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Use of Intermediaries in DWI Deterrence

Volume III—Dram Shop Acts, Common
Law Liability and State Alcoholic
Beverage Control (ABC) Enforcement
as Potential DWI Countermeasures

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16. Abstract Many trips undertaken by alcohol-impaired drivers originate at public drinking establishments: bars, taverns, nightclubs, restaurants, etc. The managers and service personnel (bartenders, waiters, waitresses) in these establishments could play a role in preventing trips by impaired drivers; either by cutting-off or slowing down alcoholic beverage service before patrons become impaired or by proposing alternatives to driving if patrons have already become impaired. This paper examines the legal framework in which businesses licensed for the sale and on-premise consumption of alcoholic beverages operate. Dram Shop laws, common law liability and state Alcoholic Beverage Control laws are considered from the perspective of what impetus they give the owner and employees to intervene in potential drunk driving situations. A state by state tabulation of Dram Shop and common law liability is also presented. The authors conclude that there are constraints on the effectiveness of all legal approaches to encouraging DWI intervention but that stepped-up enforcement of the state Alcoholic Beverage Control laws and regulations offers more potential for encouraging intervention.					
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ADDENDUM

USE OF INTERMEDIARIES IN DWI DETERRENCE

VOLUME III: DRAM SHOPS ACTS, COMMON LAW LIABILITY AND STATE ALCOHOLIC BEVERAGE CONTROL (ABC) ENFORCEMENT AS POTENTIAL DWI COUNTERMEASURES

As part of our project entitled "Use of Intermediaries in DWI Deterrence," Dram Shop Acts, Common Law liability, and State Alcoholic Beverage Control (ABC) regulations were examined. The purpose of this review was to analyze the potential of each legislative approach in curtailing the incidence of alcohol-impaired driving. The results of this examination are presented in this report: "Use of Intermediaries in DWI Deterrence: Volume III--Dram Shop Acts, Common Law Liability, and State Alcoholic Beverage Control (ABC) Enforcement as Potential DWI Countermeasures."

Readers and users should be aware of the following important issues when utilizing this report:

First, the opinions, analyses and recommendations contained in the report are those of the authors alone, and do not reflect the opinions or policies of the National Highway Traffic Safety Administration (NHTSA). Consequently, readers should not construe this report to indicate that NHTSA has adopted, or advocates, a particular position regarding Dram Shop Laws or accelerated enforcement of Alcoholic Beverage Control Regulations.

Second, State legislation regarding alcohol-impaired driving has been changing rapidly within the past few years. The information presented in this report was the most current information available at the time the report was written. However, since that date, some States have changed their laws regarding alcohol-server liability. Users may wish to consult another NHTSA publication entitled "A Digest of State Alcohol-Highway Safety Related Legislation" (DOT HS 806 480) for additional information on alcohol-server liability.

Third, the laws and regulations discussed in this report impose liability, fines and/or sanctions on servers of alcoholic beverages who serve minors, habitual drunkards, and/or "obviously intoxicated persons." Besides the problem of the definition of an "obviously intoxicated" person being quite subjective, a driver may be alcohol-impaired before he/she is identified as "obviously intoxicated." Consequently, it is unclear whether passage and/or enforcement of the laws and regulations discussed in this report would indeed reduce the incidence of alcohol-impaired driving.

Last, as indicated above, the effects of State laws governing alcohol-server liability and/or the effects of accelerated enforcement of ABC regulations on curtailing alcohol-impaired driving have yet to be established. The refusal of a bartender, waiter or waitress to serve only an "obviously intoxicated" patron for fear of being sued or fined, does not necessarily mean that a DWI trip will be deterred. There is no guarantee that the patron will not leave the drinking establishment immediately, enter his/her vehicle, and drive away in an intoxicated state. Furthermore, patrons who are not "obviously intoxicated" may be unable to drive safely, and these individuals are not necessarily refused service under the current laws and regulations. To curtail the incidence of alcohol-impaired driving, it is also necessary to develop means of identifying and dealing with such patrons who are not "obviously intoxicated," but may well be too impaired to drive. NHTSA staff are examining such problems, together with the problem of identifying appropriate and potentially effective ways of achieving alcohol-server liability.

Users will best profit from this report if they utilize it for the descriptive information it provides about each type of legislative approach: Dram Shop Laws, Common Law liability, Alcoholic Beverage Control Regulations. Although the pros and cons of each approach are discussed in the report, users must decide for themselves which approach, if any, would best fit their needs; and/or how a particular approach would have to be modified in order to reduce the incidence of alcohol-impaired driving.

NOTE

The detailed research for this paper was conducted during the Spring, 1982. The report was updated in the Spring, 1983 based on information that was, to the best of our knowledge, current through December, 1982. Many state legislatures are actively considering legislation to combat drunk driving. Dram Shop measures are among the things they are considering. Therefore, the status of Dram Shop laws in some states may have changed since these data were collected.

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I. INTRODUCTION

The consumption of alcohol is a contributory factor in as many as one half of the fatal traffic accidents that take place in the United States each year. Additional hundreds of thousands of Americans are injured and millions of dollars in property damage occur as a result of drivers combining drinking and driving. The Federal government, led by the National Highway Traffic Safety Administration (NHTSA), and numerous state and local governments as well as many private individuals and organizations are seeking ways to reduce driving while intoxicated (DWI) behavior and the attendant death, injury and damage.

Although the trend in the United States is for a greater percentage of alcohol to be purchased in package stores for "off-premises" consumption (at home, in cars, at private parties, etc.), a significant share of drinking still takes place "on-premises" (in bars, taverns, restaurants and other such establishments). Also, evidence from roadside surveys and reviews of DWI arrest cases suggest that a large percentage of trips involving DWI originate at bars, taverns or other points where on-premise consumption is taking place. If intoxicated persons leaving such establishments had ways to get home other than their private automobiles, or if persons who had to drive home could be influenced to drink less, DWI trips originating in such on-premises drinking locations might be reduced, or at least the alcohol-involved drivers might have lower average Blood Alcohol Content (BAC), reducing the risk of accident.

