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Comments: Liquor Vendor Liability for Torts of Intoxicated Patrons

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LIQUOR VENDOR LIABILITY FOR TORTS OF INTOXICATED PATRONS

An intoxicated person behind the wheel of an automobile can be as dangerous as an insane person with a firearm. He is as much a hazard to the safety of the community as a stick of dynamite that must be de-fused in order to be rendered harmless. To serve an intoxicated person more liquor is to light the fuse. [1]

I. INTRODUCTION

Personal injury and property damage caused by drunk drivers continues to rise in alarming proportions in Maryland and across the nation.[2] While state legislatures have enacted provisions aimed at curbing the increase in injuries and damages, these measures normally focus upon the intoxicated driver rather than the commercial supplier of alcoholic beverages. Actions recently taken by the Maryland General Assembly, in imposing stricter penalties on the drunk driver,[3] are representative of the typical legislative response to the increase in automobile accidents caused by inebriated motorists. Some states, however, in enacting dram shop laws, have not ignored the role played by the commercial purveyor of liquor.

Historically, courts applied a common law standard, in the absence of legislation, that freed tavern owners from civil liability to third party victims of a drunken tort-feasor's act. However, in response to the modern rise in drinking-related accidents and the sporadic application of dram shop legislation, judges began to reexamine the common law rule of vendor nonliability. As a result, a majority of modern jurisdictions find a cause of action to exist against tavern owners. Nevertheless, a minority of courts, including Maryland's, retain the traditional rule of nonliability despite a sale of liquor by the vendor which either violates a criminal statute or was made to someone obviously too drunk to drive.

This comment traces the common law and statutory development of vendor liability for the tortious acts of patrons. Additionally, the common law position accepted in Maryland, and recently reaffirmed in *Felder v. Butler,*[4] is examined in the context of modern developments

1. Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 629, 198 A.2d 550, 553 (1964).
2. Baltimore Sunpapers, Jan. 10, 1982, at B2, col. 2; *see also* Md. Dep't of Transp., Report of the Task Force on the Drinking Driver 3 (1980) (available from Md. Dep't of Transp.).
3. *See, e.g.,* Law of May 3, 1982, ch. 98, 1982 Md. Laws 1246 (codified at MD. ANN. CODE art. 27 §§ 639, 641(a) (1982 & Supp. 1982)) (probation before judgment prohibited for repeat violations of drunk driving laws); Law of May 5, 1981, ch. 244, 1981 Md. Laws 1439 (codified at MD. TRANSP. CODE ANN. § 16-205.1 (1977 & Supp. 1982) (implied consent to alcohol test deemed for anyone driving Maryland highways).
4. 292 Md. 174, 438 A.2d 494 (1981).

in vendor liability law and those theories adopted by the majority of jurisdictions.

II. BACKGROUND

A. Common Law Liability

At common law, it was not considered a tort either to sell or to give intoxicating liquor to a strong and able-bodied man.[5] This rule was premised on the theory that the customer's act of consuming the liquor, not the vendor's sale, was the proximate cause of resulting third party injury.[6] Consequently, in the absence of a statutory provision to the contrary, no cause of action against a tavern owner was available to persons suffering personal or property damage as the result of acts committed by drunk patrons.[7]

It was uniformly held by the common law courts that the act of merely serving liquor to a customer failed to meet the requisite elements for a cause of action in negligence. Once the customer left the tavern premises, these courts ruled that the bar owner was under no duty to safeguard the general public from the inebriate's potential misdeeds.[8] The general rule of nonliability was premised on two alternative theories. The act of selling a drink to a patron was considered too remote to constitute a direct act of negligence[9] due to a reluctance to charge the tavern owner with foreseeability of the resulting harm.[10] In the alternative, it was held that the sale did not constitute a proximate cause of the resulting loss[11] since the inebriate's acts were perceived to be an intervening cause of the final harm.[12]

It was also a well settled common law principle that an intoxicated man was to be held to the same standard of care as an ordinary man for acts committed while inebriated;[13] hence the drunk customer alone was held to bear legal responsibility for any injury caused by his acts. Fur-

5. Cruse v. Aden, 127 Ill. 231, 20 N.E. 73 (1889); Seibel v. Leach, 233 Wis. 66, 288 N.W. 774 (1939). The protection given tavern owners under the common law rule extended the "able-bodied man" concept to include women and minors as well. *See, e.g.,* Collier v. Stamatis, 63 Ariz. 285, 162 P.2d 125 (1945) (no liability imposed for damages caused by serving liquor to a minor female); Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949) (no liability imposed for serving a minor).
6. Nolan v. Morelli, 154 Conn. 432, 436-37, 226 A.2d 383, 386 (1967); Hill v. Alexander, 321 Ill. App. 406, 419, 53 N.E.2d 307, 313 (1944).
7. *See* Cole v. Rush, 45 Cal. 2d 345, 348, 289 P.2d 450, 452 (1955); Demge v. Feierstein, 22 Wis. 199, 203, 268 N.W. 210, 212 (1936).
8. Padulo v. Schneider, 346 Ill. App. 454, 457, 105 N.E.2d 115, 116 (1952).
9. Cowman v. Hansen, 250 Iowa 358, 92 N.W.2d 682 (1958).
10. Waller's Adm'r v. Collinsworth, 144 Ky. 3, 137 S.W. 766 (1911).
11. Belding v. Johnson, 86 Ga. 177, 180-81, 12 S.E. 304, 305 (1890); Cowman v. Hansen, 250 Iowa 358, 368-70, 92 N.W.2d 682, 687-88 (1958); Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746, 748 (1940).
12. *See, e.g.,* King v. Henkie, 80 Ala. 505, 510 (1886).
13. W. PROSSER, THE LAW OF TORTS § 32 (4th ed. 1971).

thermore, in cases of continued sales to individuals obviously intoxicated, vendor liability was judicially deflected by finding the consumer still capable of consent, and thus responsible for his own actions.[14] While limited exceptions existed,[15] vendors of alcoholic beverages were generally free from civil liability even in instances of illegal sales.[16]

Courts frequently drew upon additional theories to support the refusal to modify the common law. Judges denied a cause of action on the ground that courts were unable to grant recovery or authorize actions unknown to the common law.[17] Other courts held that judicial abrogation of the common law would be an inappropriate encroachment upon legislative authority.[18] Faced with the rigidity of the common law doctrine, state legislatures began confronting the problem and formulated statutory provisions designed to grant injured parties a remedy at law against tavern owners.

