

# MAKING LIQUOR IMMUNITY WORSE: NEVADA'S UNDUE PROTECTION OF COMMERCIAL HOSTS EVICTING VULNERABLE AND DANGEROUS PATRONS

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## INTRODUCTION

It's no secret that entertainment and recreation in Nevada—much of it alcohol fueled—is big business. Much of the state's economic activity involves hotels, restaurants, bars, shows, outdoor recreation, and related pursuits, with booze commonly a part of the experience in the form of drinks with dinner, drinks with the show, drinks in the golf cart, and so on.<sup>1</sup>

Not surprisingly, this prominence has made the resort industry and its alcohol-related components economically, politically, and legally powerful. Booze is money in much the same way that oil is money, mineral rights are money, a gaming license is money, and so on. Liquor manufacturers and vendors are among the wealthiest merchants in society. Unsurprisingly, with wealth comes stature and power, albeit often with at least some regulation and supervision. The liquor industry is more heavily regulated than most enterprises, but tends (like other wealthy businesses) to come out ahead in its political, economic, social, and legal battles.

There is, to be sure, a countervailing reaction that emerges on occasion—the “hate” half of America's love-hate relationship with liquor. The apparently frequent alcohol-fueled violence and disruption of nineteenth century America set the stage for the amazing over-reaction of Prohibition. A more productive example of alcohol regulation has been the move to reduce alcohol-related driving injuries, especially among the young.

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<sup>1</sup> Although Nevada is perhaps an extreme case of having alcohol so front and center in its daily life, there is no denying the socioeconomic significance of alcohol around the world and throughout history. *See generally* TOM STANDAGE, *A HISTORY OF THE WORLD IN 6 GLASSES* (2005). Author Standage illustrates the degree to which drink can have vast influence on society and its institutions. The book chronicles the development of wine, beer, coffee, tea, distilled alcohol, and soft drinks, their impact on society, and the degree to which the role and place of those beverages—sometimes changing in response to the introduction or increasing popularity of a competing beverage—reflected society.

One area in which alcohol's opponents and public safety gained and largely held ground was through expansion of liability for servers of alcoholic beverages if their patrons were allowed to drink to excess and then caused or suffered injury. This was accomplished through judicial imposition of tort liability and legislative enactment of "dram shop" laws.<sup>2</sup>

But a handful of states, including Nevada, have been consistently resistant to enacting dram shop laws<sup>3</sup> or recognizing common law liability for liquor vendors as one might find for negligent plumbers, electricians, and carpenters (and drivers, of course). This is perhaps no surprise in a state in which the leading industries are casinos, clubs, and entertainment generally—and where a legislature of term-limited part-timers meets only every other year.

Rather than stepping into the breach left by the state's political structure, the Nevada Supreme Court has taken the stance of early twentieth century courts, which applied narrow concepts of duty, causation, and liability in order to restrict lawsuits against liquor establishments.<sup>4</sup> The combined effect has effectively made Nevada the citadel of alcohol immunity in America—even in the most troubling of situations.<sup>5</sup>

In Part I, this Article briefly introduces dram shop laws and modern liquor liability.<sup>6</sup> In Part II, it examines Nevada law, focusing on the Nevada Supreme Court's particularly troubling recent jurisprudence.<sup>7</sup> The Nevada Supreme Court (or at least a panel of its justices)<sup>8</sup> has so vigorously embraced alcohol

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<sup>2</sup> See FRANK A. SLOAN ET AL., DRINKERS, DRIVERS, AND BARTENDERS: BALANCING PRIVATE CHOICES AND PUBLIC ACCOUNTABILITY 111–144 (2000) (describing rationale, origin, growth, and application of dram shop laws). As summarized in a recent court decision:

The term "dram shop liability" refers to "[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer." Black's Law Dictionary 568 (9th ed. 2009). "Dram shop" is an archaic term for a bar or tavern. Black's Law Dictionary 567. The term "dram" is an antiquated unit of fluid measurement, equivalent to one eighth of a liquid ounce, used by apothecaries; its use in the phrase "dram shop" was a result of the fact that taverns often sold hard alcohol by the dram.

Warr v. JMGM Grp., 70 A.3d 347, 349 n.1 (Md. 2013).

<sup>3</sup> Or what one might deem "normal" dram shop laws. The current Nevada statute conveys immunity for commercial liquor businesses while imposing social host liability if a homeowner hosting a neighborhood party should let one tortfeasor guest have one too many. See NEV. REV. STAT. § 41.1305 (2013); *infra* notes 57–59 and accompanying text.

<sup>4</sup> See *infra* notes 43–55 and accompanying text.

<sup>5</sup> See *infra* notes 43–78 and accompanying text.

<sup>6</sup> See *infra* notes 10–41 and accompanying text.

<sup>7</sup> See *infra* notes 42–109 and accompanying text.

<sup>8</sup> I have always found it odd that a court that is supposed to be *the* supreme court for a state sits in panels of three to hear and decide cases (Nevada is not alone in this practice), particularly in a state with elected justices (again, Nevada is not alone). The voters chose a particular group of justices to serve as the state's high court. The voters deserve to have the full participation of all members of the court for each case, as there is no higher court of further review (although the full court can determine to review a panel decision en banc). Under the status quo, litigants appearing before Nevada's Supreme Court suffer the randomness of panel composition, which can at the margin impact the decision (for example, drawing the three most pro-defendant justices, the three most pro-plaintiff justices, etc.) in ways unfair to the litigants. Although random selection is the order of the day when trial judges are assigned and intermediate appellate panels are formed, there is then at least the potential for review by the state's final judicial decision maker as an institution. The absence of an intermediate appellate court in Nevada makes the Supreme Court's decision to sit in panels

vendor immunity that it has imprudently allowed this sentiment to prevent prosecution of otherwise perfectly reasonable tort actions that only tangentially, if at all, touch upon a defendant's role as a vendor of alcohol. Part III analyzes the current Nevada status quo, concluding that the state and its citizens and guests would be far better served by a more normal regime of commercial host tort liability that at least permitted jury examination of problematic behavior, even if a more rational regime of liquor vendor liability remains an unattainable goal.<sup>9</sup>

#### I. THE RISE AND ROLE OF DRAM SHOP LAWS AND OTHER EFFORTS TO CONTROL ALCOHOL ABUSE

Dram laws took root in the late nineteenth century and became well established during the twentieth century.<sup>10</sup> The prevailing common law of the nineteenth century held that a business serving liquor to a patron—even an obviously intoxicated patron—was not legally liable if the inebriated patron later caused injury. The reasoning was that the cause of injury was the conduct of the patron and not the conduct of the bar or restaurant that facilitated the drunkenness of the patron.<sup>11</sup>

Prompted by the damage done by drunken tortfeasors, states gradually began to change the law legislatively. Wisconsin enacted the first dram shop statute in 1849,<sup>12</sup> followed by Indiana in 1853.<sup>13</sup> Riding the wave of the temperance movement that would eventually result in Prohibition, dram shop liability proponents enjoyed considerable success during the late nineteenth century. By 1880, eleven states had dram shop laws in place.<sup>14</sup> Then came a period of relative quiet as the temperance movement focused upon and obtained its goal of a complete ban on alcohol.<sup>15</sup> After Prohibition was

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understandable, but hardly makes it right. But more extensive discussion of this topic is beyond the scope of this comment.

<sup>9</sup> See *infra* notes 110–16 and accompanying text.

<sup>10</sup> See SLOAN ET AL., *supra* note 2, at 116–20; 1 JAMES F. MOSHER, LIQUOR LIABILITY LAW § 1.04(2)(a) (2013).

<sup>11</sup> See, e.g., *King v. Henkie*, 80 Ala. 505, 510 (1886); SLOAN ET AL., *supra* note 2, at 118. This view continued to hold sway during much of the twentieth century. See, e.g., *Fleckner v. Dionne*, 210 P.2d 530, 534 (Cal. Dist. Ct. App. 1949). There were, however, some early exceptions. See, e.g., *Harrison v. Berkley*, 32 S.C.L. (1 Strob.) 525, 525, 551 (1847), in which the court held a shopkeeper liable for illegal sale of whiskey to a slave who drank it and died rather than delivering the alcohol to his owner. In other words, the South Carolina court was progressive in the sense of being early to the modern trend of liquor vendor liability—but did so for the quite literally antebellum reason that the vendor's conduct caused the plaintiff to suffer “property” damage. It is not at all clear that liability would have been visited upon the vendor if the slave had caused injury to a third party while under the influence.

<sup>12</sup> SLOAN ET AL., *supra* note 2, at 118.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (noting that, in addition to Indiana and Wisconsin, Connecticut, Illinois, Iowa, Kansas, Maine, Michigan, New Hampshire, New York, and Ohio had such laws by the mid-1870s).

<sup>15</sup> There was still, however, some progress in passing dram shop legislation. For example, Oklahoma in 1910 enacted a dram shop law making bars liable in tort for negligent sales to

repealed, the dram shop movement had trouble regaining steam. It appears that “no state passed a dram shop statute between 1935 and 1978.”<sup>16</sup>

Then, beginning in the post-World War II period, advocates of dram shop liability as part of the effort to ameliorate the evils of alcohol regained momentum, albeit slowly. “In 1978 California became the first state to adopt a dram shop statute in the post-Prohibition era.”<sup>17</sup> Thereafter, a number of additional states passed dram shop laws. During this mid-late twentieth century period, claimants also increased efforts to have dram shop liability imposed through litigation and met with somewhat more success than had been the case prior to passage of dram shop legislation.<sup>18</sup> Many courts, however, continued to be reluctant to expand legal liability for liquor sales without the express approval of the legislature,<sup>19</sup> but this reluctance gradually ebbed, with courts expressly rejecting the traditional rule, even in states where the legislature had not already signaled a shift in the law.<sup>20</sup> By the twenty-first century, however, the modern approach had become to recognize liquor vendor liability in some form as a matter of common law, either expressly<sup>21</sup> or implicitly,<sup>22</sup> unless there was a controlling dram shop statute on point.

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patrons who later caused injury while intoxicated. *See id.* at 119. In the ensuing years, Oklahoma liquor liability law shifted several times. *See id.*

<sup>16</sup> *Id.* at 118.

<sup>17</sup> *Id.*

<sup>18</sup> *See id.* at 119 (“After Prohibition ended, a few states imposed common-law liability, including Arizona and Illinois. New Jersey is typically credited for instituting modern common-law liability for commercial servers of alcohol.”).

The New Jersey case referred to is *Rappaport v. Nichols*, 156 A.2d 1 (N.J. 1959). New Jersey subsequently enacted a dram shop law and designated it the exclusive remedy for damages resulting from negligent liquor sales. Other prominent cases breaking away from the traditional bar to liability and recognizing liquor liability as a viable tort include: *McClellan v. Tottenhoff*, 666 P.2d 408, 415 (Wyo. 1983); and *Adamian v. Three Sons, Inc.*, 233 N.E.2d 18, 20 (Mass. 1968). *See also Klingerman v. Sol Corp. of Me.*, 505 A.2d 474, 478 (Me. 1986) (recognizing a private right of action pursuant to state statute imposing fines on liquor vendors that served visibly intoxicated persons).

<sup>19</sup> *See, e.g., McCall v. Villa Pizza, Inc.*, 636 A.2d 912, 913 (Del. 1994) (stating that deference to traditional common law rule and its rationale required that any changes in the law be made by the legislature); *Slicer v. Quigley*, 429 A.2d 855, 858 (Conn. 1980); *Parsons v. Jow*, 480 P.2d 396, 397–98 (Wyo. 1971); *Lee v. Peerless Ins. Co.*, 183 So. 2d 328, 330–31 (La. 1966); *State ex rel Joyce v. Hatfield*, 78 A.2d 754, 756–57 (Md. 1951).

<sup>20</sup> *See, e.g., Garcia v. Hargrove*, 176 N.W.2d 566, 569–70 (Wis. 1970) (“Nor is this court compelled, as are some, to defer the resolution of this issue to the legislature. . . . [I]n the final analysis, the outcome of this case is not determined by application of ‘proximate cause’ or whether the legislature has or has not acted. The controlling consideration is one of public policy . . . .”); *see also Warr v. JMG M Grp.*, 70 A.3d 347, 390–92 (Md. 2013) (Adkins, J., dissenting) (summarizing movement toward liquor liability during the mid-to-late twentieth century due to changes in common law or enactment of dram shop statutes).