Proprietors and service personnel (bartenders, waitresses, etc.) in such drinking establishments could play a significant part in reducing the role of on-premise drinking in the DWI problem. They could influence the amount patrons consume, the timing of that consumption and the arrangements for transportation home. A significant question remains, however, of how best to influence such proprietors and service personnel to become involved in countering the DWI problem. All such liquor vendors are subject to the regulatory and licensing oversight of state alcoholic beverage control boards. In some states they also are liable for damage occurring as a result of their serving alcohol either statutorily, under "Dram Shop" laws or under the state's common law. This legal framework in which liquor vendors operate may provide a mechanism for getting them involved in countering DWI problems.

This paper addresses the potential of Dram Shop laws, common law liability and accelerated enforcement of state ABC regulations as potential countermeasures for driving while intoxicated. The paper has five major sections: (1) a description of findings on the status of Dram Shops laws and common law liability in the United States, (2) an analysis of the potential effectiveness of Dram Shop laws, common law liability as DWI countermeasures, (3) a description of State Alcoholic Beverage Control (ABC) provisions, (4) an analysis of the potential applicability of

state ABC provisions as DWI countermeasures, and (5) a set of conclusions and recommendations for the use of Dram Shop laws and accelerated ABC enforcement as DWI countermeasures.

II. DESCRIPTION OF FINDINGS ON DRAM SHOP AND COMMON LAW LIABILITY

A. History of "Dram Shop Acts"

During the mid 1800's temperance advocates, attempting to close saloons and "dram shops," introduced legislation in some states that established civil liability of the saloon keeper for harm arising from his business. These early laws often provided that tavern owners be financially responsible for the support of the family of patrons who had become "habitual drunkards." With the increase in alcohol related crashes, these statutes have more recently become a potential source of compensation for those persons injured as the result of such crashes. Under these statutes, also known as the "Civil Damage Acts," it would be necessary to show a causal relationship between illegal service of alcohol to the driver responsible for a crash and the crash itself.

B. Common Law Liability

In the early common law, an inebriated person was held directly and solely responsible for his own intoxication and for those negligent acts which injured himself or other persons, regardless of how he became intoxicated. Therefore, the old common law provides no remedy against the tavern owner for compensation resulting from an improper sale of alcohol.

In 1959, however, the New Jersey Supreme Court, in Rappaport vs. Nichols (31 N.J 158, A. 2d 1), permitted recovery against a tavern owner in a wrongful death action as the result of the illegal (violation of the liquor control statute) sale of alcohol to an intoxicated minor who was involved in a vehicle crash in which the plaintiff's husband was killed. With this decision, New Jersey became the first of many states imposing "third party" liability on those persons who violate the state's Alcoholic Beverage Control laws.

Court decisions in California (Coulter vs. Superior Court, 577 P. 2d 669, 1978) and in Oregon (Weiner vs. Gamma, 485 P. 2d 15, 1971), indicated the potential of holding a person civilly responsible for damages resulting from serving alcohol to a severely intoxicated person on the basis of "ordinary negligence." The underlying principle in the Rappaport case was that liability stems from violation of law (the ABC statutes) by the tavern owner. Under the "ordinary negligence" theory of law, the liability would stem from the failure of the defendant to act as a normal prudent person should, such as serving alcohol to an obviously intoxicated person with knowledge that the person would probably be driving his vehicle home, regardless of the

existence or violation of a law. This line of reasoning has not been followed in subsequent cases.

C. Elements of Dram Shop and Common Law Liability

1. Dram Shop Acts. While the statutes creating civil liability vary from state to state, most acts identify three classes of persons that require special attention: minors, habitual drunkards and "obviously" intoxicated persons. Most often, though, these persons are not able to sue for injuries they may sustain as the result of a subsequent crash, because their behavior in becoming intoxicated is considered contributory negligence. The statutes particularly protect other persons who are injured as the result of the negligent operation of a motor vehicle by the intoxicated person, such as a passenger or a driver of another vehicle. In most cases, to establish liability the elements that must be proven are: that the defendant sold or furnished the purchaser or donee an intoxicating liquor which the person consumed and from which the person became intoxicated; that the intoxicated purchaser or donee caused an actionable injury to the plaintiff and that there was a causal connection between the purchaser or donee's intoxication and the plaintiff's injury; and that the plaintiff was within a class entitled to recover under the act.

2. Common Law Liability. The major difference between Dram Shop and common law liability is that the Dram Shop statute expressly establishes liability for the improper serving of alcoholic beverage, while under "common law," the court will infer liability based upon the illegal service of alcohol. The elements stated earlier under Dram Shop are almost identical with the elements that need to be proven in common law liability cases. In the Rappaport case the court stated that: a tavern owner must sell alcohol in violation of the liquor control statutes, and that he "ought to recognize and foresee the unreasonable risk of harm to others through action of the intoxicated person."

There are two important premises underlying common law liability. First, that the actions of intoxicated persons pose a substantial risk of harm to persons or property which the tavern owner can be expected to foresee and, second, that the sale of alcoholic beverage to intoxicated persons can be considered the proximate cause of injury or damage. In Adamian vs. Three Sons, Inc., (233 N.E. 2d 18, 1968) the Massachusetts Supreme Court, in holding a tavern owner liable under the common law theory, stated that the waste in human life caused by the negligence of drunken drivers on the highway could not be left outside the scope of foreseeable risk created by the sale of liquor to an already intoxicated person. The court further stated that the sale of alcoholic beverages to certain individuals can be considered the proximate cause of injuries to the plaintiff.

