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.\(^4\)

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3. See text accompanying notes 32-57 infra.
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. These statutes, which are currently in force in twenty states, impose some form of


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

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\(^8\) 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).


\(^10\) 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. 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. 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.

Those dram shop acts which make the vendor liable for the acts of an intoxicated person 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, or committed suicide after intoxication, or was shot by an intoxicated person, 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. But in Illinois the act is satisfied if the owner

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13. Compare Earp v. Lilley, 217 Ill. 582, 75 N.E. 552 (1905); with Hall v. Ditto, 128 Ill. App. 187 (1905). 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).


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


simply has knowledge of the sale of alcoholic beverages on the premises.20

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

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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.
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. 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.

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. 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.


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 party or to himself. 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.

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.* 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. Although this discussion in *Lammers* is clearly recognized as dictum, it consistently crops up in California decisions discussing the issue of tavernkeepers' liability.

In *Hitson v. Dwyer*, 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


31. 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).

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

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


The sole question before the court was the propriety of sustaining a special demurrer which claimed uncertainty of the complaint. But in a discussion unnecessary to the decision, 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,” 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.” 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. Citing Lammers, 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.” 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 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.”

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

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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).
41. Id.
42. Id.
43. Id.
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. 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.

The Supreme Court of California has dealt with the problem only once—in the 1955 case of Cole v. Rush. 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."

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. 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, "[Als 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."\(^\text{62}\)

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."\(^\text{63}\) 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 courts\(^\text{64}\) and federal courts applying California law\(^\text{65}\) 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.\(^\text{66}\)

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


\(^\text{53}\). Id. at 356, 289 P.2d at 457.


\(^\text{55}\). Murray v. United States, 382 F.2d 284 (9th Cir. 1967).

\(^\text{56}\). 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. 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, which had repealed dram shop acts, or which still had dram shop acts in effect, 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. 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. 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." 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 injury.


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


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


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.
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.\textsuperscript{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 \textit{Jardine v. Upper Darby Lodge No. 1973, Inc.}\textsuperscript{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,

\begin{quote}
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.\textsuperscript{73}
\end{quote}

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 \textit{Adamian v. Three Sons Inc.}\textsuperscript{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.\textsuperscript{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.\textsuperscript{76} These state court actions aptly illustrate

\begin{itemize}
\item \textsuperscript{71} \textit{Id.} at 205, 156 A.2d at 10.
\item \textsuperscript{72} 413 Pa. 626, 198 A.2d 550 (1964).
\item \textsuperscript{73} \textit{Id.} at 631, 198 A.2d at 553.
\item \textsuperscript{74} 353 Mass. 498, 233 N.E.2d 18 (1968).
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,\(^7\) 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 patron\(^7\) and to the intoxicated patron who has injured himself.\(^7\)

Although several states recently have reaffirmed their adherence to the traditional common law rule of nonliability as a matter of law,\(^8\) and two states have accepted this rule in cases of first impression,\(^9\) 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,\(^8\) 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.


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

1. 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

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).
when a court determines that certain legislation is designed to protect a class of persons which includes the plaintiff against a type of harm which has in fact occurred as a result of violation of the statute. The most durable justification for the doctrine of negligence per se 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."

Clinkscales v. Carver 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.

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).


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

91. Id. at 75, 136 P.2d at 778.
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 and section 25658 of the same code prohibits sales of liquor to minors. 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.

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. But dicta in Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control, 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. 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.
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. 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. 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, is quite similar to that used in the California statutes.

The reasoning of Elder v. Fisher 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," 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 . . .." 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."

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, and no case

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.
102. IND. STAT. ANN. § 12-301 (1956).
104. Id.
of civil liability under the statutes has arisen in this state, the courts of
other jurisdictions have universally\textsuperscript{106} held that such a statute creates
a duty on the part of the seller to injured third parties,\textsuperscript{107} and to the
minor himself.\textsuperscript{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 pos-
sible by the sale diminishes the minor's capacity for using the poten-
tially 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 \ldots\textsuperscript{109}" More signifi-
cantly, the legislature has clearly stated that all divisions of the Alco-
holic Beverages Control Act—including Business and Professions Code
sections 25602 and 25658—"shall be liberally construed for the ac-
complishment of these purposes.\textsuperscript{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 poten-
tially more dangerous to himself and to others after the consumption
of any alcohol.\textsuperscript{111} Even if it could be assumed that these facts escaped

\textsuperscript{106} See Annot., 20 A.L.R.2d 119, 126-27 (1951); W. Prosser, \textit{The Law of}
\textsuperscript{107} \textit{E.g.}, Anderson v. Settergren, 100 Minn. 294, 111 N.W. 279 (1907); Moutino
\textsuperscript{108} Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959); Zamora v. J. Kor-
\textsuperscript{109} CAL. BUS. & PROF. CODE § 23001 (West Supp. 1964). For the full text of
this statute see text accompanying note 94 \textit{supra}.
\textsuperscript{110} Id.
\textsuperscript{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 acci-
dent 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 negli-
genence per se doctrine provide well-defined safeguards against this po-
tential 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 alco-
hol 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 

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 

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 be-
lieve that his patron is neither "obviously intoxicated" nor below 21
years of age. 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. 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.

