

DRAM SHOP LIABILITY—A JUDICIAL RESPONSE

A recent federal study reports that the use of alcohol by drivers and pedestrians leads to some 25,000 deaths and 800,000 collisions in the United States each year.¹ Although tort law is obviously incapable of eliminating the wholesale social disruption fostered by intoxication-caused automobile accidents, it can perform its traditional functions of equitably allocating losses and deterring future injuries. But these dual goals cannot be met unless the law is able to reach all those whose unreasonable risks result in injury.

The average drunk driving accident may result from the risk-producing activities of two parties: the motorist who drives an automobile after becoming intoxicated and the liquor vendor who sells alcohol to the motorist who is incapacitated because of intoxication or other condition. The drunk driver in California has always been subject to tort sanctions.² The liquor vendor, on the other hand, has always been absolved from civil liability.³ California cases have consistently held that as a matter of law the supplying of alcohol is not the "proximate cause" of injuries sustained by an intoxicated tavern patron or inflicted by him on a third party.

The theme of this Comment is that the line of decisions in California which denies liability against the seller of intoxicating beverages fails to use tort law to constructive social advantage. The average intoxication case demonstrates that established negligence doctrines could furnish the California courts with the tools for remaking the law of dram shop liability into a realistic and constructive force. This Comment focuses on the intoxication-caused injury in its most dramatic form—the automobile accident. But the proposals of the Comment also apply to other, less frequent and less spectacular intoxication-caused damage. Discussion will center around California precedent and statutes, but the analysis and criticism of California law applies with equal vitality to the nine other states which share the California rule of non-liability.⁴

1. STAFF OF HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 2D SESS., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 1 (Comm. Print 1968).

2. *E.g.*, *Stickel v. San Diego Elec. Ry.*, 32 Cal. 2d 157, 195 P.2d 416 (1948); *Zamucen v. Crocker*, 149 Cal. App. 2d 312, 308 P.2d 384 (1957).

3. See text accompanying notes 32-57 *infra*.

4. *Cherbonnier v. Rafalovich*, 88 F. Supp. 900 (D. Alaska 1950); *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945); *Henry Grady Hotel Co. v. Sturgis*, 70 Ga. App. 379, 28 S.E.2d 329 (Ct. App. 1943); *Stringer v. Calmes*, 167 Kan. 278, 205 P.2d 921 (1949); *Waller's*

This Comment recognizes that all jurisdictions currently allow recovery against the consumer-driver, thus assuring the plaintiff of a remedy whether or not the jurisdiction holds the liquor supplier liable. Yet even if it could be assumed that most drivers involved in intoxication-caused accidents carry automobile insurance, the limited amount of required coverage will often result in only partial recovery. In addition to burdening an innocent plaintiff with nonrecoverable damages, a doctrine which automatically excludes one class of risk-producing activity from the operation of tort law is wholly inadequate to deter future injury.

To put the legal problems of intoxication-caused injuries into proper perspective and reveal society's options in this area, Part I surveys different approach to the question of a commercial liquor seller's liability. Part II probes and criticizes the legal reasoning and policy justifications which courts have invoked in refusing to hold the seller liable. Part II concludes that no rational basis exists for continuing to arbitrarily insulate the commercial liquor seller from liability and that compelling reasons exist for courts to apply traditional common law rules in deciding tort liability. Part III compares and contrasts the commercial liquor seller—a tavern-owner or liquor store proprietor—with the private party who furnishes liquor to his guests. It considers the possible extension of tort liability to private parties and suggests distinctions between the private party and the commercial seller which make such a policy undesirable.

I

APPROACHES TO THE PROBLEM OF SELLER'S LIABILITY

A. Legislative Solutions

The most common response to the problems of sellers' liability has been the enactment of so-called dram shop acts.⁵ These statutes, which are currently in force in twenty states,⁶ impose some form of

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); *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).

Dicta in *Kraus v. Schroeder*, 105 Neb. 809, 182 N.W. 364 (1921), suggests that Nebraska falls into the group of states sharing the rule of nonliability. In *Kraus* the court found a liquor vendor liable for the injuries caused by an intoxicated patron. Although liability was based on a state dram shop act the court noted that no such remedy existed against the vendor at common law. The subsequent repeal of the Nebraska dram shop act leaves open the question of the vendor's potential liability in that state.

5. Such statutes are sometimes referred to as Civil Damages Acts.

6. ALA. CODE tit. 7, §§ 120-21 (1958) (liability for illegal sales); CONN. GEN. STAT. ANN. § 30-102 (Supp. 1969) (liability for sale contributing to intoxication);

strict liability on vendors of alcoholic beverages for the acts of intoxicated patrons. Although dram shop acts provide a mechanism for allocation of intoxication-caused injuries, they are far from an ideal solution to the problem. They are often unsatisfactory to both the injured party and the potential defendant.

The injured party suing under a dram shop act is often denied full recovery by arbitrary statutory limitations. Although most dram shop acts allow recovery by anyone injured as a result of intoxication, some limit recovery to the immediate family of the injured patron.⁷ Even if an injured party has standing to sue, several states saddle him with an arbitrary dollar limitation on recovery.⁸ Finally, the state's act may also impose a short statute of limitations.⁹

In addition to restricting the plaintiff's recovery, dram shop acts also impose liability on a tavern keeper whether or not he has departed from traditional due care standards. Fewer than one-half of the dram shop states require that the liability-producing sale be made in violation of law.¹⁰ A requirement that the sale must violate one of the nearly

DEL. CODE ANN. tit. 4, §§ 715-16 (1953) (liability for sale to persons with known intemperate habits, with notice); ILL. ANN. STAT. ch. 43, §§ 135-36 (Smith-Hurd Supp. 1969) (liability on seller and owner of premises for any sale contributing in whole or part to intoxication); IOWA CODE ANN. § 129.2 (1954) (liability for illegal sales and compensation for care where sale is illegal); ME. REV. STAT. ANN. tit. 17, § 2002 (1964) (seller liable for injuries caused by intoxication); MICH. COMP. LAWS § 436.22 (1948) (liability in cases of illegal sales); MINN. STAT. ANN. § 340.95 (1953) (liability for injuries caused by intoxicated person); NEV. REV. STAT. § 202.070 (1967) (liability to parents only in sales to minors); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney Supp. 1964) (liability in case of unlawful sales); N.C. GEN. STAT. § 14-332 (1953) (liability for sales in violation of law); N.D. CENT. CODE § 5-01-06 (Supp. 1969) (liability for sales in violation of law); OHIO REV. CODE §§ 439.01-05 (Page 1953) (liability for sales to persons with known intemperate habits); OKLA. STAT. tit. 37, § 121 (1951) (liability for injuries in cases of illegal sales); ORE. REV. STAT. § 30.730 (1969) (seller liable for all injuries resulting from sale); R.I. GEN. LAWS ANN. § 3-11-1-2 (1956) (liability for illegal sales and sales after notice); VT. STAT. ANN. tit. 7, § 501 (1957) (owner of premises and seller liable for illegal sales); WASH. REV. CODE § 71.08.080 (1961) (seller liable to person injured by sale to an habitual drunkard); WIS. STAT. ANN. § 176.35 (1957) (liability for sales to minors and habitual drunkards after notice); WYO. STAT. ANN. § 12-34 (1957) (liability for sales to minors and habitual drunkards after notice).

7. ALA. CODE tit. 7, §§ 120-21 (1958); NEV. REV. STAT. § 202.070 (1967); ORE. REV. STAT. § 30.730 (1969); WYO. STAT. ANN. § 12-34 (1957). For an act which extends recovery also to the patron's employer, see N.C. GEN. STAT. § 14-332 (1953).

8. CONN. GEN. STAT. ANN. § 30-102 (Supp. 1969) (\$20,000 limitation for injuries to each person, \$50,000 limitation of aggregate amount to all persons injured); DEL. CODE ANN. tit. 4 § 716 (1953) (\$500 limitation for all types of recovery); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1969) (\$15,000 limit for injuries to persons or property and \$20,000 for loss of support).

9. *E.g.*, CONN. GEN. STAT. ANN. § 30-122 (Supp. 1969) (one year); ILL. ANN. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1969) (one year).

10. ALA. CODE tit. 7, § 121 (1958); IOWA CODE ANN. § 129.2 (1946); ME. REV.

universal statutes prohibiting sales of alcohol to minors or intoxicated persons would at least furnish the vendor with a standard of care which would render the incidence of civil liability more predictable. The majority of dram shop acts fail to provide this warning.

The problem of lack of notice to vendors is even more acute in those states which impose liability for "contributing" to a patron's intoxication.¹¹ Where the statute makes contribution to intoxication the cause-in-fact of injury, a plaintiff could successfully impose joint and several liability upon four tavernkeepers who sell liquor to the patron in the course of an evening's spree.¹² Some statutes lessen the potential inequity of such a result by requiring an illegal sale as a precondition to imposing liability for contribution. Yet where this is not the case the law may impose liability even where the patron was visibly sober in the first three bars.¹³

Those dram shop acts which make the vendor liable for the acts of an intoxicated person¹⁴ are often held to impose liability even where the patron's intoxication is not shown to be the legal cause of the plaintiff's injury. Thus, in cases where a party died of inexplicable causes following intoxication,¹⁵ or committed suicide after intoxication,¹⁶ or was shot by an intoxicated person,¹⁷ the plaintiffs have recovered against the vendor without proof that intoxication was the legal cause of the injury.

In Vermont, Ohio, and Illinois, the owner of the premises where liquor is sold, as well as the seller, can be held liable. The potential for vicarious liability is mitigated somewhat in the first two states by a requirement that the sale be illegal and that it be made with the owner's knowledge.¹⁸ But in Illinois the act is satisfied if the owner

STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS § 436.22 (1948); MINN. STAT. ANN. § 340.95 (1953); N.Y. GEN. OBLIGATIONS LAW § 11-101 (McKinney Supp. 1959); N.D. CENT. CODE § 5-01-06 (Supp. 1969); OKLA. STAT. ANN. tit. 37, § 121 (1954); R.I. GEN. LAWS ANN. § 3-11-1 (1956); VT. STAT. ANN. tit. 7, § 501 (1957).

11. ILL. ANN. STAT. ch. 43 § 135 (Smith-Hurd Supp. 1969); IOWA CODE ANN. § 129.2 (1954); ME. REV. STAT. ANN. tit. 17, § 2002 (1964); MICH. COMP. LAWS § 436.22 (1948); N.Y. GEN. OBLIGATIONS LAW § 16 (McKinney Supp. 1969); R.I. GEN. LAWS ANN. § 3-11-1 (1956); VT. STAT. ANN. tit. 7, § 501 (1957).

12. See *Lichter v. Scher*, 11 Ill. App. 2d 441, 452, 138 N.E.2d 66, 71 (1956); *Earp v. Lilly*, 217 Ill. 582, 75 N.E. 552 (1905).

13. Compare *Earp v. Lilley*, 217 Ill. 582, 75 N.E. 552 (1905); with *Hall v. Ditto*, 128 Ill. App. 187 (1906). One state court has even held that its dram shop act dispenses with proof of any causation or contribution to intoxication. *Pierce v. Albanese*, 144 Conn. 241, 129 A.2d 606 (1957).

14. E.g., ILL. ANN. STAT. ch. 43, §§ 135-36 (Smith-Hurd Supp. 1969); IOWA CODE ANN. § 129.2 (1954); MINN. STAT. ANN. § 340.95 (1953).

15. *Sworski v. Coleman*, 208 Minn. 43, 293 N.W. 297 (1940).

16. *Bistline v. Ney Bros.*, 134 Iowa 172, 111 N.W. 422 (1907).

17. *Cox v. Hrasky*, 318 Ill. App. 287, 47 N.E.2d 728 (1943).

18. OHIO REV. CODE ANN. §§ 4399.01-.05 (Page 1953); VT. STAT. ANN. tit. 7, § 501 (1957).

simply has knowledge of the sale of alcoholic beverages on the premises.¹⁹

The courts have consistently found dram shop acts constitutional,²⁰ and have given them a liberal construction.²¹ Yet changing social conditions have clearly created burdens on vendors which were not contemplated when the statutes were drafted. In most cases legislative enactment came at a time when the relative immobility of society limited the potential damage which could be inflicted by an intoxicated patron.²² The automobile's emergence has drastically multiplied the vendor's potential liability, in terms of both scope and intensity of injuries.