B. Statutory Liability

A number of state legislatures enacted dram shop laws (also know as civil damage acts) to create a cause of action for torts committed by an intoxicated patron.[19] Early dram shop legislation found its impetus in the temperance movement popular in the late 1800's and the early

14. *See, e.g.,* Bissell v. Starzinger, 112 Iowa 266, 271, 83 N.W. 1065, 1067 (1900).
15. Exceptions to the common law rule focused on the concept of the "able-bodied man" in evaluating the consumer. A few courts, therefore, recognized a cause of action when the liquor was served to an obviously intoxicated individual lacking responsibility for his behavior. *See, e.g.,* Hoyt v. Tilton, 81 N.H. 477, 128 A. 688 (1925); Ibach v. Jackson, 148 Or. 92, 35 P.2d 672 (1934); McCue v. Klein, 60 Tex. 168 (1883). Liquor sales to known or habitual drunkards also served as a basis of departure from the common law rule of nonliability in certain jurisdictions. *See, e.g.,* Pratt v. Daley, 55 Ariz. 535, 104 P.2d 147 (1940); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482 (1940).
16. Furnishing alcoholic beverages to certain classes of persons has been prohibited by statute to some degree in all states. Felder v. Butler, 292 Md. 174, 181 n.3, 438 A.2d 494, 498 n.3 (1981); *see, e.g.,* DEL. CODE ANN. tit. 4, § 904 (1974 & Supp. 1980) (sales to individuals under 20 years of age are prohibited; seller subject to fine or imprisonment); GA. CODE ANN. § 3-3-22 (1982) (sales to noticeably intoxicated persons are prohibited). Violation of these statutes rarely was sufficient, in itself, to warrant civil liability imposition upon the vendor in the absence of concurrent civil damage legislation. *See, e.g.,* Fleckner v. Dionne, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); Barboza v. Decas, 311 Mass. 10, 40 N.E.2d 10 (1940); Hall v. Budagher, 76 N.M. 591, 417 P.2d 71 (1966).
17. Henry Grady Hotel Co. v. Sturgis, 70 Ga. App. 379, 385-86, 28 S.E.2d 329, 333 (1943); Seibel v. Leach, 233 Wis. 66, 68, 288 N.W. 774, 775 (1939).
18. *See, e.g.,* Cole v. Rush, 45 Cal. 2d 345, 354, 289 P.2d 450, 455 (1955).
19. *See, e.g.,* N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); OHIO REV. CODE ANN. § 4399.1 (Page 1973). The legislative purpose behind these statutes was to supply a remedy to third parties injured by the tavern owner's sale of liquor to the tort-feasor. Without such a statutory provision, an innocent victim was without recourse against the vendor. Hyba v. C. A. Horneman, Inc., 302 Ill. App. 143, 146, 23 N.E.2d 564, 565 (1939); Mead v. Stratton, 87 N.Y. 493, 496-97 (1882); Healey v. Cady, 104 Vt. 463, 466, 161 A. 151, 152 (1932).

1900's.[20] The underlying legislative purpose was often to embody the local community's social and moral abhorrance of the ills of alcohol.[21] More modern legislatures, however, enact dram shop laws under the power of the State to control and regulate liquor traffic within its borders,[22] and to provide for the general welfare of its citizenry.[23] In addition to providing adequate remedies to victims of alcohol-related torts, the rationale behind modern dram shop laws is to protect members of the general public and the patron, himself.[24] Moreover, modern legislatures view statutory liability of tavern owners as a risk incident to the nature of the business.[25]

The effect of dram shop legislation is to impose a degree of strict liability upon the bar owner.[26] The common law rule of proximate cause is statutorily altered to focus upon the vendor's sale, rather than the consumer's act of drinking the liquor.[27] Such legislation, therefore, frees the injured party from the requirement of establishing negligence or fault on the part of the tavern owner.[28] Similarly, the victim is not faced with overcoming the common law presumption of a lack of foreseeability by the bar owner before civil liability can be imposed.[29]

While dram shop legislation creates a cause of action against vendors which was unavailable at common law, there exist a variety of limitations that tend to reduce its effectiveness. Much of the utility of these laws is stifled by restrictions as to the class of plaintiffs[30] or the limited scope of a permitted cause of action.[31] Additionally, judicial interpretation of dram shop laws has produced divergent approaches as

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20. See Ogilvie, *History and Appraisal of the Illinois Dram Shop Act,* 1958 U. ILL. L.F. 175, 176-82, for an interesting and enlightening discussion of the foundations of dram shop legislation in the United States and the State of Illinois.
21. *Id.* at 177.
22. Klopp v. Benevolent Protective Order of Elks, 309 Ill. App. 145, 153, 33 N.E.2d 161, 165-66 (1941).
23. Pierce v. Albanese, 144 Conn. 241, 247-48, 129 A.2d 606, 612-13 (1957).
24. Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973).
25. Klopp v. Benevolent Protective Order of Elks, 309 Ill. App. 145, 153, 33 N.E.2d 161, 165 (1941); Hyba v. C. A. Horneman, Inc., 302 Ill. App. 143, 149, 23 N.E.2d 564, 567 (1939). By selling liquor under a state license, which is a privilege and not a right, the vendor is judged to have assumed the risk of statutory liability. *See, e.g.,* Pierce v. Albanese, 144 Conn. 241, 252, 129 A.2d 606, 613 (1957).
26. W. PROSSER, THE LAW OF TORTS § 81, at 538 (4th ed. 1971).
27. Healey v. Cady, 104 Vt. 463, 466, 161 A. 151, 152 (1932).
28. *See* Appleman, *Pleading, Evidence, and Procedure Under the Dram Shop Act,* 1958 U. ILL. L.F. 219, 234-45.
29. *Id.* at 236.
30. While most dram shop laws provide a cause of action against the tavern owner by any person suffering injury or damage caused by a drunk patron, a number of jurisdictions limit recovery solely to the patron's immediate family. *See, e.g.,* Comment, *Dram Shop Liability — A Judicial Response,* 57 CAL. L. REV. 995, 997 (1969). Other jurisdictions, though not limiting the imposition of civil liability to immediate family members, have indicated the specific coverage under the statute. *See, e.g.,* MINN. STAT. ANN. § 340.95 (1972 & Supp. 1982).
31. Certain jurisdictions' dram shop legislation requires family members or employers to provide the tavern owner with written notice of the patron's habitual drunk-

to their application. Some jurisdictions favor a belief that since dram shop laws create a remedy unknown at common law they should be narrowly construed.[32] Other courts, in an effort to further advance the policy of allowing injured persons to recover from tavern owners, give a liberal construction to such legislation.[33] Furthermore, the number of states that employ dram shop laws has fluctuated with the change in attitudes and perceptions of each newly-elected state legislature.[34] Due to these inherent limitations in existing dram shop legislation, modern courts again began to reevaluate the common law doctrine in an effort to conform the law to the needs of today's society.

C. Modern Changes in Vendor Liability Through Case Law

Traditional principles of tavern owner tort liability have undergone a dramatic change over the last twenty-five years. As courts have reconsidered the issue of third party injury claims against vendors, they have increasingly abandoned the common law approach. Currently, an overwhelming majority of courts have rejected the traditional common law rule.[35] This current trend had its genesis in two landmark

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enness and with a request to refuse delivery or sale of alcoholic beverages to the individual. *See, e.g.,* COLO. REV. STAT. § 13-21-103 (1973).