D. State Summary-Overview

States have many varieties and combinations of Dram Shop acts and common law liability. Our research indicates that 13 states have some form of Dram Shop provisions alone, 12 states and the District of Columbia have common law liability under ABC regulations alone, eight states have a combination of both potential causes of action, and 18 states have neither Dram Shop nor common law liability. Although we have not investigated court cases in states without Dram Shop acts or common law liability, it is presumed that these 18 states retained the original common law position that the injuries were too remote to be a foreseeable consequence of the vendor's acts. (See Attachment "A" for a state-by-state summary). Also in two of the states with common law liability (California and Oregon) court decisions have implied that a cause of action can arise on the basis of "ordinary negligence."

E. Diversity of Dram Shop Acts and Common Law Liability

I. Dram Shop Acts.

a. Statutory Provisions. States enacting Dram Shop laws have not been uniform in many of their provisions. In most instances, those persons identified to be refused service are: minors, habitual drunkards, and obviously intoxicated persons. In some states, though, there are major differences. Very recently, the State of California has amended its Dram Shop law by specifying that only sales to minors are a potential source of liability to tavern owners. In Colorado, Delaware, Ohio, Wisconsin and Wyoming, a tavern owner can be liable only if he has served an "habitual drunkard." Other variations in the provisions of the statutes include: notification to commercial servers of the status of particular persons as "habitual drunkards" is required for enforcement in Ohio and Wyoming; in Oregon, only the spouse, parents and children of the patron illegally served have a cause of action against the tavern owner; and some statutes specify that contributory negligence of the patron can be used as defense by the tavern owner. The type and amounts of recovery by those persons injured also vary considerably by statute from state to state. In Alabama, Iowa, Michigan, Illinois and North Dakota, the measure of damages includes the plaintiff's means of support, in addition to personal and property damage. Connecticut and Rhode Island restrict recovery to personal and property damage alone. Some states limit the actual amount of money recoverable under their Dram Shop laws.

b. Judicial Interpretations. In addition to the variation in the language and provisions of many Dram Shop acts, the judicial interpretations of these statutes also have varied widely. The courts in the states of Illinois and Minnesota have held that their statutes are "penal" in nature and should be strictly construed, so that recovery is limited only to those

persons specified in the statutes. Other states, such as Connecticut, view their statutes more broadly, and have expanded the potential range of plaintiffs, in addition to those listed in the statutes.

Another major difference in judicial decisions is the possible defenses against a Dram Shop cause of action. Most courts have rejected a recovery for damages sustained by a "patron" on the theory of "contributory negligence;" that is, a person who deliberately allows himself to become intoxicated should not be permitted to recover damages against a tavern owner. In a minority of cases, the court has allowed recovery by injured "patrons," especially in the case of minors.

Still another major variation in judicial interpretation of Dram Shop laws is the requirement for a causal connection between the service of alcoholic beverages and the subsequent injury causing crash. In most jurisdictions, the plaintiff must introduce evidence the illegal service was the major contributory cause of the crash (specific negligent actions brought about through the patron's intoxication). In some jurisdictions, the courts have inferred that illegal service of alcohol can be considered the proximate or underlying cause of the crash, so that a mere showing of the illegal service and subsequent crash is sufficient to establish a cause of action.

2. Common Law Liability

As in the case of Dram Shop liability, the courts vary substantially in their interpretations of liability based upon a tavern owner's violation of an ABC law. In fact, in some jurisdictions where both Dram Shop and common law liability are available as a cause of action to injured parties, there are differences in the elements of proof required for either cause of action. In Minnesota, while *Robinson vs. Lamott* (289 N.W. 2d 60, Minnesota, 1979) established that the Civil Damage Act was the exclusive remedy against liquor vendors and a common law action was not available, *Trial vs. Christian* (293 N.W. 2d 618, Minn., 1973) disregarded this finding and held that the plaintiff could proceed under a claim of common law negligence for sale of 3.2 beer, since this beer was not statutorily defined under the Civil Damage Act.

In the instance of personal injury to the patron in Alaska, Louisiana, New Hampshire and Pennsylvania, the court held that liability of those furnishing intoxicating liquor in violation of a statute prohibiting such a sale, was established or supportable. (*Vance vs. U.S.*, 355 F Sup 756, Alaska, 1975, *Pence vs. Ketchum*, 316 So 2d 831, La., 1976; *Ramsey vs. Anctil*, 211 A 2d 900, N.H. 1965; *Majors vs. Broadhead Hotel*, 205 A 2d 873, Pa., 1965). Conversely, in Connecticut, Minnesota and New York, the courts held that a consumer could not recover for personal injuries, because the courts viewed the consumption of the liquor, rather than its sale as the proximate cause of the injuries sustained (*Nolan vs. Morelli*, 226 A 2d 383, Conn., 1967;

Noohan vs. Galick, 112 A 2d 892 Conn., 1955; Hannah vs. Jensen, 298 N.W. 2d 52, Minn., 1980; Vadasa vs. Feigels, 391 N.Y. ed 32, 1973).

Several courts have held that liability was established because of violation of a statute prohibiting the sale or gift of intoxicating liquor to a minor (Smith vs. Clark, 190 A 2d 441, Pa., 1963; Aliulis vs. Tunnel Hill Corp., 275 A 2d 751, N.J., 1971). Other courts refused recovery for personal injuries sustained by a minor in violation of a statute (Vallentine vs. Azar, 445 P 2d 449, Ariz., 1968; Bryant vs. Jax Liquors, 365 So 2d 710, Ala., 1977; Shepard vs. Marsaglia, 1/6 N.E. 2d 4/3, Ill., 1961).

