COMMENT

HOW WISCONSIN GOT IT WRONG: REEVALUATING DRAM SHOP LIABILITY

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Wisconsin has the highest rate of drunk driving in the country. Reducing the opportunity to drink and drive is a preventative measure that addresses the problem before harm or other consequences occur. Serving alcohol to intoxicated patrons is a crime in Wisconsin, but a national study shows that these laws are rarely enforced. Meanwhile, Wisconsin's dram shop act grants civil immunity to those who would otherwise be liable for alcohol-related injuries. The Supreme Court of Wisconsin has expanded the already broad scope of immunity that Wisconsin's dram shop act grants, causing countless innocent third party victims to go uncompensated. Broadening liability instead of immunity would encourage licensed drinking establishments to help prevent drunk driving. The Wisconsin State Legislature should amend the dram shop act to eliminate broad, ambiguous terms like procurement, and expand civil liability to licensed drinking establishments that serve visibly intoxicated patrons.

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INTRODUCTION

Wisconsin is known for its drinking culture. Milwaukee's Miller Brewery is one of the largest breweries in the world,[1] supplying patrons at Lambeau Field, Miller Park, and the many festivals held in Milwaukee—the City of Festivals. Meanwhile, alcohol-related injuries plague Wisconsin. According to a nationwide study conducted by the United States Department of Health and Human Services, "Wisconsin has the highest rate of drunk driving in the nation."[2] In 2009, alcohol contributed to approximately forty-five percent of all traffic fatalities in Wisconsin.[3] The Wisconsin Department of Transportation reported that during 2010, an alcohol-related crash injured or killed one person every 2.3 hours.[4] These figures do not include numerous alcohol-related injuries and fatalities unrelated to driving.

Yet Wisconsin laws remain lenient. Wisconsin does not criminalize first-offense drunk driving.[5] First offenders do not face jail time—just a

1. *See Locations*, MILLERCOORS, http://www.millercoors.com/who-we-are/locations.aspx (last visited Jan. 7, 2013).

2. *Drunken Driving*, WIS. DEP'T TRANSP., http://www.dot.wisconsin.gov/safety/motorist/drunkdriving/index.htm (last modified May 26, 2011). "More than 26 percent of Wisconsin adults who were surveyed admitted that they had driven under the influence of alcohol in the previous year . . . ." *Id.* The United States Department of Health and Human Services released the survey in April 2009. *Id.*

3. *Id.*

4. WIS. DEP'T OF TRANSP., 2010 WISCONSIN TRAFFIC CRASH FACTS iv, 80 (2012), *available at* http://www.dot.wisconsin.gov/safety/motorist/crashfacts/docs/crash-alcohol.pdf. The report defines "alcohol-related crash" as when "[e]ither a driver, bicyclist or pedestrian is listed on a police or coroner report as drinking alcohol before the crash." *Id.* at 97.

5. *See* WIS. STAT. § 346.65(2)(am) (2011–12). Wisconsin is one of just four states refusing to impose criminal liability on first offenders. U.S. DEP'T OF TRANSP.,

fine.[6] Hand in hand with the lenient criminal code, Wisconsin's dram shop act[7] has offered sweeping immunity from civil liability to those who provide alcohol to of-age drinkers since 1985.[8] The immunity provision of the dram shop act reads: "[a] person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person."[9]

Thus, the act prevents an innocent victim of a drunk driver from suing, for instance, the tavern that knowingly overserved the driver.[10] The statute permits zero recovery from taverns, no matter how reckless they act in overserving of-age patrons.[11] It is a crime for a drinking establishment to provide alcohol to an intoxicated person.[12] Yet a drinking establishment would not be civilly liable if one of its bartenders illegally overserved a person who crashed and killed others on the road.[13]

Wisconsin's dram shop act, unaltered since its enactment in 1985, places it among just fourteen states that do not allow third party victims to sue licensed establishments for injuries caused by serving intoxicated patrons.[14] This is unacceptable. Innocent third-party victims should have recourse against a drinking establishment if, for example, a bartender continues serving excessive amounts of alcohol to a patron despite knowing that the patron is heavily intoxicated and is going to drive. Yet, under Wisconsin's dram shop act, the drinking establishment would not be civilly responsible, despite the bartender's clear violation of the criminal code.[15]

Further, Wisconsin courts have expanded immunity by broadly interpreting the statutory term "procure."[16] This not only deprives

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NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., REPORT NO. DOT HS 811 673, DIGEST OF IMPAIRED DRIVING AND SELECTED BEVERAGE LAWS x-xvii (26th ed. 2012), *available at* www.nhtsa.gov/staticfiles/nti/pdf/811673.pdf.

6. § 346.65(2)(am).

7. § 125.035. Dram shop acts govern liability of persons and establishments that serve alcohol for alcohol-related injuries. BLACK'S LAW DICTIONARY 567 (9th ed. 2009).

8. *See* § 125.035. The legal drinking age in Wisconsin is twenty-one. § 125.02(8m).

9. § 125.035(2).

10. *See id.*

11. *See id.*

12. § 125.07(2)(a).

13. *See* § 125.035(2).

14. § 125.035; *Dram Shop and Social Host Liability*, MOTHERS AGAINST DRUNK DRIVING (revised June 2012), *available at* http://www.madd.org/laws/law-overview/Dram_Shop_Overview.pdf.

15. § 125.035(2).

16. *E.g.*, *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶¶ 29–39, 251 Wis. 2d 171, 641 N.W.2d 158.

innocent third-party victims of a full remedy, but also leads to absurd consequences. The situation is best illustrated by a hypothetical example. Suppose that the Smiths hosted a party, but did not supply alcohol. At the beginning of the night, the Smiths promised a partygoer who brought his own alcohol that he could spend the night so that he did not have to drive. But after everyone left, the Smiths told the intoxicated partygoer to leave. After leaving, the partygoer ran a red light and collided with a minivan, killing all of the occupants. As is common of drunk drivers, the partygoer had no insurance and was insolvent.[17]

Because the Smiths did not provide alcohol to or procure alcohol for the partygoer, they would not qualify for dram shop immunity.[18] Thus, they may be civilly liable for breaching their voluntarily assumed duty to allow the partygoer to spend the night. Had the Smiths instead provided the partygoer with a beer that he drank as they walked him to his vehicle, they would be immune.[19] Wisconsin law promotes perverse incentives: to escape liability, social hosts should provide alcohol to their guests.[20]

Alcohol-provider immunity has not been addressed by the Wisconsin State Legislature in over twenty-eight years. The time is ripe for change. Modest efforts have already been made. In 2010, the Wisconsin State Legislature enacted a law increasing various drunk driving penalties.[21] In addition, the Wisconsin Department of Transportation began the "Zero in Wisconsin" campaign, with the premise that "any preventable traffic death is one too many."[22]

To fulfill this goal, Wisconsin should focus its efforts not only on enforcement of its drunk driving laws, but also on encouraging drinking establishments to act reasonably by abrogating immunity for those who serve visibly intoxicated persons. That change would ultimately reduce drunk driving.[23] Of course, drinkers who directly cause harm would be

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17. Brett T. Votava, Comment, *Missouri Dram Shop Liability: Last Call for Third Party Liability?*, 69 UMKC L. REV. 587, 604 (2001).

18. *See* § 125.035(2).

19. *See id.*

20. *See Stephenson*, 2002 WI 30, ¶¶ 37–40.

21. 2009 Wisconsin Act 100, 2009 Wis. Sess. Laws 1105. These penalties apply to violations occurring on or after July 1, 2010. *Id.* at 1116, § 97.

22. *Zero in Wisconsin*, WIS. DEP'T TRANSP., http://www.zeroinwisconsin.gov (last modified Nov. 2012). Although this campaign does not focus exclusively on alcohol-related injuries, they are a significant contributing factor to driving fatalities in Wisconsin. *Id.*

23. U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., REPORT NO. DOT HS 809 878, PREVENTING OVER-CONSUMPTION OF ALCOHOL—SALES TO THE INTOXICATED AND "HAPPY HOUR" (DRINK SPECIAL) LAWS (revised 2005) [hereinafter DOT, PREVENTING OVER-CONSUMPTION OF ALCOHOL], *available at* http://www.nhtsa.gov/people/injury/alcohol/PIREWeb/pages/index.html; *see also*

civilly liable. But liability should also be imposed on other culpable parties.