32. *See* Howlett v. Dogilo, 402 Ill. 311, 318-20, 83 N.E.2d 708, 712-14 (1949); Kennedy v. Garrigan, 23 S.D. 265, 267, 121 N.W. 783, 785 (1909).
33. *See* Arlington v. Phelps, 79 F. Supp. 295, 297 (D. Ill. 1948); Wilcox v. Conti, 174 Misc. 230, 231-32, 20 N.Y.S.2d 106, 107 (1940).
34. There are currently sixteen jurisdictions with dram shop laws in effect. ALA. CODE tit. 6, § 6-5-71 (1977); COLO. REV. STAT. § 13-21-103 (1973); CONN. GEN. STAT. ANN. § 30-102 (West 1975); GA. CODE ANN. § 3-3-22 (1982); ILL. REV. STAT. ch. 43, § 135 (Smith-Hurd Supp. 1982); IOWA CODE ANN. § 123.92 (West Supp. 1982-83); MICH. COMP. LAWS ANN. § 436.22 (1978); MINN. STAT. ANN. § 340.95 (1972 & Supp. 1982); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.D. CENT. CODE § 5-01-06 (1975); OHIO REV. CODE ANN. § 4399.01 (Page 1973); R.I. GEN. LAWS §§ 3-11-1, 3-11-2 (1976); UTAH CODE ANN. § 32-11-1 (1981); VT. STAT. ANN. tit. 7, § 501 (1972); WIS. STAT. ANN. § 176.35 (West Supp. 1980); WYO. STAT. § 12-5-502 (1977).

    The fluctuation in the number of states employing such legislation may be observed by comparing similar listings in various writings on the topic. *Compare* Comment, *Dram Shop Liability—A Judicial Response,* 57 CAL. L. REV. 995, 996-97 n.6 (1969) *with The Torts of the Intoxicated: Who Should Be Liable?,* 15 COLUM. J.L. & SOC. PROBS. 33, 34 n.14 (1979).
35. Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973); Vance v. United States, 355 F. Supp. 756 (D. Alaska 1973); Deeds v. United States, 306 F. Supp. 348 (D. Mont. 1969); Davis v. Shiappacosse, 155 So.2d 365 (Fla. 1963); Ono v. Applegate, 612 P.2d 533 (Hawaii 1980); Alegria v. Payonk, 101 Idaho 617, 619 P.2d 135 (1980); Colligan v. Cousar, 38 Ill. App. 2d 392, 187 N.E.2d 292 (1963); Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Lewis v. State, 256 N.W.2d 181 (Iowa 1977); Pike v. George, 434 S.W.2d 626 (Ky. 1968); Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973); Mumford, Inc. v. Peterson, 368 So.2d 213 (Miss. 1979); Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo. 1980); Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973); Campbell v. Carpenter, 279 Or. 237, 566 P.2d 893 (1977); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1964);

decisions, both rendered in 1959.

In *Waynick v. Chicago's Last Department Store,*[36] the plaintiff brought a diversity action for damages suffered as the result of an automobile accident caused by a drunk driver. After first ruling that neither Illinois nor Michigan dram shop laws applied,[37] the Seventh Circuit held that the plaintiffs stated a valid cause of action against the bar owner based on common law principles of negligence.[38] Applying the traditional proximate cause rule to the facts at hand, the court found the intoxicated driver to be outside the definition of "a strong and able-bodied man" responsible for his own actions.[39] Consequently, it was held that any sale to a person in this condition constituted a violation of the Illinois criminal statute prohibiting liquor sales to intoxicated persons.[40] Violation of this statute, coupled with the status now granted an intoxicated person, formed the necessary proximate cause between the sale of liquor by the tavern owner and the resulting injuries caused by the inebriate.[41] The defendant bar owner was held to have breached a duty to protect the public safety and was found liable for all ensuing damages resulting from his sale of alcohol to the intoxicated patron.[42]

That same year, the New Jersey Supreme Court found a vendor civilly liable for damages in a wrongful death suit based upon the vendor's illegal sale of alcohol to a minor. In *Rappaport v. Nichols,*[43] the court held that violation of a penal statute prohibiting sales of liquor to minors or intoxicated individuals could be used as evidence of negligence. The court further maintained that sales to such persons created a foreseeable and unreasonable risk of harm to both the customer and the "traveling public."[44] This risk was believed to be further enhanced by the increased travel by automobile and corresponding increase in alcohol-related traffic accidents.[45] Therefore, the court held that furnishing drinks to a patron who the vendor knew or should have known to be either underage or intoxicated constituted negligence and subjected the vendor to civil liability.[46]

Once the *Waynick* and *Rappaport* decisions had pierced through

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Callan v. O'Neil, 20 Wash. App. 32, 578 P.2d 890 (1978). These jurisdictions, combined with those states having current dram shop acts in force, see *supra* note 34, comprise a vast majority of forums that recognize some form of civil liability against liquor vendors.

36. 269 F.2d 322 (7th Cir. 1959), *cert. denied,* 362 U.S. 903 (1960).
37. 269 F.2d at 324-25.
38. *Id.* at 326.
39. *Id.* at 325.
40. *Id.* at 325-26.
41. *Id.* at 326.
42. *Id.* at 325-26.
43. 31 N.J. 188, 156 A.2d 1 (1959).
44. *Id.* at 201-02, 156 A.2d at 8.
45. *Id.*
46. *Id.* at 203-04, 156 A.2d at 10.

the common law shield of vendor nonliability, a steady stream of jurisdictions began to adopt similar rationales.[47] The focal point of these judicial reinterpretations centers around the common law negligence elements of duty and causation.[48]

Modern courts now impose a duty on vendors to their customers and the general public based upon revised perceptions of foreseeability and judicial expansion of state penal statutes.[49] These courts readily concede that it is reasonably foreseeable to a tavern owner that if he sells an obviously incapacitated person a drink, that person can ultimately cause injury to a third party by reason of his impaired condition.[50] The "reasonable man" test by which the vendor is judged takes into account drunk-driving statistics to determine the degree of vendor foreseeability.[51] The imposition of a standard of care is deemed justified by these courts, given the potential danger of the automobile, and concurrently, society's proclivity to drink and drive.[52] Such a duty has been found to exist apart from statutory provisions, under the rationale that "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."[53]

Other courts charging tavern owners with a legal duty liberally construe the legislative intent behind state criminal laws that prohibit liquor sales to certain classes of persons.[54] These courts reason that the purpose behind these statutes reflects a concern for public and consumer safety, and have transferred the duty required of vendors by penal statutes over to the arena of civil liability.[55] Consequently, depending upon the jurisdiction, if a bar owner breaches his duty by violating a relevant penal statute, his act may constitute either rebuttable

47. Within the next decade, a variety of jurisdictions followed the lead of *Waynick* and *Rappaport.* Some of these courts had traditionally followed the common law rule. *See, e.g.,* Davis v. Shiappacosse, 155 So.2d 365 (Fla. 1963); Mitchell v. Ketner, 54 Tenn. App. 656, 393 S.W.2d 755 (1964). Other jurisdictions had previously repealed dram shop acts, but the state courts elected to follow the modern trend and grant a cause of action based on common law negligence principles. *See, e.g.,* Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Ramsay v. Anctil, 106 N.H. 375, 211 A.2d 900 (1965).
48. *See generally* Annot., 98 A.L.R.3d 1230 (1980); Annot., 97 A.L.R.3d 528 (1980).
49. *See, e.g.,* Thaut v. Finley, 50 Mich App. 611, 213 N.W.2d 820 (1973); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965).
50. *See* Ono v. Applegate, 612 P.2d 533, 540-41 (Hawaii 1980); Adamian v. Three Sons, Inc., 353 Mass. 498, 501, 233 N.E.2d 18, 20 (1968); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290, 293 (1965).
51. *See, e.g.,* Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 8-9 (1959).
52. *See* Deeds v. United States, 306 F. Supp. 348, 358 (D. Mont. 1969); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290, 293 (1965).
53. Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 629, 198 A.2d 550, 553 (1964).
54. *See, e.g.,* Elder v. Fisher, 247 Ind. 598, 603, 217 N.E.2d 847, 851 (1966).
55. *See, e.g.,* Adamian v. Three Sons, Inc., 353 Mass. 498, 233 N.E.2d 18 (1968); Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 198 A.2d 550 (1964).