<sup>21</sup> *See Warr*, 70 A.3d at 391 (Adkins, J., dissenting). Judge Adkins noted that “courts in thirty-four states have abandoned [the traditional] common law rule [of no liquor liability] and held that, as a matter of state common law, the serving of alcohol can be the proximate cause of [a plaintiff’s] injuries.” *Id.* (citing numerous cases, including *Ontiveros v. Borak*, 667 P.2d 200, 205–07 (Ariz. 1983); *Vesely v. Sager*, 486 P.2d 151, 158 (Cal. 1971); *Largo Corp. v. Crespin*, 727 P.2d 1098, 1103–04 (Colo. 1986); *Trail v. Christian*, 213 N.W.2d 618, 623–24 (Minn. 1973); *Nehring v. LaCounte*, 712 P.2d 1329, 1334–35 (Mont. 1986); *Mason v. Roberts*, 294 N.E.2d 884, 887–88 (Ohio 1973); *Campbell v. Carpenter*, 566 P.2d 893, 897 (Or. 1977); *Jardine v. Upper Darby Lodge*, 198 A.2d 550, 553 (Pa. 1964); *Mackay v. 7-*

By the twenty-first century, there were dram shop laws in nearly eighty percent of the states, as well as common law liability in another eight states, with recovery permitted both at common law and via statute in eighteen states.<sup>23</sup> The vast majority of the U.S. population was subject to a regime of dram shop liability, as the eight states essentially immunizing liquor sales and service were for the most part the nation's least populous states.

As of the turn of the twentieth century, dram shop liability existed in at least some form for commercial servers of alcohol in Alabama, Alaska, Arizona, California, Colorado, Connecticut, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.<sup>24</sup> A small but recalcitrant handful of states continued to reject liquor vendor liability: Arkansas, Delaware, Kansas, Maryland, Nebraska, Nevada, South Dakota, and Virginia.<sup>25</sup> Bypassed by history and evolving legal attitudes,

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Eleven Sales Corp., 995 P.2d 1233, 1236 (Utah 2000); *Estate of Kelley v. Moguls, Inc.*, 632 A.2d 360, 363 (Vt. 1993); *McClellan v. Tottenhoff*, 666 P.2d 408, 414–15 (Wyo. 1983)).

In running up the total number of cases viewed as permitting liquor liability as a matter of common law, Judge Adkins is taking a broad view. Some of the cases cited involve permitting liability only under quite narrow circumstances. And, as discussed below (*see infra* notes 27–31 and accompanying text), there are some major distinctions among the states regarding the scope of dram shop liability. For example, almost all of the liability states permit an action by blameless third parties who are injured by the intoxicated bar patron—but many states do not permit the patron or culpable third parties to recover or may reduce the recovery. Most important, it appears that courts became more receptive to recognizing liquor liability after seeing that other political branches or the public supported such liability. In most states, the courts were not ahead of the legislature or public sentiment on the issue.

<sup>22</sup> *See Warr*, 70 A.3d at 391 n.33 (Adkins, J., dissenting). Judge Adkins noted that:

[a]nother seven states, though not expressly discussing and rejecting the old common law rule of proximate causation [in which the serving of liquor by the vendor was too remote to confer liability and that the operative cause of injury was the patron's conduct], have implicitly done so by their recognition of a cause of action for dram shop liability.

*Id.* (citing several cases, including *Davis v. Shiappacossee*, 155 So. 2d 365, 367 (Fla. 1963); *Thrasher v. Leggett*, 373 So. 2d 494, 497 (La. 1979); *Bailey v. Black*, 394 S.E.2d 58, 60–61 (W. Va. 1990)).

<sup>23</sup> *See SLOAN ET AL.*, *supra* note 2, at 120; *see also* 1 MOSHER, *supra* note 10, at § 1.51 (summarizing current state dram shop laws).

<sup>24</sup> *See SLOAN ET AL.*, *supra* note 2, at 122–23 tbl.5.2 (identifying for each state in 1998 whether the following parties have standing to sue under dram shop statutes: minors, adults, innocent third parties, complicit third parties, family of the drinker, and family of the innocent third party). To a degree, the prevailing norm of liquor vendor liability has been curtailed during the past three decades in some states that have passed what some commentators describe as “anti-dram shop acts” that curtail (but usually do not eliminate) liability or place restrictions on litigation against liquor vendors. *See* 1 MOSHER, *supra* note 10, at § 1.05. Notwithstanding this public policy counterattack of sorts by the liquor industry, dram shop liability in some form remains the clear majority rule in the United States.

<sup>25</sup> *See SLOAN ET AL.*, *supra* note 2, at 122–23.

these states continue to oppose liquor liability.<sup>26</sup> Today's immunity country for liquor servers has a distinct rural and western or southern tinge.

Dram shop laws differ, however, regarding the scope of liability and who may sue for relief. It appears that every state dram shop law provided a cause of action for "innocent" third parties injured by the alcohol-fueled negligence of an intoxicated patron.<sup>27</sup> Most every statute also provides a right of action for a third party who may have been partially at fault in connection with an auto collision or other tort, provided the third party is not more culpable than the intoxicated tortfeasor.<sup>28</sup> Similarly, most dram shop laws provide a cause of action to the families of the intoxicated patron who is killed or injured because of being served excessive alcohol.<sup>29</sup> Most, but fewer, dram shop laws create liability if the vendor negligently serves an underage patron.<sup>30</sup> States divide regarding whether an adult patron who becomes intoxicated through negligent service by the vendor has a claim against the vendor, with a majority of the liquor liability states stopping short of providing relief to the drunken customers themselves.<sup>31</sup>

In every state that has a dram law, the elements of dram shop liability are essentially that there (1) be injury to a third party (with standing to sue),<sup>32</sup> (2)

<sup>26</sup> See *infra* notes 43–59 and accompanying text (discussing Nevada law); see, e.g., *Warr*, 70 A.3d at 364; *Shea v. Matassa*, 918 A.2d 1090, 1094 (Del. 2007).

<sup>27</sup> See SLOAN ET AL., *supra* note 2, at 122–23 tbl.5.2. According to Table 5.2, every state that provided some form of dram shop liability in 1998 permitted innocent third parties to bring suit under dram shop laws. *Id.* But when individual dram shop laws are examined, they often reveal limits on the liquor vendor's liability. For example, although Wisconsin's dram shop cause of action applies if the vendor serves a minor, the law actually provides immunity where alcohol is negligently served to adults. See DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 556–57 (5th ed. 2005) (citing *Stephenson v. Universal Metrics, Inc.*, 641 N.W.2d 158 (Wis. 2002)).

<sup>28</sup> See SLOAN ET AL., *supra* note 2, at 122–23 tbl.5.2. According to Table 5.2, Arizona, Idaho, Illinois, Iowa, Louisiana, Michigan, Minnesota, New York, North Carolina, Tennessee, and Wisconsin deny dram shop recovery to third parties who bear some responsibility for their injuries.

<sup>29</sup> See *id.* But, according to Table 5.2, Arizona, Colorado, Hawaii, Maine, Oregon, and Vermont do not permit family member recovery (unless, presumably, the family member is an innocent third party injured by the drunken tortfeasor). A few states (e.g., Minnesota, New York, Tennessee, Wisconsin) permit family member recovery while barring recovery of an injured third party who is at fault. *Id.* A statute or court decision establishing standing to sue for an injured third party implicitly is also establishing that the defendant owed a duty to the plaintiff. As discussed in Part II of this Article, Nevada courts have refused to impose such a duty upon liquor vendors. See *infra* Part II.

<sup>30</sup> See SLOAN ET AL., *supra* note 2, at 122–23 tbl.5.2. According to Table 5.2, Alabama, Colorado, Georgia, Idaho, Illinois, Michigan, Minnesota, New York, North Carolina, North Dakota, Oklahoma, Oregon, and Vermont are exceptions.

<sup>31</sup> See *id.* Table 5.2 indicates that twenty-three liquor liability states deny recovery to adult intoxicated patrons involved in torts—Alabama, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Michigan, Minnesota, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Utah, Vermont, Wisconsin, and Wyoming.

<sup>32</sup> Recall that a state may still deny dram shop recovery to third parties who are significantly at fault in bringing about their injuries (usually they must be more comparatively negligent than the defendant), such as a pedestrian who darts out in front of a drunken driver or motorist who rear-ends a drunken driver properly stopped at a traffic light.

inflicted by an intoxicated tortfeasor, and the (3) intoxicated tortfeasor was served alcohol by a vendor acting negligently or in violation of the law.<sup>33</sup> The negligence can take the form of serving a patron who clearly has had enough or serving a minor (which, while not only illegal, also involves serving a less experienced drinker who is less likely to hold his liquor well, know when to stop drinking, call a cab, etc.).

For the most part, dram shop statutes do not impose strict liability.<sup>34</sup> Rather, they only impose a duty upon the vendor of alcohol that was largely not imposed historically by the common law. But even after passage of a dram shop statute (or a change in the common law), the vendor must ordinarily be negligent in some way in order to be liable for any subsequent harms inflicted by an intoxicated patron after the patron has left the bar and hit the road. In many dram shop states, violation of the statute is considered negligence per se; but even in these states, a plaintiff cannot normally recover without first proving that the illegal or negligent provision of alcohol was a legally cognizable cause of plaintiff's injury.<sup>35</sup>

Thus, the standard dram shop law does not automatically impose liability on the vendor, but merely removes a traditional immunity and permits the plaintiff to pursue a claim of negligent serving of alcohol which proximately caused plaintiff's injuries. The plaintiff must still prove not only negligence, but also causation (and damages) in order to recover against the vendor.<sup>36</sup> Dram shop laws therefore do make for slam-dunk recovery for plaintiffs merely because the liquor vendor erred or a patron of the vendor inflicted injury.

Dram shop laws are usually not (as is commonly thought) restricted to injuries inflicted by drunk driving, although that is by far the most common

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<sup>33</sup> See 1 MOSHER, *supra* note 10, at § 2.02. See also PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS 77-93 (1992) (explaining the theories underlying dram shop liability, the common restrictions applicable to dram shop liability, and the responsibility and culpability of alcohol dispensers).

<sup>34</sup> Except to the extent that one might consider liability for serving inebriated minors who subsequently injure themselves or others to be a strict liability offense. My own view is that even this version of dram shop liability (in general, serving intoxicated minors is treated more seriously than serving intoxicated adults) is more akin to negligence in that the liquor vendor who serves a minor has usually done this with either actual knowledge (allowing the clearly young children of a patron to drink with a patron without checking age) or through failing to demand proof of the requisite age. However, it appears that at least in some states, a minor's false identification, even if expertly forged, does not provide the vendor with a defense to a dram shop action.

<sup>35</sup> See DOBBS & HAYDEN, *supra* note 27, at 555 ("Even if a commercial vendor for on the premises consumption is found to have breached its duty, a plaintiff must still show the illegal sale of alcohol led to the impairment of the ability of the driver which was the proximate cause of the injury and there was a causal connection between the sale and a foreseeable ensuing injury. . . . Ordinarily the question of causation in a negligent tort case is one of fact for the jury and becomes one of law only when there is no evidence from which the jury could reasonably find a causal nexus between the negligent act and the resulting injuries." (quoting *Brigance v. Velvet Dove Rest., Inc.*, 725 P.2d 300, 305 (Okla. 1986))).

<sup>36</sup> In this sense, dram shop liability is akin to all tort liability. Even if a defendant acted badly, the defendant is not legally liable unless plaintiff can prove (by at least a preponderance of evidence) that defendant's bad acts caused injury to the plaintiff.

form of dram shop claim.<sup>37</sup> For example, a vendor may take a patron from sobriety to inebriation by serving many drinks in a short time. On his way home, the patron might then assault a third party. Although the vendor could defend the third party's dram shop action on issues of causation and the amount of damages, if the plaintiff surmounted these hurdles, the vendor would be liable even though the drunk patron had done his damage without the aid of an automobile.

Thus, although dram shop laws (and judicial decisions imposing dram shop liability) can be described as expanding liability, they can also be accurately described as merely putting liquor vendor liability on the same footing as other forms of enterprise liability. Under a dram shop regime (be it common law or statutory), vendors are liable if their actions are a proximate cause in bringing about injury to another. As with other torts, this requires, at a minimum, that the defendant's conduct be a cause-in-fact of the injury. "But for" the defendant's conduct, the injury would not have taken place. But, as also is the case in the law generally, a cause-in-fact does not create liability for loss unless it is a legally sufficient or "proximate" cause of the loss. Prevailing law will hold defendants accountable for damage inflicted on others, but not if the causal chain in creating the damage is too attenuated from the conduct of the defendant.

Applied to liquor liability, a standard tort regime would hold that if negligent sales of alcohol to the already inebriated patron would contribute to foreseeable injury inflicted by the inebriated, the vendor's action would be a legally sufficient cause, and that both the vendor and the drunken driver would be liable to an injured third party. If the third party was sufficiently comparatively negligent, this might be sufficient to cut off liability for the driver and vendor. But if the third party was not at fault or only minimally at fault, standard tort law would hold both driver and vendor liable, with their respective fault apportioning their liability. In a state with joint and several liability, both the driver and the vendor would be responsible for compensating the victim. As lawyers learn during the first semester of law school, there can be more than one proximate (i.e., legally sufficient) cause of an event or injury.