Part I of this Comment explains Wisconsin's dram shop act in the context of negligence law. Part II analyzes Wisconsin's dram shop act in greater depth. Section A explains how Wisconsin courts have expanded dram shop immunity. Section B compares Wisconsin's dram shop act to three other states' statutes, arguing that alcohol providers should be held liable for serving visibly intoxicated persons. Section C offers a solution by outlining proposed statutory language and defending the changes against counterarguments. Finally, this Comment concludes that the legislature should eliminate broad, ambiguous terms like procurement, and expand civil liability to licensed drinking establishments that serve visibly intoxicated patrons.

I. WISCONSIN'S DRAM SHOP ACT

A. Negligence in Wisconsin

Wisconsin's dram shop act immunizes would-be tortfeasors from civil liability. A brief explanation of Wisconsin negligence law shows how the dram shop act operates. In Wisconsin, negligence and liability are two distinct inquiries: (1) whether the defendant committed a negligent act, and (2) whether, based on specific public policy reasons, the court should impose liability for that act.[24] The dram shop act speaks to the second inquiry.

Negligence claims in Wisconsin contain four elements: duty, breach, causation, and damages.[25] Wisconsin adheres to a reasonableness standard, where everyone has a duty to the world at large to refrain from acts that "unreasonably threaten the safety of others."[26] To establish a causal connection, the defendant's breach must have been a "substantial factor" in causing the plaintiff's injury.[27]

WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 72 (1987).

24. *Hornback v. Archdiocese of Milwaukee*, 2008 WI 98, ¶ 19, 313 Wis. 2d 294, 752 N.W.2d 862 (citing *Hoida v. M&I Midstate Bank*, 2006 WI 69, ¶ 25, 291 Wis. 2d 283, 717 N.W.2d 17). An individual can commit a negligent act and be held liable even if "the identity of the harmed person or harmed interest is unknown at the time of the act." *Rockweit v. Senecal*, 197 Wis. 2d 409, 419–20, 541 N.W.2d 742 (1995).

25. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 11, 308 Wis. 2d 17, 746 N.W.2d 220.

26. *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 350 (1928) (Andrews, J., dissenting). The Supreme Court of Wisconsin adopted the *Palsgraf* dissent in *Pfeifer v. Standard Gateway Theater*, 262 Wis. 229, 239–40, 55 N.W.2d 29 (1952), and *Klassa v. Milwaukee Gas Light Co.*, 273 Wis. 176, 182, 77 N.W.2d 397 (1956).

27. *Nichols*, 2008 WI 20, ¶ 41.

Wisconsin clarified its negligence standard by adopting section 324A of the Restatement (Second) of Torts, which pertains to voluntary undertakings.[28] Under that standard, a person commits a negligent act if he or she agrees to provide a service necessary to protect a third person, but then fails to act reasonably by increasing the risk of harm.[29] In *Gritzner v. Michael R.*,[30] for example, the defendants agreed to watch the plaintiffs' daughter.[31] Despite knowing their son's sexual proclivities, the defendants left him alone with the plaintiffs' daughter and the son sexually assaulted her.[32] The Supreme Court of Wisconsin found that the defendants assumed a duty of care for the plaintiffs' daughter, but then breached that duty when they left her alone with their son, thereby increasing the risk of harm.[33]

After finding that a defendant committed a negligent act, the court must still determine whether to hold the defendant liable.[34] In the context of liability for alcohol-related injuries, liability may not attach if public policy factors counsel against it or Wisconsin's dram shop act applies:

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28. "This court has adopted the theory of negligence set forth in the Restatement (Second) of Torts § 324A, Liability to Third Person for Negligent Performance of Undertaking." *Gritzner v. Michael R.*, 2000 WI 68, ¶ 56, 235 Wis. 2d 781, 611 N.W.2d 906 (citing *Am. Mut. Liab. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 48 Wis. 2d 305, 313, 179 N.W.2d 864 (1970)). Section 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

RESTATEMENT (SECOND) OF TORTS § 324A (1965).

29. RESTATEMENT (SECOND) OF TORTS § 324A (1965); *see Gritzner*, 2000 WI 68, ¶ 20. Justice Diane Sykes's concurring opinion in *Stephenson* explores how a designated driver scenario might fall within this category of negligent acts where drinking is done in reliance on a ride home. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 57, 251 Wis. 2d 171, 641 N.W.2d 158 (Sykes, J., concurring) ("[I]t might be possible to prove a causal link between the ultimate harm and the drunk driver's reliance on the designated driver's undertaking.").

30. 2000 WI 68, 235 Wis. 2d 781, 611 N.W.2d 906.

31. *Id.* ¶ 2.

32. *Id.* ¶¶ 9–10.

33. *See id.* ¶ 57.

34. *Hornback v. Archdiocese of Milwaukee*, 2008 WI 98, ¶ 19, 313 Wis. 2d 294, 752 N.W.2d 862 (citing *Hoida v. M&I Midstate Bank*, 2006 WI 69, ¶¶ 24–25, 291 Wis. 2d 283, 717 N.W.2d 17).

"even if all the elements for a claim of negligence are proved, or liability for negligent conduct is assumed by the court, the court nonetheless may preclude liability based on public policy factors."[35] Wisconsin courts consider six public policy factors in assessing liability, asking whether: (1) "the injury is too remote from the negligence," (2) the recovery is "wholly out of proportion" to the culpability of the negligent tortfeasor, (3) the harm caused is highly extraordinary given the negligent act, (4) recovery would place too unreasonable a burden on the negligent tortfeasor, (5) "recovery would be too likely to open the way to fraudulent claims," and (6) recovery would enter into a field that has "no sensible or just stopping point."[36]

Thus, the courts address public policy directly, instead of inquiring about the presence of a duty.[37] If a court determines that any of these factors are present, it may refuse to impose liability despite negligent conduct.[38] Wisconsin's dram shop act, independent of the six public policy factors, grants immunity to alcohol providers.[39]

B. Wisconsin's Dram Shop Act: Statutory Immunity

Wisconsin's dram shop act operates similar to the six public policy factors—despite negligent conduct, liability will not attach. The dram shop act provides broad immunity: "[a] person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person."[40] This immunity extends to all drinking establishments, as well as most social hosts and fellow drinkers.[41] Bars and individuals alike can *never* be held civilly liable for serving alcohol to of-age drinkers.[42] In the meantime, courts continue to expand immunity by defining even minor acts as "procuring." For instance, courts have defined procurement to include contributing money,[43] encouraging consumption,[44] or even vouching for another with a head nod to a bartender.[45]

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35. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 12, 308 Wis. 2d 17, 746 N.W.2d 220 (quoting *Smaxwell v. Bayard*, 2004 WI 101, ¶ 39, 274 Wis. 2d 278, 682 N.W.2d 923).

36. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 43, 251 Wis. 2d 171, 641 N.W.2d 158.

37. *Nichols*, 2008 WI 20, ¶ 45 (citing *Gritzner*, 2000 WI 68, ¶ 24).

38. *Stephenson*, 2002 WI 30, ¶ 48.

39. WIS. STAT. § 125.035(2) (2011–12).

40. *Id.*; *see Stephenson*, 2002 WI 30, ¶ 38.

41. § 125.035(2).

42. *Id.*

43. *Miller v. Thomack*, 210 Wis. 2d 650, 669, 563 N.W.2d 891 (1997).

