislation usurped the common law negligence action that existed).

186. *See supra* notes 119-21 and accompanying text.

187. "Those cases that have refused to abrogate the common law rule have done so either by adhering to it without analyzing its rationale or by citing the need for legislative action." 122 Ariz. at 571, 596 P.2d at 709. *See also supra* notes 44-46 and accompanying text.

188. For an argument propounding the point that merely accompanying and drinking with a person who becomes intoxicated should not preclude dram shop liability in a state with an existing dram shop act, see *Nelson v. Araiza*, 69 Ill. 2d 534, 372 N.E.2d 637 (1977); *Todd v. Biglow*, 51 Mich. App. 346, 214 N.W.2d 733 (1974).

189. This principle was enunciated by the Minnesota Supreme Court in the context of the issue of contribution between the intoxicated person and the tavern keeper. *Farmers Ins. Exch. v. Village of Hewitt*, 274 Minn. 246, 143 N.W.2d 230 (1966).

[T]here is no question that the driver of the automobile [intoxicated person] and the vendor making the illegal sale of intoxicating liquor are jointly liable to the injured parties. It is true that liability rests on different legal grounds. One rests on common-law negligence and the other on a Civil Damage Act: [a dram shop act]. But the liability of both is common to the injured party. Action for recovery against one does not bar action against the other, but there can be no double recovery and payment by one relieves the other pro tanto of liability up to the amount paid. We have held in several cases that plaintiff is entitled to only one full recovery, and if one of the tortfeasors is sued first, whatever is recovered in that action must be offset against any recovery against the other tortfeasor in a subsequent action. If it is true that one full recovery sets the limit against both tortfeasors, the question naturally arises—why should they not each be liable for their fair share inter se, whether they are sued in the same action or separately, when the action is finally determined or settled so there can be no further action against any of the parties?

*Id.* at 251, 143 N.W.2d at 234. *But see Virgilio v. Hartfield*, 4 Mich. App. 282, 145



states have felt to be of concern, such as written notice to a tavern keeper, the fact that a minor is involved, and obvious intoxication, would be factors in the consideration of the circumstances on a case-by-case basis.<sup>190</sup>

Each state's law dealing with the area of provider liability is unique. Therefore, each state would need to draft a statute tailored to its particular needs. The aim of these statutes should be to eradicate pre-existing arbitrary classifications of circumstances that shackle the equitable distribution of liability by imposing a pure system of common law liability. Bearing in mind the premise that each state has a specific set of problems to solve, a suggested dram shop act may take on the following form:

Any person, suffering an injury recognized by the law, and caused by an intoxicated person, may have a civil right of action against any person who caused any part of the intoxication of that intoxicated person by providing, in any manner, alcoholic beverages to that intoxicated person. A civil right of action shall not be either denied or allowed based solely on distinctions based on the role of a party as either social host, commercial vendor or otherwise. These factors may, however, be properly considered in determining the existence of liability if they are incorporated in an analysis of the totality of the circumstances in deciding whether standards of reasonable care by a person of ordinary prudence were met. All parties can be made to share in liability based upon principles of joint and several liability and contributory or comparative negligence prevailing in this state.

This statute should be accompanied by a statement of legislative intent. It should be made clear to the courts that the purpose of the act is to provide for an application of law without arbitrary distinctions.<sup>191</sup> The legislature may also consider monitoring the courts to prevent their slipping into traditional common law distinctions through amending the act whenever necessary. The purpose of the statute is to provide a system of liability that is cohesive with the area of tort law, thereby providing an equivalent

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N.W.2d 367 (1966) (policy rests on the rule that the right of contribution between tortfeasors must arise under a responsibility to the plaintiff that comes from a common law theory of liability).

190. Judge Prather, in his dissent in *Meade v. Freeman*, 93 Idaho 389, 462 P.2d 54 (1969) (overruled in *Alegria v. Payonk*, 101 Idaho 617, 619 P.2d 135 (1980)), criticized the traditional common law rule as follows:

Some courts cling steadfastly to the myth that it is the drinking and not the sale that is the proximate cause of the ensuing injury and are wearing blinders when it comes to observing the ordinary course of human events. . . . The underlying principle . . . is that the seller is sending out into the public a thing of danger which a reasonably prudent person under like circumstances would apprehend would be likely to cause injury to someone else.