If the injuries are significant and outstrip the automobile insurance of the driver, and the vendor is a "deep pocket" with greater resources than the driver (through insurance or wealth), the effective impact of a dram shop regime may be that the vendor largely pays for the damage inflicted by the drunk driver even though it was, of course, the drunk driver who was most directly involved in bringing about the injury. Both the vendor and the driver may have proximately caused the collision and resulting injury, but the driver's actions arguably played a more significant role and certainly a more immediate role.<sup>38</sup>

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<sup>37</sup> See BLACK'S LAW DICTIONARY 567–68 (9th ed. 2009) (providing that "dram-shop act" and "dram-shop liability" pertain broadly to any injury caused by an intoxication, not only to those injuries arising from an automobile collisions); 1 MOSHER, *supra* note 10, at § 2.01(3).

<sup>38</sup> But even this bit of conventional wisdom is very case specific. For example, most observers outside the Nevada legislature or judiciary would agree that a bar that knowingly serves an alcoholic and then helps him drive away is probably more at fault for a collision than the driver.

For that reason, dram shop laws are resented by the alcohol industry.<sup>39</sup> But regardless of the overall wisdom of alcohol vendor liability, alcohol vendor liability is not distinctly different from ordinary tort liability, provided that a plaintiff can bear the burden of adequately showing causation between a vendor's actions and injury to the plaintiff, even if other actors (e.g., a drunk driver) also contributed along the way to the injury.

The weight of scholarly research clearly suggests that dram shop laws are effective in reducing alcohol-related driving injuries.<sup>40</sup> Whether this gain in loss reduction outweighs the cost of imposing the liability (through litigation and other disputing costs, insurance premiums, and decrease in commerce) may be open to debate. But for the most part, more than forty states have answered the question by enacting and keeping dram shop laws on the books or failing to overturn common law imposition of dram shop liability. Although expansion of dram shop liability has slowed (the recalcitrant eight states with essentially no dram shop liability<sup>41</sup> appear committed to this legal and policy choice), there has not been any significant national curtailment in dram shop liability. Dram shop liability is the norm in America—but not in Nevada.

## II. ALCOHOL LIABILITY IN NEVADA: THE JUDICIARY AND LEGISLATURE BEND TO POWER

### A. *Immunizing Liquor Vendors*

Nevada's background fits well the stereotype of the frontier West where the local saloon was a centerpiece of Main Street. Towns like Virginia City and Goldfield appear to have looked like something out of a Hollywood movie. Rugged individualism also appears to have been part of the package, as reflected in Mark Twain's description of his time in Northern Nevada.<sup>42</sup> Not

<sup>39</sup> See SLOAN ET AL., *supra* note 2, at 114–15, 132–35.

<sup>40</sup> *Id.* at 134–35, 231; *id.* at 237 (citing five empirical sources) (noting that “empirical analyses have consistently demonstrated the effectiveness of dram shop liability in reducing mortality”); *cf. id.* at 194 (finding that “the increased probability of a suit [for negligent or illegal server behavior], as perceived by the management, raised the bar’s level of precaution in serving obviously intoxicated adults”); *id.* at 216 (“[T]ort is an effective deterrent [of negligent or inappropriate server behavior].”).

<sup>41</sup> As discussed in Part II of this Article, Nevada currently has the odd situation of immunizing commercial liquor vendors from dram shop liability while imposing dram shop liability on social hosts. Without meaning to minimize the dangers of excessive drinking at house parties (as opposed to bars and restaurants), I regard Nevada's situation as one of essentially no dram shop liability. There simply are not that many social host liquor liability lawsuits in relation to commercial liquor liability lawsuits, even though cases establishing social host liability get significant attention in the news and in law school casebooks. In Nevada, for example, there appear to be no reported cases involving social host dram shop actions (to even speak of the home where a party was held as a “dram shop” is a bit of a misnomer) since passage of the statute. Arguably, however, a case involving fraternity hazing or alcohol poisoning could be considered an incidence of social host liability. See *infra* Part II.

<sup>42</sup> See generally MARK TWAIN, *ROUGHING IT* (Shelley Fisher Fishkin ed., Oxford Univ. Press 1996) (1871). Sufficiently old television viewers might also remember the once-popular program *Bonanza*, which chronicled the lives of wealthy rancher Ben Cartwright (played by Lorne Greene) and his three adult sons (the youngest of which was played by a pre-*Little House on the Prairie* Michael Landon) (they still lived on the ranch with Dad, perhaps diminishing the rugged individualism of the show a bit). Nearly every episode featured the

surprisingly, Nevada courts were happy to embrace the general rule that alcohol servers were not responsible for what patrons did while under the influence of that alcohol; this was the patron's problem (and the problem of their victims).

While attitudes toward liquor liability evolved in other jurisdictions, Nevada clung to the traditional approach. In *Hamm v. Carson City Nugget*,<sup>43</sup> the Nevada Supreme Court reiterated its support for the traditional bar to liquor server liability, embracing the doctrinal view that "the" proximate cause of injury to a drunken patron or his victim was the patron's consumption of alcohol and that the vendor's provision of alcohol was too remote from the loss to qualify as a legally sufficient cause of the loss.<sup>44</sup>

The court was aware of recent cases and an arguable trend to the contrary<sup>45</sup> but was unwilling to disturb the historical rule, finding that "[i]n the final analysis the controlling consideration is public policy and whether the court or the legislature should declare it," finding the matter most apt for legislative consideration.<sup>46</sup> *Hamm* also held that a liquor vendor's violation of Nevada criminal statutes concerning liquor sales was not negligence per se and

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Cartwrights making a short pit stop at a Virginia City saloon for whiskey and/or a beer. As a child watching the program, I was impressed with how rich the Cartwrights must be in that, perhaps owing to the need to keep the plot moving along, they seldom had more than a few sips of beer before leaving the bar, leaving glasses three-quarters full in their wake. *Bonanza* (NBC television broadcast 1959–1973). In retrospect, the Cartwrights may have been precursors to current media efforts to promote responsible drinking. However, alcohol consumption in a frontier-mining town full of armed men could also, of course, lead to violence, which was apparently fairly frequent in places like Virginia City. See generally TWAINE, *supra* (describing at various junctures fights, robberies, and killings).

<sup>43</sup> *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358 (Nev. 1969).

<sup>44</sup> *Hamm*, 450 P.2d at 359 (affirming the traditional common law that "[a] liquor vendor was not responsible to innocent third persons for injury or death due to the inebriated person's conduct [because the] proximate cause of damage was deemed to be the patron's consumption of liquor, and not its sale"). Subsequent Nevada cases continued to follow *Hamm* in both reasoning and result. See, e.g., *Yoscovitch v. Wasson*, 645 P.2d 975, 976 (Nev. 1982) (holding that a motorcycle passenger injured due to a collision with an intoxicated minor driver has no cause of action against the convenience store that sold the alcohol to the minor); *Van Cleave v. Kietz-Mill Minit Mart*, 633 P.2d 1220, 1222 (Nev. 1981) (finding no liability as a matter of law where convenience store's sale of alcohol to a minor who later inflicted injuries through intoxicated driving); *Mills v. Cont'l Parking Corp.*, 475 P.2d 673, 674 (Nev. 1970) (holding that a pedestrian killed by drunk driver had no claim against parking lot that allowed the driver to retrieve keys and take the vehicle off the lot). A departure of sorts is *Davies v. Butler*, 602 P.2d 605, 606, 614 (Nev. 1979), in which the court ordered a new trial due to unduly pro-defendant jury instructions in a case involving a fraternity pledge who died of alcohol poisoning during a hazing/initiation rite in which the fraternity forced the pledge to consume alcohol. Although clearly correctly decided and in step with modern dram shop law, *Davies* is distinguishable in that it involves an organization with more than an arms-length commercial relationship with the patron/victim that was coercing alcohol consumption rather than merely facilitating it or failing to stop it. *But see Sparks v. Alpha Tau Omega Fraternity, Inc.*, 255 P.3d 238, 241, 246 (Nev. 2011) (finding no duty of fraternity or others to protect a patron at an alumni event from assault by another attendee); *Bell v. Alpha Tau Omega Fraternity*, 642 P.2d 161, 162–63 (Nev. 1982) (affirming defense verdict where fraternity member sued organization after becoming voluntarily inebriated and fell from fraternity house roof during prank).

<sup>45</sup> *Hamm*, 450 P.2d at 359.

<sup>46</sup> *Id.*

that the criminal prohibition on the sale of liquor to a minor did not create a private right of action against a liquor vendor.<sup>47</sup>

The court's next extensive discussion of liquor server liability took place in *Hinegardner v. Marcor Resorts*,<sup>48</sup> which barred an auto collision victim's action against the casino bar that had served the drunken driver causing the accident.<sup>49</sup> The court reaffirmed support for the common law rule and deferred to the legislature as to whether there was to be a change in the tort law of liquor liability. "Civil liability, or an accountability akin to it, which imposes some responsibility on a vendor who willfully or carelessly serves alcohol to an intoxicated patron or a minor has much to commend it. However, such a measure should be the result of legislative action rather than judicial interpretation."<sup>50</sup>

In response, a dissent attacked the traditional rule as archaic and viewed a legislative solution as illusory.

Today's majority opinion is also unresponsive to Nevada's public policy as reflected by ever increasing criminal sanctions against persons who drive under the influence of alcohol. Unfortunately, criminal sanctions against offending drivers accomplish little by way of discouraging purveyors of intoxicants from serving persons already numbed by the effects of alcohol.

Moreover, today's "head-in-the-sand" ruling fails to recognize the facts of life. I intend no disrespect for our legislators, but the realities of political life in a state heavily financed by establishments that benefit economically from the sales and inducements of alcoholic beverages leave small reason to believe that dram-shop legislation will soon materialize. In a state that relies so extensively on "odds," I suggest that the prospects for dramshop legislation are about the same as they were for voluntary legislative redistricting when judicial rescue was necessitated in the form of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).<sup>51</sup>

Relatively soon after *Hinegardner*, the court reiterated its position in favor of the traditional rule of no liquor liability for vendors in *Snyder v. Viani*.<sup>52</sup>

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<sup>47</sup> *Id.* at 360.

<sup>48</sup> *Hinegardner v. Marcor Resorts, L.P. V.*, 844 P.2d 800 (Nev. 1992).

<sup>49</sup> *Id.* at 803-04.

<sup>50</sup> *Id.* at 804.

<sup>51</sup> *Id.* at 805-06 (italics in original). *Baker v. Carr* is the U.S. Supreme Court's "one person, one vote" opinion in which the Court required that legislative districts be of roughly equivalent population. Prior to the decision, many state legislatures and even Congress contained rural districts with comparatively few voters while many urban districts had many times as many voters but less representation. The Court in *Baker v. Carr* rejected the claim that legislative districting presented a political question that should not be addressed by courts, reasoning that the political process itself was ill-equipped to deal with the problem because it was already gripped by malapportionment. Representatives from the over-represented rural districts would never voluntarily dilute their power.

<sup>52</sup> *Snyder v. Viani (Snyder I)*, 885 P.2d 610, 613 (Nev. 1994). The liquor liability analysis in *Snyder I* has largely been eclipsed by judicial disqualification concerns raised after *Snyder I* because then-Justice Robert Rose was an owner/investor of a liquor-serving establishment, engendering heated opinions from the fractious relationship among some members of the court. *See Snyder v. Viani (Snyder II)*, 916 P.2d 170, 171, 174-75 (majority opinion finding no basis for disqualification); *id.* at 176-78 (Rose, J., concurring) (Justice Rose vigorously defending himself and his participation in the case); *id.* at 178-81 (Steffen, C.J., dissenting) (attacking Rose's participation in the original proceeding, *Snyder I*); *id.* at 184-86 (Springer, J., dissenting) (criticizing Rose for participating in the instant opinion, *Snyder II*); *see also*

Then came a period of relative common law quiescence<sup>53</sup> until the court faced the issue from another angle in *Rodriguez v. Primadonna*,<sup>54</sup> discussed below.<sup>55</sup>

Confirming the worst fears of the dissenting justices in *Hinegardner*, the state legislature ultimately enacted a statute amazingly protective of liquor vendors,<sup>56</sup> whereby a commercial vendor of alcohol is immunized from civil liability for injuries to inebriated patrons or torts committed by inebriated patrons, even if the commercial vendor knowingly serves a minor.<sup>57</sup> Social hosts, how-

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Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 889 (2009) (reviewing the Nevada Supreme Court's historically lax attitude toward judicial disqualification, particularly its status as one of the last states to continue to openly embrace the "duty to sit" doctrine rejected by federal law and ABA Judicial Code).