1. LEGISLATIVE HISTORY

In 1850, Wisconsin enacted a law requiring innkeepers to post a bond for damages attributable to selling alcohol.[46] The law was the first of its kind.[47] More than eighty-five years later, the Supreme Court of Wisconsin held that if the drinker is the injured party, then the drinker does not have a cause of action against the alcohol provider.[48] Wisconsin's dram shop act still embraces that principle today and this Comment endorses that approach.[49] The law should not, and does not, allow drinkers to become intoxicated and then complain to the establishment. Ultimately the drinker (like the establishment) has control over the situation, whereas innocent third parties do not. In 1939, the court adopted a broader policy—liability should be focused solely on the drinker, not on the provider, even if an innocent third party suffers the injury.[50]

In 1985, responding to the court's then recent willingness to expand liability,[51] the Wisconsin State Legislature enacted section 125.035.[52] The statute codified common law and ensured that the court could not expand liability.[53] Yet, "[i]n 1985, the year the legislature enacted the civil immunity statute, 51.5% of the fatal motor vehicle accidents nationwide involved alcohol beverages."[54] According to the court, "the legislature has expressed its intent to focus liability on the person who drinks the alcohol and not on the person who furnishes it or brings about its acquisition."[55] This theory still predominates today.[56]

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44. *Greene v. Farnsworth*, 188 Wis. 2d 365, 370, 525 N.W.2d 107 (Ct. App. 1994).

45. *Stephenson*, 2002 WI 30, ¶¶ 6, 37.

46. Act of Feb. 8, 1850, ch. 139, § 1, 1850 Wis. Sess. Laws 109.

47. Marc E. Odier, Note, *Social Host Liability: Opening a Pandora's Box*, 61 IND. L.J. 85, 87 (1985).

48. *Demge v. Feierstein*, 222 Wis. 199, 203, 268 N.W. 210 (1936).

49. WIS. STAT. § 125.035(2) (2011–12).

50. *Seibel v. Leach*, 233 Wis. 66, 68, 288 N.W. 774 (1939).

51. *See Koback v. Crook*, 123 Wis. 2d 259, 264–66, 366 N.W.2d 857 (1985); *Sorensen v. Jarvis*, 119 Wis. 2d 627, 648–49, 350 N.W.2d 108 (1984).

52. § 125.035.

53. *Meier v. Champ's Sport Bar & Grill, Inc.*, 2001 WI 20, ¶¶ 33–34, 241 Wis. 2d 605, 623 N.W.2d 94.

54. *Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 128, 532 N.W.2d 432 (1995).

55. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 40, 251 Wis. 2d 171, 641 N.W. 2d 158.

56. *See Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶¶ 4–5, 33, 308 Wis. 2d 17, 746 N.W.2d 220 (holding that property owners who were aware that minors were consuming alcohol on their property were not liable when a minor left the property in her vehicle, struck, and severely injured Shannon, Brittney, Brooke, and Lee Nichols).

The statute "describes two general activities that immunize a person from civil liability: the 'procurement' of alcohol for another, and the 'selling, dispensing or giving away' of alcohol to another."[57] Wisconsin courts have regarded the terms "selling," "dispensing," and "giving away" as unambiguous.[58] Because the only litigated issue is what constitutes procurement,[59] this next Subsection focuses on procurement as interpreted by the courts.

2. PROCUREMENT BEFORE *STEPHENSON V. UNIVERSAL METRICS*

Stephenson v. Universal Metrics, Inc.[60] both expanded procurement and undercut conventional causation requirements.[61] But even before the *Stephenson* decision, Wisconsin courts expansively interpreted procurement. These broad interpretations immunize would-be tortfeasors for acts that do not comport with the everyday understanding of procurement. For example, one who financially contributes to purchasing alcohol with the intent that it be consumed procures it under the statute.[62] In *Miller v. Thomack*,[63] the court found that the defendant procured alcohol when she contributed about five dollars toward a case of beer.[64]

In like manner, procurement may be found where one encourages, advises, or assists a person to drink alcohol.[65] In *Greene v. Farnsworth*,[66] the plaintiff alleged that the defendants bought alcohol and then encouraged, advised, and assisted the driver in consuming it.[67] In finding for the defendants, the court held that the defendants' behavior fell under the immunity granted by statute.[68]

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57. *Stephenson*, 2002 WI 30, ¶ 28 (quoting WIS. STAT. § 125.035(2) (1997–98)).

58. *Id.* ("We think it is clear that Kreuser did not 'sell, dispense or give away' alcohol to Devine.").

59. *See Miller v. Thomack*, 210 Wis. 2d 650, 661, 563 N.W.2d 891 (1997) ("Our task is to construe the word procure.").

60. 2002 WI 30, 251 Wis. 2d 171, 641 N.W.2d 220.

61. *Id.* ¶ 37.

62. *Miller*, 210 Wis. 2d at 669.

63. 210 Wis. 2d 650, 563 N.W.2d 891 (1997).

64. *Id.* at 657, 669. In *Meier v. Champ's Sport Bar & Grill, Inc.*, an underage drinker at a bar who contributed money toward alcohol and carried the alcohol to his acquaintances was also held to have procured it under the statute. 2001 WI 20, ¶¶ 6, 18, 241 Wis. 2d 605, 623 N.W.2d 94.

65. *Greene v. Farnsworth*, 188 Wis. 2d 365, 370, 525 N.W.2d 107 (Ct. App. 1994).

66. 188 Wis. 2d 365, 525 N.W.2d 107 (Ct. App. 1994).

67. *Id.* at 369.

68. *Id.* at 368–69.

Eight years later, the court in *Stephenson* stated that *Greene* took a "broad view of procurement."[69] In defining procurement, the court emphasized that the defendants in *Greene* "'encouraged, advised, and assisted' the tortfeasor to drink alcohol."[70] Ultimately, this language helped the court shape its decision in *Stephenson*, in which the court found that the defendant procured alcohol and was thus immune.[71]

3. *STEPHENSON V. UNIVERSAL METRICS*

During a work party at a country club in Wisconsin, a bartender refused to continue serving alcohol to Michael Devine.[72] John Kreuser, Devine's coworker, indicated to the bartender that he would give Devine a ride, and the bartender again began serving Devine.[73] While a factual dispute exists whether Kreuser nodded his head or verbally indicated that he would give Devine a ride, the court concluded that "the actual manner in which Kreuser communicated his agreement [was] immaterial."[74]

Later that night, "Devine told Kreuser that the bartender had cut him off" again and that was the last time that they spoke.[75] Kreuser left without giving Devine a ride.[76] Kreuser neither attempted to notify Devine nor anyone else that he planned to leave.[77] About forty minutes after Kreuser left, Devine crossed the centerline while driving his own vehicle and crashed into another vehicle driven by Kathy Stephenson.[78] Both Stephenson and Devine died.[79] Devine's blood alcohol concentration was 0.338 grams per deciliter, over four times the legal limit.[80]

The plaintiff, Stephenson's widower, did not even bother suing the country club.[81] Although it was clear that the bartender grossly overserved Devine, Wisconsin's dram shop act immunized the country

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69. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 34, 251 Wis. 2d 171, 641 N.W.2d 158.

70. *Id.* (quoting *Greene*, 188 Wis. 2d at 370).

71. *Id.* ¶ 37.

72. *Id.* ¶¶ 4, 6.

73. *Id.* ¶ 6.

74. *Id.* ¶ 6 n.2.

75. *Id.* ¶ 7.

76. *Id.* ¶ 8 & n.3.

77. *Id.* While no evidence shows that Kreuser left before or after Devine, *id.*, that is immaterial, because since he did not even attempt to locate Devine, he failed to act reasonably. *Id.* ¶ 24.

78. *Id.* ¶ 9.

79. *Id.*

80. *Id.* (citing WIS. STAT. §§ 340.01(46m), 346.63(1)(b) (1997–98)).

