

ness to erode the doctrine of absolute judicial immunity, even in a case in which the action was clearly inexcusable and unfounded. This reaffirmation of the doctrine leads to two conclusions. First, it lends new impetus to the calls for extending only qualified immunity to judges in section 1983 cases<sup>38</sup> and to the suggestions that governmental units should be held liable for the constitutional violations of their employees.<sup>39</sup> Second, the decision precludes the possibility that the Court will apply qualified immunity to the judiciary.<sup>40</sup> Congressional action to apply qualified immunity to judges or to hold governmental units liable, or both,<sup>41</sup> is necessary to make section 1983 a viable remedy for persons injured by a judge's actions.

TORTS—COMMON LAW LIABILITY—SOCIAL HOST MAY BE LIABLE TO THIRD PARTIES. *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). An automobile passenger brought an action for damages against the owner and the manager of an apartment complex who allegedly furnished intoxicating liquors to the driver of the automobile in which plaintiff was riding. He claimed that the driver's resulting intoxication caused the car's collision with a roadway abutment and his consequent injuries. Plaintiff further alleged that defendants knew or should have known that their guest was becoming excessively intoxicated and intended to operate a motor vehicle follow-

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38. See generally Kates, *supra* note 18; *Developments in the Law, supra* note 18, at 1202-04; Note, *Immunity of Federal and State Judges from Civil Suit—Time for a Qualified Immunity?*, 27 CASE W. RES. L. REV. 727 (1977); Note, *supra* note 18.

39. See generally Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175 (1977). Holding the governmental unit liable for the judge's unconstitutional action would provide a remedy for the injured plaintiff, would allocate the cost to the general public, which benefits from the judge's employment, and, to the extent that state judges are a part of the political process, would deter unconstitutional actions.

40. *Id.* See *Butz v. Economou*, 98 S. Ct. 2894, 2916 (1978) (Rehnquist, J., dissenting). In discussing the disparate treatment of judges and prosecutors, who receive absolute immunity, and other state officials, who receive only qualified immunity, Justice Rehnquist observed: "But the cynical among us might not unreasonably feel that this is simply another unfortunate example of judges treating those who are not part of the judicial machinery as 'lesser breeds without the law.'" *Id.* at 2922 n\*.

41. The fine line between promoting independent decisionmaking and deterring malicious or unconstitutional action may best be drawn by providing for liability of the governmental unit, but allowing the good faith and reasonable belief defense of qualified immunity.

ing her consumption of the liquor. The trial court sustained the defendants' demurrers, and the passenger sought mandamus.<sup>1</sup> The California Supreme Court issued the writ and *held*: Under both common law and the California Business and Professions Code,<sup>2</sup> a social host who furnishes intoxicating liquor to "an obviously intoxicated" guest may be liable for harm to third parties when the risk of injury to others is reasonably foreseeable.<sup>3</sup>

The common law imposes liability upon a person for foreseeable injuries proximately caused by his failure to exercise reasonable care for the protection of others.<sup>4</sup> A purveyor of intoxicating liquors traditionally was not liable in tort for injury to the person or property of another caused by his patron or guest.<sup>5</sup> The rationale for the rule was that the proximate cause of the injury was not the furnishing of the alcoholic beverages, but rather their consumption by the purchaser or donee.<sup>6</sup>

Legislatures in many states modified this rule by the enactment of "dram shop" acts, which created a cause of action in injured third parties against persons who illegally sold or furnished intoxicating liquors.<sup>7</sup> Other states established criminal sanctions for the sale or gift of intoxicating liquors to designated classes of persons, such as minors or visibly intoxicated persons.<sup>8</sup> Courts employed these two kinds of enactments to extend the civil liability of both commercial and noncommer-

1. *Coulter v. Superior Court*, 21 Cal. 3d 144, 147-48, 577 P.2d 669, 670-71, 145 Cal. Rptr. 534, 537-38 (1978).

2. CAL. BUS. & PROF. CODE § 25602 (Deering 1976). "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."

3. *Coulter v. Superior Court*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

4. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30 (4th ed. 1971).

5. *E.g.*, *Howlett v. Doglio*, 402 Ill. 311, 83 N.E.2d 708 (1949); *Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (1951); *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966); *Tarwater v. Atlantic Co.*, 176 Tenn. 510, 144 S.W.2d 746 (1940); *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939). *See generally* H. BLACK, *A TREATISE ON THE LAWS REGULATING MANUFACTURE AND SALE OF INTOXICATING LIQUORS* § 281 (1892).

6. *E.g.*, *King v. Henkie*, 80 Ala. 505 (1886); *Collier v. Stamatis*, 63 Ariz. 285, 162 P.2d 125 (1945); *Nolan v. Morelli*, 154 Conn. 432, 226 A.2d 383 (1967).

7. Approximately fifteen states presently have dram shop acts. *See, e.g.*, ALA. CODE tit. 6, § 6-5-71 (1975); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); OHIO REV. CODE ANN. § 4399.01 (Page 1973).