<sup>53</sup> During this period—and continuing today—the court generally took a relatively restricted view of duties owed by commercial actors to consumers and the public. *See, e.g.*, *Forouzan, Inc. v. Bank of George*, No. 56337, 2012 Nev. Unpub. LEXIS 267, at \*6 (Nev. Feb. 27, 2012) (finding that secured creditor was not required to foreclose on distressed secured property but had discretion and limited duties to the debtor); *Anderson v. Wells Cargo, Inc.*, No. 54962, 2011 Nev. Unpub. LEXIS 1726, at \*11 (Nev. Nov. 15, 2011) (finding that general contractor owed no duty to road users after finishing construction of median and turning property over to the county); *Sparks v. Alpha Tau Omega Fraternity, Inc.*, 255 P.3d 238, 241 (Nev. 2011) (concluding that fraternity participating in University of Nevada Football pre-game tailgating did not have a duty to protect a patron from violent behavior of another patron); *Sanchez v. Wal-Mart Stores, Inc.*, 221 P.3d 1276, 1283–84 (Nev. 2009) (finding that pharmacy does not owe a duty of care to a customer to check for contraindications with other drugs prescribed for consumer and filled by pharmacy, and third parties may not sue pharmacies when injured by consumer driver who was impaired by prescription drug use where pharmacy allegedly negligently provided the prescription drugs). The court's reluctance to impose liquor liability may stem from a conservative doctrinal and public policy approach to tort questions as well as (or rather than) solicitude for liquor vendors and the state's hospitality industry.

<sup>54</sup> *Rodriguez v. Primadonna Co.*, 216 P.3d 793 (Nev. 2009).

<sup>55</sup> *See infra* notes 60–74, 76 and accompanying text.

<sup>56</sup> Of course, the passage of a liquor vendor immunity law also tends to vindicate the reluctance of the *Hamm* and *Hinegardner* courts to depart from the common law of liquor vendor immunity. If the Nevada Supreme Court were to have recognized dram shop liability as a matter of common law, such a decision might have been legislatively overruled. Nevada's immunity for commercial liquor vendors was enacted during the 1995 legislative session, only a year after *Hinegardner*.

<sup>57</sup> *See* NEV. REV. STAT. § 41.1305 (2013). The statute, initially passed in 1995 and revised in 2007, is titled:

Liability of person who serves, sells or furnishes alcoholic beverages for damages caused as a result of consumption of alcoholic beverage: No liability if person served is 21 years of age or older; liability in certain circumstances if person served is under 21 years of age; exception to liability; damages; attorney's fees and costs.

Regarding commercial liquor vendors, the current law states the following:

1. A person who serves, sells or otherwise furnishes an alcoholic beverage to another person who is 21 years of age or older is not liable in a civil action for any damages caused by the person to whom the alcoholic beverage was served, sold or furnished as a result of the consumption of the alcoholic beverage.
2. Except as otherwise provided in this section, a person who:
  - (a) Knowingly serves, sells or otherwise furnishes an alcoholic beverage to an underage person; or
  - (b) Knowingly allows an underage person to consume an alcoholic beverage on premises or in a conveyance belonging to the person or over which the person has control, is liable in a civil

ever, are subject to dram shop liability.<sup>58</sup> That's right—an ordinary citizen can be held liable in tort if a tipsy underage party guest causes an accident on the way home (so long as the social host knew the guest was underage), but the Mirage can intentionally serve twenty cocktails in one hour to a seventeen-year-old who obliterates a pedestrian on the way home with no liability (as a matter of law!) for the Mirage.<sup>59</sup>

### *B. Expanding the Immunity of Commercial Hosts Beyond the Dram Shop Bar*

Nevada thus entered the twenty-first century as perhaps the American state most protective of the liquor industry. It then arguably cemented that reputation in an egregious example of judicial resistance to liquor vendor liability in the Nevada Supreme Court's most recent examination of the liquor liability issue and its cousins. In *Rodriguez v. Primadonna*,<sup>60</sup> the Nevada Supreme Court was faced with a situation in which a tragically injured plaintiff proceeded against a hotel-casino (albeit one that sold alcohol, but not to the plaintiff) on a theory of simple negligence. Rather than treating the case under ordinary principles of tort law, the court both took unduly narrow views of duty and causation and unnecessarily expanded the scope of liquor vendor immunity.

*Rodriguez* began innocently enough as a family outing, though not one to be emulated. Marlene, Manuel, and Daniel Garibay, adults, took seventeen-year old Fabian Santiago out for a night of drinking and gambling at the hotel-casino owned by Primadonna Company, LLC.<sup>61</sup> The booze came from Daniel's

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action for any damages caused by the underage person as a result of the consumption of the alcoholic beverage.

*Id.* at §§ 41.1305(1)–(2).

If the liquor vendor violates the ban on “knowingly” serving the underage, the prevailing party “may recover the person’s actual damages, attorney’s fees and costs and any punitive damages that the facts may warrant.” *Id.* at § 41.1305(4). An “underage person” is defined as someone who is “less [sic] than 21 years of age.” *Id.* at § 41.1305(5).

<sup>58</sup> The immunity for commercial liquor vendors, by contrast, is sweeping in that the legislature essentially invades traditional judicial turf to not only bar a claim for relief but also to make an ex ante declaration regarding the ordinarily case-specific concepts of cause and negligence.

The liability created pursuant to subsection 2 does not apply to a person who is licensed to serve, sell or furnish alcoholic beverages or to a person who is an employee or agent of such a person for any act or failure to act that occurs during the course of business or employment and any such act or failure to act may not be used to establish proximate cause in a civil action and does not constitute negligence per se.

*See Id.* at § 41.1305(3).

<sup>59</sup> Ironically, the current version of NEV. REV. STAT. § 41.1305 grew out of an effort by MADD (Mothers Against Drunk Drivers) and other anti-drunk driving activists to enact dram shop liability legislation. The liquor and resort industries not only successfully counter-attacked to prevent passage of dram shop liability, but amended the proposed bill so dramatically that the resulting bill became one immunizing commercial liquor vendors. Later, social host liability was established, but immunity remained for commercial vendors.

<sup>60</sup> *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793 (Nev. 2009).

<sup>61</sup> *Id.* at 796. Marlene is Fabian's mother. Manuel and Daniel are his step-uncles. *Id.* Oddly, the otherwise quite thorough Nevada Supreme Court opinion does not tell the reader the particular Primadonna property at which the events occurred. Primadonna, a subsidiary of MGM Mirage, owns and operates three casino resorts in Primm, Nevada. Located near

purchase at the hotel liquor store, the opinion being unclear as to whether the underage Santiago drank or gambled illegally in their room, the public spaces of the hotel, or both.<sup>62</sup> The men in the group engaged in “disruptive” behavior that involved:

at least two altercations with other hotel guests, and [disturbing] guests by kicking and knocking on hotel room doors. During one of the altercations, Manuel punched another hotel guest in the face. Primadonna’s security personnel intervened and, at the security officers’ request, Fabian, Manuel, and Daniel agreed to leave the hotel property.<sup>63</sup>

The eviction process involved three security officers taking the three men to their room, gathering their belongings, and escorting them out of the hotel to their vehicle.<sup>64</sup> The men, who were apparently clearly inebriated, planned to sleep in their car in the hotel parking lot and leave in the morning. Marlene, Santiago’s mother, attempted to negotiate an agreement to allow the men to “sleep off” their intoxication in the hotel room in return for her promise to keep them quiet and out of trouble, but was rebuffed by security personnel, who insisted upon evicting them.<sup>65</sup>

Once in the car, the men were discussing whether to leave or attempt to sleep off their intoxication in the vehicle when they were approached by hotel security and told that they must leave the parking lot.<sup>66</sup> “Consequently, Manuel drove the vehicle out of the Primadonna’s parking lot. Mistaking a frontage road for the freeway entrance, Manuel rolled the vehicle while driving at approximately 80 miles per hour. Fabian [Santiago, the 17-year-old] was seriously injured in the accident, suffering extreme spinal injuries, leaving him a quadriplegic.”<sup>67</sup>

On behalf of Fabian Santiago, Fabian’s grandfather and guardian ad litem filed suit, alleging negligence by the hotel, which in turn filed a third-party complaint against the boy’s mother, seeking indemnity should it be held liable to Fabian. The hotel contended that the hotel was “entitled to indemnification and contribution of the fees and costs incurred to defend the action because Marlene knowingly permitted Fabian, her minor child, to ride with an intoxicated driver who did not have a valid driver’s license.”<sup>68</sup> Continuing in this

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Interstate 15 on the Nevada side of the California-Nevada border, Primm is essentially a cluster of retail outlets and the three Primadonna-owned casinos: Whiskey Pete’s; Buffalo Bill’s; and the Primm Valley Resort. Primadonna also operates an RV resort and two golf courses in the vicinity.

<sup>62</sup> *Id.* The case is styled as “*Rodriguez*” v. *Primadonna* because Martin Rodriguez brought the action as guardian ad litem for Santiago.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* Because the procedural posture of the case (a defense motion for summary judgment granted by the trial court and affirmed on appeal), the facts of the Supreme Court opinion are essentially undisputed, but to the extent there is conflict, plaintiffs’ version of events is taken as true for purposes of deciding the motion. Had the case been tried, it of course is possible that the actual facts as determined by a jury could be less favorable to plaintiffs than what is reflected in the court’s opinion.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 797.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The hotel’s “best defense is a good offense” counterattack failed (although it may have been an effective rhetorical tactic) when the court, after entering judgment for the hotel

aggressive vein, the hotel argued that the action was frivolous because the plaintiff had sued only the casino-hotel, a “deep pocket” defendant, rather than the boy’s relatives, in an action clearly foreclosed by Nevada’s “clear law negating dram-shop liability.”<sup>69</sup>

C. *Confusing Liquor Vendor Immunity and Commercial Host Negligence*

However described, *Rodriguez v. Primadonna* is not a dram shop action. Had Fabian Santiago been pursuing a dram shop claim, he would have argued that the hotel’s negligence or violation of law regarding alcohol sales and service had caused his injury. But there is no mention in the case of Fabian Santiago being permitted to purchase alcohol or being served alcohol by the hotel (which was presumably done by his step-uncles back in the room). Rather, Santiago’s claim was that he was hurt because the hotel forced his uncles to drive drunk—not that the hotel got them drunk.

So styled, the Santiago claim made by his guardian Rodriguez seems a plausible tort claim under the facts as construed in favor of plaintiff, which is required when deciding a motion for summary judgment. Although it implicates the potential liability of a liquor vendor, this is not a dram shop claim as the term is normally understood. Further, as the court acknowledged, Nevada courts are reluctant to grant summary judgment “in negligence cases because negligence is ordinarily a question of fact for the jury.”<sup>70</sup> However, the *Rodriguez* court found the plaintiff’s case failed as a matter of law because of the absence of any duty on the part of the hotel to avoid putting the men in harm’s way by forcing them to drive drunk.

The court conferred immunity on the hotel by finding its eviction “reasonable as a matter of law” on the ground that the hotel had an absolute right to evict unruly patrons and that essentially there were no rules regarding the consequences of the circumstances under which the patrons were evicted. “[H]otel proprietors have the statutory right to evict from the premises anyone who acts

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and against the plaintiff’s negligence claim, refused to give the hotel the additional victory of requiring the vanquished plaintiffs to pay the hotel’s legal fees (or those of its liability insurer), reasoning that the trial court’s denial of indemnity was not an abuse of discretion. *See id.* at 797, 800–01. The court’s extended discussion of the issue suggests, however, that the court found it a close one and that the hotel, had it prevailed before the trial court, might have been supported on appeal.

<sup>69</sup> *Id.* at 797. The hotel’s argument for indemnity seems strained, despite whatever pause it gave the court. Plaintiffs frequently choose not to sue impecunious potential defendants or non-target defendants, particularly when they are friends, relatives, or business associates or arguably culpable persons who may be more likely to give favorable testimony against a target defendant if not named as co-defendants. Further, the plaintiff’s theory of the case was that injury would have been avoided completely if only Fabian Santiago and his relatives had been permitted to sleep in their vehicle without being roused off the grounds by hotel security. Although this theory of the case may not have prevailed at trial in light of the evidence that the men were considering leaving prior to being evicted (the hotel would still have been able to defend on that ground even if it lost its summary judgment motion), it is a rational theory of the case that does not require naming the relatives as co-defendants.

<sup>70</sup> *Id.* at 798 (citing *Butler v. Bayer*, 168 P.3d 1055, 1063 (Nev. 2007)).

in a disorderly manner or who causes a public disturbance in or upon the premises.”<sup>71</sup>

Because the guests conceded that they had indeed been disorderly, the hotel’s eviction was judicially blessed as proper without regard to ensuing consequences—apparently even if a jury might reasonably regard those consequences as foreseeable. Although it is difficult to know if the court meant what it literally said, what the court said in *Rodriguez* was that a hotel can evict the unruly without regard to the dangers the eviction presents for the bounced patron or the general public, so long as the eviction itself is not abusive. From a public policy perspective, this is myopic legal doctrine.