81. *See id.* ¶ 2.

club—it can never be civilly liable for selling excessive amounts of alcohol to of-age drinkers.[82] Mr. Stephenson also did not sue Devine, the drunk driver who directly caused Mrs. Stephenson's death (presumably due to insolvency, as is the case of many drunk drivers[83]).[84]

Instead Mr. Stephenson sued Kreuser, the coworker that agreed to give Devine a ride but then failed to do so.[85] The Supreme Court of Wisconsin found that "Kreuser's agreement to drive Devine home, coupled with Kreuser's later decision not to drive Devine home, could be viewed as a failure to exercise reasonable care under the circumstances."[86] Thus, the court found that Kreuser committed a negligent act.[87] Despite Kreuser's negligent act, the court held that Kreuser "procured" alcohol for Devine and Wisconsin's dram shop act thus immunized Kreuser, just as it immunized the bartender and the country club.[88]

In so holding, the court determined that procurement is "akin to 'bringing about' or 'causing to happen.'"[89] It must encompass more than giving, otherwise it would be an extraneous addition to the other enumerated actions.[90] Even minor affirmative acts, such as a head nod, are procurement.[91] Kreuser procured alcohol and was immune, because "[h]ad it not been for Kreuser's purposeful actions, the bartender would not have given more alcohol to Devine."[92] The court also held that Wisconsin's six public policy factors forbid liability.[93]

4. NARROW EXCEPTIONS TO STATUTORY IMMUNITY

Although Wisconsin's dram shop act grants broad immunity, it offers three limited exceptions.[94] The first two focus on voluntariness: if the provider causes alcohol consumption either "by force or by representing that the beverages contain no alcohol," then the provider is

82. WIS. STAT. § 125.035(2) (2011–12).
83. Votava, *supra* note 17, at 605.
84. *See Stephenson*, 2002 WI 30, ¶ 2.
85. *Id.*
86. *Id.* ¶ 24.
87. *Id.*
88. *Id.* ¶ 37.
89. *Id.* ¶ 36.
90. *Id.* ¶¶ 35–36.
91. *Id.* ¶¶ 6, 37.
92. *Id.* ¶ 37.
93. *Id.* ¶ 52. See Part I.A for a discussion of Wisconsin's six public policy factors.
94. WIS. STAT. § 125.035(3)-(4) (2011–12).

not immune.[95] The third circumstance permits liability when an individual knowingly provides alcohol to an underage person who then injures a third party.[96]

But one may provide alcohol to an underage person and still retain immunity in four situations.[97] First, property owners must actually provide alcohol to be liable.[98] Even if property owners know that minors are consuming alcohol on their property, they cannot be civilly liable for injuries caused to third parties.[99] Second, individuals may still provide alcohol to underage persons accompanied by a parent, guardian, or spouse who is of legal drinking age.[100] Third, individuals retain their immunity if they provide alcohol to an underage person who uses false identification and reasonably appears to have attained the drinking age.[101] Finally, as with of-age drinkers, those who provide alcohol to underage persons are immune from injuries sustained by the underage recipient of the alcohol.[102]

This Comment does not suggest that Wisconsin should wholly eliminate statutory immunity for alcohol providers. To the contrary, alcohol providers should retain their immunity for injuries suffered by the drinker and for providing alcohol in the regular course of business, within the confines of the law. The dram shop act goes too far, however, when drinking establishments are civilly immune despite violating the criminal code by serving intoxicated persons.[103]

II. WISCONSIN SHOULD ABROGATE IMMUNITY TO CURB DRUNK DRIVING THROUGH PRIVATE ENFORCEMENT

The Wisconsin State Legislature should amend the dram shop act to eliminate broad, ambiguous terms like procurement and expand civil liability to licensed drinking establishments that serve visibly intoxicated

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95. § 125.035(3).

96. § 125.035(4). "'Third party' ordinarily describes one who is not a principal to a transaction." *Meier v. Champ's Sport Bar & Grill, Inc.*, 2001 WI 20, ¶ 23, 241 Wis. 2d 605, 623 N.W.2d 94 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1865 (3d ed. 1992); BLACK'S LAW DICTIONARY 1489 (7th ed. 1999)).

97. § 125.035(4).

98. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 33, 308 Wis. 2d 17, 746 N.W.2d 220. The immunity statute does not apply in these circumstances because alcohol was never "provided" to a minor. *Id.*

99. *Id.*

100. § 125.07(1)(a)1.

101. § 125.035(4)(b).

102. *Anderson v. Am. Family Mut. Ins. Co.*, 2002 WI App 315, ¶¶ 10, 12, 259 Wis. 2d 413, 655 N.W.2d 531.

103. § 125.07(2)(a).

patrons. Expanding civil liability would encourage bar owners to exercise caution and prohibit employees from overserving customers who may drive drunk. In turn, that will reduce alcohol-related injuries and fatalities caused by drunk driving.[104]

The current form of Wisconsin's dram shop act suffers from at least two flaws. First, its use of ambiguous terms like procurement allowed the Supreme Court of Wisconsin in *Stephenson v. Universal Metrics, Inc*. to expand immunity and misconstrue causation. Second, the language is simply too broad. The notion that drinking establishments can do no wrong is mistaken. To solve these problems, this Part compares Wisconsin's statute to other dram shop acts and outlines statutory language that would expand civil liability to licensed drinking establishments that serve alcohol to visibly intoxicated persons.

A. Wisconsin Courts Have Expanded Dram Shop Immunity

Wisconsin's dram shop act states: "[a] person is immune from civil liability arising out of the act of procuring alcohol beverages for or selling, dispensing or giving away alcohol beverages to another person."[105] The courts focus on procurement.[106] Because the courts have expanded procurement to include minor acts, the legislature should avoid ambiguous terms like procurement. The legislature should also identify acts that the statute immunizes and acts that it does not immunize. Wisconsin should not immunize acts unrelated to providing alcohol that constitute independent torts. The court may even be in favor of these changes: although it expanded immunity, it has also repeatedly called for legislative action.[107]

1. *STEPHENSON* EXPANDED THE DEFINITION OF PROCUREMENT AND LOOSENED THE DRAM SHOP ACT'S CAUSATION REQUIREMENT

The majority in *Stephenson* took a result-oriented approach, stating: "[i]t defies common sense to hold someone in Kreuser's position liable while immunizing someone who serves or even encourages alcohol consumption."[108] Perhaps Wisconsin's dram shop act as written *does* defy common sense. The hypothetical scenario with the Smiths in this

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104. *See supra* note 23.

105. § 125.035(2).

106. *See, e.g.*, *Miller v. Thomack*, 210 Wis. 2d 650, 661, 563 N.W.2d 891 (1997).

107. *See, e.g.*, *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 40, 251 Wis. 2d 171, 641 N.W.2d 158.

108. *Id.* ¶ 45.

Comment's introduction makes that clear. At any rate, the court's reliance on the dram shop act's immunity provision in *Stephenson* is misplaced, just as it would be misplaced in the Smiths' situation. Kreuser's negligent act did not stem from his procurement of alcohol for Devine. Instead the court should have relied solely on the six public policy factors to find Kreuser not liable. By relying on the immunity statute, the court both stretched the already broad definition of procurement and loosened the dram shop act's causation requirement.[109]

The majority acknowledged that "this case is a tragic one—a case for which Stephenson justifiably feels that there should be some recourse."[110] But the court's decision leaves Mr. Stephenson, an innocent third-party victim, with no recourse. Had Kreuser fulfilled his promise to Devine or had the bartender continued to refuse service, Michael Devine and Kathy Stephenson might still be alive today.

Whether Kreuser should be liable for his failure to look after Devine following his agreement to do so is a separate issue unrelated to immunity under the dram shop act. Surely Kreuser need not give Devine a ride home at all costs. Nevertheless, Kreuser must act reasonably, and even the majority found that he committed a negligent act.[111] He could have located Devine, notified the country club that he refused to give Devine a ride, taken Devine's keys from him until the next day, or found someone else to give him a ride. Instead Kreuser chose to leave without attempting to notify anyone.[112]

While the plain language suggests that the statute immunizes only "civil liability *arising out of* the act of procuring,"[113] the majority effectively eliminated the causation requirement by finding immunity even though the harm did not "arise out of" Kreuser's procurement.[114] Kreuser's failure to give Devine a ride, not his procurement, was a substantial factor in Mrs. Stephenson's death.[115] Kreuser's so-called procurement prompted the bartender to serve Devine for an additional

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109. *See id.* ¶¶ 37, 53 (Sykes, J., concurring), 63 (Abrahamson, C.J., dissenting).