negligence[56] or negligence per se.[57]

A similar transformation has occurred in the traditional concepts of proximate cause. Today, the predominant view is that the vendor's *sale* of alcohol to the customer, rather than *consumption* of the drink by the patron, is the proximate cause of any foreseeable subsequent harm.[58] Because the potentiality of hazardous conduct is foreseeable, the ensuing acts of an inebriate no longer serve as a superseding cause relieving the liquor supplier of civil liability.[59] In support of this line of reasoning, a number of judges rely upon analogies to parallel areas of tort law,[60] or upon the *Restatement (Second) of Torts.*[61] Nevertheless, jurisdictions that apply more stringent standards than mere proximate cause require the tavern owner's negligence to be wanton and reckless before liability can be imposed.[62]

D. Modern Adherence to Common Law Principles

Despite the recent exodus of courts from traditional principles of nonliability for tavern owners, a few jurisdictions, including Maryland, continue to adhere to the common law rule.[63] Apart from established

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56. *See, e.g.,* Anslinger v. Martinsville Inn, Inc., 121 N.J. Super. 525, 298 A.2d 84 (1972).
57. *See, e.g.,* Mason v. Roberts, 35 Ohio App. 2d 29, 300 N.E.2d 211 (1971); Majors v. Brodhead Hotel, 416 Pa. 265, 205 A.2d 873 (1965).
58. *See, e.g.,* Lewis v. State, 256 N.W.2d 181, 191-92 (Iowa 1977); Trail v. Christian, 298 Minn. 101, 113, 213 N.W.2d 618, 625 (1973). For support of the view that sales, rather than consumption of alcoholic beverages are seen by a majority of modern jurisdictions to be the proximate cause of injuries, see Vance v. United States, 355 F. Supp. 756, 761 (D. Alaska 1973).
59. *See, e.g.,* Deeds v. United States, 306 F. Supp. 348, 363 (D. Mont. 1969).
60. *See, e.g.,* Rappaport v. Nichols, 31 N.J. 188, 200, 156 A.2d 1, 7 (1959). The cases and writings dealing with the tort-feasor's intervening act following consumption of alcohol have drawn upon those cases finding negligence on the part of suppliers of dangerous items to incapacitated persons for support in finding negligence and proximate cause in liquor vendor cases. *See, e.g., id.*; Johnson, *Drunken Driving — The Civil Responsibility of the Purveyor of Intoxicating Liquor,* 37 IND. L.J. 317, 323-25 (1962).
61. *See, e.g.,* Lewis v. State, 256 N.W.2d 181, 188 (Iowa 1977); Deeds v. United States, 306 F. Supp. 348, 363 (D. Mont. 1969); *see also* RESTATEMENT (SECOND) OF TORTS §§ 442-44 (1965).
62. *See, e.g.,* Grasser v. Fleming, 74 Mich. App. 338, 345, 350, 253 N.W.2d 757, 760, 763 (1977).
63. Lewis v. Wolf, 122 Ariz. 567, 596 P.2d 705 (1979); Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Wright v. Moffit, 437 A.2d 554 (Del. 1981); Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Marchiondo v. Roper, 90 N.M. 367, 563 P.2d 1160 (1977). The common law doctrine had been judicially abrogated in California in Vesley v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971), but was subsequently reinstated by legislative enactment. *See* CAL. BUS. & PROF. CODE § 25602 (West Supp. 1982). For the circumstances behind this legislative change, see Gonzales v. United States, 589 F.2d 465, 468 (9th Cir. 1979).

Several jurisdictions, which currently have viable dram shop laws, have refused to extend to injured parties a common law cause of action for negligence. Phillips v. Derrick, 36 Ala. App. 244, 54 So.2d 320 (1951); Nelson v. Steffens, 170

principles, these courts offer a number of practical considerations in support of their continued allegience to the common law doctrine. Commonly cited obstacles to granting a new cause of action include the difficulty in equitably apportioning civil liability between the drunk tort-feasor and the bar owner, practical problems in the administration of vendor liability, and the impracticality of imposing a duty upon vendors to recognize when a consumer is intoxicated.[64]

Certain minority jurisdictions also view the imposition of civil liability as a public policy issue within the sole responsibility of the state legislature.[65] Courts advancing this argument point to the absence of dram shop statutes as evidence of positive legislative intent to refrain from creating vendor liability.[66] These courts fear that if they impose civil liability upon tavern owners it would adversely increase tavern owners' insurance costs,[67] open the door to similar penalties for social hosts,[68] or encourage collusive and fraudulent suits.[69] Nevertheless, several courts that currently espouse the minority view have expressed their dissatisfaction with the common law rule and have indicated their desire that the legislature promptly act to statutorily change it.[70]

Conn. 356, 365 A.2d 1174 (1976); Keaton v. Kroger Co., 143 Ga. App. 23, 237 S.E.2d 443 (1977); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Edgar v. Kajet, 84 Misc. 2d 100, 375 N.Y.S.2d 548 (1975); Griffen v. Sebek, 245 N.W.2d 481 (S.D. 1976); Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971).

64. *See* Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979). Practical difficulties frequently cited by these courts are: problems in identifying when an individual is intoxicated; predicting his future conduct; and determining which tavern owner is liable when the drunk tort-feasor has gone "bar-hopping." *Id.* at 488-94, 280 N.W.2d at 180-83; *see also* Holmes v. Circo, 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976).

65. Holmes v. Circo, 196 Neb. 496, 244 N.W.2d 65 (1976); *see also* Carr v. Turner, 238 Ark. 889, 385 S.W.2d 656 (1965); Miller v. Moran, 96 Ill. App. 3d 596, 421 N.E.2d 1046 (1981); Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 450 P.2d 358 (1969); Olsen v. Copeland, 90 Wis. 2d 483, 280 N.W.2d 178 (1979); Parsons v. Jow, 480 P.2d 396 (Wyo. 1971).

66. *See, e.g.,* Holmes v. Circo, 196 Neb. 496, 505, 244 N.W.2d 65, 70 (1976); Parsons v. Jow, 480 P.2d 396, 397-98 (Wyo. 1971).

67. Olsen v. Copeland, 90 Wis. 2d 483, 493, 280 N.W.2d 178, 182 (1979).

68. Alsup v. Garvin-Wienke, Inc., 579 F.2d 461, 464 (8th Cir. 1978); Carr v. Turner, 238 Ark. 889, 892, 385 S.W.2d 656, 658 (1965); Holmes v. Circo, 196 Neb. 496, 504, 244 N.W.2d 65, 70 (1976). Civil liability for social hosts, as opposed to commercial vendors, is beyond the scope of this comment. Interested readers should see Comment, *Tort Liability for Suppliers of Alcohol,* 44 MO. L. REV. 757, 768-71 (1979).