For example, consider a patron who is brandishing a pistol. Certainly, the hotel would be entitled to evict the patron. But should the hotel really be allowed to toss the patron onto Fremont Street or the Las Vegas Strip without first disarming him, calling police, or taking some other reasonable measure to minimize (or at least reduce) the risk that the evicted patron will shoot bystanders upon exiting the hotel? Apparently so, according to the *Rodriguez* opinion, so long as the eviction process does not breach the peace more than necessary.<sup>72</sup>

The *Rodriguez* panel’s seemingly wrong turn regarding negligence doctrine and the scope of proprietor eviction prerogatives arguably stems from (1) a crabbed view of tort law generally (i.e., that “the” cause of injury was driver intoxication and error when both that and a second cause of eviction by the hotel were at work) and (2) insisting on bringing the *Rodriguez* claim within the scope of the Nevada’s traditional dram shop immunity. Although the case could have been viewed simply as one of negligent eviction, with the patron being a dangerous driver rather than holding a dangerous weapon, the panel pivoted to make the claim one of liquor liability, a particularly strained pivot in that it appears the guests became intoxicated without benefit of being served drinks by the hotel.

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<sup>71</sup> *Id.* (citing NEV. REV. STAT. § 651.020 and noting that pursuant to NEV. REV. STAT. § 651.005, NEV. REV. STAT. § 651.020 includes parking lots as part of a hotel’s premises).

<sup>72</sup> The *Rodriguez* opinion states that a proprietor “has a duty to act reasonably under the circumstances.” *Id.* at 799 (citing *Billingsley v. Stockmen’s Hotel, Inc.*, 901 P.2d 141, 144 (Nev. 1995)), a case in which hotel security personnel placed a choke hold on a patron during the course of eviction. *Billingsley* held that the hotel could not prevail on summary judgment because there were reasonable questions of material fact regarding whether the choke hold was necessary under the circumstances. *Billingsley*, 901 P.2d at 144–45; *Rodriguez*, 216 P.3d at 799.

But *Rodriguez* found *Billingsley* “limited to its facts,” stating that despite this supposed duty to act reasonably during an eviction, a hotel operator “does not have the duty to prevent injuries caused by the intoxicated patron that are sustained either by the patron or by third parties after the eviction has been executed.” *Id.* Presumably, then, a hotel can turn loose on the public a crazed and armed patron. So long as this unguided missile does not strike until off the hotel premises, the hotel apparently is absolved of any responsibility for the carnage, no matter how irresponsible the decision to release the crazed patron upon the public.

Some of the *Rodriguez* assessment stems from its erroneous decision to turn the lawsuit into a dram shop case (and hence protect the hotel with dram shop immunity) even though the plaintiff had aptly framed the claim to avoid abutting against precedents like *Hamm v. Carson City Nugget, Inc.*, 450 P.2d 358 (Nev. 1969) and *Hinegardner v. Marcor Resorts, L.P. V.*, 844 P.2d 800 (Nev. 1992), which had rejected liquor liability.

In addition [to a proprietor's apparently absolute right to eject the disorderly without consequences so long as no choke holds are used], it is well settled in Nevada that commercial liquor vendors, including hotel proprietors, cannot be held liable for damages related to any injuries caused by the intoxicated patron, which are sustained by either the intoxicated patron or a third party. This rule applies equally when the intoxicated patron is a minor. In other words, Nevada subscribes to the rationale underlying the nonliability principle—that individuals, drunk or sober, are responsible for their torts.

Therefore, based on these principles, we conclude that when a hotel proprietor rightly evicts a disorderly, intoxicated patron, the hotel proprietor is not liable for any torts that an evicted patron commits after he or she is evicted that result in injury.<sup>73</sup>

Notwithstanding the breadth of Nevada's statutory liquor vendor immunity, this is a very long reach for the panel and is certainly not required by the court's precedents, which construe liquor-related matters broadly in the service of protecting vendors but that have previously always focused on the question of whether the vendor can be liable for facilitating the patron's inebriation. In none of the prior, pro-liquor precedents was the court (or the vendor) faced with a claim that it mishandled an already drunk patron in any way other than contributing to the drunkenness. Consequently, the *Rodriguez* panel hardly needed to invoke these pro-defendant precedents. It could have focused on the reasonableness of eviction alone rather than treating the case as a challenge to the state's historical ban on liquor liability.

Searching for some support for its conversion of an arguably simple negligence claim (alleging that hotels should not eject patrons under circumstances where injury to them or others is foreseeable) to one purportedly implicating liquor server liability, the *Rodriguez* panel cites support from Delaware,<sup>74</sup> one of the handful of jurisdictions that, like Nevada, is in the minority on this issue of law and public policy.<sup>75</sup> It also cites a California intermediate appellate court decision,<sup>76</sup> an odd choice given that California is a state that has long recognized liquor vendor liability in some form, although more recently has constricted that liability.<sup>77</sup> Further, the California case cited by the *Rodriguez* panel involved social host liability and not commercial host liability.

Having turned *Rodriguez* into a dram shop case, the court correspondingly found no duty on the part of the hotel to protect patrons "after a reasonable eviction" and entered judgment for the hotel. But throughout its opinion, the *Rodriguez* panel has begged the question of what constitutes a "reasonable" eviction, effectively concluding that so long as a hotel has grounds for evicting

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<sup>73</sup> *Rodriguez*, 216 P.3d at 798–99 (citing *Hamm*, 450 P.2d at 359; *Snyder v. Viani*, 885 P.2d 610, 612–13 (Nev. 1994); *Hinegardner*, 844 P.2d at 803).

<sup>74</sup> *Rodriguez*, 216 P.3d at 799 (citing *McCall v. Villa Pizza, Inc.*, 636 A.2d 912, 912–15 (Del. 1994)).

<sup>75</sup> See SLOAN ET AL., *supra* note 2, at 122–23 tbl.5.2.

<sup>76</sup> *Rodriguez*, 216 P.3d at 799 (citing *DeBolt v. Kragen Auto Supply, Inc.*, 227 Cal. Rptr. 258, 260–61 (Cal. Ct. App. 1986)).

<sup>77</sup> See SLOAN ET AL., *supra* note 2, at 122–23 tbl.5.2; 1 MOSHER, *supra* note 10, at § 1.51 (summarizing provisions of the California Business and Professions Code that bar dram shop liability for serving an intoxicated adult—a reversal of prior state law—but permit dram shop actions against a vendor serving an obviously intoxicated minor, although barring social host liability, and also noting that California common law had recognized dram shop liability regarding service of both adults and minors).

a patron, seemingly any manner of ejection—short of assaulting the patron—is permitted, regardless of whether the patron is drunk, angry, vicious, homicidal, loud, distracting, criminal, drug-addicted, experiencing prescription drug or other health problems,<sup>78</sup> or otherwise presents a greater danger to self or others outside the hotel than inside the hotel or under the custody of law enforcement or others. With its sweeping view of the hospitality industry’s rights “as a matter of law,” *Rodriguez* effectively eliminates the type of lay juror scrutiny that typically provides some parameters for evaluating reasonableness.

#### D. *Needlessly Barring Jury Consideration*

Of course, it is possible that lay jurors, if permitted to hear the *Rodriguez* claim, would have sided with the hotel. Jurors might not have much sympathy for patrons who act inappropriately. Although it is certainly more than plausible that jurors might empathize with the evicted patrons, they might also applaud the hotel for removing loud or unruly patrons who threaten the rights of peaceful patrons. On the other hand, although no one likes a night out or a hotel stay wrecked by other guests acting boorishly, jurors also realize that security personnel can be officious, self-important, power-drunk, and even downright mean to patrons without any corresponding consideration of the risks posed to the patron or others when ejecting a patron.

Perhaps I’m hopelessly naïve about the extent to which a hotel or other host establishment should go to avoid placing patrons (and those who they may encounter) in danger. But what better way to settle the issue than to have trial and jury consideration? Judges too often strain to grant summary judgment out of what I suspect is inordinate fear of what a jury may do if the matter is tried. But such fears are probably misplaced.

Jurors are not Marxist agents of income redistribution.<sup>79</sup> They like to stay in quiet, well-maintained hotels free of boisterous or destructive mass groups

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<sup>78</sup> While it is true that the *Rodriguez* crew was intoxicated with alcohol (that they apparently served themselves), they could have just as easily been impaired because of drug use, lack of sleep, mental illness, adverse reactions to prescription medicine, psychotic hallucinations, or an epileptic seizure. Should a hotel never face a claim for injuries that occur when the hotel ejects such patrons carelessly or without regard to the consequences? Such matters merit trial consideration to determine the reasonableness of the hotel’s conduct. It is not enough to ask only whether the patron provided cause for some form of eviction. Given the court’s rush to convert the case to a referendum on liquor liability, a future epileptic or Alzheimer’s-afflicted patron left on the curb by a casino may be barred from pursuing relief.

<sup>79</sup> Ironically, during the debate over dram shop liability/immunity during the 1995 legislative session, an attorney lobbying on behalf of the Nevada Resort Association argued that public sentiment was against dram shop liability. See *Limits by Statute Civil Liability of Sellers and Servers of Alcohol: Hearing on S.B. 498 Before the Assemb. Comm. on Judiciary*, 68th Sess. (Nev. Jun. 27, 1995) (statement of Paul E. Larsen, Nevada Resort Association). Regarding discussion of this bill, Frank LaSpina, a Las Vegas Radio Talk Show Host, posed the following question to listeners: “Should victims of drunk drivers be allowed to sue the place where the drivers were served?” About 85% of callers were opposed to the idea. Although this poll was not scientific, Larsen relied on it in his statement as the public opinion of the citizens of Nevada. *Id.*

In other words, potential Nevada jurors may be downright hostile to dram shop claims. If true, this proves my point and not that of the liquor industry. Allowing jurors, after hearing all the facts of a specific case under the supervision of a judge according to the rules of

too cheap to purchase more than a single room. But jurors also know when the businesses that are only too happy to take their money are being unreasonable in response to a problem. Jurors are perfectly equipped to assess the reasonableness or unreasonableness of a business's ejection and treatment of a patron—if only judges will let them. Responsible businesses that treat customers reasonably have nothing to fear from making considered decisions that take into account the business's need to make a profit. Businesses that officiously flex their muscle or act out of anger in situations that create needless danger may not do as well in front of jurors. Thus, perhaps jurors would be no more empathetic than the justices of *Rodriguez*.

*E. Bad Influence: Nevada's Rodriguez Arguably Facilitates Error in Colorado*

As bad as the *Rodriguez* opinion may be, the opinion is arguably only a Nevada problem. But the virus of *Rodriguez*-like thinking could potentially spread. Even in states following the majority rule of dram shop liability, some judges can be remarkably callous about the plight of guests who run afoul of a business establishment. Consider the recent Colorado case of *Groh v. Westin Operator, LLC*,<sup>80</sup> in which the first judicial reaction bears a striking similarity to *Rodriguez*, but was mercifully reversed upon rehearing,<sup>81</sup> although further review has been granted by the Colorado Supreme Court.<sup>82</sup> As discussed

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evidence and procedure, to assess the conduct of a liquor vendor is unlikely to result in an avalanche of litigation and liability verdicts. Rather, dram shop actions will likely be brought only in egregious cases where a plaintiff and counsel have a realistic chance of prevailing. In turn, plaintiff verdicts in such cases will not only compensate deserving victims but also establish a level of deterrence that is significant but not so extreme as to undermine responsible business operations. On the larger policy point, of course, I cannot resist noting the inconsistency of the radio listeners (and liquor industry lobbyists) who stress the need for "personal responsibility" on the part of the drunken driver but see no corresponding need for expecting the commercial vendor to act responsibly—or to even allow a jury to review the vendor's actions.

<sup>80</sup> *Groh v. Westin Operator, LLC (Groh I)*, No. 11CA0363, 2012 Colo. App. LEXIS 1794 (Colo. App. Nov. 1, 2012).

<sup>81</sup> *Groh v. Westin Operator, LLC (Groh II)*, No. 11CA0363, 2013 Colo. App. LEXIS 1217 (Colo. App. Mar. 28, 2013).

<sup>82</sup> *Westin Operator, LLC v. Groh*, No. 13SC382, 2013 Colo. LEXIS 800 (Colo. Oct. 28, 2013) (granting en banc certiorari review of second appellate court decision). The Colorado Supreme Court summarized the issues for review as:

Whether the court of appeals erred in holding that a hotel has a duty not to evict a guest under the circumstances of this case, and that a reasonable jury could find a breach of such duty on the present record.

Whether the court of appeals erred by failing to apply the Colorado Dram Shop Act when finding that summary judgment based on proximate cause was not warranted.

*Id.* at \*1.