110. *Id.* ¶ 40. It does not matter that neither Kreuser nor Devine knew of the third party (Kathy Stephenson) before the accident, because in Wisconsin persons are held liable even though "the identity of the harmed person or harmed interest is unknown at the time of the act." *Rockweit v. Senecal*, 197 Wis. 2d 409, 419–20, 541 N.W.2d 742 (1995).

111. *Stephenson*, 2002 WI 30, ¶ 24.

112. *Id.* ¶ 8 n.3.

113. WIS. STAT. § 125.035(2) (2011–12) (emphasis added).

114. *See Stephenson*, 2002 WI 30, ¶¶ 53 (Sykes, J., concurring), 63 (Abrahamson, C.J., dissenting).

115. *Id.*

thirty to forty-five minutes.[116] Nevertheless, the court held that Kreuser's limited procurement of alcohol for Devine absolved him for both his procurement and his failure to give Devine a ride.

Chief Justice Shirley Abrahamson and Justice Diane Sykes agreed that the majority misconstrued causation.[117] They maintained that the statute did not immunize the defendant from liability for his failure to give his coworker a ride.[118] The defendant's liability "[did] not stem from his 'procurement' of alcohol for the drunk driver . . . but from his failure to drive the drunk home."[119]

In an out-of-state case, the California Court of Appeals used similar logic to reverse an order for summary judgment.[120] The court held the defendant liable because the third party was not injured by the defendant's procurement of alcohol, but instead by his promise to withhold the driver's keys, which he failed to do.[121] The Supreme Court of North Dakota similarly held that dram shop statutes do not "cover the entire field of bar owner liability" and recognized the possibility of premises-based liability.[122]

Wisconsin's dram shop act, as interpreted, has unfortunate consequences. Following the majority's logic, alcohol providers are now immune not only from acts "arising out of . . . procuring . . . selling, dispensing, or giving away alcohol,"[123] but also from negligent acts unrelated to providing alcohol.[124] As the Wisconsin Court of Appeals stated:

> Whether the conduct alleged is an underlying tort, a conspiracy to commit it, or aiding and abetting it, the statute immunizes acts growing out of the procurement of alcoholic beverages. . . . [T]he legislature clearly intended to completely immunize such persons from all civil liability, regardless of the number of

116. *Id.* ¶¶ 6–7. Kreuser informed the bartender that he would give Devine a ride home at 8:30 PM, and Devine approached Kreuser between 9:00 PM and 9:15 PM to tell him that the bartender had cut him off again. *Id.* Kreuser did not obtain any more alcohol for Devine. *Id.* ¶ 7.

117. *Id*. ¶¶ 53 (Sykes, J., concurring), 67–69 (Abrahamson, C.J., dissenting).

118. *Id.* ¶¶ 53 (Sykes, J., concurring), 63 (Abrahamson, C.J., dissenting).

119. *Id.* ¶ 53 (Sykes, J. concurring).

120. *See Williams v. Saga Enters.*, 274 Cal. Rptr. 901, 906–07 (Ct. App. 1990).

121. *Id.* at 907.

122. *Zueger v. Carlson*, 542 N.W.2d 92, 95 (N.D. 1996).

123. WIS. STAT. § 125.035(2) (2011–12).

124. *Stephenson*, 2002 WI 30, ¶¶ 53 (Sykes, J., concurring), 63 (Abrahamson, C.J., dissenting).

> people involved or the particular label used by artfully drafted pleadings.[125]

Below, this Comment proposes language that clarifies causation by addressing these concerns.

2. THE COURT'S CALLS FOR LEGISLATIVE ACTION

In dram shop cases, the Supreme Court of Wisconsin has repeatedly called for legislative action. In *Stephenson*, for example, the majority stated: "[T]his case is a tragic one—a case for which Stephenson justifiably feels that there should be some recourse. However, . . . the legislature has expressed its intent to focus liability on the person who drinks the alcohol and not on the person who furnishes it."[126] Of course liability should focus on the person who drinks the alcohol. But that should not prevent Wisconsin from holding others responsible proportionate to their fault. Both public policy goals can be achieved.

Other opinions comment on the statute's inequities. In *Meier v. Champ's Sport Bar & Grill, Inc.*,[127] the majority stated: "We conclude by noting that we do not fail to grasp the severity of harm caused to Jason Meier. We realize that the consequences of our decision may seem harsh. The statute requires the outcome, and it is beyond our powers to redraft it."[128] The common theme among these cases is that the outcomes are less than fair. In *Doering v. WEA Insurance Group*,[129] Chief Justice Abrahamson, writing for the majority, stated:

> Indeed, there are ample reasons for questioning the soundness of sec. 125.035. . . . In an attempt to decrease alcohol-related fatalities and injuries several states have enacted statutes making many negligent suppliers of alcohol beverages liable for injuries caused by their patrons. The Wisconsin legislature, on the other hand, has chosen to grant immunity from civil liability to most of those who provide alcohol beverages to others.[130]

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125. *Greene v. Farnsworth*, 188 Wis. 2d 365, 372–73, 525 N.W.2d 107 (Ct. App. 1994). "[T]he underlying theory of liability is irrelevant as long as the liability sought to be imposed arises out of the act of providing alcoholic beverages." *Stephenson v. Universal Metrics, Inc.*, 2001 WI App 173, ¶ 6, 247 Wis. 2d 349, 633 N.W.2d 707.

126. *Stephenson*, 2002 WI 30, ¶ 40.

127. 2001 WI 20, 241 Wis. 2d 605, 623 N.W.2d 94.

128. *Id.* ¶ 40.

129. 193 Wis. 2d 118, 532 N.W.2d 432 (1995).

130. *Id.* at 128–29.

Ten pages later the Chief Justice continued to point out the statute's shortcomings: "We agree with the plaintiffs that the statute has the effect of treating victims differently. Some victims injured by persons impaired by alcohol beverages may initiate a suit against those furnishing alcohol beverages to the tortfeasor, while other victims may not."[131]

In its many decisions, the court has refused to narrowly interpret the statute. Yet, in doing so, the court continues to encourage the legislature to take another look. As recently as 2008, the court stated:

> If there is to be such an expansion of common-law negligence to cover facts such as those presented here, that decision, which involves policy choices, should be made by the legislature. We encourage the legislature to address the question of whether to hold social hosts accountable for the types of actions alleged in this case.[132]

The legislature has not acted on this issue since 1985, the year that it passed Wisconsin's dram shop act. Harsh outcomes and judicial calls for legislative action, coupled with the gut-wrenching drunk driving statistics, signal to the legislature that the time is ripe for change.

B. Wisconsin's Dram Shop Act: Abrogating Immunity to Drinking Establishments for Serving Visibly Intoxicated Persons

Section A of this Part discussed the Supreme Court of Wisconsin's expansion of procurement and loosening of the dram shop act's causation requirement, along with the court's calls for legislative action. Section B discusses the second major flaw in Wisconsin's dram shop act: the inability to hold drinking establishments civilly responsible for innocent third-party injuries resulting from service to visibly intoxicated persons.

1. DRUNK DRIVING IS A FORESEEABLE CONSEQUENCE OF SERVING A VISIBLY INTOXICATED PERSON

Wisconsin is among just fourteen states that refuse to provide third-party victims with an action against licensed establishments for injuries caused by serving intoxicated persons.[133] Dram shops that serve alcohol to visibly intoxicated persons present foreseeable risks to others. First, drunk driving is a foreseeable consequence of serving visibly

131. *Id*. at 138–39.

132. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 32, 308 Wis. 2d 17, 746 N.W.2d 220.