8. *See, e.g.*, FLA. STAT. ANN. § 562.50 (West 1962); MASS. ANN. LAWS ch. 138, § 69 (Michie/Law. Co-op 1972); MO. ANN. STAT. § 311.310 (Vernon 1963). For a thorough discussion of the history of dram shop legislation, see Hagglund & Arthur, *Common Law Liquor Liability*, 7 FORUM 73 (1971).

cial dispensers of alcoholic beverages to third parties.<sup>9</sup>

Dram shop acts initially applied only to commercial purveyors of alcoholic beverages.<sup>10</sup> Some courts, however, have recently interpreted the language of acts that impose civil liability on "any person" illegally "selling, bartering, or giving"<sup>11</sup> alcoholic beverages to include social hosts,<sup>12</sup> despite the arguments that legislatures intended "giving" to include only those "gifts" that were merely a "subterfuge for sale"<sup>13</sup> and that the title of the acts should limit their application to those in the liquor business.<sup>14</sup>

Liquor control statutes with criminal sanctions also provided a vehicle for judicial extension of tort liability. Violation of statutory prohibitions may be negligence per se, or evidence of negligence, if the injured party falls within the class of persons the legislature intended to protect and if the harm that occurs is one the statute was designed to prevent.<sup>15</sup> In addition to finding a violation of the penal statute, a court must also find that the sale or gift of liquor proximately caused the injury.<sup>16</sup> Several courts have held owners and operators of taverns civilly liable on these grounds,<sup>17</sup> and a few have even applied such rea-

9. Actions allowed against a tavern owner for injuries sustained by the consumer himself are not treated in this casenote. For examples of such actions, see *Galvin v. Jennings*, 289 F.2d 15 (3d Cir. 1961) (automobile accident); *Ramsey v. Ancil*, 106 N.H. 375, 211 A.2d 900 (1965) (piece of glass embedded in wrist when patron pounded fist on table); *Soronen v. Olde Milford Inn*, 46 N.J. 582, 218 A.2d 630 (1966) (fatal fall in tavern); *Smith v. Evans*, 421 Pa. 247, 219 A.2d 310 (1966) (automobile accident); *Majors v. Brodhead Hotel*, 416 Pa. 265, 205 A.2d 873 (1965) (fell or jumped from ledge onto roof of hotel kitchen); *Schelin v. Goldberg*, 188 Pa. Super. Ct. 341, 146 A.2d 648 (1958) (struck by another customer when plaintiff attempted to pin a flower on him).

10. See e.g., *Cruse v. Aden*, 127 Ill. 231, 20 N.E. 73 (1889); *Miller v. Owens-Illinois Glass Co.*, 48 Ill. App. 2d 412, 199 N.E.2d 300 (1964).

11. See MINN. STAT. ANN. § 340.95 (West 1972) (amended 1977):

Every husband, wife, child, parent, guardian, employer, or other person who is injured in person or property, or means of support, by any intoxicated person, has a right of action, in his own name, against any person who, by illegally selling, bartering or giving intoxicating liquors, caused the intoxication of such person, for all damages, sustained; and all damages recovered by a minor under this section shall be paid either to such minor or to his parent, guardian, or next friend, as the court directs; and all suits for damages under this section shall be by civil action in any court of this state having jurisdiction thereof.

12. See, e.g., *Williams v. Klemesrud*, 197 N.W.2d 614 (Iowa 1972); *Ross v. Ross*, 294 Minn. 115, 200 N.W.2d 149 (1972). See generally, 48 NOTRE DAME LAW. 709 (1973); 1973 WASH. U.L.Q. 708.

13. See *Harris v. Hardesty*, 111 Kan. 291, 296, 207 P. 188, 190 (1922).

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

15. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

16. W. PROSSER, *supra* note 3, at § 42.

17. See, e.g., *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 233 N.E.2d 18 (1968); *Trail v. Christian*, 298 Minn. 101, 213 N.W.2d 618

soning to private individuals.<sup>18</sup>

Because it had no dram shop act, California relied on its liquor control statutes<sup>19</sup> to render those who serve liquor liable to third parties who are injured by the intoxicated person. Citing the staggering number of alcohol-related automobile accidents, the California Supreme Court in *Vesely v. Sager*<sup>20</sup> overruled prior decisions,<sup>21</sup> and held that civil liability could be imposed on a vendor of intoxicating liquors even though the patron's consumption intervened between the sale and the injury to the third party.<sup>22</sup> The duty to the plaintiff injured by the inebriated patron arose from a statute that prohibits the furnishing of liquor to obviously intoxicated persons; the purpose of the statute is to protect the general public from injury resulting from excessive use of alcoholic beverages.<sup>23</sup> The court ruled that the vendor's sale met the proximate cause requirement because the sale was a substantial factor in causing the injury and because the consumptive act of the patron was reasonably foreseeable at the time of the negligent sale.<sup>24</sup> A year later the California Court of Appeal in *Brockett v. Kitchen Boyd Motor Co.*<sup>25</sup> applied *Vesely* to a parallel section of the liquor control statute, which prohibited the sale of liquor to minors.<sup>26</sup> Construing the words "every person" to encompass both commercial and noncommercial