The statutory limitations on standing, amount of recovery, and time in which to sue are clumsy, broad-brush attempts to lessen the expanding burden of the seller's liability in a mobile America.²³ These statutory hurdles to recovery bear no reasonable relationship to the goals of equitably compensating injured parties or deterring future injuries. Dram shop acts, rather than achieving satisfactory protection for society without unfairly castigating liquor sellers, have saddled vendors with an unreasonable burden while arbitrarily denying large groups of injured parties an adequate recovery, or any recovery at all. A growing number of states have repealed their dram shop acts in recent years.²⁴

The dram shop acts arose as a result of the pressure of the temperance movement²⁵ and still stand as a legislative attempt to remove

19. 24 ILLINOIS LEGISLATIVE COUNCIL File 1-670, DRAM SHOP LIABILITY 5 (1952), as quoted in Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175 (1958).

20. E.g., *Pierce v. Albanese*, 144 Conn. 241, 129 A.2d 606 (1957); *Huckaba v. Cox*, 14 Ill. 2d 126, 150 N.E.2d 832 (1958).

21. E.g., *Roberts v. Casey*, 4 Conn. Cir. 89, 225 A.2d 836 (1966); *Hohn v. City of Ortonville*, 238 Minn. 428, 57 N.W.2d 254 (1953).

22. See list of citations of state statutes in 14 jurisdictions which had civil damages acts as of 1888 in Osborn, *Liquor Statutes in the United States*, 2 HARV. L. REV. 125, 134 nn. 1-16 (1888).

23. Note, for example, that Connecticut 1961 Public Act 432 amended the state's liquor control act to reduce from \$25,000 to \$20,000 the amount recoverable by any one person and placed a ceiling of \$50,000 for damages under the act. CONN. GEN. STAT. ANN. § 30-102 (Supp. 1969). Prior to Connecticut 1959 Public Act 631, § 1, which set the \$25,000 figure, there had been no limit to recovery under the state's dram shop act. No. 631, § 1, [1959] Conn. Pub. Acts 762 (expired 1961). Connecticut 1961 Public Act 432 also reduced from 90 to 60 days the time in which notice could be given by a potential plaintiff under the act.

24. Massachusetts, see *Barboza v. Decas*, 311 Mass. 10, 40 N.E.2d 10 (1942); Pennsylvania, see *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958); Indiana, see *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); New Hampshire, see *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965); New Jersey, see *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959).

25. "Although the National Temperance Movement did not effectuate the 18th Amendment of the Constitution until 1919, prior to that time prohibitionists lobbied

an emotion-laden segment of social activity from the operation of tort law. The result has been an inadequate solution to the problem of injuries caused by intoxication. More significant, for the purposes of this Comment, is the impact they have had, and continue to have, on those states without dram shop legislation. The dram shop acts did not arise as a response to the traditional common law rule of non-liability.²⁶ Rather, they have served as an important justification for imposition of that rule in states which have no dram shop legislation. Courts of several states, including California, have refused to impose liability on an alcohol vendor on a theory of legislative inaction. These courts have reasoned that the failure of the legislature to enact a dram shop law in the face of the abundant models in other states evidences a legislative intent to absolve vendors from all liability.²⁷

Classical dram shop acts are not an adequate solution to the problem of intoxication-caused injuries. Aimed at legislating morals rather than setting reasonable standards for tort compensation, the acts are rife with built-in inequities for both the vendor and the injured party. Dram shop acts are not, of course, the only possible legislative response to the problem. It is possible to conceive statutory solutions which would adequately serve the dual aims of deterrence of risk-producing intoxication and fair loss allocation.²⁸ Yet even the most carefully drafted statute will be based on the faulty assumption that the problem of intoxication-caused injury somehow requires exceptional treatment. As illustrated below, a judicial application of accepted negligence principles to the activities of the liquor supplier is a more logical and salutary solution.

B. The California Precedent: The Old Rule of Non-Liability

Until the last decade, the states which lacked dram shop acts

State Legislatures to pass Dram Shop Acts designed to control the liquor traffic." Ogilvie, *History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175 (1958). The atmosphere of the times is described in FOUR, OGGERT & THOMPSON, A CENTENNIAL HISTORY OF ILLINOIS 86 (1920) as, "the mighty clamor of the early 1870's known as the Woman's Crusade, which set thousands of furious females marching against the saloon with prayers on their lips and destruction in their hearts."

26. See statutes cited note 22 *supra*.

27. *Cole v. Rush*, 45 Cal. 2d 345, 354, 289 P.2d 450, 456 (1955); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 256, 78 A.2d 754, 757 (1951); *Hall v. Budagher*, 76 N.M. 591, 595, 417 P.2d 71, 73 (1966). See text accompanying notes 155-59 *infra* for a discussion of this reasoning.

28. Such a statute could provide for secondary liability for the commercial supplier for all damages caused to third parties by his negligent sales and uncompensated by tort recovery against the vendee. To deter negligent sales the statute could provide for a fine or punitive damages whenever the supplier was found liable. Finally, to guarantee adequate recovery, such a statute could require that licensed commercial suppliers carry liability insurance, or an equivalent bond.

uniformly held that at common law the liquor seller was not liable for injuries caused by an intoxicated patron, whether to a third party²⁹ or to himself.³⁰ There was no liability even where circumstances would have warned a reasonable man of the deadly dangers of supplying liquor to a particular patron. Recently, many courts have abandoned the old rule of non-liability. But California and nine other states still refuse to impose liability, whatever the circumstances.³¹

Four major cases established the current California doctrine of non-liability for the vendor of intoxicants. The doctrine was first mentioned in 1921 in *Lammers v. Pacific Electric Ry.*³² There, an employee of the defendant had ejected the plaintiff from a train while the plaintiff was quite helpless by virtue of intoxication and mental deficiency. The plaintiff later stumbled onto the tracks of another railroad, where he was injured. His complaint contained no allegation that the defendant had contributed in any way to his intoxication. In holding that defendant's action in ejecting the plaintiff was not the "proximate cause" of his injuries, the court used as analogies other situations where a plaintiff's injuries were somewhat remote from the defendant's act. In this discussion the *Lammers* court noted that all courts, up to that time, had found vendors of liquor free from liability for injuries to intoxicated patrons.³³ Although this discussion in *Lammers* is clearly recognized as dictum,³⁴ it consistently crops up in California decisions discussing the issue of tavernkeepers' liability.

In *Hitson v. Dwyer*,³⁵ 22 years later, the plaintiff sought to recover for injuries sustained when he fell off a bar stool in defendant's establishment and was dragged across the floor by defendant. He alleged that defendant had sold alcoholic beverages to him while he was intoxicated, in violation of section 3796 of the Alcoholic Beverages

29. *E.g.*, *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945); *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951); *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939).

30. *E.g.*, *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So. 2d 328 (1966). This rule is sometimes justified by invoking the maxim, "The sale of liquor to an able-bodied man is not negligence." *E.g.*, *Manthei v. Heimerdinger*, 332 Ill. App. 335, 352, 75 N.E.2d 132, 140 (1947).

The qualification of "able-bodiedness" is defined by the major exception to the rule of nonliability. Several jurisdictions have imposed liability where a tavernkeeper continued to sell liquor to an alcoholic husband after continuous contrary pleas from the wife. *Ridden v. Grimm Bros.*, 97 Tenn. 220, 36 S.W. 1097 (1896); *Pratt v. Daley*, 55 Ariz. 535, 104 P.2d 147 (1940); *Swanson v. Ball*, 67 S.D. 161, 290 N.W. 482 (1940).

31. See note 4 *supra*.

32. 186 Cal. 379, 199 P. 523 (1921).

33. *Id.* at 384, 199 P. at 525.

34. See *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 248, 210 P.2d 530, 532 (1949).

35. 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

Control Act.³⁶ The sole question before the court was the propriety of sustaining a special demurrer which claimed uncertainty of the complaint.³⁷ But in a discussion unnecessary to the decision,³⁸ the court also examined two other questions: the violation of section 3796 as grounds for negligence per se and the sale of liquor as the proximate cause of plaintiff's injuries. Noting that the purposes of the Alcoholic Beverages Control Act involved "in the highest degree the economic, social, and moral well being and safety of the State and all its people,"³⁹ the court simply concluded, "under such a statement it cannot be said that an obviously intoxicated person is one for whom the act was adopted."⁴⁰ Further, the opinion made clear that even if a court applied the statute to protect a drunk from his own intoxication, the seller's act must "proximately cause" or contribute to the injury to justify the imposition of liability.⁴¹ Citing *Lammers*,⁴² the court was satisfied to conclude that the tavernkeeper's sale did not proximately cause the plaintiff's injuries because "the proximate cause is not the wrongful sale of liquor but the drinking of the liquor so purchased."⁴³ Two judges dissented.

A 1949 district court of appeal case marked the first time a California court directly confronted the question of a liquor vendor's liability for injuries resulting from a patron's intoxication. In *Fleckner v. Dionne*⁴⁴ the plaintiff was injured in an automobile accident by a car driven by a minor who had purchased intoxicating liquor in the defendant's tavern. The plaintiff's complaint alleged that the defendant *knew* his patron was a minor and nevertheless served him in violation of statute, and further that the defendant *knew* the patron "had upon or near the premises an automobile and would thereafter drive and propel it."⁴⁵

Although recognizing that the discussions of the vendor's liability in *Lammers* and *Hitson* were dicta,⁴⁶ the court noted that these views

36. This statute was substantially identical to the current CAL. BUS. & PROF. CODE § 25602 (West 1964). For the text of the current statute see text accompanying note 94 *infra*.

37. The defendant alleged uncertainty as to which of the injuries raised by the plaintiff's complaint resulted from the fall, and which from the alleged dragging. *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 807, 143 P.2d 952, 954 (1943).

38. See *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 248, 210 P.2d 530, 532 (1949).

39. Ch. 330, § 62, [1935] Cal. Stats. 1151. Now CAL. BUS. & PROF. CODE § 23001 (West 1964).

40. *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 805, 143 P.2d 952, 955 (1943).

41. *Id.*

42. *Id.*

43. *Id.*

44. 94 Cal. App. 2d 246, 210 P.2d 530 (1949), *hearing denied* Dec. 15, 1949.

45. *Id.* at 247, 210 P.2d at 531.

46. *Id.* at 249, 210 P.2d at 532.

were in accord with the holdings of courts in other states which did not have dram shop acts. Without discussing the particular facts of the case, or the prevailing principles of California negligence theory, the court sustained the vendor's demurrer which stated that the sale was not the proximate cause of plaintiff's injuries.⁴⁷ Apparently because its holding of "no proximate cause" would render the discussion unnecessary, the court did not examine the significance of the defendant's alleged violation of the Alcoholic Beverages Control Act.

In a vigorous dissent Judge Dooling condemned the reasoning of the majority. He contended that the decision held in effect that under no circumstances could one who dispenses liquor to another, knowing that he is becoming intoxicated, be liable to a third party later injured by the intoxicated person's conduct.⁴⁸

The Supreme Court of California has dealt with the problem only once—in the 1955 case of *Cole v. Rush*.⁴⁹ In that case, the supreme court held that the widow of a patron killed in a barroom fight had no cause of action against the tavernkeeper who served her husband. The supreme court, like the California courts which had previously dealt with the issue, failed to discuss the elements of proximate cause or the policies weighing for or against the imposition of liability in the particular case. Rather, the court simply cited *Lammers*, *Hitson*, *Fleckner*, and similar decisions in other states and concluded, "It is the voluntary consumption, not the sale or gift, of intoxicating liquor which is the proximate cause of an injury resulting from its use."⁵⁰

Noting the existence of dram shop acts in other states and the lack of such legislation in California—though liquor legislation is common in the state—the court reasoned that a legislative omission in an area which the legislature frequently reviews constitutes an *active* expression of the legislature's will.⁵¹ The court further assumed that a

47. *Id.* at 251, 210 P.2d at 534.