133. *Dram Shop and Social Host Liability*, *supra* note 14.

intoxicated persons, particularly in rural communities. Wisconsin had over 44,000 convictions for drunk driving offenses in 2010, and drunk driving is much more prevalent than that figure indicates.[134] In fact, "Wisconsin has the highest rate of drunken driving in the nation."[135] Second, it is foreseeable that drunk drivers may injure or kill innocent third parties. In 2009, alcohol contributed to approximately forty-five percent of all traffic fatalities in Wisconsin.[136] This figure does not include countless other injuries, short of death, that resulted from alcohol-impaired driving.[137]

2. WISCONSIN LAW CRIMINALIZES THE SALE OF ALCOHOL TO INTOXICATED PERSONS

Wisconsin law already imposes *criminal* penalties on those who supply alcohol to intoxicated persons.[138] These criminal penalties are harsher than penalties in Wisconsin for first-offense drunk driving. Section 125.07(2)(a) states that "[n]o person may procure for, sell, dispense or give away alcohol beverages to a person who is intoxicated."[139] Those who violate this provision "shall be fined not less than $100 nor more than $500 or imprisoned for not more than 60 days or both."[140]

Wisconsin's apparent willingness to impose criminal penalties on licensed drinking establishments that supply alcohol to intoxicated persons acknowledges that the consequences are foreseeable. It also acknowledges a desire to prevent this behavior. The argument that providing alcohol to an intoxicated person is too remote to impose civil liability[141] does not hold water when the legislature concurrently maintains a law that imposes *criminal* liability.[142]

Yet this criminal law is rarely, if ever, enforced.[143] In 2009, the United States Department of Transportation's National Highway Traffic

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134. *See supra* note 2.

135. *Drunken Driving*, *supra* note 2.

136. *Id.*

137. WIS. DEP'T OF TRANSP., *supra* note 4, at iv, 80.

138. WIS. STAT. § 125.07(2) (2011–12).

139. § 125.07(2)(a)1. The statute defines "person" to include natural persons. § 125.02(14).

140. § 125.07(2)(b).

141. *Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶¶ 40, 43–44, 251 Wis. 2d 171, 641 N.W.2d 158; *Siebel v. Leach*, 233 Wis. 66, 68, 228 N.W. 774 (1939).

142. § 125.07(2)(a).

143. JAMES MOSHER ET AL., U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., REPORT NO. DOT HS 811 142, LEGAL RESEARCH REPORT: LAWS PROHIBITING ALCOHOL SALES TO INTOXICATED PERSONS (2009).

Safety Administration published a report titled *Legal Research Report: Laws Prohibiting Alcohol Sales to Intoxicated Persons*.[144] The report summarizes "legal research on State statutes and regulations that pertain to alcohol sales and/or service to intoxicated people."[145] The report opens by citing alarming statistics:

> At least 85,000 people die each year from alcohol-related causes, making alcohol-related problems the third leading cause of death in the United States. . . . The total monetary cost of alcohol-attributable consequences (including health care costs, productivity losses, and alcohol-related crime costs) in 1998 was estimated to be a staggering $185 billion.[146]

The United States Department of Transportation commented that "[t]he single most notable finding from the enforcement research is that . . . enforcement is relatively rare."[147] The report cites cultural norms, lack of political will, resource limitations, and statutory provisions (such as proof of knowledge) as the main factors contributing to the lack of enforcement.[148]

Tavern owners are unlikely to be deterred from serving intoxicated persons by unenforced laws. The situation is similar to traffic law enforcement. A motorist violates the law by driving five miles per hour over the speed limit, yet many people drive at these speeds because they probably will not receive a citation. Were police to routinely issue citations for driving five miles per hour over the speed limit, fewer people would drive at that speed. As with speeding, serving intoxicated persons is illegal.[149] Yet this law is rarely enforced and enforcement is unlikely to increase because "the bulk of alcohol enforcement work is directed to underage drinking enforcement and prevention."[150] Private enforcement in the form of civil suits will take the burden off of the state.

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144. *Id.*

145. *Id.* at 1. The report "is designed for policymakers, administrators, researchers, law enforcement professionals, health and safety advocacy groups, and others who are working to reduce injuries and fatalities stemming from alcohol-impaired driving." *Id.* at 3.

146. *Id.* at 4.

147. *Id.* at 19 (emphasis omitted).

148. *Id.* at 19–21.

149. WIS. STAT. § 125.07(2)(a) (2011–12).

150. MOSHER ET AL., *supra* note 143, at 19.

3. EXCEPTIONS TO GENERAL IMMUNITY EXIST IN OTHER AREAS OF LAW

Refusing to grant immunity for egregious conduct would prompt drinking establishments to act reasonably. Wisconsin's current approach relies solely on each bartender's individual conscience because bartenders are immune from civil liability and the criminal law is not enforced. That approach has been in place since 1985 and it has not proven successful.

In other areas of law, Wisconsin courts have held persons liable for acts harming third parties despite immunity. For example, public officials are ordinarily immune from personal liability while performing their official duties.[151] Nevertheless, officials lose immunity if they negligently perform a ministerial duty or if their conduct is otherwise "malicious, willful and intentional."[152] In similar fashion, the piercing the corporate veil doctrine permits limited liability members to be individually liable, as opposed to just the corporate entity, when a corporate entity has "no separate mind, will or existence of its own."[153]

In contrast, Wisconsin courts have never restricted immunity in the alcohol arena. Wisconsin cannot rely on the courts for change. The *Stephenson* case is a prime example of the court stretching the law to accommodate taverns. Alcohol immunity is abrogated only when an individual forces or deceives the drinker, or in certain situations when the individual provides alcohol to an underage person.[154]

The Supreme Court of Wisconsin has not gone out of its way to protect third parties harmed in related areas of law involving alcohol. For instance, the court narrowly interpreted a statute to avoid finding joint and several liability when the defendants bought beer for a nineteen-year-old, who later drove drunk and killed someone.[155] The plaintiff requested that the defendants be held jointly and severally liable because they engaged in a "common scheme or plan."[156] One of the narrow exceptions to immunity applied under the dram shop act because the defendants procured alcohol for an underage person, yet the court held that:

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151. *C.L. v. Olson*, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988).

152. *Id.* at 710–11.

153. *Consumer's Co-op of Walworth Cnty. v. Olsen*, 142 Wis. 2d 465, 484, 419 N.W.2d 211 (1988); § 183.0304(2).

154. § 125.035(3)–(4).

155. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶¶ 2–3, 309 Wis. 2d 541, 749 N.W.2d 581.

156. *Id.* ¶ 2.

> [A]lthough Robert Zimmerlee, David Schrimpf, and Tomakia Pratchet acted "in accordance with a common scheme or plan" to procure beer, they did not so act in consuming beer to the point of intoxication and in the subsequent act of driving while intoxicated, and, therefore, David Schrimpf is not jointly and severally liable under § 895.045(2) for the death of Chris Richards.[157]

In her dissent, Chief Justice Abrahamson accused the majority of overcomplicating the issue and rewriting Wisconsin's concerted action statute.[158]

In another instance, the plaintiffs in an antitrust class action filed suit against twenty-four taverns and the Madison-Dane County Tavern League, accusing them of anticompetitive price-fixing.[159] The court ruled in favor of the taverns because their "challenged actions [were] immune from state antitrust law."[160] In response, Justice Louis Butler stated in a strongly-worded dissent:

> At the end of the majority opinion, one is left wondering how one inapplicable doctrine can suddenly become applicable merely by reference to yet another inapplicable doctrine. One must also wonder why such novel and creative readings of the law, even if they made sense, are necessary, when there was a perfectly good, applicable test for private party antitrust immunity all along, the existence of which the majority never even acknowledges. Finally, one is struck by the complete illogic of the majority's apparent conclusion that because taverns are more highly regulated than other industries, there is some state policy of granting them greater, not less, immunity than other industries.[161]

4. OTHER DRAM SHOP ACTS

Thirty-six states permit civil liability against those who provide alcohol to intoxicated persons, including Illinois, Georgia, and New York.[162] Their three approaches permit, to varying degrees, innocent

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157. *Id.*

158. *Id.* ¶¶ 57–58 (Abrahamson, C.J., dissenting).

159. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 1, 308 Wis. 2d 684, 748 N.W.2d 154.

160. *Id.* ¶ 3.

161. *Id.* ¶ 111 (Butler, J., dissenting).