*Id.* at 472-73, 462 P.2d at 64-65 (Prather, J., dissenting).

191. The following factors may effect a decision of whether or not liability should be imposed: The moral aspect of defendant's conduct; historical development; convenience of administration; capacity to bear loss; and prevention and punishment. PROSSER, *supra* note 151, § 4, at 22.

level of fairness.<sup>192</sup>

The first part of the suggested dram shop act creates a civil right of action. It then directs the courts to remove all distinctions based solely on the role of the provider of alcohol.<sup>193</sup> While the role of the provider may be *considered* as a factor that may affect the common law standards imposing liability,<sup>194</sup> the statute also negates the notion that certain persons should necessarily shoulder the entire liability in a particular case.<sup>195</sup> Instead, prevailing principles of joint and several liability are used. Furthermore, the concepts of contributory or comparative negligence are specifically included in the scheme of liability to prompt those states that force a provider to bear the full liability, despite the partial fault of the intoxicated, into the adoption of a complete common law system.<sup>196</sup>

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192. This "fairness" would be encompassed in the "social engineering" aspect of the tort field. For a discussion of the role of torts in the area of social engineering, see PROSSER, *supra* note 195, at 14-16.

193. The interrelationship of factors is important. For example, if the providers of alcohol are meant to include *anyone* who provides alcohol, and the part of the statute that defines what type of provision qualifies (i.e., giving, bartering, selling, etc. . .) omits the concept of "giving gratuitously" then a social host becomes immune. This would occur despite an original intent to include the social host. *Cf.* Cady v. Coleman, 315 N.W.2d 593 (Minn. 1982) (Alcohol bought to entertain a client's personnel did not qualify as a barter. Thus, the law firm was not liable as a provider of alcohol, based upon the specific removal of the word "giving" from the dram shop act indicating that social hosts were not liable under the act).

194. Courts in states that have dram shop acts have used as their justification for the existence of a dram shop law the fact that liability is imposed based upon the *foreseeability* of harm caused by intoxicated individuals. *See, e.g.,* Ono v. Applegate, 62 Hawaii 131, 612 P.2d 533 (1980); Friend v. Campbell, 102 Mich. App. 278, 301 N.W.2d 503 (1981). However, depending on the circumstances, some injuries are more foreseeable than others, and some injuries are not foreseeable at all. So if foreseeability *was* the real premise for dram shop acts, then they would not have been drafted to include cases where injury is not foreseeable. The justification of the court for dram shop acts has merit and should be incorporated into an act. *See generally* Garcia v. Hargrove, 46 Wis. 2d 724, 176 N.W.2d 566 (1970).

195. For suppliers' contribution among themselves, see, *e.g.,* Duncan v. Beres, 15 Mich. App. 318, 166 N.W.2d 678 (1968); Hammerschmidt v. Moore, 274 N.W.2d 79 (Minn. 1978); Rubel v. Stackrow, 72 Misc. 2d 734, 340 N.Y.S.2d 691 (Sup. Ct. 1973).

196. This is *contra* to states having dram shop acts in which the negligence of the intoxicated is not a defense since the cause of action is statutory in form and thus not based on negligence. In the case of existing dram shop acts that provide for actions by wives, husbands, children or parents, a defense based upon the negligence of the intoxicated fails since the cause of action is not derivative in form but exists in the wife, husband, child or parent in their own right. *See, e.g.,* Schutz v. Murphy, 99 Mich. App. 386, 297 N.W.2d 676 (1980) (wife could maintain a suit despite the husband's preclusion from recovering damages for his own injuries); Vadasy v. Bill Feigel's Tavern, Inc., 88 Misc. 2d 614, 391 N.Y.S.2d 32 (Sup. Ct. 1973); *aff'd*, 55 A.D. 1011, 391 N.Y.S.2d 999 (1977) (a father was permitted to bring an ac-

This suggested statute is based upon the more common differences between the positions most states have adopted and an unfettered common law system.<sup>197</sup> In providing for an unrestricted application of the common law, some states may not require all of the provisions in this statute, and others may need more.