48. Admitting that out-of-state decisions were uniform in their denial of liability, Judge Dooling concluded, "I can see no reason for perpetuating in the laws of this state the errors of the courts of other jurisdictions." *Id.* at 252, 210 P.2d at 534.

49. 45 Cal. 2d 345, 289 P.2d 450 (1955).

50. *Id.* at 356, 289 P.2d at 457. The language of the case raises the possibility that the California rule of nonliability will be narrowly interpreted. The court stated, "[A]s to a competent person it is the voluntary consumption . . . which is the proximate cause of injury from its use." (emphasis added). The use of the qualification of "competence" for the first time in a California case may suggest that sales to minors or those intoxicated at the time of sale would not fall within the nonliability rule. However, the court's approval of *Fleckner*, where the defendant allegedly knew of his patron's minority and intoxication, suggests that the requirement of competence, if indeed it is more than excess verbiage, would be satisfied in all but the most extreme cases.

51. The court quoted with approval language in *State ex rel. Joyce v. Hatfield*, 197 Md. 249, 256, 78 A.2d 754, 757 (1951): "In the face of the flood of civil damage

problem which has become the subject of legislation in other states must be removed from the domain of the judiciary in California. Bounded by such reasoning, the court concluded that a finding of liability would "constitute a departure from [the court's] constitutional function and an encroachment upon that of the Legislature."⁵²

However, it is possible to construe the language of *Cole* to mean that the decision actually rests on the finding that the patron's *contributory negligence* barred plaintiff's recovery as a matter of law. The court states: "[T]he competent person voluntarily consuming intoxicating liquor contributes directly to any injury caused thereby; and . . . [the] contributory negligence of the decedent bars recovery by his heirs and next of kin in a wrongful death action."⁵³ If *Cole* is read as an application of contributory negligence doctrine the California supreme court's finding that a vendor's sale is not the proximate cause of resulting injuries is unnecessary to the holding, and thus dictum. The court's approval of *Fleckner*, where the plaintiff was an injured third party and could not have been barred by the patron's contributory negligence, is not inconsistent with such an interpretation of *Cole*. On the other hand, the amount of space in the *Cole* opinion devoted to discussions of proximate cause and judicial legislation militates against the theory that the case rests solely on the application of contributory negligence doctrine. Furthermore, later decisions of the California appellate courts⁵⁴ and federal courts applying California law⁵⁵ have assumed that *Cole* articulated the rule that as a matter of law a sale of intoxicating liquor cannot be the proximate cause of injuries sustained by patrons or third parties.⁵⁶

For many years courts of the various states approached the activity of selling liquor from two extreme positions. On one hand, drain shop

laws enacted, amended, and repealed in other states and the Volstead act—and of the total absence of authority for such liability, apart from statute—the fact that there is now no such law in Maryland expresses the legislative intent as clearly and compellingly as affirmative legislation would."

52. *Cole v. Rush*, 45 Cal. 2d 345, 354, 289 P.2d 450, 455 (1955).

53. *Id.* at 356, 289 P.2d at 457.

54. *Dwan v. Dixon*, 216 Cal. App. 2d 260, 30 Cal. Rptr. 749 (1963); *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967). *Fuller* is a well-reasoned opinion which vigorously criticizes the California rule while recognizing the necessity of deferring to the state supreme court's decisions.

55. *Murray v. United States*, 382 F.2d 284 (9th Cir. 1967).

56. While *Cole* dealt only with an injured patron, the Supreme Court of California clearly approves application of the nonliability rule to injured third parties. The court denied a hearing of *Fleckner v. Dionne* on December 15, 1949, 94 Cal. App. 2d 246, 253, 210 P.2d 534, and the discussion in *Cole* of the effect of denial of a hearing of an appellate court decision clearly indicates the supreme court's approval of *Fleckner*. "Its judgment stands, therefore, as a decision of a court of last resort in this state, until and unless disapproved by this court or until change of the law by legislative action." 45 Cal. 2d 345, 351, 289 P.2d 450, 453. It has often been held in

states imposed strict liability on vendors; on the other, most states without such legislation, in cases closely resembling California's, absolved the vendor from any liability.⁵⁷ Both approaches isolated the vendor's activity from the operation of established negligence doctrine.

C. *The New Common Law Rule*

Within the past decade, courts in nine states which had adhered to the traditional common law rule of nonliability,⁵⁸ which had repealed dram shop acts,⁵⁹ or which still had dram shop acts in effect,⁶⁰ have reevaluated the question of the liabilities of a supplier of liquor for injuries caused by a vendee's intoxication.

The first of these departures from the traditional rule was the federal case of *Waynick v. Chicago's Last Department Store*.⁶¹ The case involved an action by a Michigan resident who was injured in Michigan by an intoxicated Illinois motorist. The defendant was an Illinois liquor store which had sold liquor to the Illinois driver, in violation of an Illinois Criminal Code section prohibiting sales of alcoholic beverages to an intoxicated person.⁶² Although both Michigan and Illinois had dram shop acts, the court found that neither applied extraterritorially. However, the court reasoned that a finding of vendor's liability did not hinge on applying a dram shop statute, because the Criminal Code section was "for the protection of any member of the public who might be injured or damaged as a result of the drunkenness to which the particular sale of alcoholic liquor contributes."⁶³ The court found that the criminal statute created a duty to protect members of the public; breach of this duty constituted the legal cause of the in-

California that denial of a hearing after a district court of appeal decision is "not without significance" in indicating the supreme court's views. *E.g.*, *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal. 2d 295, 306, 379 P.2d 513, 519, 29 Cal. Rptr. 33, 39 (1963); *DiGenova v. State Board of Educ.*, 57 Cal. 2d 167, 178, 367 P.2d 865, 871, 18 Cal. Rptr. 369, 375 (1962).

57. Apparently the question of a tavernkeeper's liability has never arisen in Hawaii, Mississippi, Montana, South Carolina, Texas, Utah, Virginia or West Virginia.

58. *Davis v. Shiappacosse*, 155 So. 2d 365 (Fla. 1963); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Mitchell v. Ketner*, 54 Tenn. App. 656, 393 S.W.2d 755 (App. Ct. 1964).

59. *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Ramsey v. Anctil*, 106 N.H. 375, 211 A.2d 900 (1965); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964).

60. *Colligan v. Cousar*, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. Ostego County 1965).

61. 269 F.2d 322 (7th Cir. 1959).

62. ILL. STAT. ANN. ch. 43, § 131 (Smith-Hurd Supp. 1969).

63. 269 F.2d 322, 325 (7th Cir. 1959).

juries inflicted by his customer, and the vendor was therefore liable in negligence for the plaintiff's injuries.

In the landmark case of *Rappaport v. Nichols*,⁶⁴ decided the same year as *Waynick*, the New Jersey supreme court dealt with a plaintiff injured by a minor who had purchased alcohol in defendant's bar. The court sustained the injured party's complaint against a demurrer by using the same device as the *Waynick* court—deriving the vendor's duty from a state prohibitory statute.⁶⁵ In finding that the state prohibitory statute imposed a duty of care to the general public on the vendor of alcoholic beverages the court reasoned that the legislature strictly prohibited sales to minors because it recognized that their lack of maturity rendered them dangerous to themselves and others after consumption of alcohol.⁶⁶ Because violation of a relevant statute in New Jersey is only evidence of negligence,⁶⁷ the court made it clear that the vendor's unlawful act would constitute negligence only if he knew or should have known that the patron was underage or intoxicated.⁶⁸

Discussing the sale of liquor as the cause-in-fact of plaintiff's injuries, the court reasoned that if a jury finds that an unlawful sale was negligent and that it led to a patron's negligent operation of a motor vehicle, it could reasonably find that the seller's negligence was a substantial factor in plaintiff's injury.⁶⁹ The court further reasoned that today, when the automobile is the normal mode of travel to and from taverns and accidents resulting from drunk driving are common, a jury could reasonably find that the patron's negligent operation of his automobile after leaving defendant's establishment was a foreseeable consequence and a normal incident of the risk which the vendor had created.⁷⁰

64. 31 N.J. 188, 156 A.2d 1 (1959); Note, *New Common Law Dram Shop Rule*, 9 CLEV.-MAR. L. REV. 302 (1960); 60 COLUM. L. REV. 554 (1960); 9 KAN. L. REV. 81 (1960); 58 MICH. L. REV. 1075 (1960); 14 RUTGERS L. REV. 1618 (1960).

65. N.J. STAT. ANN. 33:1-77 (1940). "Anyone who sells any alcoholic beverage to a minor shall be guilty of a misdemeanor; provided, however, that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the minor falsely represented in writing that he or she was twenty-one (21) years of age or over, and (b) that the appearance of the minor was such that an ordinary prudent person would believe him or her to be twenty-one (21) years of age or over, and (c) that the sale was made in good faith relying upon such written representation and appearance and in the reasonable belief that the minor was actually twenty-one (21) years of age or over."

66. *Rappaport v. Nichols*, 31 N.J. 188, 201-02, 156 A.2d 1, 8 (1959). In *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966), the New Jersey supreme court extended the reasoning of *Rappaport* to find liability where the plaintiff was an intoxicated patron who fell and injured *himself* after being served in defendant's tavern.

67. *Chiapparine v. Public Service Ry.*, 91 N.J.L. 581, 103 A. 180 (1918).

68. *Rappaport v. Nichols*, 31 N.J. 188, 202, 156 A.2d 1, 9 (1959).

69. *Id.* at 204, 156 A.2d at 9.

70. *Id.*

In view of the above factors, the court concluded that imposing tort liability on the particular supplier would give greater force and effect to the statutory intention. It would afford a necessary measure of protection to innocent third parties, while imposing on the vendor a burden which could be easily satisfied by the exercise of due care.⁷¹

Most decisions recognizing potential liability for injuries to patrons or third parties resulting from the sale of alcoholic beverages have grounded their reasoning on a generous interpretation of state penal statutes prohibiting sales to minors or intoxicated persons. However, the Pennsylvania supreme court has recognized a duty to potential plaintiffs which exists independent of such statutes. In *Jardine v. Upper Darby Lodge No. 1973, Inc.*⁷² the court upheld the liability of a tavern-keeper who sold liquor to an intoxicated tortfeasor. Taking note of the Pennsylvania statute making such a sale unlawful, the court went on to state,

The first prime requisite to de-intoxicate one who has, because of alcohol, lost control over his reflexes, judgment and sense of responsibility to others, is to stop pouring alcohol into him. This is a duty which everyone owes to society and to law entirely apart from any statute.⁷³

As in the other "new common law" decisions, once the vendor's duty was recognized the court had little trouble resolving the issue of proximate cause.

The treatment of the problem by the Massachusetts supreme court shows that the new common law consists of nothing more revolutionary than a case-by-case application of traditional negligence principles. In *Adamian v. Three Sons Inc.*⁷⁴ the Massachusetts court found that a complaint against a liquor vendor by a person injured by one of defendant's patrons stated a common law cause of action in the state. In another case heard the same day, the court found that the illegal sale was not, under the particular circumstances of that case, the proximate cause of plaintiff's injuries.⁷⁵ Several other state courts have made it clear through dicta that a sale of liquor to one who injures himself or a third party can constitute the proximate cause of the resulting injury even though no decision finding a particular supplier liable has been rendered in the state.⁷⁶ These state court actions aptly illustrate

71. *Id.* at 205, 156 A.2d at 10.

72. 413 Pa. 626, 198 A.2d 550 (1964).

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

74. 353 Mass. 498, 233 N.E.2d 18 (1968).

75. *Dimond v. Sacilotto*, 353 Mass. 501, 233 N.E.2d 20 (1968).

76. See *Ramsey v. Ancil*, 106 N.H. 375, 211 A.2d 900 (1965); *Berkeley v. Park*, 47 Misc. 2d 381, 26 N.Y.S.2d 290 (Sup. Ct. Ostego County 1965); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Mitchell v. Ketner*, 54 Tenn. App.

that the line of cases beginning with *Waynick* does not represent the judicial imposition of a dram shop act, but rather the introduction of accepted tort principles to an area of social experience which for too long had been treated as somehow exceptional by court and legislature.