On the question of defenses of contributory negligence, assumption of risk, or willful misconduct, several cases allowed these defenses to bar a cause of action (Kindt vs. Kaufman, 129 Cal Rptr. 603, 1976; Norman vs. Galic, 112 A 2a 892, Conn., 1955; Ramsey vs. Anctil, 211 A 2a 900, N.H., 1965), while other state decisions held these defenses to be no bar to a recovery (Pence vs. Ketchum, 326 So 2d 831, La., 1976; Galvin vs. Jennings, 289 F 2d 15, N.J., 1961).

Liability for wrongful death of the consumer against tavern owners who violate a statute was established in the following cases: Nally vs. Blandford, 291 SW 2d 832, Ky., 1956; Soronen vs. Olde Milford, 218 A 2d 630, N.J., 1966; Connelly vs. Ziegler, 380 A 2d 902, Pa., 1977. Damages resulting from the death of the consumer was not established or supportable due to lack of proximate cause in the following cases: Henry Grady Hotel vs. Sturgis, 28 E 2d 329, Ga., 1943; Andrezajczak vs. Calarco, 339 F Supp 68, Pa., 1972.

As these examples suggest, consistency among state courts is a serious issue for establishment of civil liability as the result of ABC law violations.

III. ANALYSIS

A. Potential Effectiveness of Dram Shop Laws and Common Law Liability as DWI Countermeasures

In theory at least the existence of a Dram Shop statute and/or court decisions that support the common law concept of liquor vendor liability for injury or damage caused by intoxicated patrons should serve as a potential DWI countermeasure. Under the countermeasure model, a liquor vendor (or its employees--bartenders and cocktail waitresses) assesses the risk that serving more alcohol to a drinking patron might result in the patron going out and causing injury or damage and that the injured party might sue successfully to recover for damages. Based on that assessment, the vendor decides not to serve that person, or alternatively, having served that person beyond the point of intoxication, decides to call a cab or in

some other way help the person get home safely. Any of these actions by the liquor vendor or his agent would reduce the number of severely intoxicated persons on the road and the number of alcohol related accidents.

There are a number of points in this model where the reasoning is weak or where the incentives being attributed to the Dram Shop or common law liability are just not strong enough to result in the desired behavior by liquor vendors or their agents.

B. Constraints on Effectiveness as DWI Countermeasures

1. Legislative Process. The absence of minimal uniformity of Dram Shop Acts between states creates confusion on the part of tavern owners and the general public as to their rights and responsibilities under the statutes. In addition, legislators are frequently influenced by strong lobbying efforts. An illustration of a major change in a Dram Shop act as the result of strong lobbying pressure was the California amendment in 1979. When the court in *Coulter vs. Superior Court*, 21 Cal. 3d 144, 1978, extended liability under the Dram Shop act to include service of intoxicated persons by social hosts, the Legislature amended the statute to virtually put an end to all Dram Shop liability, whether commercial or non-commercial servers were involved (with the exception of service to minors by commercial vendors).

2. Judicial Process. The variation of judicial interpretations of Dram Shop and common law liability have likewise created a weakness in their use as a viable drinking-driving countermeasures. Many courts, as evidenced by some 18 states that have refused to recognize a common law theory of liability against a vendor who violates an ABC statute, have not recognized the potential effectiveness of civil liability as a DWI countermeasure. Several such decisions have indicated that it is the role of the legislature to determine the civil responsibility of tavern owners when they violate these statutes. In Oregon, when the legislature enacted a relatively stringent Dram Shop law, the Oregon Supreme Court interpreted these acts as limiting the liability to third parties and not extending the liability to minors and intoxicated persons who are themselves injured. (*Miller vs. City of Portland*, 288 Ore., 271, 604, P2d 1261, 1980). This appears to contradict the purpose of the statutes. It is not uncommon, therefore, for the courts to limit the potential effectiveness of Dram Shop or common law liability countermeasures. Many courts also have allowed the fear of potential future litigations to limit this remedy. Thus in the short run at least, it is unlikely that judges across the country will modify their interpretations of the common law simply to deter DWI behavior; even though such modification might make for sound social policy.

3. Liability Insurance. Another impediment to the effectiveness of Dram Shop and common law liability as DWI countermeasures is the availability of insurance to protect the

tavern owner from potentially catastrophic tort judgments. This coverage, by limiting the financial risk facing a tavern owner, reduces or eliminates his incentives to monitor and guard against the illegal sale of alcoholic beverages in his establishment.

Instead, it imposes a financial penalty on those tavern owners who are scrupulous in following the law, but who must maintain insurance for any potential incidents. The insurance protection has two negative effects. It minimizes the probability of licensees changing their business practices, and can result in sharp increases in the cost of liability insurance. If insurance programs could be enacted that would specifically penalize, through higher rates, establishments which produce a high risk potential, then the insurance coverage might no longer protect those vendors who are in violation of these statutes.

4. Political Considerations. The effectiveness of Dram Shop or common law liability will often depend upon a series of events occurring and culminating with an injury producing crash. As a practical matter, the probability of both a crash occurring and recovery by an injured party against a tavern owner is relatively small. Some of the reasons for the low probability of successful recovery include: high cost of court actions, lack of knowledge of potential legal remedies, the length of time that law suits require (up to four years, in some instances), use of sophisticated law firms and lots of resources by insurance carriers to defend those actions, and the limited likelihood of favorable court outcomes.

There are also strong financial incentives to continue serving restricted patrons compared to the low risk of financial loss through an adverse court decision. Most tavern owners will try to keep patrons in their establishments unless and until a specific deterrent for illegal service is perceived as a definite risk, rather than a remote possibility.