162. *Dram Shop and Social Host Liability*, *supra* note 14.

third parties who are injured to recover from alcohol providers. While Wisconsin has the highest rate of drunk driving in the country, Illinois has about ten percent fewer people driving drunk, and Georgia and New York each cut Wisconsin's figure in half.[163]

a. Illinois

Illinois's dram shop act imposes strict liability on persons licensed to sell alcohol.[164] "The legislative intent of the Dramshop Act is to place responsibility for damages caused by the intoxication from the consumption of alcohol on those who profit from its sale."[165] The act imposes liability when: (1) a person licensed to sell alcohol (2) causes another person's intoxication (3) who injures a third party (in person or property).[166] While Wisconsin immunizes taverns from third-party injuries, Illinois imposes liability on taverns so long as they caused the person's intoxication.[167]

The Illinois dram shop act "is to be liberally construed to protect the health, safety, and welfare of the people from the dangers of traffic in liquor. It grants every person injured a right of action. It provides no statutory defenses."[168] Thus, as a matter of law and public policy, tavern owners may not seek indemnification from the intoxicated person,[169] or exculpate themselves by having patrons sign releases of liability.[170] Nor may tavern owners decrease their liability by amounts that injured parties recover from their own insurers.[171] In fact, any violation subjects dram shops to joint and several liability.[172]

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163. *State Estimates of Persons Aged 18 or Older Driving under the Influence of Alcohol or Illicit Drugs*, NSDUH REPORT (Apr. 17, 2008), http://www.oas.samhsa.gov/2k8/stateDUI/stateDUI.htm.

164. 235 ILL. COMP. STAT. ANN. 5/6–21(a) (West 2005).

165. *Walter v. Carriage House Hotels, Ltd.*, 646 N.E.2d 599, 602 (Ill. 1995).

166. Illinois's dram shop act states in relevant part:

> Every person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor, within or without the territorial limits of this State, causes the intoxication of such person.

235 ILL. COMP. STAT. ANN. 5/6–21(a).

167. *Id.*; WIS. STAT. § 125.035(2) (2011–12).

168. *Walter*, 646 N.E.2d at 602–03 (quoting *Nelson v. Araiza*, 372 N.E.2d 637, 638 (Ill. 1977)).

169. *Wessel v. Carmi Elks Home, Inc.*, 295 N.E.2d 718, 721 (Ill. 1973).

170. *Scheff v. Homestretch, Inc.*, 377 N.E.2d 305, 308 (Ill. App. 1978).

171. *Muranyi v. Turn Verein Frisch-Auf*, 719 N.E.2d 366, 371–72 (Ill. App. 1999).

172. 235 ILL. COMP. STAT. ANN. 5/6–21(a).

To be sure, Illinois's dram shop act is harsh on licensed establishments: "as our courts have long recognized, the Dramshop Act is primarily a police-power regulation intended to protect the public by controlling the evils resulting from the liquor trade."[173] But it also limits recoveries.[174] Damages caps increase or decrease each year relative to the consumer price index.[175] In 2012, Illinois capped damages for a direct injury at $62,961.47 and for loss of means of support or society at $76,952.91.[176] Illinois, like Wisconsin, refuses to impose liability on persons licensed to sell alcohol when the intoxicated person himself suffers an injury.[177] Nor does Illinois hold strictly liable licensed distributors or brewers who are only connected by furnishing an "apparatus for the dispensing or cooling of beer."[178]

By imposing strict liability, Illinois limits the burden on courts by eliminating the need to determine factual issues such as visible intoxication, knowledge, and procurement. It also allows innocent third-party victims to recover. In consideration for a plaintiff-friendly standard, the act limits recoveries.[179] The Illinois courts and legislature also recognize that the ultimate loss in many dram shop cases will be borne not by the dram shop operator, but by an insurance company.[180] But the loss to the tavern "may be of an indirect nature which arises from the owner's or operator's fear of cancellation of insurance or prohibitive premiums."[181]

b. Georgia

Georgia's dram shop act permits suits only in egregious situations, but it still provides for broader liability than Wisconsin's dram shop act:

> [A] person . . . who knowingly sells, furnishes, or serves alcoholic beverages to a person who is in a state of noticeable intoxication, knowing that such person will soon be driving a motor vehicle, may become liable for injury or damage caused by or resulting from the intoxication of such . . . person when

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173. *Muranyi*, 719 N.E.2d at 371 (citing *Nelson*, 372 N.E.2d at 638).

174. 235 ILL. COMP. STAT. ANN. 5/6–21(a).

175. *Id.*

176. *Dram Shop Liability Limits*, ST. ILL. COMPTROLLER, http://www.ioc.state.il.us/index.cfm/linkservid/20DA0861-1CC1-DE6E-2F48D55C7A0613FE/showMeta/0/ (last visited Feb. 10, 2013).

177. 235 ILL. COMP. STAT. ANN. 5/6–21(a); WIS. STAT. § 125.035(2) (2011–12).

178. 235 ILL. COMP. STAT. ANN. 5/6–21(a).

179. *Id.*

180. *See Wessel v. Carmi Elks Home, Inc.*, 295 N.E.2d 718, 720 (Ill. 1973).

181. *Id.*

> the sale, furnishing, or serving is the proximate cause of such injury or damage.[182]

Georgia's statute contains language permitting civil liability for providing alcohol to persons "in a state of noticeable intoxication."[183] But Georgia's statute contains a key qualification: the alcohol provider must *know* that the patron "will soon be driving a motor vehicle." This language severely limits recoveries.

Yet Wisconsin's dram shop act is even more limiting. In Wisconsin, alcohol providers are not liable even if they serve already-intoxicated patrons, knowing that the patrons will soon drive. In a rural Wisconsin setting, where the bartenders and the "regulars" know each other, this statute could provide an effective deterrent. The bartender would observe the patron arrive in his or her vehicle and would be familiar enough with the patron to know that he or she would soon drive. Georgia's dram shop act addresses specific egregious situations that may arise, but requiring knowledge that the patron will soon drive is too restrictive.

c. New York

In contrast to Georgia's dram shop act, New York's statute permits civil suits for any injuries resulting from an unlawful alcohol sale:

> Any person who shall be injured . . . by any intoxicated person . . . shall have a right of action against any person who shall, *by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person*, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.[184]

New York defines "unlawful selling" as providing alcohol to any underage person, visibly intoxicated person, or known habitual drunkard.[185] Many states have adopted the "visibly intoxicated person" standard.[186] New York's statute is reasonable—if you break the law, you may be held both criminally and civilly liable.

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182. GA. CODE ANN. § 51-1-40(b) (2000).
183. *Id.*
184. N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2010) (emphasis added).
185. N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 2011).
186. *See supra* text accompanying note 162.

C. A Solution

Society has an interest in imposing liability on dram shops when the consequences of overserving patrons are so foreseeable and so tragic. In the 2000s, the Supreme Court of Wisconsin both broadened immunity for alcohol providers[187] and limited the exception concerning underage drinkers.[188]

1. PROPOSED STATUTORY LANGUAGE

Wisconsin can improve its dram shop act. The following language strikes a balance by addressing concerns yet preserving immunity in some situations:

> (a) "Provide" means to sell, dispense, distribute, or give away.
> (b) Except as provided in sub. (c), a person is immune from civil liability arising out of his or her act of providing alcohol if the alcohol provided by that person is a substantial factor in causing injury to another person.
> (c) A licensed drinking establishment is not immune from civil liability under sub. (b) if it provides alcohol to a visibly intoxicated person who injures a third party.
> (d) If a licensed drinking establishment provides alcohol to a visibly intoxicated person who injures a third party, the licensed drinking establishment shall be civilly liable to the third party in proportion to its fault.