The Colorado Supreme Court's decision to review may indicate that Colorado is moving toward a jurisprudence as protective of hotels and bars as that of Nevada, although I obviously hope not. More likely, the Colorado Supreme Court has taken the case to clarify the law and provide more definitive guidance to commercial liquor vendors and related businesses. My bet is that in the end, Colorado will recognize that evicting a patron is subject to both a pure negligence analysis (e.g., whether the hotel acted reasonably) as well as a liquor liability analysis if the business played a role in the patron's intoxication—and that such claims cannot be foreclosed as a matter of law under circumstances such as that in *Groh*.

below, however, *Groh* at least has the virtue of presenting contrasting judicial perspectives between appellate courts and extensive discussion of the issue rather than the comparatively cut-and-dried declaration of immunity issued by the *Rodriguez* panel.

Jillian Groh and ten friends went out on the town in Denver for a night of revelry and planned to stay overnight in the Westin Hotel downtown. Although this is clearly more responsible behavior than having the group drink and drive eleven cars home with drivers under the influence, having eleven patrons in a regular hotel room (it had two double beds and presumably was not designed for more than a handful of occupants) did not sit well with Westin.<sup>83</sup>

In the dead of night (2:45 a.m.), a Westin security guard heard noise and investigated, finding the noise coming from Groh's room. Although there had been no complaints from other patrons, the guard approached Groh and demanded the group quiet down. A dispute ensued in which Groh asked to see the manager. The guard ordered the group to leave. The group members protested that they were too drunk to drive away.<sup>84</sup> After further discussion, the hotel agreed to let Groh and two others stay but evict the rest of the group, which "reiterated their protests that they were intoxicated."<sup>85</sup> Further dispute ensued, but Westin refused to permit more of Groh's party to remain in the hotel room.<sup>86</sup>

Groh then determined that "if her friends would have to leave, she would leave as well. That would turn out to be the first in a series of tragic decisions that led to tragic consequences."<sup>87</sup> The hotel guards escorted Groh and her

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<sup>83</sup> *Groh I*, 2012 Colo. App. LEXIS 1794, at \*2. Making matters economically worse for Westin, Groh had obtained the room at her sister's employee discount rate. Groh was the only registered guest, so presumably only a single occupancy rate was charged. *Id.*

<sup>84</sup> *Id.* at \*2-3. In an easy-to-miss but disturbing part of the *Groh I* opinion, the panel states that "[t]hroughout this entire process, only the friend who loudly informed the guard that he refused to leave appeared to Westin personnel to be 'a little tipsy'; Groh and the rest of the members of the group, despite their protestations, did not appear drunk to Westin personnel." *Id.* at \*4-5.

Although it may have been impossible for Groh to conclusively refute at the summary judgment stage the hotel's position, which had the benefit of making its eviction of the group appear reasonable, there would at least be a question of fact for a jury regarding the reasonableness of the Westin's conclusion that the group members were sober enough to drive and the reasonableness of the steps taken (other than observation) in making this decision. For example, it does not appear that the guards took any additional steps to ascertain the sobriety of the group members.

As phrased by the *Groh I* panel, it is almost as if the court is accepting as true the factual scenario of the party seeking summary judgment. But the ground rules of summary judgment require that the facts be construed in favor of the party opposing summary judgment. Further, as discussed below, one member of Groh's party had a blood alcohol content of nearly three times the legal standard for intoxication. *See infra* note 92. Could the Westin guards really have failed to notice this level of drunkenness?

<sup>85</sup> *Groh I*, 2012 Colo. App. LEXIS 1794, at \*3-4.

<sup>86</sup> *Id.* at \*4.

<sup>87</sup> *Id.* Again, the *Groh I* panel majority (there was a spirited and thorough dissent, *see id.* at \*22 (Webb, J., dissenting)) was betraying its favoritism toward the hotel and its deviation from the ordinary ground rules of summary judgment procedure. It is a question of fact as to whether Groh's decision to leave is "the first" important event in bringing about harm or whether earlier events such as the actions of the hotel were the cause of her injuries. In

group out and blocked her from re-entry.<sup>88</sup> She sought a cab ride home but a taxi was not immediately available. When she sought to wait in the lobby, a hotel guard refused and told her to “get the f\*\*\* out of here.”<sup>89</sup> Groh eventually ended up riding home in her car with a friend driving.<sup>90</sup>

Driven by the friend, Groh’s car (a PT Cruiser) crashed into another vehicle being towed, resulting in severe injuries to Groh that left her “in a persistent vegetative state.”<sup>91</sup> The blood alcohol content of Groh’s friend was between 0.170 and 0.222, nearly three times the state’s 0.08 definition of intoxication for legal driving. The driver friend was “subsequently charged with several felonies associated with her driving Groh’s vehicle while intoxicated.”<sup>92</sup>

Notwithstanding these compelling facts, the Colorado trial court granted summary judgment for the hotel.<sup>93</sup> As discussed, the *Groh I* panel hearing the

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effect, the *Groh I* panel majority improperly found facts in favor of the defendant and summary judgment movant.

<sup>88</sup> *Id.* at \*5.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*5–6. Favoring the hotel’s side of the story is that Groh and her group, despite the uncharitable conduct of hotel security, apparently missed an opportunity to secure a taxi in the vicinity and that Groh failed to wear a seat belt. *See id.* at \*5–6. But these are simply issues of fact for a jury to assess in determining the relative fault of the hotel and Groh in bringing about this tragedy. In addition, the collision, which injured Groh, took place fifteen miles away from the hotel. *Id.* at \*6. But this distance, alone, should not (as a matter of law) be sufficient to break the requisite chain of causation that a plaintiff must prove. Rather, the degree to which the auto collision is separated in time and space from the hotel’s alleged negligence would seem to presumably present an issue of fact for jury determination.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Even for an experienced drinker, a blood alcohol content of 0.222 is pretty serious. Most people would be falling down drunk with blood alcohol content at this level. While this may be an important fact in assessing Groh’s contributory negligence in allowing the friend to drive her home, it also suggests that the Westin’s assertion that Groh’s group did not appear intoxicated (*see supra* text accompanying note 84) is not to be believed by reasonable people (and certainly not by reasonable judges), at least not as a matter of law. There was certainly a lot of drinking going on and the group must surely have shown signs of inebriation to any reasonable observer.

<sup>93</sup> *Groh I*, 2012 Colo. App. LEXIS 1794, at \*6. In addition, the trial court held that the hotel had a contractual right to evict Groh even absent the issue of group noise. *Id.* at \*7. The trial judge apparently viewed Groh’s checking in and obtaining three keys as a representation or agreement that there would be no more than three occupants of the room.

For reasons beyond the scope of this Article, I question this analysis absent some more concrete evidence of such an agreement between the hotel and Groh. Even if there is fine print in the check-in documents presumably signed by Groh when she registered, this hardly indicates “agreement” on this point by Groh and the hotel. More justifiably, courts could imply a term of reasonableness in the contracting for a night of lodging—and stuffing eleven people into a standard room with two double beds is probably not reasonable. But this still begs the question in that notwithstanding Westin’s right to evict, there remains the question of whether the eviction was handled reasonably.

The trial judge and the judges favoring Westin characterize the situation as one in which the hotel had almost no alternative but eviction. This, of course, is incorrect. The hotel’s own actions (allowing Groh and the two other key holders to stay rather than evicting the whole group) demonstrate that it recognized that it had discretion regarding response to the situation. Unfortunately, the hotel seems not to have suggested nor even considered more reasonable responses that would have better served the interests of the business, the guests, and society (which has and will, in at least an indirect way, bear the costs of the terrible collision that injured Groh).

case affirmed.<sup>94</sup> Rehearing was granted, and the *Groh II* panel reversed, holding that there were indeed genuine issues of material fact regarding whether the Westin had acted reasonably in evicting the group and arguably constructively evicting Groh.<sup>95</sup>

F. *A Different Perspective on Commercial Host Negligence*

The *Groh II* opinion, as one might expect, read like the parallel universe version of the *Groh I* opinion—with the same pro-and-con arguments made, but with a different voting alignment. In contrast to the first panel decision, the second opinion

conclude[d] that a hotel must evict a guest in a reasonable manner, which precludes ejecting a guest into foreseeably dangerous circumstances resulting from either the guest's condition or the environment. We further conclude that here a reasonable jury could find a breach of this duty on the present record. Therefore, we reverse the summary judgment against plaintiff . . . in part, and remand for further proceedings, limited to her negligence claim based on the eviction.<sup>96</sup>

A number of immediate possibilities suggest themselves. First, the hotel could have allowed the group to remain in the room if they were sufficiently quiet (remember, no other patrons had complained) and imposed a surcharge on Groh for the increased wear and tear inflicted on the room. Or (Response 1a, I suppose), it could have done this and simply absorbed the presumably modest cost of the wear and tear of the extra occupants. Or (Response 1b), it could have required Groh to pay the rack rate for the room and taken away the benefit of her sister's employee discount or have imposed a surcharge because of Groh's stuffing of eleven people into the room.

Second, Westin could have required the group to purchase an additional room or two so that the revenue to the hotel was more matched to the wear and tear inflicted (three rooms with two double beds each would hold up to twelve persons, each sleeping in a bed; with couches, pull-out or regular, perhaps only one other room was necessary; or perhaps there was an open suite or meeting room in which the intoxicated group could sleep off their partying). (On one occasion, I spent the night with my family in a Marriott meeting room when the hotel had mishandled our family's reservation. This was the hotel's "accommodation" to having lost our reservation (we had a written confirmation but they had no regular rooms available; when the business wants to keep a visitor on the premises, it has ways) (we were indeed charged for the privilege of camping out in the meeting room but at a price lower than the charge for a regular room)).

Third, the hotel could have insisted that the guests depart in cabs or with sober friends or family. Fourth, it could have pressed into service the hotel shuttle and driven the group members home. Fifth, if group members were disorderly or illegally staying on the premises, it could have called the police, who might have even saved the hotel the expense of cabs or a shuttle driver.

To the extent that any of these methods hurt the Westin bottom line, it could have pursued small claims court relief against Groh and her group. Although the group undoubtedly crammed itself into one room as a cost-saving measure (but also to presumably create a party atmosphere), my bet is that even these occupants, even if of modest means, would have scrounged up the cash or credit cards to avoid driving when seemingly very drunk.

<sup>94</sup> *Id.* at \*22.

<sup>95</sup> *Groh v. Westin Operator, LLC (Groh II)*, No. 11CA0363, 2013 Colo. App. LEXIS 1217, at \*1–2 (Colo. App. Mar. 28, 2013).

<sup>96</sup> *Id.* Thus, there was no de facto dram shop claim available to the plaintiff. Although she and her friends were inebriated, this was not because of receiving alcoholic beverages from the defendant. *But see id.* at \*61 (Furman, J., dissenting) (arguing that *Groh* in part is a liquor liability case and that "the majority's opinion frustrates the clear public policy statement of the legislature that 'where an individual makes a deliberate choice to drink alcohol,

Judge John Webb, who had been in vigorous dissent in *Groh I*,<sup>97</sup> wrote the majority opinion in *Groh II*,<sup>98</sup> with Judge David Furman (the author of *Groh I*) forced into the role of strident dissenter in *Groh II*.<sup>99</sup> There was no individual change of heart by the swing-voting judge on the first panel, Judge Robert Russel. Rather, Judge Russel had been replaced by Judge JoAnn Vogt by the time of the second decision.<sup>100</sup>

### G. *Judicial Divergence on Commercial Host Liability*

In microcosm, the disparate *Groh* opinions illustrate both the seemingly substantial division of the bench on the issues of innkeeper liability, eviction prerogatives, and the degree to which a state's dram shop law subsumes such negligence claims. It is also a telling illustration of legal realism and the degree to which the perceptions of individual judges influence the purportedly objective crafting and application of law. *Groh II* also reflects the degree to which Nevada jurisprudence arguably erred in oversimplifying issues of commercial host liability and liquor liability in *Rodriguez v. Primadonna*.<sup>101</sup>

In reading *Groh II*, one sees the underlying facts presented in a different light modestly more favorable to the plaintiff than as presented in *Groh I*.<sup>102</sup>

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that individual should also be responsible if that choice results in negligence' " (quoting *Casebolt v. Cowan*, 829 P.2d 352, 368 (Colo. 1992) (Rovira, C.J., dissenting), a case denying summary judgment to an employer who allowed an intoxicated employee to borrow a car, but did not provide the alcohol to the employee—an odd source of purported support)); *Groh II*, 2013 Colo. App. LEXIS 1217, at \*61 (Furman, J., dissenting) (concluding that the majority opinion "is in contravention of public policy expressed by our legislature in the Dramshop Act, and I note that other jurisdictions with similar statutes have come to the same conclusion when presented with similar facts" (citing *Rodriguez v. Primadonna Co.*, 216 P.3d 793, 799 (Nev. 2009))).

<sup>97</sup> *Groh I*, 2012 Colo. App. LEXIS 1794, at \*22 (Webb, J., dissenting).

<sup>98</sup> *Groh II*, 2013 Colo. App. LEXIS 1217, at \*1.