IV. DESCRIPTION OF FINDINGS (ABC LAW ENFORCEMENT)

All states exercise some form of control over the distribution and sale of alcoholic beverages. Their alcoholic beverage control laws and regulations limit, among other things, who can purchase and consume alcoholic beverages. Stricter administrative enforcement of such regulations offers a potential DWI countermeasure. Such an approach may be more effective and more feasible than exclusive reliance on civil tort claims implied by Dram Shop laws and common law liability.

A. History of ABC Laws and Regulatory Systems

The introduction of Alcoholic Beverage Control (ABC) laws in the states paralleled the development of Dram Shop laws and common law liability. Regulation of the manufacture and sale of alcoholic beverages began in the late 1800's and culminated in the enactment of the 18th Amendment to the U. S. Constitution in

1920, prohibiting the manufacture, distribution and consumption of alcoholic beverages. The 21st Amendment, repealing Prohibition in 1933, was a watershed in alcoholic beverage regulation, giving the states authority over the manufacture, distribution, and sale of alcoholic beverage within their borders.

B. Elements of ABC Laws and Regulations

States can be classified into two major groups, based on the type of system used for controlling alcoholic beverage: license states and control (or monopoly) states. In pure license states, private firms manufacture, distribute and sell alcoholic beverages, holding licenses to do so from, and conforming to, the laws and regulations of the state ABC agency. In control states, the state itself handles the wholesale distribution of alcoholic beverages with private firms involved, to varying degrees, in the retail sale of such beverages. In "pure" control states, the state owns the retail package stores as well as the wholesale distribution network. In "mixed" control states, private retailers are licensed for package sales as well as on-premises consumption.

Although the type of laws and regulations varies considerably between states, most of these laws contain a number of common regulatory elements and purposes. The laws usually express several interrelated purposes dealing with:

1. Generation of state revenues;
2. Elimination or at least control of any criminal element involved in alcohol beverage manufacture and sale;
3. Control of public morality, and
4. Consumer protection and public health.

There has been a good bit of disagreement over the relative importance of these goals and less over what each means. Philosophies underlying the discussion have ranged from complete prohibition to abolition of any restrictions on alcohol availability. As several analysts have pointed out, concerns over "public morality," or even public health and consumer protection, have often been associated in people's minds with the religiously-based temperance movement, and hence have been regarded suspiciously.* As we will discuss later, such an association is unfortunate because of the very real public health-related issues surrounding alcohol use related to DWI.

The mechanisms for achieving these purposes include:

1. Licensing and regulation of alcoholic beverage manufacturers.

*Medicine in the Public Interest, The Effects of Alcohol Beverage Control Laws, Washington, D.C., MIPI 1979.

2. Licensing and regulation or direct control of the wholesaling and retailing of alcoholic beverages--for both on-and-off-premise consumption. In some dry jurisdictions, this can include absolute prohibitions of sales.
3. Collection of taxes and licensing fees.
4. Restrictions on sales, such as: locations, visibility, advertising, and hours and days of sale.
5. Limitations on who can purchase or be served, such as minors and intoxicated persons.

This report, focusing as it does on the potential applicability of ABC enforcement to DWI deterrence, is concerned with the second and third objectives and focuses primarily on use of the fifth regulatory mechanism--limitation on who can purchase or be served.

C. Enforcement of ABC Statutes on Illegal Service

Enforcement of state ABC statutes dealing with service or sales to underage or intoxicated persons involves several steps, including investigation, adjudication, and penalization. Avenues of appeal are also open to the licensee.

1. Investigation. Enforcement of alcoholic beverage control statutes or regulations regarding who can be served will normally come about as a result of investigation by an undercover agent from the state or local police or the ABC agency itself.

States differ in terms of who has responsibility for these investigation and enforcement activities. In some states, sole responsibility rests with state ABC agents; in others, sole responsibility rests with local law enforcement officials; in still others, both state ABC agents and local police share ABC inspection and law enforcement responsibilities, while in some jurisdictions, the state police may also play a role. In all jurisdictions, the agencies responsible for investigation and enforcement of illegal service provisions have other enforcement responsibilities. State ABC agents must inspect and enforce all other aspects of state ABC laws and regulations pertaining not only to on-premise consumption but also to retail sales for off-premise consumption, manufacture and wholesale distribution. Where state and/or local police are charged with responsibility for enforcement, they, of course, must spend large fractions of their time on completely unrelated activities.

Investigations may be carried out on a regular or random basis or may arise from a complaint filed by a concerned citizen observing an apparent violation. In most jurisdictions, the resources and staff available for investigation are limited, so the number of licenses investigated in a given time period is

small relative to the total number of licences. Similarly, the depth or thoroughness of investigations can be a problem.

2. Adjudication and Penalty. Once a violation has been observed, the enforcement of these ABC statutes are both criminal and administrative/civil in nature. An observed violation by a bartender or store clerk generally results in a misdemeanor charge being placed against the violator. This charge is returnable in a criminal court. In addition, the tavern owner or store owner usually must appear before the ABC Commission to answer charges of a violation. Should the violation be substantiated, the owner can be penalized by a fine, suspension of privileges for sale of alcohol beverages for a limited period of time, revocation of his license permanently or a combination of sanctions.

3. Appeals. Almost all of these statutes provide for similar appeals mechanisms. There is first an administrative appeal or appeals. This can be an appeal from a local district commission or agent to the ABC Board, and a further appeal to the Governor or his designee. This can be followed by a judicial appeal, the basis of which would be arbitrary, capricious or unreasonable action by the administrative agency. The courts will almost never question the agency's determination of facts, but only whether the resulting actions of the agency were warranted by their findings of fact.

4. Status of Enforcement. Resources available for this preliminary assessment have not permitted a state-by-state analysis of special ABC enforcement efforts, especially related to DWI prevention. A search of secondary sources failed to yield even baseline statistics on numbers of ABC enforcement actions or investigation.