The emphasis in the language of the "new common law" cases on the increased use of automobiles and the vast increase in drunk driving deaths and accidents,⁷⁷ shows clearly that concern for the third party injured by automobile was the main force behind the reevaluation of the traditional common law rule of nonliability. Of course, once the courts recognized the duty of a liquor vendor not to create unreasonable risks through the negligent sale of alcoholic beverages, they did not limit the new protection to drunk driving accident victims. Thus, the courts have granted recovery to the third party shot by an intoxicated patron⁷⁸ and to the intoxicated patron who has injured himself.⁷⁹

Although several states recently have reaffirmed their adherence to the traditional common law rule of nonliability as a matter of law,⁸⁰ and two states have accepted this rule in cases of first impression,⁸¹ there is a clear trend toward reevaluation of the old common law rule in the light of changed circumstances. Unlike the California dram shop decisions in which the court has refused to act because of legislative inactivity,⁸² the new common law represents a belief that legislative inaction does not bar the judiciary from fashioning an equitable solution

656, 393 S.W.2d 755 (1965).

The language of *Mitchell v. Ketner*, 54 Tenn. App. 656, 665, 393 S.W.2d 755, 759 (1965), where the Tennessee Appellate Court granted a new trial in an action against a tavernkeeper, is typical:

We are unwilling to hold that, no matter what the circumstances, the act of the purchaser and not the sale constitutes the proximate cause of injuries to third persons

. . . . The ultimate test is one of foreseeability which in turn must rest on such factors as the apparent condition of the buyer of the intoxicant and whether he is likely to become the driver on an automobile . . . it can only be said that each case, in finality, must rest on its own particular facts.

77. See *Rappaport v. Nichols*, 31 N.J. 188, 204, 156 A.2d 1, 9 (1959); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 501, 233 N.E.2d 18, 20 (1968); *Berkeley v. Park*, 47 Misc. 2d 381, 383, 262 N.Y.S.2d 290, 293 (Sup. Ct. Ostego County, 1965); *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 631, 198 A.2d 550, 553 (1964).

78. *Prevatt v. McClennan*, 201 So. 2d 780 (Fla. Dist. Ct. App. 1967).

79. *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966); *Schelin v. Goldberg*, 188 Pa. Super. 341, 146 A.2d 648 (1958).

80. *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 58 Cal. Rptr. 792 (1967); *Vallentine v. Azar*, — Ariz. —, 455 P.2d 449 (App. Ct. 1968); *Farmers Mutual Automobile Ins. Co. v. Gast*, 17 Wisc. 2d 344, 117 N.W.2d 347 (1962); *Lee v. Peerless Ins. Co.*, 248 La. 982, 183 So. 2d 328 (1966).

81. *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966); *Meade v. Freeman*, 38 U.S.L.W. 2185 (Idaho Sup. Ct. Aug. 28, 1969).

82. See text accompanying notes 51 & 52 *supra*.

to the problem. In addition, this line of cases illustrates that established negligence doctrine is a highly effective judicial tool for solution of the problem. The fact that other courts have adopted this reform approach does not compel a change in the California rule if it is the most logical, but these reforms make imperative a thorough probe of the reasons offered to justify nonliability.

II

JUSTIFICATION FOR THE CALIFORNIA RULE— ANALYSIS AND CRITICISM

A. Denial of Liability Based on Tort Principles

The victim of a California drunk driving accident who sues to recover from the vendor of alcohol faces solid state precedent that the sale is not the proximate cause of resulting injuries. More perplexing than the weight of case law is the realization that the cases themselves are so bereft of reasoning in support of the denial of liability as to render any attempt to refute the rule a bewildering exercise.

Analysis of the rationale of "no proximate cause" requires isolation of its component parts. The flat statement that a sale of intoxicating liquor is not the proximate cause of injuries resulting from intoxication could mean any or all of four different things: 1) The vendor owed no duty to protect the plaintiff from injury; 2) the vendor's sale was not the cause-in-fact of the plaintiff's injury; 3) the plaintiff's injury was not a foreseeable consequence of the vendor's sale; or 4) the patron's action in negligently operating an automobile while intoxicated was a cause of the plaintiff's injury which superseded that of the defendant's sale.⁸³

I. Vendor's Duty to Injured Parties

a. Duty of Care as Imposed by Criminal Statute

If a court decides that two parties stand in such relationship that one owes the other a duty of care, the standard of care imposed is usually that of a reasonable man under like circumstances.⁸⁴ However, many courts have held, through the doctrine of negligence per se, that particular legislation can create both a duty and a standard which constitutes the proper conduct of a reasonable man.⁸⁵ This occurs

83. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 375-416 (1950).

84. *E.g.*, James v. Frazee, 209 Cal. 456, 288 P. 784 (1930); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 454 (1933).

85. *E.g.*, Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947).

when a court determines that certain legislation is designed to protect a class of persons which includes the plaintiff⁸⁶ against a type of harm which has in fact occurred as a result of violation of the statute.⁸⁷ The most durable justification for the doctrine of negligence per se⁸⁸ is the concept that courts, by choosing to adopt for tort purposes the community standard enunciated by the legislature, are attempting to "further the ultimate policy for the protection of individuals which they feel the legislature must have had in mind when drafting the statute."⁸⁹

*Clinkscales v. Carver*⁹⁰ is representative of the many California cases which apply the negligence per se doctrine. In *Clinkscales* the defendant violated a state Vehicle Code provision requiring automobiles to observe boulevard stop signs. This violation was held to be the basis for his civil liability in a wrongful death action even though the defendant was immune from criminal prosecution because of irregularities in authorization of the stop sign. *Clinkscales* established the yardstick for determining when California criminal statutes are to be adopted as the basis for civil liability:

When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them except where they would serve to impose liability without fault.⁹¹

Although the statute found to constitute such a standard in *Clinkscales* was a section of the Vehicle Code this doctrine should be clearly applica-

86. E.g., *Nunneley v. Edgar Hotel*, 36 Cal. 2d 493, 497, 225 P.2d 497, 499 (1950); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933). Of course the final determination of whether even such a potentially applicable statute is adopted as the defendant's standard of duty for negligence will be made by the court. See text accompanying notes 199-200 *infra*.

87. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933). The requirement that a plaintiff's particular injuries must have been the type of harm anticipated by the legislature in drafting the statute before a rational imposition of negligence per se can be justified is aptly illustrated in *Mitchell v. Ketner*, 54 Tenn. App. 656, 660, 393 S.W.2d 755, 757 (1965). In that case the defendant tavernkeeper sold alcohol to a person who injured the plaintiff. Although the sale was in violation of a statute prohibiting the sale of alcoholic beverages on Sunday, the Tennessee court concluded that defendant's violation was not negligence per se because the legislature was not guarding against drunk driving on the Sabbath through the law in question.

88. The use of an applicable statute to evidence the existence and scope of duty has long been justified as a simplistic recognition that since a reasonable man would not disobey the criminal law, one who does not obey must be negligent. See Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 322 (1914).

89. W. PROSSER, *THE LAW OF TORTS* 193 (3rd ed. 1964); See, e.g., *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P.2d 777 (1943); *Nunneley v. Edgar Hotel*, 36 Cal. 2d 493, 225 P.2d 497 (1950).

90. 22 Cal. 2d 72, 136 P.2d 777 (1943).

91. *Id.* at 75, 136 P.2d at 778.

ble to any criminal statute shown to be for the protection of the public.

Three California statutes are potentially applicable to the area of civil liability for liquor vendors. Section 25602 of the Business and Professions Code prohibits the sale of liquor to intoxicated persons,⁹² and section 25658 of the same code prohibits sales of liquor to minors.⁹³ Business and Professions Code section 23001, which states the purposes of the Alcoholic Beverages Control Act, is very useful for ascertaining the legislative intent behind the statutes in question. Section 23001 states:

This division is an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages. It is hereby declared that the subject matter of this division involves in the highest degree the economic, social and moral well-being and safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of this purpose.⁹⁴

An examination of the case law sheds little light on the applicability of these particular statutes as standards of civil protection for those injured as a result of an illegal sale. With regard to an injured patron, an unsupported dictum in *Hitson v. Dwyer* states that the predecessor of section 25602 was not intended for the protection of intoxicated persons.⁹⁵ But dicta in *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*,⁹⁶ a case dealing with a violation of section 25658, implies that statute was intended for the protection of minors. The California courts have never discussed these statutes as a standard for the protection of third parties.⁹⁷ Since there is no California authority, comparison of the treatment afforded similar statutes in other jurisdictions may help evaluate the California legislation.

Many of the states which have imposed liability on a vendor of liquor have found that state statutes prohibiting sales to minors or in-

92. "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).

93. "Every person who sells, furnishes, gives or causes to be sold, furnished or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25658(a) (West 1964).

94. CAL. BUS. & PROF. CODE § 23001 (West 1964).

95. See text accompanying notes 39, 40 *supra*.

96. 261 Cal. App. 2d 181, 188, 67 Cal. Rptr. 734, 739 (1968).

97. Although the issue was raised in the complaint in *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949), the court disposed of plaintiff's claim without reference to the statute. See text following note 47 *supra*.

toxicated persons were designed to protect those injured because of intoxication.⁹⁸ The similarity between these statutes and the California statutes under consideration is striking. Like Business and Professions Code sections 25602 and 25658, most of the statutes found to be a basis for civil liability specifically prescribe a misdemeanor as the penalty for violation.⁹⁹ The very wording of the prohibitory statutes and, perhaps more significant, the legislative statement of the purpose of the acts in which the prohibitions are included,¹⁰⁰ is quite similar to that used in the California statutes.

The reasoning of *Elder v. Fisher*¹⁰¹ is typical of the analysis given such statutes by courts which have established the new common law. In that case the Indiana supreme court interpreted a statute substantially identical to Business and Professions Code section 23001. The statute stated that the purpose of the prohibitory legislation was "the protection of . . . the people of the state,"¹⁰² and the court found that a plaintiff injured in an automobile accident with a driver who became intoxicated by liquor sold in violation of the statute was included in the protected class. The court determined that a statute stating that it would support the "economic welfare, health, peace and morals . . ." of the state's people, was clearly "designed to protect against more than the immediate and obvious effects of intoxicating liquor"¹⁰³ The court found it "probable that the legislature intended to protect against the possible harm resulting from the use of intoxicating liquor by those to whom it was not to be sold."¹⁰⁴

A comparison with civil liability arising out of the violation of a state statute forbidding the sale of firearms to minors proves useful to the analysis of the intended scope of sections 25602 and 25658 of the Business and Professions Code. Although the California Legislature has only recently prohibited gun sales to minors,¹⁰⁵ and no case

98. *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965); *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1965); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966).

99. *E.g.*, N.J. STAT. ANN. 33:1-77 (1940). (see text of statute in note 67 *supra*); FLA. STAT. § 562.11 (1965).

100. *E.g.*, ILL. ANN. STAT. ch. 43, § 94 (Smith-Hurd 1944): "This 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 manufacture, sale and distribution of alcoholic liquors." For the text of CAL. BUS. & PROF. CODE § 23001 (West 1964) see text accompanying note 94 *supra*.

101. 247 Ind. 598, 217 N.E.2d 847 (1966).

102. IND. STAT. ANN. § 12-301 (1956).

103. *Elder v. Fisher*, 247 Ind. 598, 603, 217 N.E.2d 847, 851 (1966).

104. *Id.*

105. CAL. PEN. CODE § 12551 (West Supp. 1969) (ch. 1340, § 3, [1963] Cal. Stats 2863, *as amended* ch. 1360, § 1, [1967] Cal. Stats. 3200); CAL. PEN. CODE § 12552 (West Supp. 1969) (ch. 1360, § 2, [1967] Cal. Stats. 3200).

of civil liability under the statutes has arisen in this state, the courts of other jurisdictions have universally¹⁰⁶ held that such a statute creates a duty on the part of the seller to injured third parties,¹⁰⁷ and to the minor himself.¹⁰⁸ Selling a firearm to a minor may be less dangerous than selling him alcohol when he is likely to use an automobile shortly after consumption. In the latter case alcohol consumption made possible by the sale diminishes the minor's capacity for using the potentially dangerous item safely.