69. Olsen v. Copeland, 90 Wis. 2d 483, 490-91, 280 N.W.2d 178, 181 (1979).

70. Lewis v. Wolf, 122 Ariz. 567, 572, 596 P.2d 705, 710 (1979); Marchiondo v. Roper, 90 N.M. 367, 369, 563 P.2d 1160, 1161-62 (1977). The *Marchiondo* court went so far as to warn the legislature that it would hold differently when next presented with the issue of vendor liability should the legislature fail to take corrective action. *See id.* at 370, 563 P.2d at 1162.

III. VENDOR LIABILITY IN MARYLAND

There is a dearth of Maryland case law addressing the issue of tavern owner liability to injured third parties. Those few cases that do confront this subject adhere to the common law rule that a vendor is not liable for the tortious conduct of his patrons. The earliest reference to this question is found in the case of *Emerson v. Taylor*.[71] Although this case concerned an action for loss of consortium caused by the defendant's negligent operation of an elevator, the Court of Appeals of Maryland did acknowledge, in dictum, the existence of similar third party claims based on the sale of liquor to spouses.[72] Nevertheless, it was not until 1951 that the Maryland court squarely addressed the issue of vendor liability for a drunken customer's acts.

State v. Hatfield[73] involved a wrongful death action brought by the State for the widow and estate of a driver killed in a car accident. The collision was caused by a drunk minor who had been illegally served alcoholic beverages by the defendant tavern owner.[74] The vendor filed a demurrer, claiming that the customer's act of drinking the alcohol, not the sale of it, formed the proximate cause of the ensuing accident. The lower court sustained the defendant's demurrer and the court of appeals affirmed.[75] The court recognized that other jurisdictions had enacted dram shop laws, and emphasized that the Maryland legislature had never passed such a statute.[76] The establishment of civil liability upon vendors for tortious acts by patrons was considered a legislative prerogative, hence the court interpreted the failure to enact legislation as a positive expression by the General Assembly of their intent to continue vendor nonliability.[77] The *Hatfield* court refused to grant the plaintiff a cause of action, fearing that to do so would represent an unauthorized encroachment on the authority of state lawmakers.[78] Instead, the court disposed of the issue by adopting the common law approach to proximate cause and standard of care, stating that "human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the

71. 133 Md. 192, 104 A. 538 (1918).
72. *Id.* at 195-96, 104 A. at 539.
73. 197 Md. 249, 78 A.2d 754 (1951).
74. *Id.* at 251, 78 A.2d at 754-55. The defendants owned and operated a tavern, the Valley Inn, in Baltimore County which was alleged to be "remote from settlements and only accessible to persons operating automobiles." The drunk driver causing the accident which resulted in this suit was a minor who was served in violation of a penal statute. *Id.* at 250-51, 78 A.2d at 754-55. Despite the patron's age, the court failed to find any problem in utilizing the "able-bodied man" theory in reaching its decision.
75. *Id.* at 251-52, 78 A.2d at 755.
76. *Id.* at 253-54, 78 A.2d at 756.
77. *Id.* at 256, 78 A.2d at 757.
78. *Id.*

liquor."[79]

In the second and most recent Maryland case to decide this issue, the court of appeals reiterated its prior holding, despite the national trend to the contrary. In *Felder v. Butler,*[80] the appellants brought a negligence action against a tavern owner for damages incurred in a car accident caused by an intoxicated patron.[81] The appellants' claim rested upon the dual theories of common law negligence and violation of a statute as evidence of negligence.[82] However, Chief Judge Murphy, writing for the majority, declined to depart from the common law and refused to grant injured third parties a cause of action against tavern owners.

The *Felder* court acknowledged the evolution of vendor liability that had occurred since the *Hatfield* decision and examined both its scope and rationale.[83] The court also took note of Maryland penal statutes that impose criminal sanctions on vendors who sell liquor to minors or intoxicated persons.[84] Although the court recognized the gravity of the problem posed by drunk driving and the adaptability of the common law to meet societal needs, the majority reiterated its reluctance to judicially create a new cause of action.[85] Ignoring issues of proximate cause and standard of care, the *Felder* court labeled the issue of vendor liability a "public policy" matter and voiced the same fear of judicial intermeddling in legislative affairs as had been raised thirty years previously in the *Hatfield* decision.[86] The court concluded by noting that the legislature may wish to reconsider the lack of any statutory provision for a cause of action against vendors and implied that future cases on this issue might meet with a different outcome.[87]

In her dissent, Judge Davidson found that legislative inaction was a dubious basis upon which to draw the affirmative conclusions formed

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79. *Id.* at 254, 78 A.2d at 756.
80. 292 Md. 174, 438 A.2d 494 (1981). The only intervening reference to the issue of tavern owner liability which occurred between the *Hatfield* and *Felder* decisions was a brief acknowledgment, in dictum, of the common law doctrine. Walker v. Hall, 34 Md. App. 571, 584, 369 A.2d 105, 113 (1977).
81. Felder v. Butler, 292 Md. 174, 176-77, 438 A.2d 494, 495 (1981). The patron who was the drunken tort-feasor in this case was a woman. *Id.* at 175-76, 438 A.2d at 495. Thus, the Maryland court has held that liquor sales to underaged patrons (*Hatfield*) and to female customers (*Felder*) meet the common law prerequisite of a sale to an "able-bodied man." *See supra* note 5.
82. Brief for Appellant at 9-25, Felder v. Butler, 292 Md. 174, 438 A.2d 494 (1981).
83. Felder v. Butler, 292 Md. 174, 178-81, 438 A.2d 494, 496-98 (1981).
84. *Id.* at 181, 438 A.2d at 498. See *infra* note 125 for a discussion of these Maryland statutes.
85. Felder v. Butler, 292 Md. 174, 182, 438 A.2d 494, 499 (1981).
86. *Id.* at 183-84, 438 A.2d at 499-500.
87. *Id.* at 184, 438 A.2d at 499. In concluding its decision, the court inferred that judgment in future suits of this nature would not depend upon legislative action, saying: "[t]herefore, since the legislature has not yet created dram shop liability by statute, we decline, *for now,* to join the new trend of cases . . . . Nevertheless, the legislature may wish to consider re-examining the *Hatfield* rule . . . ." *Id.* (emphasis added).

by the majority. According to Judge Davidson, mere inaction by the state's lawmakers to create dram shop statutes does not rise to the level of a declaration of state public policy.[88] With the alarming increases in drunk-driving injuries and the changing conditions within society, the dissenting judge remained unconvinced that the common law rule was capable of providing fair and effective solutions to the problem.[89] Rather, the dissent argued that a civil cause of action should be granted against vendors for injuries caused by patrons to whom they sell liquor in violation of existing Maryland penal statutes.[90]

IV. ANALYSIS

The *Hatfield* decision, rendered thirty years ago, adequately reflected the tenor of existing legal thought on the issue of vendor liability. The present holding in the *Felder* case, however, represents an anachronism currently shared by only a handful of jurisdictions nationwide.[91] While relying upon the legislature's inertia as an indication of its positive intent, the court abstained from taking affirmative steps to effect a valid judicial change. The *Felder* court's reluctance to shape needed reform overlooks both the availability of viable, alternative courses of action and the court's own prior treatment of related issues within the area of Maryland tort law.