A dram shop act alone is inadequate. As previously discussed, commercial vendors of alcoholic beverages can purchase insurance to cover their potential losses under a dram shop act.<sup>198</sup> Consequently, the deterrent effect of dram shop acts is negated. Furthermore, the social host who cannot be expected to purchase insurance is treated harshly relative to the commercial vendor. Thus, a dram shop act alone cannot provide an equitable legal system. An equitable system would require that a dram shop act be accompanied by a penal statute imposing sanctions against commercial vendors. The penal statute should be limited to sanctions against commercial vendors, because if social hosts who did not buy insurance were included under the penal statute, social hosts would again be treated inequitably relative to commercial vendors.

To provide fairness and equity to all classes of providers, an integrated system is required. A penal code providing sanctions against commercial vendors together with a dram shop act provides such a system.<sup>199</sup> The severity of penal sanctions should be strong enough to deter commercial vendors to the same extent as other providers of alcohol.<sup>200</sup> Otherwise, if the deterrent effect of the penal sanction is less than that of the dram shop act, social

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tion for the loss of services of his child despite the inability of the boy to bring an action in his own name). This rule does not include recovery by another who actively causes part of the intoxication. This is the defense of complicity. *See, e.g., Nelson v. Araiza*, 69 Ill. 2d 534, 372 N.E.2d 637 (1977).

197. *See supra* notes 176-84 and accompanying text.

198. For cases that construed dram shop liability insurance provisions, see *Lincoln Casualty Co. v. Vic & Mario's, Inc.*, 62 Ill. App. 2d 262, 210 N.E.2d 329 (1965) (insurance policy was found to cover only on the premises drinking); *Dorsey v. Kriloff*, 319 Ill. App. 116, 48 N.E.2d 768 (1943) (insurance policy was found not to cover an employee).

199. Penal sanctions cannot be made part of a dram shop act, because dram shop acts impose civil liability and not penal sanctions. 45 AM. JUR. 2d *Intoxicating Liquors*, § 561 (1969).

200. When studying the awards available under civil liability acts, the state legislatures should examine the nature and extent of the awards available in their state. In Illinois, a daughter brought suit against the provider of alcohol that sold her the alcohol which caused her intoxication. She brought the suit on behalf of her parents claiming she had been supporting them and thus her parents had lost their means of support. *Kelly v. Hughes*, 33 Ill. App. 2d 314, 179 N.E.2d 273 (1962). *See also State Farm Mut. Auto. Ins. Co. v. Village of Isle*, 265 Minn. 360, 122 N.W.2d 36 (1963) (in determining the amount of the award for the loss of means of support consideration of habits, condition of family, health, and earning capacity of supporter, life expectancies of supporter and supportee, was proper).

hosts would again be treated more harshly than commercial vendors. Conversely, if the deterrent effect of the penal sanction is stronger than that of the dram shop act, commercial vendors would be treated more harshly than social hosts. To match the deterrent effect of a dram shop act, state legislatures may look to the amount of the average liability incurred in a recovery under the dram shop act in the state.<sup>201</sup> This value may be used to set a fine under the penal code. In this way the deterrent effect that comes to bear on commercial vendors can be equalized with the effect experienced by social hosts.

## VI. CONCLUSION

The mechanization of today's society has brought a new dimension to the potential injury an intoxicated person can cause. The degree of legislation society wishes to produce to stop or punish the drunk driver is a political question. Courts and legislatures alike have created a morass of arbitrary distinctions and categorizations of persons within the law upon which liability is either denied or imposed. Society can no longer afford to allow this important area of the law to remain in a state of disarray.<sup>202</sup> With the severity and number<sup>203</sup> of intoxicated-caused injuries, lawmakers have a duty to clean house.

Under traditional common law, the providers of alcohol are absolutely immune from liability.<sup>204</sup> Under state-enacted dram shop

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201. If the levels of deterrence were equal then a provider would not be discriminated against based on his role as either a commercial supplier or social host. However, this is a policy decision and it may well be that society may want to deter one party to a greater extent. For example, a commercial enterprise may have a better ability to absorb loss than the social host. Entities "who by means of rates, prices, taxes or insurance are best able to distribute to the public at large the risks and losses which are inevitable" may be chosen to bear that loss. PROSSER, *supra* note 151, at 22.