This treatment of similar statutes by other states forms a solid framework for the argument that the California courts should interpret California Business and Professions Code sections 23001, 25602 and 25658 as legislative standards appropriate to create and define a duty of care on the part of a liquor vendor for the protection of those suffering injuries as a result of intoxication. This argument is bolstered by an examination of the language of section 23001, which sheds light on the intended scope of the statutes in question.

The language of section 23001 leaves no doubt that the California Legislature intended the Alcoholic Beverage Control Act to go beyond the limited function of promoting temperance as a moral end in itself, for the statute aims at the "protection of the safety, welfare, health, peace, and morals of the people of the State . . ."¹⁰⁹ More significantly, the legislature has clearly stated that all divisions of the Alcoholic Beverages Control Act—including Business and Professions Code sections 25602 and 25658—"shall be liberally construed for the accomplishment of these purposes."¹¹⁰ It would be fruitless to speculate on the specific classes of parties and harms which the legislature sought to bring within the purposes of the Alcoholic Beverages Control Act. Yet certain data could hardly have gone unnoticed by a legislative body concerned with the threats to residents' physical and economic well-being inherent in alcoholic abuses. For example, an intoxicated motorist is far more likely to injure himself or a third party than is one who is sober. Further, a minor, because of his immaturity and lack of experience with the effects of intoxicating beverages, may be potentially more dangerous to himself and to others after the consumption of *any* alcohol.¹¹¹ Even if it could be assumed that these facts escaped

106. See Annot., 20 A.L.R.2d 119, 126-27 (1951); W. PROSSER, *THE LAW OF TORTS* 688 (3rd ed. 1964).

107. *E.g.*, *Anderson v. Settergren*, 100 Minn. 294, 111 N.W. 279 (1907); *Moutino v. Piercedale Supply Co.*, 338 Pa. 435, 13 A.2d 51 (1940).

108. *Tamiami Gun Shop v. Klein*, 116 So. 2d 421 (Fla. 1959); *Zamora v. J. Korbin & Co.*, 59 N.M. 33, 278 P.2d 569 (1954).

109. CAL. BUS. & PROF. CODE § 23001 (West Supp. 1964). For the full text of this statute see text accompanying note 94 *supra*.

110. *Id.*

111. "[F]atally injured young drivers who have been drinking tend, as a group, to

the attention of the legislature at the time section 23001 was drafted, they are important factors in protection of the health and safety of the state's people. If courts are to "liberally construe" the Act to protect the safety, welfare, health, peace and morals of the people, they must take these factors into account in determining whether the Act creates a standard for civil liability. A holding that the California statutory prohibitions against sales of alcohol to inebriates and minors were not intended for the protection of any persons injured in any accident resulting from intoxication would necessarily render the wording of Business and Professions Code section 23001 a meaningless exercise in legislative verbiage.¹¹²

In his classic work on negligence per se, Morris warns against too liberal an application of that doctrine, for fear that civil liability could result from a generally excusable act which technically violated the criminal law.¹¹³ The result would, of course, be liability without fault. However, the procedures used in California's application of the negligence per se doctrine provide well-defined safeguards against this potential abuse. If the court finds a violation of a statute which has been held to establish a standard of care a presumption of negligence arises and the defendant may seek to rebut the presumption by evidence that his conduct was justifiable or excusable.¹¹⁴ The test of justification or excuse is whether the defendant, although in technical violation of the law, did what might be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.¹¹⁵ Therefore, a person who has acted "reasonably" will not incur civil liability by a technical violation of the statute.

Additional safeguards against saddling the vendor with liability without fault are found in the standards used to determine whether there has been a threshold violation of the criminal statute. The cases

have lower blood alcohol concentrations than older drivers who crash similarly. This suggests that young persons may, on average, be more susceptible to the effects of alcohol than older drivers." STAFF OF HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 2D SESS., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 58 (Comm. Print 1968). The extent of the problem of the drinking minor is illustrated by a recent Illinois study which reports that of drivers 15 to 20 years of age fatally injured in that state in 1966, 33 percent had been drinking. Kowalski, Rose & Fiorese, *Blood Alcohol Levels in Vehicular and Pedestrian Fatalities in Illinois*, 131 ILL. MED. J. 5 (May 1968).

112. It may be argued that the California Legislature intended the provisions of Business and Professions Code sections 25602 and 25658 for the protection of injured *third parties* but not for the protection of inebriates or minors themselves. See text accompanying notes 171-173 *infra*.

113. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 458-59 (1933).

114. *E.g.*, *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 177 P.2d 279 (1947); *Boie-Hansen v. Sisters of Charity of St. Vincent De Paul Society, Inc.*, 152 Cal. App. 2d 845, 314 P.2d 189 (1957).

115. *Alarid v. Vanier*, 50 Cal. 2d 617, 624, 327 P.2d 897, 900 (1958).

arising under both section 25602 and section 25658 have made it clear that no violation will be found where a vendor has good reason to believe that his patron is neither "obviously intoxicated"¹¹⁶ nor below 21 years of age.¹¹⁷ In addition, section 25660 provides the vendor with an absolute defense to prosecution under section 25658 if he can show that he relied on certain identification cards supplied by a minor.¹¹⁸ It must also be remembered that a statutory violation which is not found to be excused or justified will result in liability only if all of the other elements of proximate cause are found to be present by judge or jury.¹¹⁹

Considering judicial interpretation of similar statutes in other jurisdictions and the stated purpose of the California statutes, this state's courts should find that Business and Professions Code sections 25602 and 25658 create a duty of care for the protection of third parties and, arguably, patrons, from the particular types of harm which commonly result from intoxication. As shown above, the California application of negligence per se doctrine and the limitations inherent in the prohibitory statutes themselves guarantee that the duty and standard imposed by the legislation could be easily satisfied by a vendor through the exercise of due care.

b. Vendor's Duty Independent of Statute

While the use of prohibitory statutes to determine the existence and scope of a liquor vendor's duty has proven workable in other states, and could be applied in California, it may be rejected in this

116. See, e.g., *People v. Johnson*, 81 Cal. App. 2d 973, 975, 185 P.2d 105, 106 (App. Dep't Super. Ct. 1947), where the court stated: "It seems clear, therefore, that a duty is placed upon the seller before serving the intended purchaser to use his powers of observation to such extent as to see that which is easily seen and to hear that which is easily heard, under the conditions and circumstances then and there existing. On the other hand, it is equally clear that he is not required to subject the customer to tests which would disclose symptoms not readily apparent to anyone having normal powers of observation—sight, hearing and possibly smell."

117. See, e.g., *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control*, 261 Cal. App. 2d 181, 189, 67 Cal. Rptr. 734, 739 (1968): "A licensee does not act at his peril in selling liquor and if he uses due care and acts in good faith his license is not to be jeopardized because some minor representing himself as an adult succeeds in purchasing liquor."

118. "Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license, a registration certificate issued under the Federal Selective Service Act, or an identification card issued to a member of the Armed Forces. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon." CAL. BUS. & PROF. CODE § 25660 (West 1964).

119. E.g., *Burt v. Bank of Calif. Nat'l Ass'n.*, 211 Cal. 548, 296 P. 68 (1931).

state. The California courts, hitherto silent on the subject, may find that Business and Professions Code sections 23001, 25602 and 25658 were not intended to protect intoxicated persons, minors, or those they injure. Conversely, the court could find that the statutes prescribe a standard which is too limited or lenient for effective tort use.¹²⁰ If the statutes are found to be applicable to tort actions, the courts would still be free to decide that the scope of the duty created by legislative enactment does not coincide with the best measure of civil liability in the particular case.¹²¹ The alternative to negligence per se is, of course, the more common tort mechanism of balancing social interests and policies in order to determine the scope and existence of duty.¹²²

In California, courts have consistently held that policy considerations play a dominant role in determining whether a defendant owes a duty of care to avoid creating unreasonable risks to a particular class of plaintiffs.¹²³ The set of policy factors to be balanced has been described in various ways in the treatises and California cases. The most frequently cited factors include: 1) The social utility of the activity out of which the injury arises, discounted by the risks involved in its conduct; 2) the workability of the rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; 3) the relative ability of the parties to bear the financial burden of injury and the availability of means by which loss may be shifted or spread; 4) the prevention of future harm; and 5) the moral blame attached to the conduct of either party.¹²⁴ Analyzing a vendor's activities in terms of these considerations will help clarify the discussion of nonstatutory liability.

120. See note 142 *infra*.

121. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 474-75 (1933).

122. This technique was applied to a vendor of liquor in *Jardine v. Upper Darby Lodge No. 1973, Inc.*, 413 Pa. 626, 198 A.2d 550 (1964). See text accompanying notes 72, 73 *supra*.

123. E.g., "[D]uty" . . . is an expression of the sum total of the considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." W. PROSSER, *THE LAW OF TORTS* 332-33 (3d ed. 1964), *quoted in* *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968); *Biakanja v. Irving*, 49 Cal. 2d 647, 650, 320 P.2d 16, 18 (1958).

124. *Cf. Rowland v. Christian*, 69 Cal. 2d 108, 113, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 101 (1968); *Schwartz v. Helms Bakery Limited*, 67 Cal. 2d 232, 237 n.3, 430 P.2d 68, 71, 60 Cal. Rptr. 510, 513 (1967); *Hergenrether v. East*, 61 Cal. 2d 440, 443-45, 393 P.2d 164, 166-67, 39 Cal. Rptr. 4, 6-7 (1964); *Biakanja v. Irving*, 49 Cal. 2d 647, 650, 320 P.2d 16, 18 (1958); *Raymond v. Paradise Unified School District*, 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851-52 (1963); Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1034-45 (1928); W. PROSSER, *THE LAW OF TORTS* 148-51 (3d ed. 1964); 2 HARPER & JAMES, *THE LAW OF TORTS* 1052 (1956).

(i) *Social utility and risks of selling liquor.*—The risks of the liquor vendor's enterprise in terms of the physical and mental damage caused by alcohol and the prevalence of personal injuries sustained on the premises and after departure arguably outweigh any socially redeeming qualities incident to the operation of a tavern. When the vendor's actions are viewed in more narrow terms, such as the sale of liquor to a minor or intoxicated person, the scale clearly tips against him. For here the risks to society are greatly increased and any redeeming qualities of liquor sales in general disappear.

(ii) *Workability of the rule of care.*—A comparison of the parties' relative abilities to adopt a practical means of avoiding injury must take into account the difficulty encountered by a third party when attempting to shield himself against a random accident with a hopelessly intoxicated driver. On the other hand, the vendor, operating at the source of the problem, would have substantially less difficulty in refusing to contribute to the incompetence of at least those patrons who are most likely to cause injuries. In addition, the imposition of the duty of care on a liquor vendor, especially if existing prohibitory statutes are used as the standard, creates a burden which could be satisfied by the exercise of due care.¹²⁵

(iii) *Ability to pay and shift losses.*—There is of course no way to make a valid generalization about whether the average liquor vendor or average accident victim has greater financial resources. Yet even without this information, the vendor's practical ability to spread the loss suffered in consequence of personal injury judgments over a larger segment of society cuts toward recognizing his duty to the injured party. The cost of the vendor's liability insurance would be reflected in the price of his product, resulting in the cost of liquor-caused injuries being borne ultimately by the class of imbibers.

(iv) *Prevention of future harm.*—The threat of vendor liability through the imposition of a duty of care, while by no means eliminating drunk driving accidents or other liquor-caused injuries, would clearly be an effective deterrent to negligent sales. Although the most effective way to reduce liquor-caused injuries may be to coerce the consumer into drinking less,¹²⁶ a finding of negligence on the part of a vendor by no means relieves the negligent patron of liability to a third party.¹²⁷ If

125. See text accompanying notes 116-118 *supra*.

126. England's stiff "breathalyzer" law, passed in 1967, is credited with reducing traffic fatalities to one-fourth of the previous toll in some areas during the first few months of its operation. *How Britain Cuts Road Deaths*, U.S. NEWS AND WORLD REPORT, Feb. 19, 1968, at 101.

127. It is generally accepted in California that where separate negligent acts of two tortfeasors combine to produce a single injury, each is liable for the entire result. *E.g.*, *Acquisto v. Bank of America Natl. Trust and Savings Ass'n*, 95 Cal. App. 2d 736,

the purpose of tort law is to reduce future injuries, as well as to allocate damages, all possible sources of unreasonable risk must be reached by the deterrent effect of the law.