<sup>99</sup> *Id.* at \*33 (Furman, J., dissenting). By "vigorous" and "strident," I do not necessarily mean that the dissents were not well done. Both judges wrote rather lengthy and comprehensive dissents reflecting strong feelings on the issue. And, although I find Judge Webb's assessment (in the *Groh I* dissent and *Groh II* majority opinion) considerably more persuasive, Judge Furman's dissent in *Groh II* undoubtedly played a role in the Colorado Supreme Court's decision to review the case.

<sup>100</sup> In keeping with the annoying judicial practice of providing only minimal information about the composition of a panel or court hearing a case (e.g., the U.S. Supreme Court's famous "Justice X took no part," etc.), the *Groh II* opinion does not explain why Judge Vogt replaced Judge Russel, but notes only that Judge Vogt was "[s]itting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2012." *Id.* at \*1 n.\*. Judge Russel, who joined the Colorado Court of Appeals in 2004, resigned in 2012 shortly after *Groh I* to take a position in the Colorado United States Attorney's office as Chief of Appeals. Judge Vogt served on the court from 1998 until her retirement in 2009 and, pursuant to Colorado practice, was available for such special appointments.

<sup>101</sup> *Rodriguez v. Primadonna Co.*, 216 P.3d 793 (Nev. 2009), discussed *supra* Part II.B–C.

<sup>102</sup> For example, *Groh II* set forth some factual detail not noted or emphasized in the *Groh I* opinion, such as the following:

During these interactions [between Groh's group and hotel security], at least one person told the Westin employees that everyone in the group was "drunk," "that was the whole purpose" of the room having been rented, and the guard could not expect them to leave because "We are drunk. We can't drive."

One also sees in *Groh II* distinctly different judicial views regarding the practical impact of a decision, particularly regarding the likely costs imposed on the instant parties, similarly situated parties, and society.<sup>103</sup> Disturbingly (at least

*Groh II*, 2013 Colo. App. LEXIS 1217, at \*2–3. “Although police officers were on the premises investigating an unrelated incident [at the time the Groh group was evicted], the Westin did not involve them.” *Id.* at \*3.

[During the time the group was escorted out of the hotel, one] of Groh’s friends asked the guard, “Hey, man, it’s freezing out here, can we wait in the lobby while we get a cab?” [at which time the guard gave the reply of] “No, get the f\*\*\* out of here.” [The guard’s reply was noted in the first panel opinion.]

*Id.* at \*3.

In addition, *Groh II* noted that the towed vehicle hit by the car that Groh was riding in was “traveling well below the speed limit.” *Id.* at \*4. Although one might infer this from the initial opinion, the second opinion’s explicit statement makes more understandable the collision, as a drunk driver might not only be speeding, but also have impaired visual depth perception.

*Groh II* also noted that discovery in the case had revealed “evidence of procedure manuals and other training activities used by the Westin,” as well as evidence of industry practices in this area. *Id.* at \*26 n.7. The suggestion, although never expressly stated by the court, is that the Westin’s conduct with Groh was arguably inconsistent with these protocols.

*Groh II* was also a little more precise about the driver’s blood alcohol content, noting that a “toxicology expert estimated that Reed’s blood alcohol content was between 0.170 and 0.222 at the time of the accident,” whereas the first opinion focused on the 0.222 level. *Id.* at \*4. Of course, someone with 0.170 blood alcohol is still at a level twice that of the legal threshold for determining drunkenness.

<sup>103</sup> For example, the *Groh II* majority balanced competing policy arguments and concluded that

[t]he social utility of allowing an innkeeper to lawfully end the special relationship with a guest and evict the guest is significant. However, requiring that the innkeeper act reasonably in evicting the guest, where the circumstances place the guest at risk during the eviction or present an imminent risk of post-eviction injury, would not outweigh that social utility. For example, the duty of care involving an intoxicated guest could be satisfied by providing the guest with mobility support during the eviction, allowing the guest to remain on the premises long enough to call a taxi, offering to call a taxi for the guest, or turning the guest over to a police officer for a welfare check and, if appropriate, transportation to a detox facility. The burden on innkeepers to take such steps would be “relatively inexpensive.” Hence, the costs would be properly “borne by the owner, operator, and, indirectly, the customers.”

*Id.* at \*23 (citations omitted).

In contrast, the trial court concluded that scrutinizing hotel conduct for reasonableness during eviction in connection with injuries taking place after eviction “would put hotels in the impossible position of exercising control over others when they have no right to do so.” *Id.* at \*4–5.

Judge Furman, in his *Groh I* majority and *Groh II* dissent, agreed with the trial court and took issue with the *Groh II* view that “placing . . . the burden on innkeepers to carry out this duty [of care to the evicted patron] would be ‘relatively inexpensive’ ” and argued that “imposing such a duty to an evicted former guest could directly contravene the Westin’s clearly established duty to use reasonable care to protect its guests from third persons on its premises.” *Id.* at \*47 (Furman, J., dissenting).

Judge Furman also noted that the *Groh II* majority’s conclusion as to the low cost of the duty of care was “factually unsupported by the record.” *Id.* This criticism appears to be correct. But, perhaps unsurprisingly, Judge Furman’s own two *Groh* opinions are both chock full of assertions that appear not to have any empirical support, in the record or otherwise.

All of the judges involved in *Groh*, like the Nevada Justices involved in *Rodriguez*, are making factual determinations concerning issues of burden, difficulty, and costs based on their own assessments, rather than rigorous factual exploration. But, that is of course the nature of judicial balancing and decision-making (as well as a broader topic for another day),

to me), one also sees rather different judicial views of when a judge may be able to so completely, clearly, and correctly assess a factual situation as to preclude jury consideration of the matter.<sup>104</sup>

Perhaps unsurprisingly, the different *Groh* opinions had different views of Nevada's *Rodriguez v. Primadonna*<sup>105</sup> decision. *Groh II*, while unwilling to assail *Rodriguez* and its reasoning, distinguished it in a manner that implies disagreement with *Rodriguez*.<sup>106</sup> By contrast, *Groh I* and the Furman dissent in

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one that frequently gives rise to calls for judicial restraint or resort to formalist approaches that arguably reduce the role of courts in making broader factual or public policy conclusions on the basis of a limited record or body of public knowledge. Rightly or wrongly, however, both sides of the debates on commercial host liability and liquor liability do this with considerable abandon.

Judge Furman also invoked a classic "slippery slope" type of public policy argument, positing that a failure to grant Westin victory as a matter of law would create overbroad liability to commercial actors.

The majority's imposition of a duty on the Westin under the facts of this case . . . is a great expansion of tort duty in Colorado. Hotels will now have an expanded duty to protect evicted guests, and I fail to see any distinction in the majority's reasoning which will prohibit such a duty from being expanded to any business owner. While the majority states that hotel guests are not merely invitees, the majority provides no logical distinction why the opinion must be limited to its facts or apply only to hotels.

*Id.* at \*60.

<sup>104</sup> For example, the *Groh II* panel emphasized the degree to which a reasonable jury might find Westin's conduct unreasonable. *See id.* at \*11, \*18–19 (majority opinion); *id.* at \*32 ("We disagree with the dissent that proximate cause can be resolved as a matter of law because the collision with a slow-moving vehicle occurred fifteen miles from the hotel. While on different facts lack of proximity might be a litmus test, here that analysis does not warrant taking proximate cause away from the jury because the accident occurred within the distance separating the hotel and Groh's residence, the intended destination.").

By contrast, Judge Furman in the *Groh I* panel opinion and his *Groh II* dissent was supremely confident that he knew exactly what a jury would do in the face of the disputed facts of the case. "I conclude a reasonable jury could not have found that the Westin could foresee that evicting Groh would give rise to such a risk of harm." *Id.* at \*35 (Furman, J., dissenting).

I do not think that [Westin's knowledge of the Groh group's drinking] could lead a reasonable jury to conclude that the Westin knew, or should have known [that] Groh or her companions would . . . attempt to drive drunk, and then later encounter a slow-moving vehicle on the highway. Instead, I conclude no reasonable jury could find the Westin's acts or failure to act caused

Groh to be injured in the car accident. [A] look at the chain of events illustrates my point . . . .

*Id.* at \*56–57 (subsequently arguing that a dozen significant links were part of the overly attenuated causal chain that resulted in Groh's injuries).

<sup>105</sup> *Rodriguez v. Primadonna Co.*, 216 P.3d 793 (Nev. 2009), discussed *supra* Part II.B–C.

<sup>106</sup> *Groh II* gave *Rodriguez* superficial respect, but clearly rejected the Nevada panel's approach and analysis:

*Rodriguez*, on which the district court relied, is distinguishable. There, a minor guest and two adult guests became intoxicated on liquor sold by the defendant hotel and then engaged in disruptive behavior in the hotel. They were asked to leave, although one of the adults told hotel personnel that they could not leave but should be allowed to "sleep it off." The guests were escorted to their car, where they tried to sleep, but a security guard ordered them out of the parking lot. The guests drove away, were involved in a one-car accident, and the minor suffered serious injuries.

The Nevada Supreme Court declined to recognize a duty "to prevent injuries caused by the intoxicated patron that are sustained either by the patron or by third parties after the eviction has been executed." The court reasoned that "[the hotel] did not have the duty to arrange safer transportation, prevent an intoxicated driver from driving, or prevent [the minor], a passenger,

*Groh II* embraced *Rodriguez*.<sup>107</sup> Although *Groh II*'s efforts to distinguish *Rodriguez* rather than disagree with it may be a model of judicial diplomacy (in that no direct criticism is given of the Nevada court), the effort to merely distinguish (rather than reject) *Rodriguez* fails.

If anything, the facts of *Rodriguez* are better for the plaintiff than the facts of *Groh*: The Nevada case involved eviction of guests who had twice committed themselves to doing the safe thing (first paying for a room and then trying to sleep in their car rather than driving), whereas Ms. Groh not only left in solidarity with her friends when she was not strictly forced to go, but also arguably volunteered to be a passenger with a drunk driver. If anything, *Rodriguez* is a stronger case than *Groh*—and yet there was nary a dissent in Nevada, let alone the extensive discussion of competing perspectives found in *Groh*.

As previously noted, Westin is seeking review of *Groh II* before the Colorado Supreme Court, arguing that it had an essentially absolute right to evict the patrons and that—because the Westin was apparently not the source of the alcohol consumed by the *Groh* group—Colorado's long-standing regime of liquor liability actually supports the hotel's claim that it cannot be liable to *Groh*.<sup>108</sup> I am more than a little skeptical about Westin's chances of prevailing on this argument (and, as a practical matter, stunned that this case has not been settled instead of being litigated so vigorously).

But regardless of the outcome of the case, *Groh*, like *Rodriguez* (and Nevada dram shop and tort law generally) shows that the bench is divided on the issue of innkeeper negligence and that judges can be quite protective of hotels and quite unsympathetic to intoxicated victims.<sup>109</sup> Although the issue of commercial host liability for eviction is distinct from that of liquor server liability, the two are related in that they say much about the judiciary's and society's attitudes toward drink, entertainment, and duties of care. If Colorado lets Westin "off the hook" by reinstating the trial court's summary judgment, it will, like the Nevada panel in *Rodriguez*, be granting commercial enterprises sweeping discretion regarding the treatment of their guests, even under circumstances where the host's eviction of a patron is fraught with danger to the patron and others.

Should this happen, one might wonder how Colorado can impose liability for serving liquor, but then immunize the same business when it throws inebriated patrons into dangerous situations. At least Nevada is consistent, although

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from riding with a drunk driver." However, the opinion does not address whether the guests had requested to remain on the premises while they summoned a taxi. Nor does it indicate whether the outside temperature or other weather conditions exposed the guests to any risks. Further, the court considered the hotel's statutory right to evict, which has no analog in Colorado.

*Groh II*, 2013 Colo. App. LEXIS 1217, at \*27–28 (majority opinion) (alteration in original) (citations omitted).

<sup>107</sup> See *id.* at \*44 (Furman, J., dissenting) (citing *Rodriguez* for support of the proposition that hotel evictions are reasonable as a matter of law "provided no more force is used than is necessary").

<sup>108</sup> See *supra* note 82 and accompanying text.

<sup>109</sup> Nevada's current statute immunizing commercial liquor vendors from dram shop liability, passed after decades of judicial grants of immunity to the industry, also shows that legislatures can be hospitable to businesses as well, even to the point of subservience. See *supra* notes 57–59 and accompanying text.

in an embarrassing way: In both types of cases, the force of Nevada law is brought to bear on behalf of the state's wealthiest businesses and against the claims of those who made the businesses wealthy, but were injured, at least in part, due to the conduct of the businesses.

### III. RECONSIDERING NEVADA'S APPROACH TO TORT CLAIMS INVOLVING COMMERCIAL HOSTS

Dram shop liability appears to have been an effective tool in reducing alcohol-related traffic injuries. Studies consistently reflect a reduction in the number and severity of alcohol-related auto accidents correlated with the presence of dram shop liability.<sup>110</sup> To be sure, liquor liability is but one part of the regulation of alcohol imposed in varying degrees of stringency by all states.<sup>111</sup> But along with licensing, inspections, and substantial penalties for alcohol-related crime and wrongdoing, civil liability for negligent liquor vendors appears to work. More than 80 percent of the states governing more than 90 percent of the U.S. population appear to think dram shop liability works and maintain it for commercial liquor vendors in some form.