202. "The dram shop rule was promulgated by the courts in horse and buggy days. The attitude that the plaintiff's rights are limited to the remedies available at common law must yield when the rationale for the rule no longer applies." *Lewis v. Wolf*, 122 Ariz. 567, 571, 596 P.2d 705, 709 (Ariz. Ct. App. 1979) (overruled in *Ontiveros v. Borak*, 136 Ariz. 500, 508, 667 P.2d 200, 208 (Ariz. 1983)).

203. Judges who handle these types of cases understand the realities of injuries caused by intoxicated persons, however, their decisions have been limited by higher authority. Exasperated, one judge prefaced his opinion with the biting remark: "This is another one of those cases where an innocent life has been snuffed out by a drunk driver." *Id.* at 567, 596 P.2d at 705 (the judge was forced to deny liability).

204. If legal liability is to coincide with moral wrong, what can be said in favor of the bartender who serves intoxicants to someone who is already

acts, there are numerous arbitrary classifications and distinctions that determine a provider's candidacy for liability.<sup>205</sup> Both these systems lack the requisite flexibility to impose liability in an equitable manner.<sup>206</sup> The modern common law is a move towards a system of liability which is not based upon arbitrary distinctions. However, the modern common law has rarely matured in states in which it has been introduced. The law usually remains dependent upon the existence of penal statutes. Even when a state has managed to move into an area of unfettered common law, the legislature has explicitly overruled the development by the courts.<sup>207</sup>

Before making changes in this area of the law, the problem must be evaluated, then goals must be set to solve the problem and methods used to achieve these goals discovered. The basic problem is the question of whether society can alleviate injury caused by an intoxicated person. The goals that are appropriate to the solution of this problem are the deterrence of actions that cause injuries and the compensation of injuries when they occur.

To equitably achieve the goals of deterrence and compensation, civil liability must be administered unfettered by arbitrary distinctions. To force legal systems of states into such an unfettered system, legislation is needed.<sup>208</sup> Legislation should impose an unhampered common law system, and explicitly remove the inequities which exist in a state's system. Any enactment of a dram shop act should be part of an integrated system. The practical reality of insurance inherently produces a significant difference between the commercial vendor and other providers of alcohol.<sup>209</sup> To create an equitable system, penal statutes that impose sanctions against commercial vendors should be enacted in tandem with dram shop acts. This would equalize the deterrent effect between commercial vendors, who can insure themselves against liability, and social hosts, who do not have access to such insurance.

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intoxicated when he knows or should have reason to know that upon leaving the bar that person will unleash an instrument of potential destruction? Such anti-social conduct cries out for legal liability.

*Id.* at 571, 596 P.2d at 709.

205. See *supra* notes 103-21 and accompanying text.

206. See *supra* notes 119-21 and accompanying text.

207. See, e.g., CAL. BUS. & PROF. CODE § 25602(a)-(c) (West Supp. 1984).

208. The fact that courts cling to the traditional common law is evidence of the fact that they will not move to the common law. Exceptions are few. See, e.g., Lopez v. Maez, 98 N.M. 625, 651 P.2d 1269 (1982) (the problem of maintaining a cause of action on the sole theory that there was a violation of a statute remains). However, as one court has noted the "immunization of hosts is not the inevitable result of the law of negligence, for conventional negligence analysis points strongly in exactly the opposite direction." Kelly v. Gwinnell, 96 N.J. at 543, 476 A.2d at 1221.

209. See *supra* notes 172-73 and accompanying text.

The lethal mixture of an intoxicated driver and an automobile makes this area of the law extremely important. The systems that have developed to deal with the liability of the providers of alcohol are inadequate and legislative change is needed. A coherent system based upon notions of fairness and equity is a necessity. This area of the law *deserves* a sober re-evaluation.<sup>210</sup>

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210. For persons whose "reason" is so *hardened* as to not be able to furnish a sufficient basis of concern in this area of the law, a reading of the article *Anger and Action After the Tears*, Washington Post, Oct. 17, 1982, at H1, col. 1, may be adequate to create sufficient empathy.