The recognition of a duty with its attendant threat of civil liability when the other elements of proximate cause are found would clearly have a greater prophylactic effect than the current California rule.¹²⁸ The California doctrine of nonliability for the supplier of liquor focuses the deterrent effect on only one aspect of the tavern transaction—consumption—while ignoring the effect of the sale. If the threat of civil liability deters the patron from excessive consumption, the California approach, while inequitable, is at least effective. Yet where the patron is not deterred, the nonliability rule which allows the vendor to sell alcohol to a minor, inebriate, or other incompetent individual without fear of tort sanction invites tragedy. The ineffectiveness of tort deterrence in this area becomes even more evident with the recognition that the patron's actions often lack the volition assumed by any deterrence theory.¹²⁹

(v) *Moral blame*.—In deciding the relative moral blame of the parties, it seems clear that one should not rest on a moral judgment against tavernkeeping as a business. Rather a court should consider the actions of the plaintiff and the defendant in the particular case. In this regard the fact of a criminal violation of Business and Professions Code sections 25602 or 25658, even if found inappropriate as the basis for an imposition of negligence per se, should influence the court's determination of culpability.

313 P.2d 775 (1950). Of course the injured party is entitled to only one satisfaction. *E.g.*, *Watson v. McEwen*, 225 Cal. App. 2d 771, 37 Cal. Rptr. 677 (1964). Thus, where a third party is injured by an intoxicated patron, the injured party may sue either the vendor or patron or unite them in a suit for the entire amount. *E.g.*, *Atkinson Co. v. Consani*, 223 Cal. App. 2d 342, 35 Cal. Rptr. 750 (1963). Where the injured third party joins the vendor and patron as co-defendants there will be a right to contribution among the co-defendants for the judgment. CAL. CODE CIV. PRO. § 875 (West Supp. 1969). In such a case each party will pay a pro rata share amounting to one-half of the judgment. *See* CAL. CODE CIV. PRO. §§ 875-76 (West Supp. 1969). Even though the negligent driver might escape liability in a given case where the injured party chooses to sue only the vendor, the random threat of suit in every case should continue to deter risk-producing conduct on his part.

128. This potential for liability through the established tort mechanism would also be more likely to promote careful conduct on the part of vendors than a dram shop act which may impose liability regardless of the risk-creating character of a vendor's conduct. *See* text accompanying notes 10-19 *supra*.

129. While there has been no comprehensive study of the relationship between alcoholism and highway injuries, recent figures suggest that alcoholics, though only an infinitesimal percentage of the population, account for a major part of all alcohol-induced automobile accidents. Crampton, *The Problem of the Drinking Driver*, 54 A.B.A.J. 995, 996 (1968); STAFF OF HOUSE COMM. ON PUBLIC WORKS, 90TH CONG., 2D SESS., 1968 ALCOHOL AND HIGHWAY SAFETY REPORT 70-72 (Comm. Print 1968).

A determination of the existence and scope of duty through such an application of general policy considerations is an extremely adaptable process. As a result, the concepts of duty within a particular jurisdiction should and do change with changing social conditions.¹³⁰ The 20 years since the decision in *Fleckner v. Dionne* have seen the advent of more and more powerful automobiles, the necessity of driving on heavily traveled highways, the expanded popularity of the "roadhouse" and the increase in the number of drunk driving accidents. Even if *Fleckner* could be somehow justified as a reasonable decision for its time, these changed social conditions should now create a duty on the part of the liquor supplier to protect the general public from the creation of the unreasonable risks inherent in the unlawful and negligent sale of intoxicating liquor.

Thus, to the extent that California cases holding "no proximate cause" rest on the finding that liquor sellers owe *no duty* to parties injured as a result of intoxication, it is submitted that such a duty logically arises either from prohibitory statutes designed to protect the public or from traditional principles of duty.

2. *Vendor's Sale as Cause-In-Fact of Injuries*

Even assuming a California court accepts the view that liquor sellers owe a duty of care to plaintiffs injured as a result of a customer's drunken conduct, a jury might conclude that a particular sale did not constitute the cause-in-fact of plaintiff's injuries. Since *Anderson v. Minnesota, St. Paul & Sault Ste. Marie R.R.*,¹³¹ this issue in most jurisdictions has been formulated as "Was defendant's conduct a material element and a substantial factor in bringing about the event?"¹³² This formulation is accepted in California,¹³³ and the question is one for the jury.¹³⁴

While the question will vary with each particular fact situation, it should be noted that the new common law decisions imposing liability in other jurisdictions have found a vendor's sale to be the cause-in-fact of many different types of injuries.¹³⁵ It seems safe to predict that

130. See Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 12-15 (1953).

131. 146 Minn. 430, 179 N.W. 45 (1920).

132. *Id.* at 434, 179 N.W. at 46.

133. *E.g.*, *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 691, 58 Cal. Rptr. 792, 794 (1967); *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 219, 157 P.2d 372, 375 (1945).

134. *E.g.*, *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 691, 58 Cal. Rptr. 792, 794 (1967); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 525-526, 50 Cal. Rptr. 592, 595 (1966).

135. See *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966) (plaintiff fell while intoxicated and fractured his skull); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959) (plaintiff struck by a negligently driven automobile); *Majors v.*

proving that a negligent sale was a substantial factor in bringing about his injury will be the least troublesome element of "proximate cause" which a California plaintiff will face.¹³⁶

3. *Injury As a Foreseeable Consequence of Sale*

Once the plaintiff establishes duty and causation, present day tort doctrine will generally hold a defendant liable for injuries which were reasonably foreseeable at the time of his act or omission.¹³⁷ Thus, where the injured party was not in contact with defendant at the time of his act or omission, the question will always arise whether the defendant-vendor should have foreseen the injury.

The California "car-key" cases illustrate how the foreseeability requirement has been applied in the state. In *Richards v. Stanley*¹³⁸ defendant left the keys in her car when she parked in a downtown area. Soon afterward a thief took the automobile and collided with the plaintiff. In plaintiff's action against the owner, the court reasoned that the owner of an automobile would not be liable to parties injured by a third person unless the owner was put on notice that the potential driver would be incompetent to handle the automobile.¹³⁹

Ten years later, in *Hergenrether v. East*,¹⁴⁰ the court faced a fact situation essentially similar to that in *Richards*. In *Hergenrether* the plaintiff, injured by the negligent driving of an intoxicated thief, recovered against the vehicle's owner. This difference in result is easily

Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965) (plaintiff crawled out of a window after becoming intoxicated).

136. A few conceivable fact situations suggest problems. If Business & Professions Code section 25602 is used as the negligence standard, a vendor might be found negligent for serving one or two drinks to an injury-causing patron who was obviously intoxicated when he entered vendor's bar. In this situation it seems doubtful that a jury would find vendor's sale a substantial factor or material element of plaintiff's injuries.

The case where the court applies Business & Professions Code section 25658 in finding a tavernkeeper negligent for sales to a minor who injures plaintiff is more perplexing. While it could be argued that any sale of liquor to a party, such as a minor, who is considered by the law to have diminished responsibility greatly increases the risk of injury, nevertheless a jury may well balk at finding that two drinks sold to a 20 year old patron was the cause-in-fact of an automobile accident where the minor is found to have a blood alcohol level well below that required in any state to justify a drunk driving charge.

137. *E.g.*, *Stewart v. Cox*, 55 Cal. 2d 857, 863-64, 362 P.2d 345, 348-49, 13 Cal. Rptr. 521, 524-25 (1961); *Richardson v. Ham*, 44 Cal. 2d 772, 777, 285 P.2d 269, 272 (1955).

138. 43 Cal. 2d 60, 271 P.2d 23 (1954).

139. The court suggested that the violation of a statute might supply the basis of a negligence action. *Id.* at 62, 271 P.2d at 25. Here the defendant in fact violated a city ordinance against leaving keys in an unattended automobile but the ordinance specifically excluded civil liability as a penalty for its violation.

140. 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

explained in terms of the foreseeability of the injury. The court took notice of its decision in *Richards*, but reasoned that the case before it contained "special circumstances" which should have made the risk of injury to a third party by a negligently driving thief foreseeable to the owner. These special circumstances were that the defendant intended to park his truck for a long period of time and that he was parking in a known "skid row" area where the crime rate and percentage of habitually intoxicated residents were noticeably high.¹⁴¹ With these facts in mind, the court had little trouble imposing liability and distinguishing the *Richards* decision.

In actions against a vendor for injuries resulting from intoxication of his patron, a finding of foreseeability should require evidence of particular facts which raised the possibility that a patron would engage in a potentially dangerous activity which he was incompetent to perform. Thus, the sale to an intoxicated patron is obviously distinguishable, in terms of foreseeability of subsequent injury-causing activity from the sale to a customer who is apparently sober,¹⁴² and such a sale transacted at a "roadhouse" is clearly more likely to cause a traffic accident than a similar transaction in a neighborhood bar.¹⁴³ Such an application of foreseeability principles ensures that the recognition of a liquor vendor's duty will not result in his strict liability in each case of injury following a patron's intoxication.

4. *Patron's Negligence as a Superseding Cause of Plaintiff's Injuries*

Where the plaintiff is a party injured by the actions of defendant's patron, the focus turns from foreseeability to the closely related issue of "superseding cause."¹⁴⁴ Whenever someone other than the defendant causes his injuries, the plaintiff must show that the intervening act of the third party does not so supersede the defendant's negligence as to relieve the defendant of liability.¹⁴⁵ While a disputed question regarding the character of an intervening act is for the jury in California,¹⁴⁶

141. *Id.* at 445-46, 393 P.2d at 167, 39 Cal. Rptr. at 7.

142. A problem arises where a patron who subsequently injured plaintiff spent a long time in vendor's bar and consumed a great deal of alcohol but, while found to have a blood alcohol percentage high enough to violate drunk driving statutes, was not "obviously intoxicated" as required by CAL. BUS. & PROF. CODE § 25602 (West 1964). See note 116 *supra*. In this case it seems obvious that the use of the prohibitory statute as a standard would insulate much risk-creating activity, yet the court might insist on its use as a means of insuring that the defendant-vendor was put on notice of the risk.

143. Compare *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 498-500, 233 N.E.2d 18, 19 (1968) with *Dimond v. Sacilotto*, 353 Mass. 501, 502, 503, 233 N.E.2d 20, 21 (1968).

144. W. PROSSER, *THE LAW OF TORTS* 308-13 (3rd ed. 1964).

145. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 398 (1950).

146. See, e.g., *Mosley v. Arden Farms Co.*, 26 Cal. 2d 213, 219, 157 P.2d 372,

the state's courts have consistently held that a defendant will not be absolved by the intervention of another when defendant's negligence consists of creating the risk that such intervention will occur.¹⁴⁷ Thus, one who loans his automobile to an intoxicated person in California is liable to a third party injured as a result of the inebriate's negligent driving.¹⁴⁸ In addition, California decisions have found an owner liable when a vehicle was entrusted to an unlicensed adult,¹⁴⁹ an unlicensed minor,¹⁵⁰ an aged and enfeebled driver,¹⁵¹ a driver with defective eyesight,¹⁵² or a known reckless driver.¹⁵³

The question of "superseding cause" is generally phrased "Was the intervening cause, in retrospect, so abnormal . . . that it should relieve defendant of liability?"¹⁵⁴ While cases may certainly arise in which a patron's intervening act is found so abnormal as to absolve the vendor of liability, the negligent driving of an automobile after becoming intoxicated is not such an act. It is a normal consequence of the defendant's acts and should not relieve a vendor of responsibility. This is in line with the reasoning of the California courts in analagous cases. To find otherwise would allow the alcohol vendor immunity from liability because the very risk of danger he created has materialized.

In discussing possible justifications for a finding that the sale of liquor is not the proximate cause of injuries following a patron's intoxication, it was noted that every element of proximate cause can and will vary with the facts of the particular complaint. For this reason a find-

375 (1945); *Fuller v. Standard Stations, Inc.*, 250 Cal. App. 2d 687, 691, 58 Cal. Rptr. 792, 794 (1967).