As with almost any issue of legal policy, there is room for debate. Liquor vendors obviously would prefer not to be subject to liquor liability. Frequently allied with the liquor industry are other businesses that generally oppose regulation and issue groups who see too much litigation in society that generates more revenue for lawyers than for the populace. Their objections are not unfounded, but neither are they particularly persuasive. Just as direct regulation imposes costs, indirect legislation such as a regime of civil liability enforced by plaintiffs, lawyers, and courts carries costs. But immunity from civil liability also carries costs in that it removes the deterrence that one logically posits from civil liability.

In the law, generally, it is presumed that if there are legal remedies for a breach of duty, social actors will be less likely to breach duties to one another. The concept is most established in tort law. Drivers (as a whole) are presumably more careful more of the time knowing that if they cause injury, they can be held responsible under the law and may have to pay damages, even if alcohol-fueled errant driving or enabling such driving is not sufficiently egregious to merit criminal penalties.

Admittedly, this sort of deterrent model is not perfectly effective, but neither is any regime of social control. Even in a society that punished misconduct by death, there would still be misconduct because humans cannot conform their behavior to even fair and rational rules and norms all of the time. And when rules are irrational (e.g., the death penalty for spitting on the sidewalk), there may even be intentional or unconscious backlash or relaxation in imposition of penalties by police and courts viewing such extreme penalties as excessive.

Nonetheless, the available evidence does suggest that rules, norms, prohibitions, and penalties designed to impact behavior are at least substantially

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<sup>110</sup> See SLOAN ET AL., *supra* note 2, at 231–35.

<sup>111</sup> *Id.* at 187–89.

effective. If nothing else, society accepts that premise in its design of criminal law, commercial law, tort law, and property law, as well as public law regulation of food, drugs, energy and the environment.

Seen in this light, continued immunity of liquor vendors is a clear anomaly; a departure from basic legal theory and doctrine that has become an anachronism. Nevada is part of a handful of remaining states essentially giving liquor vendors absolute immunity across the board for their actions dispensing alcohol.

Commercial liquor vendors make money selling liquor. When liquor sales inflict injury on patrons, third parties, or society, the vendor should be forced to internalize those costs. Commercial actors can, as they have done in more than forty states with dram shop liability, establish systems to minimize their exposure, procure insurance, and price their products as necessary to shoulder costs. By contrast, social hosts are by definition amateurs in the liquor service game and cannot logically be held to the same standards. If someone is to receive some slack regarding liquor liability, it should be the social host and not the commercial vendor.<sup>112</sup>

But despite the strong case for reasonable dram shop liability, it is unrealistic to expect Nevada to change course regarding liquor liability, certainly not without a corresponding sea change in legislative sentiment or political power. But adherence to a regime of alcohol immunity, even if misplaced, need not be permitted to morph into larger tort immunity for the hospitality industry regarding other aspects of the conduct of a commercial host. The fact that a hotel or restaurant is immune from liability for the injuries inflicted by its actions in serving alcohol hardly justifies immunizing these same businesses from the consequences of their negligence in evicting patrons or other forms of misconduct.

Just as Nevada legislators and courts may be inclined not to “fence in” vendors and their patrons through excessive caution about serving alcohol, they may correspondingly feel less forgiving than their counterparts in other states when drinkers irresponsibly injure others. This may explain decisions like *Rodriguez v. Primadonna*<sup>113</sup> that refuse to even permit a trial in cases where a drunken patron suffers injury, but it does not explain why Nevada is unwilling to provide a day in court to innocent victims of drunken drivers aided and abetted by liquor vendors.

Although no one explanation appears to capture Nevada’s opposition to dram shop liability (much less that of the remaining handful of states with liquor vendor tort immunity), this may be a case in which prevailing doctrine and jurisprudence explain puzzling law as much as more legal realist considera-

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<sup>112</sup> But, only if there is to be a distinction. Logically, a server of booze is a server of booze regarding the potential for inflicting injury. Both commercial vendors and social hosts should be liable—if the facts support a claim for negligent provision of alcohol. In practice, I suspect judges and jurors are likely to be more forgiving of social hosts and will impose liability only in clear or even egregious cases, which seems fine to me. The bulk of the problem lies with commercial establishments rather than parties in a neighborhood home. The focus of efforts to obtain legal accountability should be upon the commercial establishments.

<sup>113</sup> *Rodriguez v. Primadonna Co.*, 216 P.3d 793 (Nev. 2009), discussed *supra* Part II.B–C.

tions, such as the power of the resort, hospitality, and liquor industries. Theoretically and doctrinally, Nevada courts have exhibited a relatively narrow approach to duty<sup>114</sup> and causation in non-alcohol cases as well as in liquor liability.<sup>115</sup>

Seen in this light, decisions like *Rodriguez v. Primadonna* may result from unduly restrictive tort doctrine and undue fear of juries and trials as much as from deference to the liquor industry (and, of course, to the legislature that is so deferential to the liquor industry). But regardless of the ultimate reasons, the net result is law that grants more legal protection to a particular type of commercial actor—the hospitality host—than to other commercial and social actors.

At a minimum, this is disparate treatment, which should instinctively make the legal system wary in that it is a system premised on treating like cases alike and the principle that no person (or entity) is above the law. If a hotel evicts a drunk patron who kills others or vandalizes their property (when he would have otherwise snoozed in his hotel room), the State of Nevada essentially says that this is okay, even to the point of preventing the state's citizens and the trial process from examining the hotel's behavior. But when a taxi, a bus, a school, or a shopping center does the same thing, these other entities may be held accountable—or are at least subject to fact-based trial scrutiny.

Notwithstanding the flexibility that legislatures and courts have in defining legal obligations and status, Nevada's current protection of businesses already favored with liquor licenses comes uncomfortably close to being an equal protection problem, even if it is not clearly constitutionally disfavored favoritism such as that based on race, religion, gender, ethnicity, or age. Further, there is no strong public policy reason for being so protective of commercial hosts.

Although one may not like the protection of caps on non-economic damages enjoyed by Nevada's physicians (the cap is \$350,000 absent intentional misconduct by the doctor), one can at least argue with a reasonably straight face that the cap makes sense as a means of encouraging medical professionals to practice in Nevada (a state with too small a medical community in relation to its population) or in reducing physician charges (because malpractice premiums or litigation costs will be passed on to the patients).<sup>116</sup> What is the argument for giving commercial hosts special legal immunity? That Nevada lacks enough

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<sup>114</sup> See *supra* note 44 (citing cases finding no duty on part of defendant).

<sup>115</sup> See, e.g., *Fourth St. Place, LLC v. Travelers Indem. Co.*, 270 P.3d 1235 (Nev. 2011), wherein the court concluded that a contractor's failure to properly secure a tarp on top of a building during roof repairs was not a sufficient cause of damage to property when heavy rains entered the building through the open roof. There are also several significant insurance coverage issues in *Fourth Street*, all of them subject to debate (and in my view wrongly decided). But there was no concurrence or dissent suggesting any division of the court on these issues. And, as is so often the case, the "court" was not the full court but a three-justice panel (composed of the same three justices that comprised the *Rodriguez* panel).

<sup>116</sup> Of course, the injuries inflicted by malpractice (death, serious injury, lost income, family disruption, social dislocation, lost productivity) may far exceed any reduction in the price of medical services wrought by damage caps or other legal protection, if there is in fact a price reduction passed on to consumers. The cost-benefit case for damage caps is unproven (as well as morally troublesome), but it is at least a case.

bars or restaurants? That new hotels will not be built if the hotels are required to be responsible for negligent eviction of dangerous patrons?

The hospitality industry in Nevada generally does well. When it does poorly, this is almost certainly the result of larger socioeconomic events (e.g., recessions, a spike in fuel prices, terrorist attacks on airplanes) or even mild weather in the frost belt more than the risk of tort liability.

Nevada's super-immunity for commercial hosts (particularly if they serve alcohol) is indefensible public policy. Commercial actors should be held accountable and forced to internalize the costs of injury inflicted on others, particularly innocent third parties (self-destructive patrons are perhaps a closer case, but that's what juries and trials are for). The activity of the commercial host generates profits that the host retains (subject to taxation) and enjoys. Simple equity and symmetry should require that the business also be held responsible for injury it inflicts as well.

Simple moderate-to-conservative economic theory counsels against the path taken by Nevada regarding liquor liability. It especially counsels against the expansion of immunity wrought by cases like *Rodriguez v. Primadonna*. Further, both the mega-immunity of *Rodriguez* and Nevada's near-blanket statutory dram shop immunity run counter to sounder organizational analyses and cognitive theory.

Organizationally, commercial vendors are in a much better position than their customers and social hosts to establish systems that minimize the risks of over-drinking and damage done by intoxicated patrons. Ironically, when dram shop liability/immunity was debated extensively in the 1995 Nevada legislature, hospitality and liquor industry representatives stressed the degree to which they had established systems of education, training, and supervision to reduce the risks of employees continuing to serve the compromised patron.

In effect, the industry is acknowledging that it is in a better position than the patron or a social host to mitigate the dangers of drinking. Certainly, liquor vendors are in a much better position than third parties who may be the victims of drunken patrons. But instead of appreciating this reality, the industry lays all responsibility upon patrons while the legislature and Nevada Supreme Court join the chorus. The industry's self-interested position is understandable. But the behavior of the legislature and the court—entities charged with serving Nevada as a whole—is hard to justify.

Cognitive science research repeatedly confirms that humans make mental errors and are often irrational, only partially rational, or inclined to act against their own best interests, particularly in the face of temptation, distraction, or deception. When the temptation, distraction, or deception also results in diminishment of the already imperfect cognitive abilities of humans, they will often do particularly foolish things that hurt themselves and others.

Although the legal system should not absolve people of such behavior, it should also be willing to recognize when others (often for a profit) contribute to that bad behavior. Liquor vendors may be the worst offenders, but as cases like *Rodriguez v. Primadonna* and *Groh v. Westin* reveal, commercial hosts can contribute to horrific injury and its attendant socioeconomic loss without dispensing a drop of alcohol.

Instead of continuing to trot out unrealistic rhetoric about personal responsibility (while expecting none from those in the best position to exercise it), Nevada's legal system would better serve the State and its people by focusing more on the empirical realities of modern recreational life. A few minutes of such focus strongly argues for at least permitting reasonable fact-based examination of the conduct of commercial hosts and ending the current regime of immunity.

#### AN ILLUSTRATIVE CONCLUSION: TOO MUCH AMOUNT OF WRONG?

A colleague at another law school is a big fan of Las Vegas. On one fairly recent visit, he and his wife returned to their room at the Cosmopolitan only to find it occupied by a naked, bleeding man sleeping on the bed. The uninvited guest had (you guessed it) been drinking heavily (it was not clear where) but despite having lost his clothes (and having no recollection of how he lost the clothes or how he had been wounded), he had been sufficiently articulate to persuade the hotel to let him in the law professor's room—which of course turned out to be the wrong room.

Fortunately, the incident became anecdote fodder. The mysterious stranger, in spite of the blood, was not badly hurt, was not violent, and was eventually relocated to the correct room. My friend, although one of the few law professors I might bet on in a fight, took the incident in stride and did not lash out at the intruder in spite of what must have been obvious alarm at the situation.<sup>117</sup> But such a matter—occasioned by the hotel's misconduct—could easily have turned violent and tragic. An altercation with security personnel and an eviction could have ensued. After this hypothetical eviction, the naked, inebriated, bloody stranger or an upset guest could have injured themselves or others or been the target for abuse.

But Nevada law (as currently construed by the Nevada Supreme Court) would appear to immunize the hotel from the consequences of such an eviction, no matter how negligent the action and (despite an innkeeper's duty to guests) perhaps even from the consequences of mistakenly letting a clearly problematic patron into the wrong room so long as the hotel did not itself inflict physical injury. By analogy, the *Rodriguez v. Primadonna* panel would have found that *the proximate cause of any injury was conduct by the naked, bloody intruder or the angry returning guest. Applied to the "case of the unwanted visitor," such reasoning is ludicrous. Is the reasoning of Rodriguez any better? Should the matter not at least merit jury consideration regarding conduct, causation, and injury?*

At some point, Nevada's legal system must ask itself whether such extensive immunity for commercial hosts can be justified. Nevada's resistance to the modern world of dram shop liability is embarrassing enough. Expanding it to other aspects of the hospitality industry only adds to the embarrassment.

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<sup>117</sup> He was offered only modest-cum-trivial compensation for this frightening breach of security, perhaps because the hotel realized that it was well protected under Nevada law and by Nevada courts.