To gain some insight into current ABC enforcement efforts related to minimum age violations and service to intoxicated persons, we talked with a small number of ABC officials in two Washington D.C. area jurisdictions. The major finding in the interviews was the apparent low level of enforcement of the illegal service of alcoholic beverages to minors and intoxicated persons by the investigative staff on the ABC commissions and the local and state enforcement agencies. This appeared to be due to the shortage of ABC Commission staff to conduct these investigations, and the low priority of law enforcement agencies on these types of investigations, and arrests. The ABC staff members have a broad variety of tasks to perform in addition to these investigation and enforcement activities. In addition, ABC investigators in one jurisdiction, presently do not have arrest powers for criminal enforcement of the laws.

We suspect that many states match pretty closely the situation in these two local jurisdictions in terms of levels of enforcement effort related to DWI. However, some states have experimented with accelerated ABC enforcement directed toward DWI prevention. For example, in New Jersey, State Police, the

Alcoholic Beverage Control Enforcement Bureau and the Alcohol Treatment and Rehabilitation Program have piloted a joint project aimed at reducing the incidence of DWI. Undercover investigators, working for the ABC agency, observe service to intoxicated patrons in bars, taverns or cocktail lounges. When a patron who has been served too many drinks to drive home safely leaves the bar, the investigator contacts a state police officer in the area. The officer intercepts the patron before he or she drives away and offers him a ride home or a ride to an alcohol detoxification center. The rides are actually provided by Alcohol Treatment and Rehabilitation (ATRA) program volunteers.

The ABC investigator then files charges against the licensee for violation of state statute--serving an intoxicated person. Although relatively small, this pilot program was given a lot of publicity, including letters announcing the program mailed to all licensees in the state. A further effort was made to maximize its impact by not publicizing the particular establishments or even locations that would be investigated, in hopes that as many licensees as possible would perceive an increased risk of enforcement action.

Other states may be working on accelerated enforcement efforts, but we do not have information to confirm this impression.

V. ANALYSIS OF ABC LAW ENFORCEMENT

A. Potential Effectiveness of ABC Law Enforcement as a DWI Countermeasure

It appears that accelerated enforcement of ABC laws and regulations prohibiting service to intoxicated persons could serve as a significant DWI countermeasure. At the present time, all 50 states and the District of Columbia have some form of Alcoholic Beverage Control statute that licenses and regulates the sale of the on-and off-premises consumption of alcoholic beverages. Unlike Dram Shop laws and common law liability, problems of spotty national coverage are nonexistent. Also, although the statutes differ among states, with varying forms of control and administrative responsibilities for enforcement, virtually all states prohibit sales to intoxicated persons.

At least three factors argue for both the potential effectiveness of, and the feasibility of, accelerated ABC law enforcement as a DWI countermeasure: stronger incentives controlling licensee behavior, ease of adoption, and current political support. Each of these will be discussed below.

1. Incentives Controlling Licensee Behavior. Underlying the idea of using accelerated ABC law enforcement as a DWI countermeasure is an implicit model of the incentives such enforcement would provide licensees and their staffs, and the behavior that would result. Licensees that violate the law by

serving intoxicated persons risk detection by the ABC agency and the possibility of incurring some penalty: a fine, suspension of license, revocation of license, etc. A fine represents potential financial loss but suspension or revocation of a liquor license is potential disaster. Even if the license is suspended for only a limited period of time, customers may go elsewhere and establish new habits, resulting in potential long term financial losses for the licensee.

Accelerated ABC enforcement, if accompanied by appropriate publicity, increases the licensee's perceived risk of being apprehended for a liquor law violation. If cited for a violation, there is then substantial risk of incurring some penalty. Whether handled administratively or judicially, the penalty is likely to be relatively swift. Also, insurance coverage is generally not available for losses stemming from violation of the law; so the licensee must bear the financial loss himself.

In all these respects, accelerated enforcement of the ABC laws differs from Dram Shop laws or common law liability in its potential incentive for licensees. The connection between a licensee's illegal service and his suffering some adverse effect is much more direct and less tenuous. Moreover, the risk is not shared with other vendors, given the unavailability of insurance.

2. Ease of Adoption. Levels of enforcement effort for particular ABC provisions are set by the ABC Board or Commission members, and by the administrative staffs in the agencies or state and local police administrators, depending on who has responsibility for such enforcement. The decision to step-up inspections of on-premise drinking establishments and enforcement of provisions restricting service to intoxicated persons is an administrative action. As such, it does not require the introduction or adoption of new legislation, although in most jurisdictions at least informal concurrence on such action would probably be needed from key legislators.

Compared to Dram Shop laws, where new legislation would have to be introduced and adopted, or compared to the area of common law liability, where an effective countermeasure can only emerge through an evolution in judicial thinking as reflected by specific court decisions, accelerated enforcement of ABC laws would be easy to implement in jurisdictions that chose to do so.

3. Political Support for ABC Enforcement. There is a growing public awareness of the human and property losses associated with drunk driving. This creates an environment in which adoption of new or strengthened initiatives becomes feasible.

A recent development in the drinking-driving countermeasure area is the growth of citizen groups concerned with drunk driving. They are dedicated groups of highly motivated persons,

many of whom are related to victims of drunk drivers. As a result of their activities and high visibility, several states and communities have established Alcohol and Highway Safety Task Forces, designed to study the status of drinking and driving laws and enforcement policies, and to recommend changes that might bring about a reduction in alcohol-related crashes. In several of the Task Force Reports, ABC law enforcement has been recognized as a potential DWI countermeasure activity.