147. *E.g.*, *Austin v. Riverside Portland Cement Co.*, 44 Cal. 2d 225, 234, 282 P.2d 69, 74 (1955); *McEvoy v. American Pool Corp.*, 32 Cal. 2d 295, 298-99, 195 P.2d 783, 786 (1948). This reasoning is specifically supported in the *Restatement of Torts*:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or . . . (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

RESTATEMENT (SECOND) OF TORTS § 447 (1965):

[I]f the likelihood that a person will act in a particular manner is the hazard, or one of them, which makes the actor negligent, such an act whether innocent, tortious, or intentional or criminal does not prevent the actor from being liable for the harm caused.

Id. § 449.

148. *E.g.*, *Knight v. Gosselin*, 124 Cal. App. 290, 12 P.2d 454 (1932); *Caccamo v. Swanston*, 94 Cal. App. 2d 957, 212 P.2d 246 (1949).

149. *Johnson v. Casetta*, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (1961).

150. *Buelke v. Levenstadt*, 190 Cal. 684, 214 P. 42 (1923).

151. *McCalla v. Grosse*, 42 Cal. App. 2d 546, 109 P.2d 358 (1941).

152. *Schifflette v. Walkup Drayage and Warehouse Co.*, 74 Cal. App. 2d 903, 169 P.2d 996 (1946).

153. *Rocca v. Steinmetz*, 61 Cal. App. 102, 214 P. 257 (1923).

154. *Prosser, Proximate Cause in California*, 38 CALIF. L. REV. 369, 405 (1950).

ing that a vendor is not liable for injuries following intoxication of his patron is clearly justified in many conceivable fact situations. What is not justified is the finding that the vendor is never liable as a matter of law. Such a holding, based on the notion that the sale of alcohol is a unique type of social conduct, cannot be supported by any tort doctrine falling under the broad umbrella of proximate cause. It is submitted that the California precedent cannot be justified in light of traditional tort principles. Yet the state's nonliability doctrine may rest on grounds of policy which justify its retention regardless of its inconsistency with tort principles.

B. Policy Reasons for Retaining the Nonliability Rule

The California plaintiff who is able to establish all elements of proximate cause may still be barred from recovery by a finding that judicial imposition of liability on the liquor vendor would be invalid as usurpation of the legislative function.

In *Cole v. Rush*,¹⁵⁵ the Supreme Court of California reasoned that the statute legislature, in failing to adopt a dram shop act in the face of many out-of-state models, had expressed an intention that no liability should attach to liquor vendors.¹⁵⁶ This reasoning should pose little problem for the California plaintiff. The absence of a dram shop act in California may well manifest the legislature's intent that no *strict liability* attach to the sale of intoxicating liquor in the state—a position quite understandable in light of the inequities which have accompanied such legislation in other jurisdictions.¹⁵⁷ Yet there appears little reason to believe that any such legislative mandate exists regarding liability under negligence principles. Indeed, it should be the presumption that specific legislation is no more necessary to impose liability for the sale of liquor to incompetents than it is with regard to any other conduct which a reasonable man would recognize as creating an unreasonable risk of injury.¹⁵⁸ In seeking to change California's rule of nonliability, the plaintiff is not asking the court to change or overrule a legislative enactment, but rather to reevaluate a doctrine of its own creation.¹⁵⁹ Once the false issue of "judicial legislation" has been removed, the

155. 45 Cal. 2d 345, 289 P.2d 450 (1955).

156. See text accompanying notes 51, 52 *supra*.

157. See text accompanying notes 5-27 *supra*.

158. Johnson, *Drunken Driving—The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 330 (1962).

159. Judge Carter, quoting from *Pratt v. Daly*, 55 Ariz. 535, 542, 104 P.2d 147, 151 (1940) in his dissent to *Cole v. Rush*, stated, "We are not asked to make law. We are asked to declare what the common law is and always has been, and a declaration by us that it has always *permitted* such an action, even though none has ever actually been brought, is no more legislation than would be a declaration that it does not." *Cole v. Rush*, 45 Cal. 2d 345, 365, 289 P.2d 450, 462 (1949) (dissenting opinion).

court can proceed with this reevaluation in terms of established negligence principles.

C. *Affirmative Defenses*

Even if a plaintiff establishes all the elements of proximate cause the vendor of alcoholic beverages might still escape liability if he is allowed to raise the defenses of contributory negligence or assumption of risk. Such defenses are generally not available under state dram shop acts,¹⁶⁰ and the "new common law" jurisdictions are split on the issue. New Jersey¹⁶¹ and Pennsylvania¹⁶² have held that contributory negligence and assumption of risk are not available to a vendor, and it is likely that Indiana will fall into this group.¹⁶³ On the other hand, New Hampshire will allow the defenses,¹⁶⁴ with New York and Florida likely to concur.¹⁶⁵

For purposes of analysis it will be useful to view those defenses which may be used against an injured patron separately from those which may be applied against a third party.

1. *Defenses Against Injured Patrons*

In California, as a result of the decision in *Cole v. Rush*, a person who is injured as a result of his own intoxication is barred from recovery by contributory negligence as a matter of law.¹⁶⁶ The wisdom of such a ruling is open to question. The *Restatement of Torts* asserts that when a defendant's negligence consists of the violation of a statute intended to protect a particular class of persons against their own ability to protect themselves a member of this class should not be barred from recovery by his contributory negligence.¹⁶⁷ The courts have accepted this doctrine in cases concerning civil injuries resulting from violations of statutes prohibiting unregulated boxing matches,¹⁶⁸ child labor,¹⁶⁹

160. See, e.g., *Krotzer v. Drinka*, 344 Ill. App. 256, 100 N.E.2d 518 (1951); *Zucker v. Vogt*, 329 F.2d 426 (2d Cir. 1964). *Contra*, *Cookingham v. Sullivan*, 23 Conn. Supp. 193, 179 A.2d 840 (Super. Ct. 1962).

161. *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 581, 586, 218 A.2d 630, 634 (1966).

162. *Majors v. Brodhead Hotel*, 416 Pa. 265, 269, 205 A.2d 873, 876 (1965).

163. *C.f.*, *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847, 851 (1966). Here the court relied on the reasoning that the state prohibitory statutes were intended for the protection of those injured as a result of intoxication, and those themselves intoxicated. This suggests the unavailability of the defenses of contributory negligence or assumption of risk, which would defeat the legislature's intention.

164. *Ramsey v. Anctil*, 106 N.H. 375, 376, 211 A.2d 900, 901-02 (1965).

165. See Comment, *Common Law Liability of the Liquor Vendor*, W. RES. L. REV. 251, 268-69 (1966).

166. See text accompanying note 53 *supra*.

167. RESTATEMENT (SECOND) OF TORTS § 483 (1934).

168. *Hudson v. Crafts*, 33 Cal. 2d 654, 204 P.2d 1 (1949).

169. *Boyles v. Hamilton*, 235 Cal. App. 2d 492, 45 Cal. Rptr. 399 (1965).

and sexual intercourse with an underage female.¹⁷⁰

The strong analogy between the statutory rape and child labor legislation and the liquor regulation statutes is not limited to Business and Professions Code section 25658, which deals with minors, but also applies to the ban on sales to inebriates contained in section 25602. The law's presumption of helplessness and incompetence is no less applicable to the intoxicated adult than to the minor.

It may be contended that the analogy is inapposite because, unlike the treatment given underage females and child laborers, the legislature has prescribed criminal punishment for the minor or inebriate who purchases alcohol.¹⁷¹ However, the 1949 state supreme court case of *Hudson v. Crafts*¹⁷² undercuts this argument. In that case the court refused to bar tort recovery for an injured party who had voluntarily participated in an illegal prize fight. Noting that the plaintiff's participation itself was a violation of criminal law, the court found that this fact did not detract from the law's purpose of protecting ill-advised participants.¹⁷³ Against the background of *Hudson*, the California courts should have little problem finding contributory negligence inapplicable against inebriates and minors who illegally purchase alcohol.

Assuming that at least one purpose of Business and Professions Code sections 25602 and 25658 was the protection of minors and persons incapacitated by alcohol from the hazards of their own consumption, the California courts should not allow the unreasonable conduct of such a person to immunize the seller who violates the statute. Clearly, any other result would strip the legislation of much of its ability to effect its purpose.¹⁷⁴ By practically excluding the whole class of patron-plaintiffs from recovery, it would make a sham of any verbal recognition of a vendor's duty of care toward minors and intoxicated persons.

2. *Defenses Against a Third Party*

Whether a vendor may vicariously assert defenses of the patron against an injured third party is an unsettled question. This problem would most likely arise in one of two situations. First, the plaintiff's reckless driving may constitute contributory negligence in an accident with an intoxicated patron. Second, the plaintiff's solicitation of a ride in the patron's automobile, with knowledge of the patron's intoxication,

170. See, e.g., *Bishop v. Liston*, 112 Neb. 559, 199 N.W. 825 (1924). See RESTATEMENT (SECOND) OF TORTS § 61 (1964).

171. See CAL. BUS. & PROF. CODE § 25658 (West 1964).

172. 33 Cal. 2d 654, 204 P.2d 1 (1949).

173. *Id.* at 659.

174. Cf., *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 589, 218 A.2d 630, 634 (1966).

may constitute assumption of risk. Since members of the public, like minors and intoxicated persons, are arguably protected by the state's prohibitory statutes,¹⁷⁵ the treatment of both groups should perhaps be the same. Yet the two groups are distinguishable. Unlike minors or inebriates, third parties generally are neither legally nor physically incompetent to protect themselves. Further, contributory negligence and assumption of risk are likely to affect only a small percentage of injured third parties. In contrast, as shown above, the availability of the defense of contributory negligence against minors or inebriates as a matter of law automatically excludes all patrons from the protection of a civil remedy. For these reasons, a court could find these defenses against third parties available to the vendor without sabotaging the purpose of the statutes.

Thus far this Comment has examined various judicial and legislative approaches to the problem of a liquor vendor's liability for injuries caused by intoxication and focused attention on the possible justifications for the California rule of nonliability. It is submitted that the California rule, unjustified by traditional tort doctrines or deference to the legislature's will, must be reevaluated by the state's courts.

The remaining question concerns the proper scope of that reevaluation. Can a finding of liability, based on established negligence doctrine, be limited to the commercial vendor of liquor, or must it extend to all parties who supply alcohol to potential tortfeasors?

III

LIABILITY FOR THE NONCOMMERCIAL SUPPLIER

In *Carr v. Turner*,¹⁷⁶ the Arkansas supreme court held that a liquor vendor was not liable for injuries to a third party which resulted from the actions of an intoxicated purchaser. The plaintiff argued that the defendant-vendor's violation of an Arkansas statute¹⁷⁷ should result in the imposition of civil liability. The court, noting that the statute in question prohibited a sale or gift to an intoxicated person or minor by any person, reasoned that the use of the statute as a standard for civil liability could not be confined to those who sell liquor. The court concluded that granting plaintiff relief would result in compelling the private person entertaining friends in his home to "maintain super-

175. See text accompanying notes 91-119 *supra*.

176. 238 Ark. 889, 385 S.W.2d 656 (1965).

177. ARK. STAT. ANN. § 48-901 (1964): "(a) [A]ny person who shall sell, give away, or dispose of intoxicating liquor to a minor or habitual drunkard or an intoxicated person shall be guilty of a misdemeanor. . . ." Note the similarity to CAL. BUS. & PROF. CODE §§ 25602 and 25658. See text of these statutes accompanying notes 92, 93 *supra*.

vision over all his guests and refuse to serve drinks to those nearing the point of intoxication."¹⁷⁸ Thus, the fear of private liability suggested by the civil application of a prohibitory statute served as the justification for denying the liability of a commercial vendor of alcohol.

Because the statute in question is almost identical to the California legislation prohibiting sales to minors and inebriates,¹⁷⁹ California courts might conceivably use similar reasoning to deny liability to commercial sellers. Thus, the analysis of California's rule of nonliability for the liquor vendor would be incomplete without an examination of the possible justification for *noncommercial* liability, and, if such liability is found unpalatable, an examination of the factors which might allow a court consistently to impose liability on one group and not the other.