A. Common Law Grounds for Modifying the Rule of Vendor Nonliability

A cause of action in negligence has traditionally encompassed four elements: (1) a duty imposed on the defendant to conform to a certain standard of care; (2) breach of this duty; (3) proximate cause — a causal connection between the breach of duty and the injury; and (4) an actual loss or damage resulting to another.[92] The rule of nonliability adopted in *Hatfield,* and reaffirmed in *Felder,* can be viewed as the product of traditional judicial perceptions of duty and proximate cause, formulated to satisfy the needs of an earlier era. However, an assessment of the elements of negligence, in light of modern knowledge, reveals adequate grounds for allowing injured parties a cause of action against tavern owners.

For liability in negligence to attach to the defendant he must be obligated to the plaintiff to conduct himself in accordance with a le-

88. *Id.* at 185-86, 438 A.2d at 500 (Davidson, J., dissenting).
89. *Id.* at 186, 438 A.2d at 500.
90. *Id.* at 186, 438 A.2d at 500-01.
91. *See supra* note 63. The *Felder* court concedes that a shift in modern judicial approaches to vendor liability has occurred and refers to this change as the "new trend of cases." Felder v. Butler, 292 Md. 174, 178, 438 A.2d 494, 496 (1981).
92. W. PROSSER, THE LAW OF TORTS § 30 (4th ed. 1971); *see also* Read Drug & Chemical Co. v. Colwill Constr. Co., 250 Md. 406, 412, 243 A.2d 548, 553 (1968); Walter Brooks Bradley, Inc. v. Yates & Co., 218 Md. 263, 268, 146 A.2d 433, 436 (1958).

gally recognized standard of care.[93] The standard imposed upon the defendant is generally that of a reasonable person under similar circumstances.[94] Moreover, the test of a reasonable person may be expanded to include the experience of the individual defendant, as well as the knowledge possessed by the average person.[95] Given the prevalence and publicity of the death and damage caused by drunk drivers, it is hard to imagine that a tavern owner could be unaware of the dangers of serving alcoholic beverages to youthful or obviously intoxicated patrons. Imposition of a duty upon tavern owners would require that they refrain from selling liquor to those particular individuals who, by common experience or knowledge, the tavern owner knows or should know are likely to represent an unreasonable risk of harm to others.[96] Vendors ignoring these risks, by making sales to incapacitated customers, may reasonably be found to have breached a standard of care owed to members of the general public.[97]

Questions of proximate cause depend, in part, upon whether the resulting injury was of a type that is foreseeable to an ordinary, prudent person acting under the same circumstances as those encountered by the defendant.[98] Whether a defendant liquor vendor could have anticipated subsequent injury to third parties may be determined in light of the frequency with which such injuries occur. In more than ninety percent of the cases of death by automobile collision in Maryland, when fault could be ascertained, a drinking driver was involved.[99] Approximately one million serious injuries sustained in car accidents nationwide are the result of intoxicated drivers, at a cost of more than five billion dollars annually.[100] The dimensions of these statistics would seem to confirm the reasonable probability, capable of being anticipated by vendors, that subsequent harm will result from sales to minors or drunk patrons. It is not necessary that the exact manner in which injury was caused be foreseeable, only that the resulting damage occur within "a general field of danger which should have been antici-

93. *See* Social Security Admin. Baltimore F.C.U. v. United States, 138 F. Supp. 639, 645 (D. Md. 1956).
94. *See* Lindenberg v. Needles, 203 Md. 8, 15-16, 97 A.2d 901, 904 (1953).
95. Johnson v. County Arena, Inc., 29 Md. App. 674, 678-80, 349 A.2d 643, 645-46 (1976).
96. While the general standard of care does not vary, a court may consider relevant circumstances, including the defendant's superior ability and experience acquired by his occupation, to determine if he acted as a reasonable person with similar attributes. *See* Holler v. Lowery, 175 Md. 149, 157-58, 200 A.2d 353, 357 (1938); Johnson v. County Arena, Inc., 29 Md. App. 674, 678-80, 349 A.2d 643, 645-46 (1976).
97. *See, e.g.,* Jardine v. Upper Darby Lodge No. 1973, Inc., 413 Pa. 626, 629, 198 A.2d 550, 553 (1964).
98. Campbell v. State, 203 Md. 338, 346, 100 A.2d 798, 802 (1953); City of Baltimore v. Terio, 147 Md. 330, 336, 128 A. 353, 355 (1925).
99. Md. Dep't of Transp., Report of the Task Force on the Drinking Driver 3 (1980) (available from Md. Dep't of Transp.).
100. Baltimore Sunpapers, Jan. 10, 1982, at B2, col. 2.

pated."[101] However, the test of foreseeability does not contemplate a standard of strict liability. Examination of the factual circumstances surrounding the tavern owner's sale assists the court in determining the degree of foreseeability on a case by case basis.[102] Thus, recognition of a negligence cause of action in vendor liability cases would merely require tavern owners to refrain from sales to individuals who a reasonably prudent person would believe to be capable of inflicting harm on others.

Reliance upon existing principles of proximate cause in Maryland disposes of the defense of superseding causation that may arise within the context of determining vendor liability. When the plaintiff is injured by someone other than the defendant, the intervening act will not release the defendant from liability if the intervention was susceptible of being foreseen by the defendant in the natural and ordinary course of events.[103] In order to constitute a superseding cause sufficient to absolve the defendant of liability, the intervening act must alone be the cause of the injury.[104] Courts have been especially unwilling to relieve defendants who, because of their initial negligence, create the risk that an intervening cause of the injury will occur.[105]

Illustrative of Maryland's judicial approach regarding issues of intervening causation are cases involving the doctrine of negligent entrustment. Essential to the foundation of a cause of action for negligent entrustment is the recognition that certain people present dangers on public highways by reason of their propensity to drink and drive, and that these particular intervening acts are foreseeable.[106] In *Rounds v. Phillips,*[107] the administratrix of the estate of a driver killed in a car accident sought to bring suit against the parents of the minor who had caused the collision. The plaintiff contended that a cause of action should be granted since, despite the defendant's knowledge of their

101. Segerman v. Jones, 256 Md. 109, 132, 259 A.2d 794, 805 (1969) (quoting McLeod v. Grant County School Dist. No. 128, 42 Wash. 2d 316, 255 P.2d 360 (1953)); *see also* American Laundry Mach. Indus. v. Horan, 45 Md. App. 97, 104, 412 A.2d 407, 413 (1980).

102. *See generally* State, Use of Weaver v. O'Brien, 140 F. Supp. 306, 311 (D. Md. 1956); Curley v. General Valet Services, 270 Md. 248, 264, 311 A.2d 231, 239 (1973); Fowler v. Smith, 240 Md. 240, 246, 213 A.2d 549, 553-54 (1965).

103. *See* State v. Hecht Co., 165 Md. 415, 421, 169 A. 311, 313 (1933).

104. *Id.*; *see also* Suburban Trust Co. v. Waller, 44 Md. App. 335, 347, 408 A.2d 758, 766 (1979).