In the Governor's Task Force on Alcohol Abuse and Highway Safety for the State of Massachusetts, reported in March of 1982, one recommendation by the Task Force was the development of educational programs in bartending that would require all employees who dispense or serve alcoholic beverages to acquire knowledge on alcohol use and abuse, including the latter's relationship to highway safety.

The Governor's Alcohol and Highway Safety Task Force in New York State (Detailed Report, 1981), recommended more stringent enforcement of Alcohol Beverage Control Laws as a DWI countermeasure. It called for increased enforcement of ABC laws, especially those regarding establishments that serve youth. The Task Force also requested a pilot training program for restaurant owners, bar owners, and bartenders that would include information on the effects of intoxication and types of alcohol consumption patterns, as they relate to the alcohol-crash problem. They also recommended unannounced nighttime and weekend surveillance of bars, thereby creating uncertainty on the part of bar owners as to whether their establishment is under surveillance by ABC investigators or not.

A recent report (May, 1982) of the Montgomery County (Maryland) Task Force on Drinking and Driving, recommended that the County spend funds for overtime for police to have establishments that sell alcoholic beverages inspected to insure that they are not selling to underage or intoxicated customers.

The Fairfax County (Virginia) Task Force on Drinking and Driving is studying the effectiveness of strict ABC law enforcement activity within Fairfax County. The Fairfax County Police Chief, a member of the County Task Force, announced that undercover officers of the Fairfax County Police will attack drunken driving this summer by going to the source (bars and stores that sell liquor) to catch illegal sales.

Active involvement in the drinking-driving area by citizen groups provides an opportunity to achieve legislative and enforcement goals that have been difficult to attain in the past. Citizen involvement has generated public attention for the drinking-driving problem that has not been there in the past. Enforcement of ABC laws related to drinking-drivers, including the resources needed to attain such enforcement, will probably be strongly supported by these citizen activist groups.

B. Constraints on Effectiveness of ABC Law Enforcement as a
DWI Countermeasure

Despite this positive outlook for the use of accelerated ABC enforcement as a DWI countermeasure, the concept should not be oversold. From our very preliminary investigation, there appear to be some constraints both on its potential effectiveness and on the feasibility of implementing it.

1. Licensee Incentives. Although the incentives for bars and taverns not to serve intoxicated patrons appear to be stronger with accelerated DWI enforcement than with Dram Shop laws or common law liability, the incentives still are not overwhelming. Even with such accelerated enforcement, the risks of being cited and fined or shut down might not be that great. Also, there are countervailing incentives. To stop serving a patron risks losing that patron and disrupting the convivial atmosphere in the bar. Especially if the tavern owner or bartender suspects that other establishments in the area are not adhering to the law too closely, he will be very hesitant to cut off service to a patron.

2. Definition of Intoxicated Persons. Enforcement of these regulations hinges on having a definition of what constitutes an intoxicated or "obviously" intoxicated person. This raises a number of interesting issues. Intoxication is not easy to define and even if it were, it would not always be easy to spot. Heavy drinkers, especially, are able to mask the outward signs of intoxication or impairment. This can make it difficult for the bartender or tavern owner to single out uncapriciously the patron who is not to be served further. It also creates a potential dispute between the undercover investigator and the licensee over the facts in a given citation. Also, because of the lack of a clear cut standard or an operational definition of intoxication, some ABC units may resist accelerated enforcement out of a sense of "fairness" to licensees.

3. Lack of Resources. A third factor limiting the potential of accelerated ABC enforcement, relates more to feasibility than to potential impact. The ABC agencies and police units that are responsible for enforcement have limited resources for which there is still competition among important law enforcement activities. In jurisdictions where ABC agencies have sole responsibility for enforcement, the relatively small number of inspectors and undercover agents limits the inspections and investigations that can be conducted. In jurisdictions where police share responsibility for ABC enforcement, the absolute amount of resources available may be greater, but there is even more competition for their use among legitimate and pressing law enforcement needs.

The problems associated with limited resources can be mitigated somewhat by sophisticated and well publicized deployment of the resources that are available. Advance publicity of a "crackdown", concentration of undercover work in

the drinking establishments that police have identified as frequent origins for DWI trips, and some well publicized arrests or citations can help maximize the impact of whatever accelerated enforcement is possible.

Some objectives have been raised to ABC enforcement as a DWI countermeasure based on the fact that most ABC regulations only prohibit service to intoxicated patrons. Drinking establishments can serve people enough liquor for them to become impaired without violating the regulation against serving an obviously intoxicated person. Therefore strict enforcement of the regulations will not necessarily keep impaired persons from driving.

The above argument is correct as far as it goes but it does not provide a convincing case against use of enhanced enforcement. First of all, better ABC enforcement should directly reduce the number of high and very high BAC drivers. In some establishments service continues up to and beyond the point of obvious intoxication. In such places service personnel will be more likely to cut off service before patrons reach very elevated BACs. These impaired persons may still drive but they will be driving at lower levels of impairment with lower accident risks than they would otherwise.

Second, improved ABC enforcement may result in bartenders or service personnel intervening or at least cutting off service at lower BACs than they would otherwise. Bartenders and service personnel readily admit that determining when a person is "intoxicated" or even "obviously intoxicated" is not easy. There is a wide borderline area of intoxication but here their natural tendency is to give the patron the benefit of the doubt and continue serving unless he or she is becoming obnoxious or bothering other patrons. In such situations, the possible presence of an undercover police officer or ABC investigator should spur the bartender or waitress to intervene earlier rather than later.

Improved enforcement of ABC regulations when considered alone does not provide any direct incentive to intervene other than cutting off service. Regulations simply prohibit service to intoxicated patrons. They do not impose any affirmative obligations on the licensee to help impaired patrons find alternative transportation or otherwise avoid DWI. Thus a drinking establishment could be in technical compliance with the ABC regulations yet still be the point of origin for a significant number of trips by impaired drivers.