A. *The Lack of Precedent*

While all of the cases imposing the new common law liability have involved commercial vendors, the language in several such opinions makes it clear that liability will not be extended to private suppliers.¹⁸⁰ The only possible support for imposing liability on the noncommercial supplier is found in the dictum of *Jardine v. Upper Darby Lodge*, which states, in effect, that everyone owes society a duty to stop pouring alcohol into an inebriate.¹⁸¹

Although dram shop acts commonly provide for recovery against "any person" whose sale injures the protected class of parties, and provide liability for "giving" as well as selling intoxicating beverages,¹⁸² it has been consistently held that such statutes do not create a right of action against a noncommercial supplier.¹⁸³ This result has been justified by reasoning either that, regardless of the statutory language, the title of the act suggests the legislature's unwillingness to hold private persons,¹⁸⁴ or that the legislature's use of "giving" in the statute was intended only to guard against a gift as a subterfuge for sale by a commercial vendor.¹⁸⁵

Only two California decisions have considered a noncommercial supplier's civil liability for injuries resulting from a guest's intoxication. In *Dwan v. Dixon*,¹⁸⁶ plaintiff was injured in an automobile accident after being served alcohol in the defendant's home. In a terse opinion

178. Carr v. Turner, 238 Ark. 889, 892, 385 S.W.2d 656, 658 (1965).

179. See notes 92, 93 *supra*.

180. See, e.g., Rappaport v. Nichols, 31 N.J. 188, 206, 156 A.2d 1, 10 (1959).

181. 413 Pa. 626, 631, 198 A.2d 550, 553 (1964).

182. See statutes listed in note 6 *supra*.

183. Annot., 8 A.L.R.3d 1412, 1413 (1966).

184. Cruse v. Aden, 127 Ill. 231, 236, 20 N.E. 73, 75 (1889).

185. Harris v. Hardesty, 111 Kan. 291, 295-96, 207 P. 188, 190 (1922).

186. 216 Cal. App. 2d 260, 30 Cal. Rptr. 749 (1963).

citing *Fleckner* and *Cole* as support for the general rule of nonliability, the court predictably held that the complaint had not raised facts sufficient to state a cause of action. The court's failure to distinguish between commercial and noncommercial suppliers in the opinion of course does not imply that the two classes of defendants would be treated as equally responsible if the rule of nonliability were ever re-evaluated.¹⁸⁷

In the recent case of *Brockett v. Kitchen Boyd Motor Co.*¹⁸⁸ the court allowed a plaintiff injured by an intoxicated minor to recover against a noncommercial supplier who had caused the minor's intoxication. Yet a close reading of the opinion discourages any suggestion that the rule of nonliability has been changed in the state. After noting that *Cole* and *Fleckner* would bar a civil action against any supplier of liquor,¹⁸⁹ the court found that line of cases unavailable to the present defendant because of special circumstances in the case. Here the minor was the defendant's employee who became intoxicated over the course of a lengthy company Christmas party. More importantly, defendant placed the obviously intoxicated employee in his automobile and instructed him to proceed home.¹⁹⁰ In light of the well-established line of California cases imposing liability on one who loans his car to an inebriate,¹⁹¹ and the state's "car-key" cases,¹⁹² the defendant in *Brockett* clearly would have faced liability regardless of who supplied the driver with alcohol.

B. Comparison of Liability for Commercial and Noncommercial Suppliers

1. The Noncommercial Supplier's Violation of Prohibitory Statutes as Negligence Per Se

While the private transfer of liquor generally will constitute a violation of prohibitory statutes,¹⁹³ some state courts have found that such statutes do not apply to noncommercial suppliers.¹⁹⁴ Although no California cases reach this question, Business and Professions Code

187. But see 46 MINN. L. REV. 169, 184-85 (1961), for an argument based on the Minnesota court's failure to base its denial of liability on the noncommercial status of the defendant in *Dahlin v. Kron*, 232 Minn. 312, 45 N.W.2d 833 (1950).

188. 264 Cal. App. 2d 69, 70 Cal. Rptr. 136 (1968).

189. *Id.* at 70-71, 70 Cal. Rptr. at 137.

190. *Id.* at 72, 70 Cal. Rptr. at 139.

191. See note 148 *supra* and accompanying text.

192. See notes 138-41 *supra* and accompanying text.

193. See, e.g., *State v. Hughes*, 3 Conn. Cir. 181, 209 A.2d 872 (1965); *Commonwealth v. Randall*, 183 Pa. Super. 603, 133 A.2d 276 (1957); *State v. Davis*, 244 Iowa 400, 56 N.W.2d 881 (1953).

194. See, e.g., *People v. Armstrong*, 24 Misc. 2d 53, 203 N.Y.S.2d 552 (Steuben County Ct. 1960).

sections 25602 and 25658 apparently prohibit activities by private parties as well as commercial vendors. Section 25602 prescribes a misdemeanor for "[e]very person who sells, furnishes, [or] gives . . ."¹⁹⁵ alcohol to an intoxicated person. In its prohibition of liquor sales to minors, section 25658(a) contains identical language. In addition, section 25658(c), which is addressed specifically to licensees,¹⁹⁶ gives the clear impression that the other subparts of the statute are not to be so narrowly applied. Until amended in 1937,¹⁹⁷ California Penal Code section 397(b), the predecessor to Business and Professions Code section 25658, contained the phrase: "*provided*, that this section shall not apply to the parents of such children, or to guardians of their wards."¹⁹⁸ This exclusion from the application of the statute of a particular group of people suggests a literal interpretation of "every person" when applying the legislation to the activities of all nonexcluded parties.

Yet even if, as the language in these statutes suggests, it were held that the legislature intended the state's prohibitory statutes to apply to noncommercial defendants, such a finding would only determine a threshold question in the court's examination of the private supplier's duty of care. The California courts have long recognized that, even where the court finds that a criminal statute protects the particular plaintiff from the specific harm alleged, the decision as to what should constitute the civil standard of care still rests with the court.¹⁹⁹ The decision to adopt the criminal statute as the standard for civil liability should only follow a determination that the statutory test is a fair formulation of the community standard—neither too severe nor too lenient for use in tort cases.²⁰⁰ Thus, a consideration of policy factors may lead California courts to conclude that the potential protection of people and property which might follow from adoption of the statutory standard to impose

195. CAL. BUS. & PROF. CODE § 25602 (West 1964).

196. "(c) Any on-sale licensee who knowingly permits a person under the age of 21 years to consume any alcoholic beverage in the on-sale premises, whether or not the licensee has knowledge that the person is under the age of 21 years, is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25658 (West 1964).

197. Ch. 758, § 93, [1937] Cal. Stats. 2175.

198. Ch. 514, § 1, [1905] Cal. Stats. 673.

199. "[T]he standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it." *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P.2d 777, 778 (1943) (Traynor, J.). See also Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 465 (1933): "The difficulty with the negligence *per se* procedure is not that it has resulted in an untraditional placement of the function of formulating standards, but that the function has not yet been clearly placed where it belongs—with the judiciary, rather than with the legislature."

200. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 469 (1933).

civil liability on private suppliers would not justify the resulting curtailment of activity which the community judges to be socially desirable.

2. *The Private Supplier's Duty Independent of Statute*

When one evaluates the actions of a noncommercial supplier of intoxicating liquor in terms of those policy considerations commonly used in California to determine the existence and scope of duty,²⁰¹ it becomes evident that the private party must stand in a different position than the commercial vendor. Because selling liquor is a business attended with danger to the community, the courts have recognized that the activity could be entirely prohibited, or "permitted only under such conditions as will limit to the utmost its evils."²⁰² The California Legislature has prescribed these conditions in a comprehensive body of statutes which closely regulates the activities of a vendor.²⁰³ Through similar reasoning under state dram shop acts²⁰⁴ and under the new common law²⁰⁵ the courts of other states have justified civil liability for commercial vendors of alcohol as one of the burdens assumed in choosing to engage in a risk-creating profession. Such reasoning simply does not apply to the private supplier.

A comparison of the relative ability, between the private supplier and the injured party, to bear the burden of injuries suggests a lesser justification for imposing liability on the private party than on the commercial vendor. Unlike the commercial seller, the noncommercial supplier cannot spread the cost of injuries or insurance through the price mechanism. Even were this ability to spread loss to a large class unavailable to the vendor, or equally available to the private party through extended home-owner's insurance, it seems clearly more equitable to allow the cost of damage of alcohol to fall on one who is in the business of selling that commodity for a profit.²⁰⁶

More significantly, the private supplier lacks practical means of

201. See text accompanying note 124 *supra*.

202. *Schaub's Inc. v. Department of Alcoholic Beverage Control*, 153 Cal. App. 2d 858, 866, 315 P.2d 459, 465 (1957), *quoting* *Crowley v. Christensen*, 137 U.S. 86 (1890).

203. See CAL. BUS. & PROF. CODE §§ 23001-25761 (West 1964).

204. See *Pierce v. Albanese*, 144 Conn. 241, 129 A.2d 606 (1957); *Hill v. Alexander*, 321 Ill. App. 406, 53 N.E.2d 307 (1944); *Bistline v. Ney Bros.*, 134 Iowa 172, 111 N.W. 422 (1907).

205. See, e.g., *Soronen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 589-90, 218 A.2d 630, 636-37 (1966).

206. Of course the private supplier also derives benefit from the commodity. The possibility of imposing liability on this basis would vary with the particular case, depending primarily on the tangibility of the benefit involved. A court, if willing to proceed on this theory, could distinguish between the salesman who sets up a "hospitality suite" to entertain customers and the homeowner who hosts a cocktail party to entertain the neighbors.

avoiding injury. The tremendous social pressure against policing the activities of one's friends will severely limit the host's ability to minimize risk-producing activity. Even if he overcomes this pressure, the average host, unlike the vendor, may be unable to accurately ascertain when a guest is nearing the level of intoxication.

The crucial distinction between the commercial and noncommercial supplier may well be the rarely articulated but ever-present fear that the court's imposition of liability on the private host will result in the wholesale restriction of a substantial slice of social activity.²⁰⁷ The decision of whether the risks generated by the private supplying of alcohol are sufficiently grave to justify such sweeping social restrictions may well be one within the particular competence of the legislature.

It is submitted that these inherent distinctions between the commercial and private suppliers of intoxicating liquor allow, and, indeed, require the California courts to find liability for the former group while excluding that of the latter.²⁰⁸

CONCLUSION

By disregarding established principles of tort analysis, applicable statutory standards, and their own holdings in closely analogous cases, the California courts have created a unique classification for the risk-producing activities of a dram shop operator. When it is recognized that the activities in question result in widespread loss of life, physical injury and destruction of property for residents of the state, the courts' decision to exempt the actions of the liquor vendor from the well-established allocation and deterrence functions of tort law must be seen as tragic as well as inconsistent.

The problem of injuries, death and damages caused by intoxication is a grave one in this state. There can be no doubt that most possible solutions—ranging from a comprehensive treatment program for alcoholics, through more strict and efficient enforcement of existing laws—lie beyond the sphere of the court's competence. Yet the inability to deal effectively with all ramifications of a serious problem does not justify the court's decision to abandon its role entirely by following

207. *Cf.* *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 423, 199 N.E.2d 300, 306 (1964) (where the court expressed a fear that noncommercial liability would render a social drink with one's neighbor or friend a hazardous act, and "open up the floodgates of litigation as to almost every happening where someone was injured."); *Carr v. Turner*, 238 Ark. 889, 892, 385 S.W.2d 656, 657-58 (1965).

208. *See Rappaport v. Nichols*, 31 N.J. 188, 201-202, 156 A.2d 1, 10 (1959), interpreting a prohibitory statute essentially identical to those of California; see note 65 *supra*, and text accompanying note 93 *supra*, which imposed liability on a commercial supplier, while implying that its holding was not to extend to a noncommercial supplier.

poorly reasoned decisions of other jurisdictions and deferring to a legislative intention which has never been expressed.

The application of recognized negligence principles, on a case-by-case basis, to situations raising the possibility of an illegal and negligent transfer of alcohol will not eliminate injuries resulting from intoxication. But such action by the California courts will afford an equitable allocation of damages when injuries do occur, and will serve as an additional factor in deterring future harm.

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