The National Highway Traffic Safety Administration's report sheds light on how to define "visibly intoxicated."[189] Wisconsin could define "visibly intoxicated" as "a condition in which a person has drunk enough alcoholic beverages to observably affect his manner, disposition, speech, muscular movement, general appearance or behavior."[190] Alternatively, Wisconsin could list indicators of intoxication, much like Nebraska does: problems with balance, ineffective muscular coordination, strong alcohol smell, slurred speech, bloodshot and/or glassy eyes, condition of clothes and hair, or unusual behavior (e.g., vomiting, fighting, or loud or obnoxious conduct).[191]

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187. *See Stephenson v. Universal Metrics, Inc.*, 2002 WI 30, ¶ 37, 251 Wis. 2d 171, 641 N.W.2d 158.

188. *Nichols v. Progressive N. Ins. Co.*, 2008 WI 20, ¶ 3, 308 Wis. 2d 17, 746 N.W.2d 220.

189. MOSHER ET AL., *supra* note 143.

190. *Id.* at 10.

191. *Id.* at 11.

To prove visible intoxication, testimony from those who observe the patron while at and after leaving the establishment is crucial. Video surveillance tapes may be available. Circumstantial evidence may also be helpful, such as the patron's blood alcohol concentration, itemized bar tabs, and expert testimony regarding the patron's intoxication.[192] Some states, such as New Mexico, use the patron's blood alcohol concentration level as a rebuttable presumption of intoxication, and the defendant then bears the burden of proving a lack of visible signs of intoxication.[193]

The visible intoxication requirement gives more leeway than laws against operating while intoxicated, which look predominantly to blood alcohol concentration. It addresses the concern that bartenders may not be able to determine whether patrons with a high alcohol tolerance are intoxicated, because their intoxication must also be visible. The proposed language is also more lenient than the criminal statute prohibiting service to intoxicated persons, because it adds the additional requirement that a patron's intoxication must be visible.[194]

Taverns may also be concerned that holding them liable for serving visibly intoxicated patrons is unfair when the bar is crowded. But Chicago and New York City have crowded bars, and those bars can be sued for serving intoxicated patrons.[195] Besides, Wisconsin's statute criminalizing service to intoxicated persons does not cut taverns more slack merely because they are busy and profitable.[196]

Furthermore, the proposed language retains immunity for nonlicensed social hosts for several reasons. First, unlike licensed drinking establishments, "social hosts have neither the expertise to monitor the alcohol consumption of their guests nor the insurance to adequately cover potential liability."[197] Second, granting social hosts immunity avoids sticky fact situations. Alcohol consumption in bars is public, whereas consumption on private property is not. Third, "public drinking establishments, especially bars and restaurants, are the single largest source of alcohol-impaired drivers."[198] "Businesses that sell

192. *Id.* at 13.

193. *Id.* at 30. The blood alcohol concentration level triggering a rebuttable presumption in New Mexico is 0.14 grams per deciliter. *Id.*

194. *See* WIS. STAT. § 125.07(2)(a) (2011–12).

195. *See* 235 ILL. COMP. STAT. ANN. 5/6–21(a) (West 2005); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 2010).

196. *See* § 125.07(2)(a).

197. Nina J. Emerson & Sarah B. Stroebel, *Another Look at Dram Shop Liability*, 73 WIS. LAW. 14 (2000).

198. *Id.* (citing A. James McKnight, *Server Intervention: Accomplishments and Needs*, 17 ALCOHOL HEALTH & RES. WORLD 76, 76 (1993); Traci L. Toomey et al., *Alcohol Sales to Pseudo-Intoxicated Bar Patrons*, 114 PUB. HEALTH REP. 337, 338 (1999)).

intoxicating beverages are subject to restrictions and requirements that other enterprises are not subjected to."[199]

2. THE PROPOSED LANGUAGE'S UTILITY

Expanding civil liability should reduce alcohol-related injuries and fatalities caused by drunk driving. According to the National Highway Traffic Safety Administration, "[s]tudies indicate that enforcement and prosecution of dram shop laws (and resulting case decisions) are associated with a substantial reduction in alcohol-related harm."[200] After reviewing eleven studies, the Community Preventative Services Task Force concluded "on the basis of strong evidence that dram shop liability is effective in preventing and reducing alcohol related harms."[201] Each study found that dram shop liability was associated with a reduction in alcohol-related motor vehicle fatalities.[202] The median reduction was 6.4%.[203]

On balance, these proposed changes to the dram shop act represent the most efficient resource allocation. Taverns should be held liable, in proportion to their fault,[204] instead of forcing innocent third parties to absorb the costs. Wisconsin's dram shop act also burdens taxpayers, who must cover unpaid medical bills that should be paid by licensed drinking establishments that serve intoxicated patrons. Increased liability exposure will prompt dram shops to "better train servers and . . . promote designated driver programs."[205]

Tavern owners are not only in the best position to pay, but most importantly are in the best position to prevent service to visibly intoxicated persons. Innocent third parties have no reasonable means of evaluating the potential danger and preventing injury from drunk drivers.

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199. *State v. Eastman*, 148 Wis. 2d 254, 258, 435 N.W.2d 278 (Ct. App. 1988). "The production and sale of alcohol beverages are highly regulated and have been subject to special controls for a long time." AARON R. GARY, ALCOHOL BEVERAGES REGULATION IN WISCONSIN § 1.3 (2012).

200. DOT, PREVENTING OVER-CONSUMPTION OF ALCOHOL, *supra* note 23.

201. *Preventing Excessive Alcohol Consumption: Dram Shop Liability*, COMMUNITY GUIDE (Apr. 5, 2012), http://www.thecommunityguide.org/alcohol/RRdramshop.html; *see also* Veda Rammohan et al., *Effects of Dram Shop Liability and Enhanced Overservice Law Enforcement Initiatives on Excessive Alcohol Consumption and Related Harms: Two Community Guide Systematic Reviews*, 41 AM. J. PREVENTIVE MED. 334 (2011); *Dram Shop and Social Host Liability*, *supra* note 14.

202. *See supra* note 201.

203. *See supra* note 201.

204. Wisconsin's comparative negligence standard will ensure that tavern owners and bartenders will not be treated unfairly and that liability will be proportionate to their actions. *See* WIS. STAT. § 895.045(1) (2011–12).

205. Votava, *supra* note 17, at 605.

Individual civil enforcement will be more effective than state enforcement via the criminal code.[206] The state cannot be relied upon to bear the entire burden.

Licensed drinking establishments will be able to insure against these risks by expanding their liability insurance coverage. In fact, they already deal with this issue because Wisconsin permits civil liability for serving underage persons to discourage underage drinking.[207] Wisconsin should "spread the risk over a large segment of society through the device of insurance rather than imposing the entire risk on the innocent victim of drunken driving."[208] Dram shops should be responsible for insuring against these risks because they are more culpable than innocent third parties. By serving visibly intoxicated individuals, taverns and bartenders are already breaking the law.

If enacted, the proposed statute would eliminate ambiguity in the term "procuring." It would also clarify the existing causal link required between providing alcohol and the injury caused. Finally, it would extend civil liability to licensed drinking establishments that serve visibly intoxicated patrons.

CONCLUSION

Wisconsin taverns profit from alcohol sales and have the ability to regulate alcohol consumption, yet assume zero responsibility for third-party injuries caused by overserving customers. The Wisconsin Department of Transportation began the "Zero in Wisconsin" campaign with the premise that "any preventable traffic death is one too many."[209] Wisconsin is far from that goal. If Wisconsin remains on this course, the state Department of Transportation may as well change the campaign's title to better reflect the legislature's priorities: "Zero Tavern Liability in Wisconsin."

The Wisconsin State Legislature should amend the dram shop act to eliminate broad, ambiguous terms like procurement, and expand civil liability to licensed drinking establishments that serve visibly intoxicated patrons. These proposed changes would reduce alcohol-related injuries and fatalities caused by drunk driving or otherwise.[210]

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206. MOSHER ET AL., *supra* note 143.

207. § 125.035(4).

208. *Koback v. Crook*, 123 Wis. 2d 259, 269, 366 N.W.2d 857 (1985) (quoting *Kelly v. Gwinnell*, 476 A.2d 1219, 1225 n.9 (N.J. 1984)).

209. *Zero in Wisconsin*, *supra* note 22.

210. *See supra* note 23.