In this respect, Dram Shop laws may provide a slightly stronger incentive for action since the licensee can reduce the probability of being sued by ensuring that the drinker has a safe way home. But even with Dram Shop laws the incentives for positive intervention are minimal. Most acts only permit a cause of action when the licensee has violated the beverage service laws and regulations, such as serving alcoholic beverages to an

intoxicated patron. Thus a claim for damage can not be supported when no illegal service takes place--minimizing the need to intervene with impaired but not obviously intoxicated patrons.

VI. RECOMMENDATIONS/CONCLUSIONS

A. Dram Shop/Common Law Liability

Our preliminary findings have suggested that the potential of Dram Shop and common law liability as countermeasures is limited. Prospectively, under ideal conditions, these countermeasures could be effective deterrents, but it would be difficult for a jurisdiction which has severe limitations on its civil liability potential (such as California today) to adopt a radical change in its laws. Also, the history of court decisions which create common law cannot be changed to accommodate these countermeasures, even should they be shown to be productive. While a program to develop Dram Shop legislation as a major national DWI countermeasure may not be feasible, individual states should be encouraged to enact Dram Shop laws, especially in states without common law liability.

A properly drafted Dram Shop law can serve as a deterrent to the sale of alcohol to minors and intoxicated persons. A well drafted Dram Shop Act should contain the following provisions:

1. It should define the classes of persons to be protected, including, at a minimum, minors and intoxicated persons illegally served, and all third persons injured as the result of such illegal service.
2. The defense of contributory negligence of the minor or intoxicated person illegally served should not be available.
3. The statute should be stated as "penal" in nature and should be strictly construed.
4. The statute should state that it is not the "exclusive" remedy for a civil liability suit, but that a common law liability cause of action could be available should an injury occur outside of the scope of the statute.
5. The illegal service of alcoholic beverages can be determined to be the "proximate cause" of the injuries.

Another method for potentially strengthening Dram Shop law effectiveness would be to restrict the liability protection afforded by commercial insurance. Perhaps this could be achieved through some "assigned risk" penalties for those tavern owners who have been proven to violate the ABC laws. This restriction

would serve as a specific deterrent to tavern owners that violate the statute, and it would minimize the cost of insurance of the entire commercial alcoholic beverage industry.

B. Enforcement of ABC Laws

As we have noted, enforcement of ABC laws appears to have strong potential as a viable DWI countermeasure. To a large extent, the existing legislation in most states provides a sufficient basis for conducting an enforcement effort to reduce the sale of alcoholic beverages to minors, obviously intoxicated persons, and habitual drunkards. The enforcement personnel, both ABC investigators and local and state law enforcement officers, are in place and are presently authorized to carry out these laws. Further, the mechanisms for adjudication of ABC laws violations, both administratively and judicially, are in place. Few, if any, legislative administrative changes would be necessary to pursue accelerated ABC enforcement.

To pursue this option, increased resources would have to be allocated to enforcement activities and, as in New Jersey, efforts would probably have to be made to coordinate the actions of various state and local agencies dealing with traffic safety, sale of alcohol and the health-related aspects of alcohol use and abuse.

C. Further Areas of Research

There are, of course, many areas of research into the potential of ABC enforcement as a viable DWI countermeasure effort. Some of these which deserve special attention are:

- a. Further examination of the state-of-the-art of ABC violation enforcement.
- b. An extensive examination and evaluation of known ABC enforcement efforts, such as the California experimental education program for bartenders and owners and the State of New Jersey ABC enforcement activity.
- c. The development of a pilot project for the study of the effectiveness of a coordinated ABC violation enforcement activity, utilizing the ABC Board, the law enforcement agencies, citizen activist groups, and other related state and local agencies.

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ATTACHMENT A.

STATE SUMMARY OF DRAM SHOP AND COMMON LAW LIABILITY

STATES	Dram Shop Acts	Common-Law Liability-ABC Laws	Both Dram Shop & Common Law Liability	NONE
Alabama	X			
Alaska		X		
Arizona				X
Arkansas				X
California			X ¹	
Colorado	X			
Connecticut	X ₂			
Delaware	X ²			
D.C		X		
Florida			X ³	
Georgia	X ⁴			
Hawaii				X
Idaho				X
Illinois	X			
Indiana		X		
Iowa			X	
Kansas				X
Kentucky		X		
Louisiana				X
Maine	X			
Maryland				X
Massachusetts		X		
Michigan			X	
Minnesota			X	
Mississippi				X
Missouri		X		
Montana		X		
Nebraska				X
Nevada				X
New Hampshire		X		
New Jersey		X		
New Mexico				X
New York			X	
North Carolina				X
North Dakota	X			
Ohio			X	
Oklahoma				X
Oregon		X ⁵		
Pennsylvania			X	
Rhode Island	X			
South Carolina				X
South Dakota				X
Tennessee		X		
Texas				X
Utah	X			
Vermont	X			
Virginia				X
Washington		X		
West Virginia				X
Wisconsin	X			
Wyoming	X			
Total	13	12	8	18

FOOTNOTES TO ATTACHMENT A.

¹California Dram Shop Act limited to cause of action brought against license furnishing alcoholic beverages to obviously intoxicated minor if the minor causes personal injury or death. Common law action based on ordinary negligence not necessarily based on ABC violation.

²Delaware limited to cause of action brought against licensee for serving habitual drunkard.

³Florida Dram Shop law limited to cause of action brought against person selling or furnishing liquor to a minor.

⁴In Georgia, parent of minor may sue person furnishing liquor to minor without parent's permission.

⁵Common law action based on ordinary negligence, not necessarily on ABC violation.