105. *See, e.g.,* Scott v. Watson, 278 Md. 160, 172-73, 359 A.2d 548, 556 (1976). The Maryland court in *Scott* adopted a combination of an "enhanced risk theory" and RESTATEMENT (SECOND) OF TORTS § 448 (1965) to solve the causation problem created by a negligent act resulting in a foreseeable third party tort. Scott v. Watson, 278 Md. 160, 172-73, 359 A.2d 548, 556 (1976); *see also* Little v. Woodall, 244 Md. 620, 626, 224 A.2d 852, 855 (1966).

106. For a comprehensive overview of Maryland cases applying the negligent entrustment doctrine to situations involving drivers with drunk-driving histories, see Curley v. General Valet Services, 270 Md. 248, 311 A.2d 231 (1973).

107. 166 Md. 151, 170 A. 532 (1934).

son's previous record of reckless and drunk driving, they negligently furnished him an automobile.[108] Adopting the negligent entrustment theory as law, the Court of Appeals of Maryland acknowledged a cause of action to exist against the supplier of a potentially hazardous article to an individual who the supplier knows, or should have known, poses a threat to those with whom he may later come into contact.[109] Subsequent cases continue to impose liability on defendants who provide incompetents the means of inflicting injury on others in accordance with the *Restatement (Second) of Torts* expression of the rule.[110] A substantial number of negligent entrustment cases involve defendants who provided automobiles to drivers whom they knew habitually drove while intoxicated.[111]

The disparity between the positions taken by the court of appeals on the issues of vendor liability and negligent entrustment appears to lack adequate justification. In both instances, the defendant supplies a potentially hazardous article to one who is likely to use it in such a manner as to pose a foreseeable risk of harm to innocent third parties.[112] Indeed, a stronger argument for civil liability may be made when the tavern owner serves liquor to an obviously intoxicated patron. Unlike the negligent entrustment situation, when the article is provided to one having a past record of incompetence, the tavern owner is able to directly observe the patron's incapacitated condition. Under this circumstance, the foreseeability of subsequent harm caused by the recipient of the hazardous article (the alcohol) is arguably greater than in cases of negligent entrustment presently recognized by Maryland courts.

B. Policy Considerations for Modifying the Rule of Vendor Nonliability

Determining the proximate cause of any contested injury necessarily turns upon issues of foreseeability and intervening causation. However, as noted by the Court of Appeals of Maryland, any decision regarding proximate cause ultimately rests upon a judicial evaluation of "fairness or social policy as well as mere causation."[113] The conditions under which most torts of intoxicated patrons occur today are vastly different from the period when the common law doctrine of nonliability for vendors developed. For example,

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108. *Id.* at 153-61, 170 A. at 532-35.
109. *Id.* at 166-67, 170 A. at 537-38.
110. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 390 (1965). For a case applying the RESTATEMENT rule, see Kohlenberg v. Goldstein, 290 Md. 477, 485, 431 A.2d 76, 81 (1981).
111. *See, e.g.,* State of Maryland v. O'Brien, 140 F. Supp. 306 (D. Md. 1956); Snowhite v. State ex rel. Tennant, 243 Md. 291, 221 A.2d 342 (1966).
112. For analogies between provision of liquor and that of other potentially hazardous articles, see Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959).
113. Peterson v. Underwood, 258 Md. 9, 16, 264 A.2d 851, 855 (1970).

> [M]ost courts, at common law, . . . held that the provision of alcohol was not the proximate cause of injury. Such reasoning is far more persuasive when a drunkard is annoying or assaulting a passerby, riding a horse, or driving his carriage through the village street at the breathtaking speed of 10 to 20 miles per hour, than when an inebriate is in incompetent control of a 2-ton metal juggernaut powered by three hundred horsepower.[114]

Antiquated notions of proximate cause, unresponsive to the exigencies of modern life, should not serve as a shield behind which vendors who negligently serve minors or drunk customers can seek protection. The *Felder* court, by perpetuating the common law principles enunciated in the *Hatfield* decision, provides such immunity to liquor vendors despite an obvious need for change.

The court of appeals recognizes the dynamics of the common law and its susceptibility to change caused by society's vascillating conditions and increasing knowledge.[115] Modification of the common law may be effected by legislative action, judicial opinion, or by court rules.[116] Consequently, the court may revise or abrogate common law principles which it finds unresponsive to the demands of modern life.[117] Since the judiciary is not bound by the doctrine of stare decisis from taking action deemed necessary to protect fundamental rights of injured parties, the court of appeals can change the rule of vendor nonliability by exercising its authority to interpret Maryland common law.[118]

The Maryland judiciary has demonstrated its willingness to create a right of action apart from existing and contrary common law, and in spite of the General Assembly's refusal to heed the court's suggestion for enactment of new legislation.[119] For example, in *Lusby v. Lusby,*[120] the court of appeals permitted a cause of action for damages by one spouse against another, despite the common law doctrine of spousal

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114. Halvorson v. Birchfield Boiler, Inc., 76 Wash. 2d 759, 767, 458 P.2d 897, 901 (1969) (Finley, J., dissenting).
115. Williams v. State, 292 Md. 212, 217, 438 A.2d 1301, 1308 (1981); Lewis v. State, 285 Md. 705, 715, 404 A.2d 1073, 1078 (1979).
116. Pope v. State, 284 Md. 309, 341, 396 A.2d 1054, 1073 (1979); Moaney v. State, 28 Md. App. 408, 414, 346 A.2d 466, 471 (1975).
117. Kline v. Ansell, 287 Md. 585, 590, 414 A.2d 929, 931 (1980); Pope v. State, 284 Md. 309, 341-42, 396 A.2d 1054, 1072-73 (1979); White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966).
118. Pope v. State, 284 Md. 309, 342, 396 A.2d 1054, 1073 (1979); White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966).
    In Marusa v. District of Columbia, 484 F.2d 828 (D.C. Cir. 1973), the District of Columbia Circuit Court, after reviewing the *Hatfield* decision, rejected the common law rule of nonliability. In doing so, the court stated that "judges and scholars have generally been wary of this kind of generalization from the common law, and with good reason. The common law is an immense and amorphous body of doctrine." *Id.* at 834-35.
119. *See* Lusby v. Lusby, 283 Md. 334, 357, 390 A.2d 77, 88 (1978).
120. 283 Md. 334, 390 A.2d 77 (1978).

immunity from tort action. Faced with an intentional tort perpetrated by a husband upon his wife by means of outrageous conduct, the court readily conceded that "no sound public policy in the latter half of the 20th century" could be thought to prevent the wife from recovering from her husband for his outrageous acts.[121]

The common law doctrine of vendor nonliability is a creation of the courts and not a product of statute. The plaintiffs in the *Hatfield* and *Felder* cases were not asking the court to modify or overrule a legislative provision, but rather to revise a judge-made doctrine. However, both decisions focused on the lack of legislation as grounds for refusing to take action to effectuate change. In *Hatfield,* the court determined that the legislature's failure to enact dram shop provisions constituted an expression of intent "as clearly and compellingly as affirmative legislation would."[122] Three decades later, the *Felder* court elected to adopt this same interpretation.[123] However, as Judge Davidson pointed out in her dissenting opinion in *Felder,* reliance by the court on legislative nonaction provides a dubious basis for reaching positive inferences of that body's intent.[124] Such an approach appears to be one of judicial preference, rather than a result mandated by legal precedent.