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(1973); *Rappaport v. Nichols*, 31 N.J. 188, 156 A.2d 1 (1959); *Jardine v. Upper Darby Lodge No. 1973*, 413 Pa. 626, 198 A.2d 550 (1964). *But see, e.g.*, *Carr v. Turner*, 238 Ark. 889, 385 S.W.2d 656 (1965); *Holmes v. Circo*, 196 Neb. 496, 244 N.W.2d 65 (1976); *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 450 P.2d 358 (1969); *Hall v. Budagher*, 76 N.M. 591, 417 P.2d 71 (1966); *Hulse v. Driver*, 11 Wash. App. 509, 524 P.2d 255 (1974).

18. *See Brattain v. Herron*, 159 Ind. App. 634, 309 N.E.2d 150 (1974); *Thaut v. Finley*, 50 Mich. App. 611, 213 N.W.2d 820 (1973).

19. CAL. BUS. & PROF. CODE §§ 25602, 25658 (Deering 1976). Section 25658(a) provides: "Every person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." For the text of § 25602, see note 1 *supra*.

20. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

21. The court overruled the following cases: *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Lammers v. Pacific Elec. Ry.*, 186 Cal. 379, 199 P. 523 (1921); *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); *Hitson v. Dwyer*, 61 Cal. App. 2d 803, 143 P.2d 952 (1943).

22. *Vesely v. Sager*, 5 Cal. 3d 153, 165, 486 P.2d 151, 160, 95 Cal. Rptr. 623, 631-32 (1971). *See* 5 LOY. L.A. L. REV. 441 (1972); 1971 WASH. U.L.Q. 645.

23. 5 Cal. 3d at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631.

24. *Id.*

25. 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972) (employer liability for accident caused by intoxicated minor employee after leaving office Christmas party).

26. For the text of the pertinent section, see note 19 *supra*.

purveyors,<sup>27</sup> the court held a social host liable for injuries to a third party.<sup>28</sup>

Both *Vesely* and *Brockett* expressly left open the issue whether a noncommercial supplier could be subject to civil liability to third parties for providing alcoholic beverages to an obviously intoxicated person.<sup>29</sup> *Coulter v. Superior Court*<sup>30</sup> resolved this question by adopting the Court of Appeal's construction of "every person" in its interpretation of section 25602.<sup>31</sup> The court, however, went a step further and held that damage suits against a social purveyor may be maintained on the basis of "established general negligence principles" wholly apart from the liquor control statute.<sup>32</sup> The existence of the host's common law duty rests on the foreseeability of harm to third persons on the highway, the certainty of plaintiff's injuries, the close connection between the host's conduct and the injury suffered, and the strong public policy that seeks to prevent future alcohol-related accidents.<sup>33</sup>

While the decision in *Coulter* seems far-reaching, at least in terms of popular perceptions of appropriate conduct, it is actually only a short step from *Vesely*. Once *Vesely* removed the traditional proximate cause bar to the maintenance of a negligence action,<sup>34</sup> the California court needed only to establish the existence of a supplier's duty to third parties injured by the inebriate.<sup>35</sup> The liquor control laws provided a statutory basis from which to infer this duty. After *Brockett* and *Coulter* extended this duty to noncommercial as well as commercial providers of alcoholic beverages, the finding of a common law duty was virtually inevitable.<sup>36</sup> In light of the deadly combination of automobiles and intoxicated drivers,<sup>37</sup> the California Supreme Court justifiably found that service of liquor to an obviously intoxicated guest is a breach of the supplier's duty of due care.

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27. 24 Cal. App. 3d 87, 93, 100 Cal. Rptr. 752, 756 (1972).

28. *Id.*

29. *Vesely v. Sager*, 5 Cal. 3d 153, 157, 486 P.2d 151, 153, 95 Cal. Rptr. 623, 625 (1971); *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 93, 100 Cal. Rptr. 752, 756 (1972).

30. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

31. *Id.* at 152, 577 P.2d at 673, 145 Cal. Rptr. at 538.

32. *Id.* at 149, 577 P.2d at 672, 145 Cal. Rptr. at 537.

33. *Id.* at 154-55, 577 P.2d at 674-75, 145 Cal. Rptr. at 539-40.

34. See notes 20-24 *supra* and accompanying text.

35. See *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (1976); *Coffman v. Kennedy*, 74 Cal. App. 3d 28, 141 Cal. Rptr. 267 (1977); *Brockett v. Kitchen Boyd Motor Co.*, 24 Cal. App. 3d 87, 100 Cal. Rptr. 752 (1972).

36. See cases cited note 35 *supra*.

37. "For the year 1976, alcohol was described as the *primary* collision factor in 28.3 percent