Considering judicial interpretation of similar statutes in other juris-
dictions 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 pro-
hibitory statutes themselves guarantee that the duty and standard im-
posed 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. Dept 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 hav-
ing normal powers of observation—sight, hearing and possibly smell."

117. See, e.g., Lacabanne Properties, Inc. v. Department of Alcoholic Beverage
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 is-
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).

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{124} Analyzing a vendor's activities in terms of these considerations will help clarify the discussion of nonstatutory liability.

\textsuperscript{120} See note 142 infra.
\textsuperscript{121} Morris, The Relation of Criminal Statutes to Tort Liability, 46 Harv. L. Rev. 453, 474-75 (1933).
\textsuperscript{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.
\textsuperscript{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).
(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.\textsuperscript{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,\textsuperscript{126} a finding of negligence on the part of a vendor by no means relieves the negligent patron of liability to a third party.\textsuperscript{127} If

\textsuperscript{125} See text accompanying notes 116-118 supra.

\textsuperscript{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. \textit{How Britain Cuts Road Deaths}, U.S. \textsc{News and World Report}, Feb. 19, 1968, at 101.

\textsuperscript{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. \textit{E.g.}, \textit{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. 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.

(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. 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., 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?" This formulation is accepted in California, and the question is one for the jury.

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. It seems safe to predict that

131. 146 Minn. 430, 179 N.W. 45 (1920).
132. Id. at 434, 179 N.W. at 46.
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. 186

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. 187 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 188 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. 189

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.


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. 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; 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. 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." 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. While a disputed question regarding the character of an intervening act is for the jury in California,"
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 analogous 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-

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.

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

If 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.

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, 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. 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. 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. 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. Once the false issue of "judicial legislation" has been removed, the

156. See text accompanying notes 51, 52 supra.
157. See text accompanying notes 5-27 supra.
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, and the "new common law" jurisdictions are split on the issue. New Jersey and Pennsylvania 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. On the other hand, New Hampshire will allow the defenses, with New York and Florida likely to concur.

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. 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. The courts have accepted this doctrine in cases concerning civil injuries resulting from violations of statutes prohibiting unregulated boxing matches, child labor, child labor,
and sexual intercourse with an underage female.\textsuperscript{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.\textsuperscript{171} However, the 1949 state supreme court case of \textit{Hudson v. Crafts}\textsuperscript{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.\textsuperscript{173} Against the background of \textit{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.\textsuperscript{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. \textit{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,

\textsuperscript{170} See, e.g., Bishop v. Liston, 112 Neb. 559, 199 N.W. 825 (1924). See \textit{Re-}
\textit{statement (Second) of Torts} § 61 (1964).
\textsuperscript{171} See \textit{CAL. Bus. & Prof. Code} § 25658 (West 1964).
\textsuperscript{172} 33 Cal. 2d 654, 204 P.2d 1 (1949).
\textsuperscript{173} \textit{Id.} at 659.
may constitute assumption of risk. Since members of the public, like
minors and intoxicated persons, are arguably protected by the state's
prohibitory statutes, 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 in-
jured 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 pur-
pose of the statutes.

Thus far this Comment has examined various judicial and legis-
 lative approaches to the problem of a liquor vendor's liability for in-
juries caused by intoxication and focused attention on the possible justifi-
cations 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 re-
evaluation. Can a finding of liability, based on established negligence
doctrine, be limited to the commercial vendor of liquor, or must it ex-
tend to all parties who supply alcohol to potential tortfeasors?

III

LIABILITY FOR THE NONCOMMERCIAL SUPPLIER

In Carr v. Turner, 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 statute 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).
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." 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, 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. 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.

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, it has been consistently held that such statutes do not create a right of action against a noncommercial supplier. 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, 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.

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

179. See notes 92, 93 supra.
182. See statutes listed in note 6 supra.
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

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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.
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 . . . 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, gives the clear impression that the other subparts of the statute are not to be so narrowly applied. Until amended in 1937, 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." 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. 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. 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

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).
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) (Taynor, 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."
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,\textsuperscript{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."\textsuperscript{202} The California Legislature has prescribed these conditions in a comprehensive body of statutes which closely regulates the activities of a vendor.\textsuperscript{203} Through similar reasoning under state dram shop acts\textsuperscript{204} and under the new common law\textsuperscript{205} 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 homeowner'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.\textsuperscript{206}

More significantly, the private supplier lacks practical means of

\textsuperscript{201} See text accompanying note 124 supra.
\textsuperscript{203} See \textsc{cal. bus. \& prof. code} §§ 23001-25761 (West 1964).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

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

\[208. \text{See Rappaport v. Nichols, 31 N.J. 188, 201-202, 156 A.2d 1, 10 (1959), interpreting a prohibitory statute essentially identical to those of California; see note 65 supra, and text accompanying note 93 supra, which imposed liability on a commercial supplier, while implying that its holding was not to extend to a noncommercial supplier.}\]
poorly reasoned decisions of other jurisdictions and deferring to a legis-
lative 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 intoxi-
cation. But such action by the California courts will afford an equit-
able allocation of damages when injuries do occur, and will serve as an
additional factor in deterring future harm.

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