C. Statutory Grounds for Modifying the Rule of Vendor Nonliability

While the Maryland legislature has never enacted a dram shop act, penal statutes do exist that prohibit the sale or provision of alcoholic beverages by commercial licensees to underage or incapacitated customers.[125] Although the majority's decision in *Felder* does no more than note the existence of these Maryland criminal provisions, other jurisdictions with similar penal statutes have utilized them as catalysts

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121. *Id.* at 357, 390 A.2d at 88.

122. State v. Hatfield, 197 Md. 249, 256, 78 A.2d 754, 757 (1951).

123. Felder v. Butler, 292 Md. 174, 183-84, 438 A.2d 494, 499 (1981). In adopting this position, the *Felder* court stated that "[t]he court has therefore declined to alter a common law rule in the face of indications that to do so would be contrary to the public policy of the State, *as declared by* the General Assembly of Maryland." *Id.* at 183, 438 A.2d at 499 (emphasis added).

124. *Id.* at 185, 438 A.2d at 500 (Davidson, J., dissenting).

125. MD. ANN. CODE art. 2B, § 118(a) (1981 & Supp. 1982) limits sales to individuals by age (21 years or older for alcoholic beverages, except sales of beer and light wine to persons 18 years of age or older) and restricts sales to customers visibly under the influence of alcoholic beverages. MD. ANN. CODE art. 2B, § 119(a) (1981 & Supp. 1982) prohibits sales or provision of alcoholic beverages to known habitual drunkards, mentally deficient persons, or persons who are the subject of a notice provided vendors as to their unsound mental, psychological, or physical condition. Violation of either of these statutes carries with it the potential of a misdemeanor conviction and the imposition of a fine, imprisonment, or both. *See id.* §§ 118(a), 119(a), 200.

for changing the common law rule of nonliability.[126] These courts interpret the legislative intent behind these criminal laws as indicative of a desire to protect both the consumer and other members of the public.[127] Hence, the vendor who violates such criminal statutes is also found to have violated a standard of care established by the legislature.[128]

Maryland statutes lend themselves to a similar judicial interpretation. By limiting licensee liability to only those sales made to customers visibly intoxicated, incapacitated, or under legal age, the Maryland legislature specifically isolated the very classes of individuals who possess the greatest potential for causing harm to themselves or others.[129] The court could logically extend the duty currently placed on vendors to refrain from such sales into the area of civil responsibility.

In Maryland, violation of a statute is evidence of negligence.[130] However, the mere violation of a statute does not support an action for damages absent the existence of sufficient evidence to show that the violation was the proximate cause of the injury suffered.[131] Existing criminal statutes allow a vendor, charged with making an illegal sale, to present evidence of due caution in his defense.[132] Similar factual considerations could also be available to negate the elements of foreseeability or proximate causation when determining the civil liability of a vendor.[133] Thus, a jury weighing the evidence presented in an action

126. *See, e.g.,* Pike v. George, 434 S.W.2d 626 (Ky. 1968); Trail v. Christian, 298 Minn. 101, 213 N.W.2d 618 (1973).

Both cases, in order to initiate the modern revision of common law nonliability principles, relied to a degree upon the violation of a state criminal statute to support the finding of a cause of action in negligence. *See* Waynick v. Chicago's Last Dept. Store, 269 F.2d 322, 326 (7th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 8 (1959).

127. Adamian v. Three Sons, Inc., 353 Mass. 498, 500, 233 N.E.2d 18, 19 (1968); *see also* Mason v. Roberts, 33 Ohio St. 2d 29, 32, 294 N.E.2d 884, 887 (1973).

128. *See, e.g.,* Elder v. Fisher, 247 Ind. 598, 217 N.E.2d 847 (1966); Thaut v. Finley, 50 Mich. App. 611, 213 N.W.2d 820 (1973); Berkeley v. Park, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (1965).

129. *See* MD. ANN. CODE art. 2B, § 118(a) (1981 & Supp. 1982). The Maryland criminal provision for sales to drunkards or persons mentally, psychologically, or physically impaired requires that such sales are not actionable unless made "knowingly." The statute's definition of "knowingly" closely approximates the usual standard imposed in common law negligence elements: "The word "knowingly," as to habitual drunkards should be construed to mean such knowledge as a reasonable man would have under ordinary circumstances, from the habits, appearances or personal reputation of such individual." *Id.* § 119(a).

130. McLhinney v. Lansdell Corp., 254 Md. 7, 254 A.2d 177 (1969); Austin v. Buettmer, 211 Md. 61, 124 A.2d 793 (1956).

131. Aron & Co. v. Service Transp. Co., 486 F. Supp. 1070 (D. Md. 1980); Dean v. Redmiles, 280 Md. 137, 374 A.2d 329 (1977); Peterson v. Underwood, 258 Md. 9, 264 A.2d 851 (1970).

132. MD. ANN. CODE art. 2B, § 118(a) (1981 & Supp. 1982).

133. *See* People v. Johnson, 81 Cal. App. 2d 973, 975, 185 P.2d 105, 106 (1947). The court, in construing a criminal statute similar to Maryland's provision, stated:

for civil damages against a tavern owner would reach its determination in a manner very much the same as is done for current criminal violations. Ultimately, a finding of negligence based on a statutory violation is within the province of a jury.[134] However, the court of appeals refuses to even grant a cause of action for the civil liability of vendors, thus removing the determination of negligence from the jury and automatically immunizing tavern owners from civil liability.[135]

V. CONCLUSION

Although the *Felder* court felt constrained by what it perceived to be the declared public policy of the state legislature, the Court of Appeals of Maryland was not left without the means to recognize a civil cause of action against tavern owners. Revised interpretations of proximate cause and legal duties of vendors initiated in the majority of jurisdictions are acceptable platforms from which to launch judicial change. Additional support for creating a cause of action can be found through existing penal statutes, the violation of which is considered evidence of negligence. By granting injured third parties a right of action against tavern owners, legislative action is not impinged, stare decisis principles are not ignored, and parties injured by the negligent acts of bar patrons are permitted an opportunity to convince a jury of the merits of their claim. The end result will force tavern owners to bear responsibility for their actions and lead to a decrease in the already unacceptably high incidence of deaths and injuries caused by drunk drivers.

James P. O'Meara

> 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 an extent as to see that which is easily seen and to hear that which is easily heard, under the conditions and circumstances then and there existing. On the other hand, it is equally clear that he is not required to subject the customer to tests which would disclose symptoms not readily apparent to anyone having normal powers of observation—sight, hearing, and possibly smell.

Id.

134. *See* Mayor and City Council v. Seidel, 44 Md. App. 465, 471-74, 409 A.2d 747, 750-51 (1980).

135. Judge Davidson, in her dissent in *Felder*, would grant a cause of action based upon violation of the provisions contained in MD. ANN. CODE art. 2B, § 118(a) (1981 & Supp. 1982). Felder v. Butler, 292 Md. 174, 186, 438 A.2d 494, 500-01 (1981) (Davidson, J., dissenting).